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THE CANADIAN CONSTITUTION AND THE DANGERS OF ESTABLISHMENT

*Richard S. Kay**

If we are interested in the particular value of the words of the First Amendment that prohibit the making of laws "respecting an establishment of religion," Canada promises to provide a useful ground for comparison. Canada represents a political society very much like that of the United States, but its constitutional guarantees concerning religion are significantly different. I will give a brief report on the state of constitutional law in Canada insofar as it touches questions of religion. I will then suggest what the Canadian experience may show about the range of values protected by the First Amendment's Establishment Clause. Finally, I will discuss some reasons to be cautious in making any easy comparisons between these two legal systems.

I. RELIGION IN THE CANADIAN CONSTITUTION

Translated to the terminology of the United States Constitution, Canada has a free exercise clause but no establishment clause. Not only does Canada lack an establishment clause, it has numerous instances of what, under American judicial interpretations of the First Amendment, amount to the establishment of religion. The Canadian head of state, the Queen of the United Kingdom, must by law be a Protestant.¹ The Constitution Act, 1982, which contains, among other things, the Canadian Charter of Rights and Freedoms, opens with a preamble that declares that Canada is founded "upon principles that recognize the supremacy of God and the rule of law."²

More substantially, Canadian governments have a long and well

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1. See R.S.C., ch. 1-21 (1985) (Can.) (definition of crown). The religious qualification is a matter of British law. Act of Settlement, 1700, 12 & 13 Will. 3, ch. 2 (Eng.).

2. CAN. CONST. (Constitution Act, 1982) pmb1.

accepted practice of funding religiously operated schools. In fact, the Constitution Act, 1867, makes the support of denominational schools in Ontario and Quebec a constitutionally required public duty.³ To alleviate any concern that the enactment of the Canadian Charter of Rights and Freedoms might have brought into question the continued validity of that duty, the Charter contains an explicit provision declaring that it has no effect on the constitutional rights or privileges of "denominational, separate or dissentient schools."⁴

That Charter, adopted in 1982, created Canada's only constitutionally entrenched rules protecting individual choice in matters of religion. The text of section 2 reads: "Everyone has the following fundamental freedoms: (a) Freedom of conscience and religion"⁵ The Charter also contains in section 15 an equality provision that explicitly identifies a number of prohibited grounds of discrimination, including religion. But beyond this point, the text does not go. It has no constitutional language that could reasonably be construed as mandating any kind of general separation of church and state whatsoever.

It is not accurate to say, however, that Canada has no constitutionally grounded protections against public favoritism towards religion. In fact, on the few occasions that Canadian courts have had to apply section 2(a), they have sometimes used that provision to invalidate official actions that seem, on their face, more like promotion of religion than interference with religious choice. That is, using the American terminology, they have held invalid measures that seem to present establishment as well as free exercise problems. The leading case is *Regina v. Big M Drug Mart, Ltd.*,⁶ decided by the Supreme Court of Canada in 1985. In that case, the court held invalid a federal criminal law that required the closing of certain businesses on Sundays. The case presents a distinct contrast to the constitutional doctrine applied in a set of American cases decided in 1961, in which the United States Supreme Court upheld several state Sunday laws against challenges based on the Establishment, Free Exercise, and Equal Protection Clauses.⁷

3. CAN. CONST. (Constitution Act, 1867) § 93; see *re* Bill 30, [1987] 1 S.C.R. 1148 (Can.).

4. CAN. CONST. (Constitution Act, 1982) pt. 1 (Canadian Charter of Rights and Freedoms), § 9.

5. *Id.* § 2(a). Section 2(b) adds the following related language: "(b) Freedom of thought, belief, opinion and expression" *Id.* § 2(b).

6. [1985] 1 S.C.R. 295 (Can.).

7. *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kasher Super Mkt.*, 366 U.S.

