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Religious freedom in Canada and the United States

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This article compares the constitutional treatment of religion in the United States and Canada in light of differing patterns of religious practice in the two countries. It focuses on two questions. First, to what extent might constitutional norms or constitutional structures have contributed to their differing levels of religiosity? Though the evidence is inconclusive, the article argues that there are several constitutional differences—including differences with regard to the disestablishment of religion and the fragmentation of political authority into multiple jurisdictions—that might have affected levels of religiosity significantly. Second, to what extent have the religious differences between the two countries produced different constitutional norms of religious freedom? The article argues that, in general, the religious freedom jurisprudence of the two countries is surprisingly convergent, but there is one important difference: the idea of a "strict separation of church and state" pursuant to which any state support for religion or any state entanglement with religion is unconstitutional, has great power in the United States but little in Canada. Discrepancies between Canadian and American religious history have undoubtedly contributed to this difference.

The United States and Canada are liberal democracies with immigrant populations, advanced economies with high standards of living, and federal political structures. Despite these similarities, Canada has undergone rapid secularization, comparable to that experienced by some Western European nations, while the United States has not. This paper asks two questions about this difference. The first is about how the countries' constitutions have affected religious practices: To what extent, if any, is it plausible to suppose that constitutional norms or constitutional structure are among the root causes of the differing levels of religiosity? We will argue that the evidence is inconclusive; however, there are constitutional differences—including, most prominently, differences with regard to the disestablishment of religion and the fragmentation of political authority into multiple jurisdictions—that might have contributed to the disparities in the religiosity of the two countries. The second question is about how religious sociology has affected

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constitutional norms: To what extent, if any, have the religious differences between the two countries produced different constitutional norms of religious freedom? We will argue that, in general, the religious freedom jurisprudence of the two countries exhibits a surprising degree of convergence, even on questions about disestablishment, but that there is one important difference: namely, the idea of a ''strict separation of church and state''—according to which any state support for religion, or any state entanglement with religion, is unconstitutional—has great power in the United States but very little in Canada. Discrepancies between the histories of Canadian and U.S. religious practice have undoubtedly contributed to this difference.

1. Do constitutional differences cause differences in religiosity?

Seymour Martin Lipset remarks in *Continental Divide*, his comparative sociological study of the United States and Canada, that ''at the end of the 20th century, the United States remains the most devout of industrialized democratic nations, while Canada is much less so.''[1] Poll data suggest a growing disparity. George Gallup, Jr., and D. Michael Lindsay report that ''[t]he United States leads the English-speaking world in matters of faith, with levels of belief remaining consistently high in recent years, while inhabitants of Canada and the United Kingdom have witnessed significant declines in belief between 1980 and 1995.''[2] Levels of belief in God declined with stunning rapidity in Canada during the 1990s; in 1995, only 70 percent of Canadians claimed a belief in God, whereas 85 percent did so in 1990.[3] In the mid-1990s, 31 percent of Americans regarded the Bible as ''the actual word of God . . . to be taken literally,'' compared with only 14 percent of Canadians. Only 11 percent of Americans said that the Bible was ''an ancient book of fables, legends, history, and moral precepts,'' while 28 percent of Canadians expressed that view.

One should be careful not to exaggerate these differences. The disparities in religiosity may be relatively recent. In 1957, for example, ''99 per cent of Canadians claimed a religious identity and 82 percent of them actually belonged to a church.''[4] Between 1957 and 1991, the number of Canadians claiming a religious identity dropped from 99 percent to 87 percent; the number who belonged to church dropped more dramatically, from 82 percent to

[1] Seymour Martin Lipset, Continental Divide: The Values and Institutions of the United States and Canada 4 (Routledge 1990).

[2] George Gallup, Jr., & D. Michael Lindsay, Surveying the Religious Landscape: Trends in U.S. Beliefs 120–121 (Morehouse 2000).

[3] *Id.* at 121.

[4] Steve Bruce, Choice and Religion: A Critique of Rational Choice 131 (Oxford Univ. Press 1999).

less than one-third.[5] Roger O'Toole comments that ''[a]s measured by the familiar litany of shrinking membership, declining participation, reduced vocations, ageing congregations, dwindling funds, and increasing marginalization, the past four decades have undoubtedly been lean ones for Canadian religion.''[6] And even with the steep decline in Canadian religiosity since 1960, Lipset remarked in 1990 that although the United States is ''the most devout and orthodox of the world's highly industrialized countries, Canada is second.''[7]

On the other hand, Lipset is quick to add that Canada is ''clearly well behind its neighbor,''[8] and few observers deny that the United States is now significantly more religious than Canada. What has caused the disparity? Lipset stresses two related factors, one cultural and one constitutional. The cultural factor encompasses intertwining strands. One strand pertains to differences in dominant faiths. According to Lipset, ''[t]he United States is a country formed by Protestant dissent, by the groups known in England as the dissenters and nonconformists'' such as Methodists and Baptists. As a result, ''[t]he majority of Americans have always belonged to, or adhered to, the sects, not to the various denominations that were or are state churches.''[9] By contrast, ''[t]he majority of the Canadian population adhere to churches, not sects, to denominations that are hierarchical and have a long history of state support.''[10] Lipset argues that these denominational differences intersect other cultural currents. He observes, in particular, that Americans are more likely than Canadians to equate moral conscience, including religious conscience, with distrust of, and resistance to, government: ''American sectarians ... have taken it as a matter of course that the individual should obey his conscience, not the state.''[11] Lipset characterizes Canadians as ''historically conditioned'' to a ''greater role [for] government in ... society and the economy'' and as more deferential to legal authority.[12] These features of Canadian identity sustain and are in turn sustained by churches that cooperate with, rather than resist, the government.[13] He endorses the

[5] *Id.*

[6] Roger O'Toole, *Canadian Religion: Heritage and Project*, *in* RETHINKING CHURCH, STATE, AND MODERNITY: CANADA BETWEEN EUROPE AND AMERICA 34, 44 (David Lyon & Marguerite Van Die, eds., Univ. of Toronto Press 2000).

[7] Lipset, *supra* note 1, at 218.

[8] *Id.*

[9] *Id.* at 74.

[10] *Id.* at 80.

[11] *Id.* at 77.

[12] *Id.* at 49, 81.

[13] *Id.* at 79–81.

suggestions that these variations trace back to "'our countries' respective revolutions.'" "The United States "'made [a] dramatic break with England and set out to establish a distinctive tradition,'" whereas Canada "has been shaped by its gradual, non-violent separation from Britain" and by the absence of any sense of "'divinely inspired singularity.'"[14]

The constitutional factor is disestablishment, which Lipset believes plays a critical role in reinforcing the differences between U.S. and Canadian religiosity. He follows Alexis de Tocqueville in arguing that "[t]he elimination of established religion in the United States ... greatly strengthened religion there."[15] In Canada, by contrast, "[r]eligious innovation has been more limited 'because of the presence of institutional controls in which alliances between the state and established religious institutions deliberately sought to discourage religious experimentation.'"[16] He accepts the claim of John Webster Grant that "few Canadians find 'the separation of church and state' an acceptable description of either their situation or of their ideal of it."[17]

Lipset's comparative argument is a variation on a more general model, prominently defended by Rodney Stark and his collaborators, that identifies disestablishment as the crucial variable in determining whether advanced societies will be religious. Stark contends that disestablishment creates a kind of "free market" in which religions, new and old, can compete for the attention of particular believers.[18] He and his coauthors maintain that sect-like religions, which tend to be populist and demanding, will generally fare better in such markets than churchlike religions, which tend to be hierarchical and more accommodating of mainstream lifestyles. In Stark's terminology, sects emphasize "salvation," whereas churches specialize in "theology," and most "consumers" prefer "salvation."[19] For Stark and company, disestablishment is the necessary, and more or less sufficient, variable that determines whether sects can thrive. Established religions behave like lazy monopolists, trying to please government officials and elites interested in theology rather than potential "customers." Disestablishment permits

[14] *Id.* at 79, quoting Reginald Bibby, Fragmented Gods: The Poverty and Potential of Religion in Canada 217–218 (Stoddart 1990) and John Conway, *An 'Adapted Organic Tradition,'* 117 Daedalus: J. Am. Acad. Arts & Sci. 382 (Fall 1988).

[15] Lipset, *supra* note 1, at 80.

[16] *Id.* at 83.

[17] John Webster Grant, *'At Least You Knew Where You Stood With Them': Reflections on Religious Pluralism in Canada and the United States*, 2 Stud. Religion 341 (1973), quoted in Lipset, *supra* note 1, at 80.

[18] Roger Finke & Rodney Stark, The Churching of America, 1776–1990: Winners and Losers in our Religious Economy 17–21, 252–255 (Rutgers Univ. Press 1992).

[19] *Id.* at 75–86.

sects to compete freely with churches; when they do, they succeed and produce a more religious society.[20] Lipset's model is more complex because he emphasizes the combined effects of disestablishment and culture; in his view, disestablishment reinforces a cultural trajectory determined partly by the dissident beliefs of early American immigrant groups.

The thesis that disestablishment promotes religiosity dates at least to Tocqueville and undoubtedly has some power to explain the vigor of religion in the U.S.[21] On the other hand, the simplicity of Stark's ''religious free enterprise'' model makes it vulnerable to criticism. The free enterprise model suggests that disestablishment should always spark a religious revival—so that, for example, the waning constitutional power of European churches should correlate with increased religiosity there. Stark and his coauthors claim to have found such a change; Steve Bruce, a prominent critic of Stark's work, argues that European religiosity has, in fact, diminished along with the church's power, and that Stark's theory must therefore be wrong or at least substantially incomplete.[22]

The United States–Canada comparison presents a related puzzle. The statistics we cited earlier suggest that disparities in religiosity between the two societies have increased dramatically over the last half-century (recall that in 1957, 99 percent of Canadians affirmed a belief in God and 82 percent actually belonged to a church—the latter number had fallen to 33 percent by 1991), and this divergence has increased still more during the last decade. This period was, however, marked by increasing disestablishment, which under the free-market model should have led to an increase—not a radical decrease—in religiosity.

There are various ways to account for these developments. First, one might contest the meaning of the data we have thus far presented. It is notoriously difficult to define what it means for a society to be religious and to verify whether a given society meets that definition. If it is possible to argue—as Stark and Bruce do—about whether Europe has become more or less religious, then certainly one could have the same argument about Canada. But this line of inquiry does not seem promising; most observers seem to agree that Canada is continuing to become less religious than the United States (and, we should add, most people would take the same view

[20] *Id.* at 19, 237.

[21] Alexis de Tocqueville, 1 Democracy in America 297–301 1835, J. P. Mayer ed., George Lawrence trans. (Anchor Books 1969). Even before Tocqueville, Adam Smith had argued that religion would benefit from a ''free market'' in belief. Frank Lambert, The Founding Fathers and the Place of Religion in America 9–10 (Princeton Univ. Press 2003).

[22] *See, e.g.*, Rodney Stark & Laurence Iannaccone, *A Supply-Side Reinterpretation of the 'Secularization' of Europe*, 33 J. for Sci. Stud. Religion 230–252 (1994); Rodney Stark & Laurance Iannacone, *Truth? A Reply to Bruce*, 34 J. for Sci. Stud. Religion 516 (1995); Steven Bruce, Choice and Religion: A Critique of Rational Choice Theory 58–88 (Oxford Univ. Press 1999).

of Europe, notwithstanding Stark's claims to the contrary). Second, one might emphasize, as Lipset does, cultural factors in addition to disestablishment, so that disestablishment generates a robust religious society only when the seeds of certain kinds of religious belief are already present. If this were the whole story, one would probably expect to find competing trends within Canadian society; that is, disestablishment would nurture the growth of more sects within jurisdictions and localities where the right ''seeds'' were present, even if levels of religiosity within the nation as a whole declined.

Third, one might conjecture that disestablishment has been incomplete (as we shall see later, Canada continues to provide preferential funding for some mainline religious schools), or that establishment's lingering effects impede religious competition and the development of new, more robust faiths. Roger O'Toole offers an account of this kind; in his view, ''[a]s a direct result of its nineteenth-century history of consolidation, contemporary Canadian religion exhibits a distinctively concentrated denominational structure differing from both U.S. and European patterns.'' He suggests that if we consider ''the United States as an arena of religious free-competition, all indicators north of the border signal circumstances of protracted religious oligopoly.''[23]

Fourth, one might vary the hypothesis about why disestablishment matters. For example, Jose Casanova argues that religion's vitality depends on the capacity of organized religion to serve as critic and counterweight to secular political authority.[24] This ''institutional conflict'' hypothesis differs from the Stark free-market model in two respects. First, on Casanova's model, religion flourishes if it delivers a public, political good—effective opposition—rather than a private, individual good, namely, credible promises of otherworldly salvation. Casanova's model does not presuppose—as Stark's does—that sects will do a better job than hierarchical churches. Casanova, for example, credits the sustained religiosity of Catholic Poland to the church's energetic opposition to the communist state.[25] Second, on Casanova's model, established churches that collaborate with the government have two liabilities. Not only do they fail to serve as effective centers of political opposition and criticism but they share in responsibility for the government's shortcomings and misdeeds. Thus, Casanova contrasts the performance and fate of Catholicism in Spain, where the church collaborated with the Franco regime, to its stature in Poland. Establishment under Franco

[23] O'Toole, *supra* note 6, at 45.

[24] Jose Casanova, Public Religions in the Modern World 220 (Univ. Chicago Press 1994).

[25] *Id.* at 98–107, 214–215. Stark and his coauthors accept this explanation for Poland, but believe that it applies only to societies—including not only Poland but also Québec prior to the 1960s—in which churches serve as the organizational basis for a conflict among social castes. Rodney Stark & Laurence R. Iannaccone, *Response to Lechner: Recent Religious Declines in Quebec, Poland, and the Netherlands: A Theory Vindicated*, 35 J. for Sci. Stud. Religion 265, 266–268 (1996).

created a fragile religiosity that crumbled rapidly when the regime left power.[26] This observation might be relevant to the Canadian experience. It is possible that the history of church-state collaboration in Canada generated a culture within which few people had any reason to look to organized religion as an effective source of criticism and opposition when establishment ceased.