The Court in *Big M Drug Mart, Ltd.* relied on an expansive definition of freedom of religion to reach its result. The reasoning was as follows: Section 2(a)'s securing of "freedom of conscience and religion" meant that the state could take no action which had *either the purpose or the effect* of coercing or otherwise putting pressure on the religious choices of individuals. In this case, the legislative history of the statute at issue, the Lord's Day Act, made absolutely clear that it had been enacted with the principal purpose of encouraging religious observance on Sundays.⁸ That being the case, there was no need to consider in detail the actual effect that the requirement of Sunday closings had on the religious practices of individuals.⁹ In reaching this conclusion, the Canadian Supreme Court explicitly differed with the United States Supreme Court's holding that a statute which was originally designed to promote religious observance could, over time, come to acquire a secular purpose.¹⁰

The following year, however, the Supreme Court of Canada upheld another Sunday closing law, this time a provincial one, in *Regina v. Edwards Books & Art, Ltd.*¹¹ Unlike *Big M Drug Mart, Ltd.*, the weight of the evidence was that this recent enactment was not motivated by religious considerations. Rather, it was intended as a secular pause day.¹² Nevertheless, the law still had an *effect* on religious practice for observers of sabbaths on days other than Sunday by forcing them to choose between violating their religious precepts or closing two days a week to their competitive disadvantage.¹³ This amounted to a limitation of the freedom of religion of section 2(a) and required the court to consider the law under section 1 of the Charter. That provision allows the Charter rights to be limited as long as such limitation is "demonstrably justified in a free and democratic society."¹⁴ The Canadian Supreme Court has devel-

617 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961).

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

9. *Id.* at 333.

10. *Id.* at 334-35; *cf.* *McGowan v. Maryland*, 366 U.S. 420, 446-52 (1961) (holding that the Maryland Sunday closing laws are not laws respecting the establishment of religion).

11. [1986] 2 S.C.R. 713 (Can.).

12. *Id.* at 744-47.

13. *Id.* at 762-68. The same impact raised a free exercise question for the United States Supreme Court in the 1961 cases. That Court held the burden on religion insufficient to warrant a holding of unconstitutionality. *See Braunfield v. Brown*, 366 U.S. 599, 606 (1961).

14. *Edwards Books & Art, Ltd.*, [1986] 2 S.C.R. at 713, 768. The Court in *Big M Drug Mart, Ltd.*, did not undertake this inquiry with respect to the limitation on section 2(a) rights because it found it inappropriate where the limitation was not an incidental aspect of legislation with a

oped a multi-part test for this analysis which need not be fully discussed here. It is enough to say that it amounts, in essence, to a kind of balancing test familiar to students of American constitutional law.¹⁵ In this case, the Court considered the law's impact on religious choice to be indirect and less than absolute. It also noted the many exemptions the statute provided, which relieved many (but not all) non-Sunday observers from its prohibitions. The fairly restricted burden on religion that remained, the Court concluded, was justifiable in light of the state's reasonable policy of promoting a common day for rest and recreation.¹⁶

It is obvious that certain features of the still sparse Canadian constitutional doctrine on freedom of conscience suggest considerable breadth and flexibility in the potential power of courts to review state actions touching on religious matters. In its terms, section 2(a) is concerned only with individual freedom of religious choice. By interpreting it as barring any official measure that is motivated by a desire to influence religious practice, however, the Court has necessarily brought into question many state actions that, on their surface, make no restriction on behavior but merely aid or approve religion. Moreover, by suggesting that even indirect impact on religious choice can trigger a section 1 inquiry, the Court has left open the possibility that even unintended public promotion of religious activity may create a constitutional violation. Both these possibilities leave open to constitutional challenge official actions that when they occur in the United States, usually raise questions under the constitutional prohibition on the establishment of religion. Thus, relying principally on the two cases discussed, the Ontario Court of Appeal has held invalid laws requiring religious instruction, opening prayers, and Bible readings in the public schools.¹⁷ The same result in the United States, of course, was premised on a violation of the Establishment Clause.¹⁸

constitutional purpose but was, itself, the essential objective of the challenged law. [1985] 1 S.C.R. 295, 352-53 (Can.).

15. This test was first set out at length in *Regina v. Oakes*, [1986] 1 S.C.R. 103 (Can.), but has been both elaborated upon and revised in subsequent cases. See *Committee for the Commonwealth of Can. v. Canada*, [1991] 1 S.C.R. 139, 156-58; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 280-81 (Can.).

16. *Edward Books & Art, Ltd.*, [1986] 2 S.C.R. at 758-59.

17. *Canadian Civil Liberties Ass'n v. Ontario*, [1990] 71 O.R.2d 341 (C.A.); *Zylderburg v. Sudbury Bd. of Educ.*, [1988] 65 O.R.2d 641 (Can.).

18. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

II. THE ENDS OF THE ESTABLISHMENT CLAUSE

Does the experience of Canada with its freedom of religion provision tell us anything about the utility of our own religion clauses? To the extent that Canada is like the United States, it may present a model of what our constitutional regime might look like were we to have only the second of the two religion clauses, the Free Exercise Clause.

In terms of securing a society with a healthy and tolerant relationship between state and religion, Canada certainly doesn't look all that bad. It surely is not a place where oppression and intolerance have run amok. Quite the contrary, Canada is a country with a justified reputation as one of the most liberal and decent societies in the world. This is by no means to say that its history has been free of narrowness, repression, or bigotry,¹⁹ but these phenomena have been notably isolated. The relevant comparison is with the United States, and I think it is fair to say that with respect to religious tolerance, the apparent Canadian record is at least as good as the American one.

If that is the case, it might do no harm, and might even do some good, to follow the Canadian example and try to get along only with a constitutional guarantee of free exercise. One obvious lesson from the Canadian cases is the potential of a toleration provision like the Free Exercise Clause. The Canadians have been quite able to assign to their freedom of conscience provision much of the work for which we have used the Establishment Clause. Abandonment of the Establishment Clause does not necessarily entail an abandonment of, at least, some of the constitutional results that it has been interpreted to require.²⁰

Another way of reaching the same result may be to retain the Establishment Clause but to interpret it more narrowly. It is sometimes suggested that the Establishment Clause should be applied only to reach government action that in some way exerts a coercive pressure on religious choice. I take it that this proposes a situation

19. Some instances are recorded in judicial opinions. *See, e.g.*, *Walter v. Attorney Gen. of Atla.*, [1969] S.C.R. 383 (upholding a statute limiting communal landholding by Hutterites); *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299 (invalidating as discriminatory a prohibition of leafleting by Jehovah's Witnesses).

20. My discussion of Establishment Clause doctrine is based on the interpretation of that provision in the United States Supreme Court. The original intended meaning is, of course, a matter of continuing dispute.

substantially identical to the one in Canada where the freedom of religion clause has been held to reach a wide array of practices that have the purpose or effect of exerting a direct or an indirect pressure on free religious practices. This would retain that part of Establishment Clause jurisprudence that can be reformulated as anticoercive. The opinion of the Court in the recent decision holding invalid officially sponsored prayers at a middle school graduation, for example, focused almost exclusively on the indirect pressure to participate created by that occasion, notwithstanding its formally voluntary nature.²¹ This limited interpretation of the Establishment Clause has been seriously proposed in some of the literature²² and was argued to be the sole object of the clause before the Supreme Court in the graduation prayer case.²³ It would, in effect, convert the Establishment Clause into a prophylactic against potential free exercise problems, or perhaps it would read the religion clauses as a single compound prohibition against a wide range of direct and indirect coercive official behavior.²⁴

The question of the special value of the Establishment Clause, therefore, reduces to the value of limits on the *other*, noncoercive governmental action that the Establishment Clause has been held to reach (i.e., those instances of church-state association, promotion, or cooperation which do not, even on a broad interpretation, appear to put pressure on individual religious choice). What is the value of those other kinds of limitations? What are the harms that they protect us against?

I would like to posit three admittedly crude categories of noncoer-

21. *Lee v. Weisman*, 112 S. Ct. 2649 (1992). The earlier school prayer cases also depended, in part on this idea. See, e.g., *Engel*, 370 U.S. at 431 ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.")

22. See, e.g., Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986); Scott J. Ward, Note, *Reconceptualizing Establishment Clause Cases as Free Exercise Class Actions*, 98 YALE L.J. 1739 (1989).

23. Brief for Petitioners, *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (No. 90-1014). While the opinion of the Court by Justice Kennedy placed almost exclusive reliance on a finding of coercion, it did not define that as the exclusive object of the clause. *Lee*, 112 S. Ct. at 2652-61. Four Justices of the five-Justice majority joined concurring opinions that made clear they believed the Establishment Clause had a wider reach. *Id.* at 2661, 2667.

24. A somewhat different interpretation of the same idea of a single compound prohibition was offered in PHILIP B. KURLAND, *RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT* 111-12 (1962). But see *Lee*, 112 S. Ct. at 2667-78 (Souter, J., concurring) (rejecting the idea that "the Framers meant the establishment clause simply to ornament the First Amendment").

cive injury that state-church association may pose. The first is the contribution such association may make to a general atmosphere of religious intolerance. Continuous, official, favorable treatment of one form of religious belief may communicate to society an implicit hierarchy of beliefs or a preference for belief over nonbelief. Such an environment may facilitate other more direct and ultimately coercive government actions against disfavored religious groups.²⁵ It should be noted that the ultimate evil here is still a form of coercion, but the particular prohibited practice may be sufficiently remote from that evil that it could not be reached even by a very broad reading of a mere toleration provision.