Fifth, one might suppose that there are other variables at work and that disestablishment, whether by itself or in combination with other, long-standing cultural traditions, is not the whole story. The sociologist Steve Bruce and the political scientist Kenneth Wald identify two variables that, in our view, have considerable plausibility as part of the causal story. Bruce proposes the social and political structure of minority ethnic groups as one explanation for the vigor of religion in the U.S.[27] Following the lead of classic works by H. Richard Niebuhr and Will Herberg,[28] Bruce contends that immigrant groups use religious communities to preserve their ethnic identities and to develop support mechanisms at the same time that they seek to assimilate to the larger national economic culture. New immigrants who want to succeed in the United States are expected to become Americans and leave their old civic identities behind, but the larger culture considers it acceptable—even desirable—for them to retain specific religious identities.[29] These identities take on national and ethnic flavors—for example, not just Catholic, but Irish-Catholic or Italian-Catholic or Latino-Catholic—and immigrant communities in the United States not uncommonly find themselves becoming more attached to their religion than they were in the lands they left behind. These connections between ethnicity and religious communities are, of course, not unique to immigrant communities. Churches in the U.S. often have a clear racial identity. Black churches, for example, have been a source of strength for African-American neighborhoods and communities.[30]

Bruce develops this argument largely to account for disparities between American and European religiosity. Canada, like the United States, is a country of immigrants, so Bruce's argument might seem to have little power to

[26] Casanova, *supra* note 24, at 80–91, 103.

[27] Steve Bruce, Religion in the Modern World: From Cathedrals to Cults 137 (Oxford Univ. Press 1996).

[28] H. Richard Niebuhr, The Social Sources of Denominationalism (Holt 1929); Will Herberg, Protestant-Catholic-Jew: An Essay in American Religious Sociology (Doubleday 1955).

[29] Herberg, *supra* note 28, at 31, 38; Bruce, *supra* note 27, at 135.

[30] For a balanced summary and discussion of the connection between ethnicity and religious denomination, *see* Robert Wuthnow, The Restructuring of American Religion: Society and Faith Since World War II 83–88 (Princeton Univ. Press 1988). Conversely, Bruce alleges that "one attraction [to some white people] of independent evangelical Baptist churches (and the independent schools often attached to them) is that they are white." Bruce, *supra* note 27, at 160.

explain disparities in the religious cultures of these two countries. Yet, as Lipset notes, the patterns of immigration to the two countries have been considerably different.

> Canada, for much of its history, was settled by people from its founding national groups, British and French.... The United States, on the other hand, drew its immigrants from more diverse sources, first more Germans and Irish Catholics, and, from the 1880s on, increasingly other parts of Europe.[31]

This pattern changed in the twentieth century, with Canada opening itself to a broader range of immigrants and U.S. policy fluctuating between openness and exclusion. Nevertheless, even in the last quarter of the century just completed,

> the contrast between the two North American countries is striking. About one-quarter of entrants to Canada in 1987 were from Europe and the United States, while about one-seventh of newcomers to America arrived from Europe and Canada. No European country now places among the top ten sources of immigration to the United States; only Britain ranks in this group in Canada. More than 40 percent of those entering both North American countries in the 1980s have been Asian.[32]

David Martin, in a comparative study of Canadian, U.S., and European religion, concurs: ''With regard to the pattern of migration, it has not yet converted Canada from a bicultural to a multicultural society.''[33] Such differences are almost certainly fading if not already gone—the hottest political controversy about religion in Canada at the moment, for example, pertains to the application of Shari'a by private arbitration tribunals[34]—but historical discrepancies in patterns of immigration may nevertheless have a residual impact on the religious sociology of the two countries.

Moreover, U.S. and Canadian politics have been shaped by two very different minority groups, African-Americans in the United States and

[31] Lipset, *supra* note 1, at 182.

[32] *Id.* at 186. Lipset's numbers appear to be based on the number of *legal* immigrants. He notes that ''[t]here are, of course, many more undocumented immigrants in the United States. Canada takes in more legal ones per capita, though it too is home to many illegals.'' *Id.*

[33] David Martin, *Canada in Comparative Perspective*, in RETHINKING CHURCH, STATE, AND MODERNITY, *supra* note 6, at 23, 29.

[34] Mirko Petricevic, *Fiery Debate Over Sharia Laws; Arbitration System Splits Local Audience*, THE RECORD (Kitchener-Waterloo, Ontario), September 9, 2005, at A1. *See also* Mirko Petricevic, *Mosaic of Beliefs*, THE RECORD (Kitchener-Waterloo, Ontario), June 25, 2005, at P8 (indicating that no non-Chrisitan resident was recorded in the Waterloo area until 1921; non-Christians in the 2001 census accounted for approximately 5 percent of the local population).

the Québécois in Canada.[35] African-Americans are a dispersed minority: ''Unlike the Quebecois, American blacks do not control any states'' and ''[u]ntil the civil rights revolution of the 1960s, they were most oppressed in the deep south, in the states in which they were proportionately most numerous.''[36] African-American church communities, with leaders that included the Reverends Martin Luther King and Jesse Jackson, became—and continue to be—critically important sources of African-American political power. French-Canadians are concentrated in a province, where they have power and do not have to rely on religious organizations to mediate their relations with the state.[37]

Thus, while both the United States and Canada are immigrant nations with relatively diverse populations, their demographic characteristics differ in a way material to Bruce's thesis. The greater variety and dispersion of U.S. minorities might give them a greater need for subpolitical communities that can provide them with a sense of solidarity and fight for their interests in political forums. Religious communities might fill this need; if so, the differing character of minority politics and interests in the United States might help to explain why religion there is more robust. One might be able to test this possibility by investigating whether the areas of Canada receiving a higher number of non-British and non-French immigrants—such as, perhaps, some neighborhoods of Toronto—have witnessed the growth of immigrant churches like those commonly found in the United States.

Wald's suggestion focuses on two structural features of U.S. government: it is a weak state with multiple access points. Because the United States government has multiple veto points, it is less likely to provide the services, such as health care, that people need. Religious organizations can make themselves valuable to people by filling the resulting gaps.[38] But the U.S. government does not merely have many veto points; it has, more generally, many access points. There are, in other words, many different jurisdictions or officials whom groups, including religious groups, can influence or control, thereby (again) delivering value to their members.[39] David Martin makes a similar argument. He says that small religious groups have been able to form and

[35] Lipset, *supra* note 1, at 198.

[36] *Id.* at 198–199.

[37] David Martin identifies the ''demarcated territorial base'' of Québécois Catholicism as important both to its extended vigor and subsequent rapid decline. Martin, *supra* note 33, at 24.

[38] Kenneth D. Wald, Religion and Politics in the United States 23–24, n. 9 (Rowman Littlefeld 1997).