The second category encompasses those injuries which a church-state association may work on each of those institutions considered separately. The recognition of such injuries posits a constitutional assumption that each plays a distinct and essential role in society and that each has appropriate characteristics and modes of acting. It may be argued that too close a relationship might injure the state by influencing it to adopt a more absolutist and irrational form of decisionmaking.²⁶ It may injure the church by domesticating it with the more worldly outlook that is proper for secular institutions, but that can water down the intensity of religious belief and practice.²⁷ Thus, some kind of separation may reduce the risk of mutual corruption of church and state.

The last category of noncoercive injury that the American establishment law may prevent consists of the possible emotional suffering and assault to dignity that official action in support of or in association with religion may produce. Such government action may be perceived as devaluing the religious convictions of nonconformers. Such an affront to minorities may not, when stated in the abstract,

25. See *Lee*, 112 S. Ct. at 2652-53 ("A state-created orthodoxy puts at grave risk that freedom of belief or conscience which are the sole assurance that religious faith is real not imposed."); *LEO PFEFFER, CHURCH, STATE AND FREEDOM* 135-39 (rev. ed. 1967).

26. See *Lee*, 112 S. Ct. at 2666 (Blackmun, J., concurring) ("When the government appropriates religious truth, it 'transforms rational debate into theological decree.' . . . Those who disagree no longer are questioning the policy judgment of the elected but the rules of a higher authority who is beyond reproach." (citations omitted)); see also William P. Marshall, *Public Square and the Other Side of Religion*, 44 *HASTINGS L.J.* (forthcoming 1993).

27. See *Lee*, 112 S. Ct. at 2661-67 (Blackmun, J., concurring). That the wall of separation is necessary to maintain the church from secular corruption, as well as public coercion, was made clear in Roger Williams's use of that metaphor discussed by Mark DeWolfe Howe. See MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 5-10 (1965).

appear particularly serious especially since we are now, by hypothesis, dealing with action without coercive effect, direct or indirect.²⁸ It may be equally reasonable, however, to take account of the core nature of religious values in establishing personal identity.²⁹ The strength of such feelings is reflected in a remark by the father of the plaintiff in the recent graduation prayer case. Referring to the reaction of his Jewish family to a patently sectarian prayer given at an earlier graduation, he said they felt "absolutely humiliated."³⁰ This kind of injury may be recognized as the type identified by Justice O'Connor in her separate opinions arguing that the Establishment Clause should prohibit actions "endorsing or disapproving" of any religion. Such actions "send a message to nonadherents that they are outsiders, not full members of the political community."³¹

One interpretation of the Canadian experience, where the constitutional rules have focused on coercion in religious matters by the government, suggests that we have exaggerated the severity of the noncoercive kinds of injuries I have listed. As I have noted, Canadian society is, on the whole, liberal, democratic, tolerant, and decent. It certainly does not appear to be plainly more prone than the United States to any of the problems that I have identified as the peculiar concern of Establishment Clause jurisprudence. Moreover, existing doctrine in this country is not without its costs. The deliberate exclusion of religious concerns from public activity is itself perceived by some religious groups as evincing a dangerous and hostile attitude toward religion.³² It is understood by others as depriving our public decisionmaking of a critical moral dimension.³³ If nothing else, the Supreme Court's treatment of the Establishment Clause has created a doctrinal nightmare for anyone interested in

28. See William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351 (1991); Steven D. Smith, *Symbols, Perceptions and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987).

29. See Daniel O. Conkle, *Toward A General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1164-66 (1988).

30. Kevin Cullen, *Prayer Challenge: High Court to Hear Church-State Lawsuit*, BOSTON GLOBE, Nov. 6, 1991, at 29.

31. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

32. See *Abington Sch. Dist. v. Schempp* 374 U.S. 203, 306 (1963) (Goldberg, J., concurring) (stating that "[u]ntutored devotion" to the concept of neutrality can lead to "a brooding and pervasive dedication to the secular and a passive, or even active, hostility to the religious").