[39] ''[P]olitical scientists have long recognized [that] the complex structure of the U.S. government encourages groups to undertake political activity.'' *Id.* at 32. Bruce makes the same point. Steve Bruce, Conservative Protestant Politics 164 (Oxford Univ. Press 1998); Bruce, *supra* note 27, at 160.

flourish more easily in the United States than in Canada because ''the increased opportunity for subcultural formation and maintenance, and the relative weakness of state provision, makes for a very wide range of competitive religious agencies operating across the board.''[40]

Wald uses abortion politics to illustrate this theory. He suggests that anti-abortion groups have been more successful in the United States than in Canada because of ''the many avenues of attack provided by the complex and multifaceted U.S. system of government.''[41] By contrast, the Canadian parliamentary system ''offered the opponents of liberalized abortion few opportunities to challenge official policy.''[42] For example, ''the criminal code was the exclusive responsibility of the national government, so the provincial authorities and local governments could do little to restrict the availability of abortion services.''[43]

Taken in combination, Wald's two observations point to the fact that political power in the United States is more fragmented than in Canada. We use ''fragmentation'' to describe a condition in which there are many government organs or entities capable of doing something but none capable of doing everything. This condition generates two opportunities for religious organizations (and other organizations) to prove their utility to potential members and adherents: by influencing one of the many available government institutions or by responding to needs unmet by government. Fragmentation in this sense is very different from federalism. Indeed, the Canadian provinces are, in general, more powerful than the U.S. states. Fragmentation in the U.S. is the result of three conditions: first, bicameralism and the separation of powers at the national level, so that the national government is, as a practical matter, often incapable of acting on certain matters (such as health care) where it has constitutional authority to act; second, localism, so that a patchwork of tiny jurisdictions (including counties, cities, and school districts) exercise meaningful power; and third, an allocation of authority in the United States that allows some of these small jurisdictions to make critical decisions about such matters as education and criminal law (in Canada, criminal law is a matter for national legislation, and many key decisions about educational policy are made at the provincial level rather than the local level).[44]

[40] Martin, *supra* note 33, at 26.

[41] Wald, *supra* note 38, at 33.

[42] *Id.*

[43] *Id.* at 34; *see* also *id.* at 125–139 for further examples.

[44] Bruce emphasizes the importance that local control over education plays in American religious sociology. Bruce, *supra* note 27, at 142; Bruce, *supra* note 39, at 159. For a brief discussion of the differences between Canadian and American federalism, *see* Martha A. Field, *The Differing Federalisms of Canada and the United States*, 55 Law and Contemp. Prob. 107 (1992).

Political fragmentation is an intriguing explanation for the comparative robustness of U.S. religious communities and organizations. Like the disestablishment hypothesis, it focuses on political structures rather than culture or demography. These structures are at least partly ''constitutional'': the separation of powers, for example, is a constitutional characteristic of the U.S. government, as is the fact that the United States Constitution, unlike its Canadian counterpart, leaves U.S. states and localities free to enact criminal laws. (Of course, the United States Constitution is silent about local government, so it is debatable whether or not the fracturing of state power into multiple local jurisdictions is a ''constitutional'' feature of government in the U.S.) On the other hand, fragmentation, unlike disestablishment, is not a constitutional institution or principle specifically addressed to religion; it is a much more general structural condition. Political fragmentation should provide opportunities for all sorts of private associations, not just religious organizations. One way to test its importance as an explanation, therefore, would be to compare variations in Canadian and U.S. associational behavior with variations in religious behavior. If indeed varying levels of political fragmentation were responsible for disparities between U.S. or Canadian religiosity, we would have an interesting result: general features of constitutional structure not in any sense *about* religion would have significantly influenced the character of religion.

It is probably impossible to reach a conclusive judgment about the causal importance of any of the possible variables we have identified: disestablishment, historical culture, minority groups, and fragmentation of political power. Nevertheless, we can offer two comments in response to our question about whether constitutional differences are responsible for the differing levels of religiosity in the United States and Canada. First, one of the most venerable and frequently mentioned hypotheses about that difference focuses on a cause that is undoubtedly constitutional, namely, disestablishment. Second, it is at least possible that a structural constitutional condition, the comparatively greater fragmentation of political power in the United States, has reinforced the effects of disestablishment.

2. Have religious differences produced different constitutional norms of religious freedom?

Up to this point, we have been examining how constitutional norms might have shaped religious practice in Canada and the United States; in this section, we reverse the direction of the inquiry to ask whether patterns of religious practice in the two countries might have generated differences in constitutional norms regarding religious freedoms. To make progress, we must first consider to what extent those norms actually diverge. Scholars comparing U.S. and Canadian court decisions about religious freedom often

remark upon their surprising similarity.[45] If we confined our attention to judicial opinions, the dominant story would indeed be about convergence rather than divergence, with only a few exceptions. These jurisprudential parallels, which transcend differences in both the religious sociology and the constitutional texts of the two nations, are significant in their own right, and we shall return them shortly. This is one of those instances, however, where the law on the books can yield a deceptive picture of constitutional practice. The exceptions to the general pattern of jurisprudential convergence turn out to be important signals of more dramatic differences in the two countries' attitude toward disestablishment.

More specifically, Canada and the United States have radically different norms governing public support for religious education. In the United States, the Supreme Court has held that the Constitution prohibits the government from offering religious instruction in public schools; until very recently, the Court also held that the government could not provide financial support to private religious schools. In a controversial decision, *Zelman v. Simmons-Harris*,[46] five justices repudiated the latter doctrine (the other four dissented vigorously, insisting that the Constitution bars any state aid to religious education). After *Zelman*, the state may help to defray the costs of religious education provided that it does so through mechanisms that respect parental choice and that do not discriminate among religions or between religion and nonreligion. Although *Zelman* allows governments greater freedom to support religious schools, the *Zelman* majority insisted that the state's funding mechanism must be neutral among religions and between religion and nonreligion.[47]

Canadian constitutional norms are much different from either pre-*Zelman* or post-*Zelman* U.S. law. Funding arrangements vary greatly among the provinces, and they involve both state-operated religious schools and state-funded private religious schools. Many of the provinces discriminate among denominations. Here is a brief description from Mark Holmes, published in 1998 when he was professor emeritus at the Ontario Institute for Studies in Education at the University of Toronto:

> British Columbia, Manitoba, Alberta, and Quebec all provide partial funding to support independent schools that meet certain conditions.

[45] See, e.g., Donald L. Beschle, *Does the Establishment Clause Really Matter? Non-Establishment Principles in the United States and Canada*, 4 U. Pa. J. Const. L. 451 (2002); Paul Horwitz, *The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond*, 54 U. T. Fac. L. Rev. 1 (1996); Christopher P. Manfredi, Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism (Oxford Univ. Press 2000); and Robert A. Sedler, *The Constitutional Protection of Freedom of Religion, Expression, and Association in Canada and the United States: A Comparative Analysis*, 20 Case W. Res. J. Int'l L. 577, 588–589 (1988).

[46] 536 U.S. 639 (2002).

[47] *Id.* at 653–654; see also *id.* at 670–671 (O'Connor, J., concurring).

> These provinces differ in their treatment of Roman Catholic schools, with British Columbia and Manitoba treating such schools on the same basis as Seventh-Day Adventist or Dutch Reformed Institutions, while Alberta and Quebec have fully funded Roman Catholic systems as well as partially supported religious and secular schools. . . . Quebec has an elaborate protocol for the funding of private schools. . . . Many of [its] private schools are Roman Catholic, which is not the case in the provinces with publicly funded Catholic systems, probably because the public Catholic schools in Quebec, particularly the large secondary *polyvalents*, have been secularized. . . . Saskatchewan and Ontario are the most discriminatory provinces in their treatment of independent schools. Both fully fund public Roman Catholic separate schools, but provide no support for the independent schools attended by members of other denominations or religions. . . . The Maritime provinces are less overtly discriminatory than Ontario and Saskatchewan. . . . Newfoundland is the only province where parents do not have access to avowedly secular schools. There is little overt demand, probably because the Integrated [mainstream Protestant] schools are often de facto secular.[48]

Newfoundland made radical reforms to its school finance laws after two referenda in the late 1990s and no longer funds religious schools; the public schools are now secular.[49] Nevertheless, it would be difficult to overstate how odd Canada's arrangements appear to someone steeped in the modern U.S. constitutional tradition. Under U.S. law, it is virtually unthinkable that the state would be allowed to discriminate among denominations, favoring some over others, but several Canadian provinces do so explicitly. Almost as shocking are the ideas that a province might have the government operate ''public Roman Catholic schools'' and that parents in some jurisdiction might have no secular option for schooling their children. Moreover, Canada delivers its funding to the religious schools through a variety of mechanisms that Americans would find equally jaw-dropping, such as school board elections in which only registered Catholics can vote and taxes that vary with one's religion.[50]

Ontario's preferential school subsidies withstood constitutional challenges in *Reference re Bill 30 (An Act to Amend the Education Act (Ont.))*[51] and, again,

[48] Mark Holmes, The Reformation of Canada's Schools: Breaking the Barriers to Parental Choice 31–35 (McGill-Queen's Univ. Press 1998).

[49] *See, e.g., Church Control of Education Ends in Newfoundland*, The Toronto Star, January 9, 1998, at A22.

[50] For a description of some of these arrangements, *see* Albert J. Menendez, Church and State in Canada 47–68 (Prometheus 1996).

[51] [1987] 1 S.C.R. 1148.

in *Adler v. Ontario*.[52] As Holmes notes, the Ontario government's school finance scheme is among Canada's most egregiously discriminatory: Ontario funds secular schools and Catholic ones but no others. In *Adler*, Jewish parents sued the Ontario government demanding that Ontario fund Jewish schools along with Catholic ones. Joining them were other parents who sought state subsidies for independent Christian schools. The parents claimed that Ontario's law violated their rights under section 2(a) of the Canadian Charter of Rights and Freedoms, which guarantees ''freedom of conscience and religion,'' as well as under section 15(1), which affirms the equality of individuals and prohibits ''discrimination based on . . . religion'' among other categories. The Supreme Court, however, found for Ontario on the basis of section 29 of the Charter, which expressly preserves provisions of the 1867 Constitution Act that guaranteed provincial funding for Protestant schools in Québec and Catholic schools in Ontario. The majority said that the special constitutional status of minority Catholic schools was ''the product of a historical compromise which was a crucial step along the road . . . to Confederation.''[53] Although ''this special status may 'sit uncomfortably with the concept of equality embodied in the *Charter*,'. . . it must nonetheless be respected.''[54]

United States observers would expect that the Canadian laws on public support for religious education would be highly controversial, both because the laws seem outrageous by U.S. standards and because issues about public funding for religious schools are hotly contested in the U.S. As *Adler* indicates, some Canadians—especially Jewish parents and some other minority religious believers in Ontario—do find the discriminatory laws offensive. In response to a complaint from some of these parents, the United Nations Human Rights Committee held in 1999 that Ontario's education laws violated the International Covenant on Civil and Political Rights.[55] But the discriminatory laws in Ontario and other provinces have not provoked as intense a reaction as an American would expect. One angry online commentator described the United Nations ruling as having created about ''as much splash as a kite gently landing on a placid lake.''[56] On the other hand,

[52] [1996] 3 S.C.R. 609.

[53] *Id.* at 640.

[54] *Id.* at 640–642 (quoting Reference re Bill 30, [1987] 1 S.C.R. at 1197). It bears mention that the U.S. Supreme Court likewise invoked historical practice to approve denominational favoritism in *Marsh v. Chambers*, 463 U.S. 783 (1983), which upheld Nebraska's legislative chaplaincy. The *Marsh* Court declared it irrelevant that a Presbyterian minister had held the Nebraska post for sixteen consecutive years. Unlike its Canadian counterpart, the American Court could not point to any explicit textual provision to justify its departure from the basic constitutional principle prohibiting the government from discriminating among sects.

[55] Waldman v. Canada, No. 694/1996, 7 I.H.R.R. 368 (1999).

[56] Stephen Gowans, *Fairness in School Funding? It's Just Not On*, www.canadiancontent.ca/features/060301gowans.html (last visited August 24, 2005).

religious minorities were able eventually to forge an alliance with advocates of school choice; the result was an across-the-board tax credit for private-school tuition that softened, without eliminating, the discriminatory effects of Ontario's school finance laws.[57] The resulting scheme, however, remains squarely at odds with the basic equality principles that underlie both U.S. and Canadian religious freedom jurisprudence.

Thus far we have only described discrepancies between norms of religious freedom in Canada and the United States without asking whether they derive in any way from the differing religious histories and sociologies of the two countries. There is no doubt that they do. Canada's system of preferences results from its history and its religious sociology—in particular, from the existence of an oligarchic structure in which dominant churches were quasi-established within a particular region (and relegated to minority status elsewhere).[58] Ronald Manzer and other scholars have documented the links between the privileges that Canadian churches enjoyed in the past and the preferential funding schemes in existence today.[59] Conversely, the U.S. understanding of religious freedom evolved out of the very different history of religion in the United States. Many scholars have documented the influence of the Protestant tradition on the United States' embrace of disestablishment.[60] As Stephen Macedo and Philip Hamburger have described (in different ways and to different effect), the U.S. public school system, and the modern U.S. jurisprudence limiting the state's power to fund religious schools, were forged partly as a result of efforts by Protestant groups to suppress Catholic schooling.[61]

A naïve observer might expect that these distinctive and historically rooted differences in norms of religious freedom would generate divergent lines of constitutional reasoning in the Supreme Courts of Canada and the United States—so that, for example, Canada would have developed a set of principles capable of justifying the somewhat oligarchic set of ''shadow establishments'' reflected in its school finance laws, while the United States would have pursued a variety of more individualistic principles that encouraged and responded to free market competition among religious practices, sects, and churches. In practice, though, this expectation turns out to be disappointed.

[57] Ian Urquhart, *Private Schools: How They Decided*, The Toronto Star, May 12, 2001, A1.

[58] *See, e.g.*, Sedler, *supra* note 45, at 583.

[59] Ronald Manzer, Public Schools and Political Ideas: Canadian Educational Policy in Historical Perspective 51–61 (Univ. Toronto Press 1994).

[60] *See, e.g.*, Lipset, *supra* note 1, at 74–77; Lambert, *supra* note 21, at 12–14, 127–203; Marci A. Hamilton, *The Religious Origins of the Establishment Clause*, Notre Dame L. Rev. (forthcoming Spring 2006).

[61] Stephen Macedo, Diversity and Distrust: Civic Education in a Multicultural Democracy 41–152 (Harvard Univ. Press 2003); Philip Hamburger, Separation of Church and State 193–478 (Harvard Univ. Press 2004).

For the most part, Canada's jurisprudence of religious freedom is no less individualistic than its U.S. counterpart.