33. See Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989).

understanding our constitutional law of religion.³⁴

III. THE LIMITS OF COMPARISON

Notwithstanding the relatively happy experience of Canada without the aid of an establishment clause, I think we should be cautious about concluding that our constitutional system can do without one. There are at least four reasons to doubt that we can easily answer the American question based on the Canadian experience.

First, while our societies are very similar, they are by no means identical. In particular, one reading of Canadian history would suggest that Canadian constitutional assumptions may not have been influenced to the same extent as the American Constitution by a variety of dissentient religious groups. Canada was created on the premise that it consisted of two founding peoples. A central, although not exclusive, role for the two corresponding major Christian religions, mainstream Protestantism and Roman Catholicism,³⁵ may have followed from that fact. While the Canadian population has, in this century, become increasingly diverse, it is possible to speculate that a somewhat more ordered sense of social-religious expectations may partially explain its relatively satisfactory experience without a constitutional prohibition on establishment.

Second, a critical difference between Canada and the United States is assumed by the very comparison at issue. That is that the United States, unlike Canada, has had an Establishment Clause for two hundred years, and fairly prominent Establishment Clause jurisprudence for about fifty years. That fact has political and cultural, as well as legal, significance. A United States deprived of its establishment law would, in that sense, be very different from Canada, which has never had one. The message conveyed by such a change to courts and political actors would convey a particularly clear message of preference for religion. Similarly, public actions

34. See Smith, *supra* note 28, at 269.

35. See R. DOUGLAS FRANCIS ET AL., *DESTINIES: CANADIAN HISTORY SINCE CONFEDERATION* 16-17 (1988). It has been argued that the differing size and structures of churches in Canada have prevented the development of the consensus in favor of religious pluralism that has prevailed in the United States. See John Webster Grant 'At Least You Knew Where You Stood With Them': *Reflections on Pluralism in Canada and the United States*, 2 *STUD. RELIGION* 340 (1973). For a discussion of Canadian church history that confirms the assumed centrality of the two Christian religions in the church-state issues of the period from 1867 to 1929 and which also discusses the increasing presence of marginal religious groups, see ROBERT T. HAND, *A HISTORY OF THE CHURCHES IN THE UNITED STATES AND CANADA* 344-76 (1976).

undertaken pursuant to such a change might be perceived quite differently than the same actions in a regime where they had never been forbidden.

Third, the easy conclusion about the absence of serious injury resulting from public-religious association in Canada may not be entirely accurate. The kinds of harms I have described which a separation of church and state are supposed to ameliorate are difficult to measure or even to identify. Certainly with respect to the problem of the emotional impact of public approval of certain religions and implicit disapproval of others, it may be that the more severe the effect, the more its victims may suppress the evidence of it. Thus, the United States may be better off than Canada in this respect by virtue of its anti-establishment jurisprudence, even if this is not obvious upon superficial examination.

Fourth, and finally, the claim that Canada's success without an establishment clause shows the superfluity of such a constitutional rule may prove too much. Canada appears to possess as liberal and tolerant a society as that of the United States, but that was equally true before 1982, when Canada had no constitutional protection of religion at all. That would mean that our Free Exercise Clause as well as our Establishment Clause is expendable. There is certainly much to be said for the proposition that constitutional rules, in general, are only a marginal influence on social and even official conduct. For example, the United Kingdom has managed passably well with no constitutional protection of individual rights at all, although there is now some noticeable dissatisfaction with that state of affairs.³⁶ Furthermore, I doubt that many observers would, on the basis of the Canadian experience, be ready to jettison the religion clauses altogether.

As someone who has studied the Canadian constitution and who admires both the Canadian legal system and the Canadian people, I believe there is much to learn from Canada. I would be very glad to see some constitutional influence on this continent flow south as well as north.³⁷ That hope applies equally to matters of church and state, but every exercise of comparison must be undertaken with a careful attention to the differences in context that are inevitably present.

36. See, e.g., *The Constitution Revisited*, ECONOMIST, Apr. 28, 1990, at 65.

37. For a discussion of the influence of American constitutional law in Canada, see Jamie Cameron, *The Motor Vehicle Reference and the Relevance of American Doctrine in Charter Adjudication*, in CHARTER LITIGATION 69 (Robert J. Sharpe ed., 1987).

The lessons that Canadian law has to teach Americans about our constitutional law of religion are anything but conclusive.