Within both the United States and Canada, constitutional controversies over religious freedom divide into two rough categories. The first category involves questions about the limits on the government's power to burden the practices of nonmainstream religious groups and individuals. In the United States, these cases arise under the First Amendment's free exercise clause. Prominent examples from the United States include issues about whether Native American religious rituals should be exempt from state laws banning the use of peyote;[62] whether the Amish must comply with state laws requiring children to attend school until the age of fourteen;[63] and whether a city may prohibit the ritual slaughter of animals.[64] Canadian examples include issues about whether religious schools should be exempt from state certification requirements,[65] the pastor-penitent privilege,[66] and whether parents' religious beliefs could provide a legal justification for their refusal to provide medical care to their child.[67]

As the controversy over the peyote case (*Smith v. Department of Employment Services*) in the United States makes clear, people disagree sharply about how to resolve these cases. Some theories emphasize the importance of enabling religious minorities to flourish unimpeded by government, while other theories emphasize the need to protect minorities from hostility, neglect, and other varieties of unequal treatment.[68] Under neither approach, however, does the background religiosity of the nation seem relevant to the analysis. Religious minorities may care intensely about burdened practices even if the nation, as a whole, is secular. And a majority may have either secular or religious reasons for treating religious minorities badly (or well).

Perhaps for these reasons, the differences between U.S. and Canadian constitutional jurisprudence in these free exercise cases have been relatively minor. The convergence is remarkable because there are some pertinent

[62] Employment Division, Department of Human Resources of Oregon v. Smith, 484 U.S. 872 (1990).

[63] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[64] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

[65] R. v. Jones, [1986] 2 S.C.R. 284; Trinity Western University v. British Columbia College of Teachers, [2001] S.C.C. 31.

[66] Gruenke v. The Queen [1991], 3 S.C.R. 263. *See also* the discussion in Denise J. Doyle, *Religious Freedom and Canadian Church Privileges*, 26 J. CHURCH & STATE 293, 293–294 (1984).

[67] Richard B. v. Children's Aid Society, [1995] 1 S.C.R. 315.

[68] For discussion (from the standpoint of a theory that emphasizes the need to protect minorities from unequal treatment) and references, see Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1250–1301 (1994).

textual differences between the two constitutions. The U.S. free exercise clause is nominally absolute, whereas its Canadian counterpart (like other rights in the Charter) is expressly made subject to ''reasonable limits prescribed by law.'' Canada's equal protection clause explicitly applies to religion, whereas the U.S. Court has rarely made mention of the U.S. equal protection clause in religious liberty cases. Nevertheless, U.S. jurisprudence has increasingly turned on equality norms and has consistently recognized the need to accommodate state interests as well as religious liberty.[69]

The second category of religious freedom issues involves limitations on the government's ability to endorse or favor popular religions, or to promote religion in general. In the United States, these claims are treated under the establishment clause. They involve questions about, for example, whether the state may subsidize religious education; whether towns may erect crèche displays at Christmas; and whether public schools may sponsor prayer ceremonies and moments of silence. In Canada, the most prominent cases have dealt with state subsidies for religious education[70] and Sunday closing laws.[71]

One might expect that the differences in Canadian and U.S. religious sociology would produce greater divergence in these establishment clause cases than in their free exercise counterparts. It is with regard to disestablishment that the constitutional practices of the two countries differ most dramatically, both historically and today. Moreover, the intrusions upon religious freedom in many of the establishment clause cases are more subtle than are the harms in free exercise cases. Like most civil liberties cases, free exercise cases involve a readily apparent injury to an identifiable group—those who want to engage in a religious practice that is burdened or prohibited by law. In that respect, free exercise cases are much like cases about freedom of speech, reproductive autonomy, criminal procedure, and so on. In at least some establishment clause cases, by contrast, the character of the injury is less clear. The government does not prevent you from doing anything when it sponsors a crèche display or subsidizes a religious school. You may, of course, find the display offensive, and you might wish—fervently—that the government had spent its money on something else. But these sorts of complaints do not usually give you a constitutional claim. For example, you may dislike flying into Reagan National Airport, but your choice is to put up with the name or go to Dulles or Baltimore-Washington International instead. Likewise, you may disapprove of the choices the government makes about what artwork to display in the National Gallery, or about which nations to favor with foreign aid, but you are not entitled to complain in court. Indeed, establishment

[69] Christopher L. Eisgruber & Lawrence G. Sager, *Equal Regard, in* LAW AND RELIGION: A CRITICAL ANTHOLOGY 200, 200–210 and 218–222 (Stephen Feldman ed., New York Univ. Press 2000).

[70] Adler, [1996] 3 S.C.R. 609.

[71] R. v. Big M. Drug Mart Ltd., [1985] 1 S.C.R. 295; R. v. Edwards Books and Art, Ltd., [1986] 2 S.C.R. 713.

clause claims are sufficiently distinctive in American jurisprudence that they require their own special jurisdictional doctrines. Alleging that your tax dollars were used for an unconstitutional purpose will sometimes suffice to give you standing as a plaintiff if you are asserting an establishment clause claim, but not if you are complaining about the violation of some other constitutional provision.[72]

In U.S. jurisprudence, the idea that government inflicts constitutionally cognizable harm when it displays religious symbols depends on the claim that government thereby disparages members of other religions and marks them as outsiders to the core of the community. This argument is controversial within the United States. Some U.S. jurists and commentators—Antonin Scalia, for example[73]—have suggested that establishment clause claims, like free exercise clause and most other civil liberties claims, should exist only when the government is coercing somebody to do something. One might hypothesize that a country such as Canada, in which religious divisions seem less politically salient than in the United States, would have less reason to worry about whether the government had identified itself with one or another religious group. If so, that would be another reason to expect the constitutional courts of the two countries to reason differently about disestablishment.

In an important respect, Canadian and U.S. jurisprudence both vindicate the expectation that they will diverge on issues related to disestablishment. A prominent strand in U.S. establishment clause jurisprudence regards *any* direct financial support for religion as unconstitutional, even if the support is provided equally to all religions and to equivalent nonreligious institutions. This strand can no longer claim majority support on the Supreme Court after *Zelman.* Still, the four dissenters in *Zelman* vigorously championed the ''no aid for religion'' principle, and it was long ascendant in U.S. Supreme Court cases. It retains considerable support in U.S. legal culture. Closely related to the ''no aid'' principle is another strand of U.S. constitutional jurisprudence that prohibits ''entanglement'' between church and state, even when the law creating the entanglement treats all religions equally and does not discriminate between religion and nonreligion. So far as we can tell, the idea of an absolute prohibition on public support for religion, or on entanglement between church and state, would have no traction in Canadian constitutional jurisprudence. This difference seems a direct consequence of differences in constitutional text and history. The United States has an explicit establishment clause and has fought battles over state funding for religion at least since James Madison and Thomas Jefferson remonstrated against Virginia's plan to support the teaching of Christianity, whereas Canada has no such clause and has a long history of state support for religious schools and institutions.

[72] *See, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968).

[73] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 640–642 (1992) (dissenting opinion).

That said, although Canada's Constitution contains no antiestablishment clause, the Canadian Court has read section 2(a), which guarantees ''freedom of conscience and religion,'' to incorporate the equivalent of a strong disestablishment norm, one that focuses not on ''strict separation'' but on equality.[74] The reasoning of the Canadian Court on such issues will seem remarkably familiar to U.S. lawyers acquainted with the reasoning of Justice Sandra Day O'Connor in cases such as *Zelman* and *Lynch v. Donnelly* (which dealt with state-sponsored Christmas displays).[75] The seminal Canadian decision is *Big M. Drug Mart*, which addressed whether Parliament's Lord's Day Act, prohibiting business on Sundays, violated constitutionally protected freedom of conscience and religion. In a nearly unanimous opinion, the Court ruled that the Lord's Day Act was an impermissible use of Parliament's power to criminalize conduct. Critical to the decision was the law's purpose, which was unambiguously displayed in its name—the *Lord's Day* Act. The *Big M* ruling announced a departure from pre-Charter jurisprudence, which examined only effects, not purposes, of laws. The majority opinion specified that ''The legislation's purpose is the initial test of constitutionality and its effects are to be considered only when the law under review has passed . . . the purpose test. [T]he effects test. . . can never be relied on to save legislation with an invalid purpose.''[76] Furthermore, the Court refused to attribute purposes that had shifted since the law was enacted: if Parliament intended to preserve the Lord's Day, the Act must be judged against that purpose, not against different purposes that it might now serve in Canadian society.[77] Finally, federalism considerations limited the purposes that the Court was willing to ascribe to the statute: ''The Act could not have the secular purpose of providing a uniform day of rest, because this would involve 'property and civil rights within the province' under section 92(13) of the Constitution Act of 1867, and so would be *ultra vires* Parliament.''[78]

The Court's more general observations made clear that it had identified a significant antiestablishment norm within the Canadian Constitution. The Court specified that freedom of religion ''is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.'' Freedom of religion also means that ''subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his [or her] beliefs

[74] *See generally* Beschle, *supra* note 45.

[75] 465 U.S. 668 (1984).

[76] Big M Drug Mart Ltd, [1985] 1 S.C.R. at 334.

[77] *Id.* at 334–336.

[78] Sedler, *supra* note 45, at 586.

or . . . conscience.'' The religious freedom guarantee ''at the very least means [that]. . . government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose.''[79]

Ironically, although the Court adopted the ''coercion'' standard that Justice Scalia would favor as an alternative to U.S. establishment clause jurisprudence, it also made clear that its understanding of ''coercion'' was broad enough to encompass most of the establishment clause jurisprudence being generated south of the border.[80]

> To the extent that it binds all to a sectarian Christian ideal, the *Lord's Day Act* works a form of coercion inimical to the spirit of the *Charter*. . . . In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians, . . . The protection of one religion and the concomitant non-protection of others imports a disparate impact destructive of the religious freedom of society.[81]

Richard Moon observes that in *Big M* and subsequent cases, ''Canadian courts have taken such a broad view of religious coercion that any form of state support for the practices or beliefs of a particular religion, or for religious over non-religious belief systems, might be viewed as coercive and therefore contrary to the [Charter].''[82] Provincial courts have applied *Big M* to prohibit publicly sponsored prayer ceremonies, in public schools and elsewhere, even if they are optional. For example, the Ontario Court of Appeal ruled that a town violated the Charter by opening its council meetings with the Lord's Prayer; the Court reasoned that non-Christians in the audience might feel compelled to participate.[83] Moon contends that, despite judicial rhetoric about ''coercion,'' such holdings can be justified only by a distinct concern ''that all individuals are fully included within the political community, and treated by the state with equal respect, whatever their religious beliefs and practices.''[84] His view is consistent with a passage in *Big M*, where the Court explicitly linked its ruling to considerations about Canada's multiethnic

[79] Big M Drug Mart, [1985] 1 S.C.R. at 337, 347.

[80] Scalia would recognize as coercion only those government actions analogous to ''coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.'' Lee, 505 U.S. at 640 (dissenting opinion; emphasis in the original). Justice Kennedy, whose opinion provoked Scalia's dissent in *Lee*, is willing to recognize more subtle forms of psychological coercion and so comes closer to the Canadian Court's understanding of the concept. *Id.* at 592–594 (majority opinion).

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

[82] Richard Moon, *Liberty, Neutrality, and Inclusion: Religious Freedom Under the Canadian Charter of Rights and Freedoms*, 41 BRAND. L. J. 563 (2003).

[83] Freitag v. Penetanguishene, [1999] 47 O.R. 301.

[84] Moon, *supra* note 82, at 565.

heritage. The Court wrote, ''to accept that Parliament retains the right to compel universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multi-cultural heritage of Canadians.''[85]

One year after its decision in *Big M*, in *Edwards Books & Art Ltd.*, the Canadian Court reviewed an Ontario law that required businesses to close on Sundays. It differed in subtle ways from the law stricken in *Big M*: It was the product of a provincial legislature, rather than the national one; it did not bear the name ''Lord's Day Act,'' and so could be defended on the basis of the secular interest in establishing a uniform day of rest; and it included a complicated scheme of exemptions. The Canadian court upheld the law. The pattern established by *Big M* and *Edwards Books* should look familiar to American readers. The U.S. Court, too, has upheld Sunday closing laws on the (half-fictive) ground that the state is creating a uniform day of rest, which just happens to coincide with a day of rest favored by the religious majority.[86] And the U.S. Court, too, has held that a religious purpose is sufficient to render a law unconstitutional, regardless of its effects. The most apt precedent is *Wallace v. Jaffree*,[87] where the Court held unconstitutional Alabama's statute creating ''moments of silence'' in its public schools. The Court refrained from concluding that all moments of silence would be unconstitutional. Instead, it held that Alabama violated the establishment clause by amending its existing moment-of-silence statute in order to stress that the moment could be used for prayer—just as the Canadian Court held Parliament's statute invalid because it explicitly identified Sunday as the ''Lord's Day.''

What, then, about *Adler*, where the Court upheld Ontario's strikingly discriminatory system for financing Catholic education? One might suppose that this ruling would necessarily reflect principles different from those in any version of U.S. disestablishment law, where such a special status would be flatly inconsistent with the nonpreferentialism insisted upon even by those Supreme Court justices willing to allow some state support for religious education. But the justices in the Canadian majority treated the special status in much the way that Sandra Day O'Connor might have done: as an historical compromise that had to be respected because of an explicit textual stipulation but that was awkward when judged in the light of more general constitutional principles. Nor did any of the concurring or dissenting opinions try to provide a principled justification for the special status of the Catholic schools. The concurring opinion of Justices John Sopinka and John Major emphasized that ''all parents whose religion requires them to send their children to a private religious school charging tuition would be equally disadvantaged

[85] Big M Drug Mart Ltd, [1985] 1 S.C.R. at 337–8.

[86] McGowan v. Maryland, 366 U.S. 420 (1961).

[87] Wallace v. Jaffree, 472 U.S. 38 (1985).

relative to parents who have the option of sending their children to state-funded public schools.'' They recognized that ''a distinction is made between these religious groups and the separate Roman Catholic schools'' but found that ''this distinction is constitutionally mandated and cannot be the subject of a Charter attack.''[88] Justice Beverley McLachlin's partial dissent emphasized the role of integrated public schools in encouraging ''a more tolerant harmonious multicultural society'' and concluded that this function justified a state policy that would, in fact, otherwise infringe the parents' right to equal treatment.[89] A dissenting opinion by Justice Claire L'Heureux-Dube would have found in favor of the Jewish parents.

There is one other difference between U.S. and Canadian disestablishment controversies, a difference that pertains not to the principles applied in those cases but to their frequency and public significance. Disputes about disestablishment—about public funding for religious education, about religion in the public schools, and about government display of religious symbols—appear to be less frequent and less passionately contested in Canada than in the United States. In 2001, Manitoba's premier announced that the decorated spruce tree in the provincial capitol would again be called a ''Christmas Tree''—ending a twenty-year period when it was referred to as a ''multicultural tree.''[90] This news prompted a number of editorials and letters commenting on the silliness of a ''multicultural tree'' and approving of the decision to put ''Christ'' back into Christmas. But it does not appear to have produced either litigation or a secularist backlash, and the whole episode seems to have been more the exception than the rule; the legal disputes about nativity displays that are common in the U.S. seem to be relatively rare in Canada. More generally, David Lyon, a sociology professor at Queens University, reported in an article published five years ago that ''[b]y and large, the idea that religious commitments affect public life is scarcely raised today in most media and academic accounts.''[91] The situation in the United States was and is, of course, vastly different.

Intense political controversies about religion do, of course, sometimes erupt in Canada. Just before this article went to press, groups in Canada and around the world took to the streets to protest a proposal that would have allowed Islamic couples to obtain legally binding decisions from private tribunals applying Shari'a law.[92] The proposal involved an application of Ontario's Arbitration Act, a very general statute that enables consenting

[88] Adler, [1996] 3 S.C.R. at 702 (concurring opinion).

[89] *Id.* at 719 (concurring in part and dissenting in part).

[90] *Christmas tree will be called a 'Christmas' tree in Manitoba legislature: Premier*, CANADIAN PRESS NEWSWIRE, December 13, 2001.

[91] David Lyon, *Introduction*, *in* RETHINKING CHURCH, STATE, AND MODERNITY, *supra* note 6, at 9.

[92] Bruce Cheadle, *Protests Set to Oppose Sharia Law*, THE TORONTO STAR, September 6, 2005, at A02.

parties to submit disputes to private arbitrators. Ontario's Muslims contended that they should be able to invoke the act for family law disputes, something that Orthodox Jews and Catholics had already done. Critics responded that Shari'a was unacceptably discriminatory, and that Muslim women would be coerced to participate in private tribunals and surrender rights they had under Canadian family law.[93] In mid-September 2005, Ontario's premier, Dalton McGuinty, surprised both sides in the controversy by moving to ban all religious arbitrations, including Jewish and Catholic ones as well as the controversial Shari'a tribunals.[94] Disputes about the authority of arbitrators to apply religion-based family law have arisen elsewhere—including in New York, with regard to Orthodox Jewish women seeking *gets* in divorce cases[95]—but Ontario's battle over Shari'a was especially heated and visible. It involved not only free exercise–type issues (insofar as an Islamic minority sought accommodation for its religiously motivated practices) but also establishment-type issues (insofar as the state was asked to enhance the power of Islamic institutions by allowing them to promulgate legally authoritative rulings). One might accordingly regard the dispute about Shari'a as a prominent Canadian establishment clause controversy—but of a very different flavor from the most familiar U.S. debates, which deal with the legitimacy of government policies that advance the majority's religious interests.

Our claims about the frequency and character of establishment clause disputes are admittedly both impressionistic and speculative, and it would require a much more systematic investigation of church-state disputes in Canadian politics than we have undertaken to determine whether, and how much, the constitutional politics of religious freedom differs in the two countries. We close, however, with a description of one episode that, in our view, illustrates the nature of the differences. It pertains to a textual difference between the U.S. Constitution and the Canadian Charter of Rights and Freedoms that we have thus far ignored. The Canadian document, unlike the U.S. text, specifically invokes God: its preamble begins, ''Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law. . . .'' As others have noted, it is ironic that Canada is less religious

[93] Caroline Mallan, *Sharia Report Called 'Betrayal' of Women*, THE TORONTO STAR, December 21, 2004, at A01. During the course of the Ontario controversy, Québec rejected the use of Shari'a in its arbitral tribunals. Les Perreaux, *Quebec Rejects Islamic Law*, THE TORONTO STAR, May 27, 2005, at A08. For a scholarly analysis of the controversy, *see* Ayelet Shachar, *Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies*, 50 MCGILL L. J. 49 (2005).

[94] Prithi Yelaja & Robert Benzie, *McGuinty: No Sharia Law*, THE TORONTO STAR, September 12, 2005, at A01.

[95] Nicholas Pengelley, *Faith-based Arbitration in Ontario*, 9 VINDOBONA J. INT'L COMM L. & ARB. 111 (2005); Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540 (2004).

than the United States but its Constitution, unlike that of the U.S., asserts God's supremacy. We think there is less here than meets the eye. The Canadian Charter was drafted in the late twentieth century when religious leaders were allied in their concern about encroaching secularism; by contrast, when the U.S. Constitution was drafted, in the eighteenth century, religious leaders worried, instead, about denominational and sectarian rivalries. No observer of the U.S. debate about ''under God'' in the Pledge of Allegiance can doubt that, if the United States had drafted a constitutional ''charter of rights and freedoms'' in the 1980s, it would have included a reference to God (we suspect that only America's extraordinary reverence for its founding generation has spared the country from a campaign to insert God into the Constitution's preamble).

More interesting than the Charter's inclusion of God are the politics that surrounded it. Pierre Trudeau had initially opposed including any reference to God in the Constitution. He reversed himself when conservatives succeeded in making hay of the issue, and an adviser suggested that standing on principle would be costly to Trudeau's Liberal Party in the future.[96] Trudeau told the Toronto *Globe and Mail* that he personally favored the inclusion of ''God'' in the preamble, though he also said that he thought it ''strange, so long after the Middle Ages that some politicians felt obliged to mention God in a constitution which is, after all, a secular and not a spiritual document.''[97] ''Privately, Trudeau told the liberal caucus that he did not think God gives a damn whether he was in the constitution or not.''[98]

One can easily envision U.S. conservatives pushing for the inclusion of God in the constitutional text, and one can equally well see liberal U.S. politicians trimming their positions on the issue to avoid a conservative backlash. It is almost impossible, though, to imagine that the liberals would ever say to a newspaper what Trudeau said, *after* changing his position, to the Toronto *Globe and Mail*. And, in the United States, the insertion of the word God into the constitutional text would be a continuing source of controversy and agitation—just as the inclusion of the phrase ''under God'' in the Pledge of Allegiance has become. It does not appear to have been so in Canada.

[96] George Egerton, *Trudeau, God, and the Canadian Constitution: Religion, Human Rights, and Government Authority in the Making of the 1982 Constitution*, *in* Rethinking Church, State, and Modernity, *supra* note 6, at 105–106.

[97] *Id.* at 91, 106. The quotations appeared in *The Globe and Mail* on April 25, 1981, the day after the amendments adding a reference to God went through the Canadian Senate (they had passed the House on the preceding day).

[98] *Id.* at 106.

3. Conclusion

From the perspective of religious freedom, the most obvious constitutional difference between the United States and Canada centers upon religious establishments; the United States has pursued a strict version of disestablishment, whereas Canada has sponsored various cooperative relationships between its government and churches, especially the Anglican and Catholic churches. Our analysis confirms the importance of this difference. Disestablishment is one plausible explanation for the greater vigor of religion in the U.S. in comparison with its Canadian counterpart. It is almost certainly the explanation for the greatest jurisprudential divergence between the two countries on issues of religious freedom, namely, the attractiveness of ideas about ''strict separation''—with regard to matters of financial aid and entanglement—to U.S. jurists but not their Canadian counterparts.

Disestablishment, however, does not explain all the important differences between the U.S. and Canadian versions of religious freedom. Nonconstitutional factors, such as history and demographics, have played a role. We have noted, in particular, that the greater variety and dispersion of U.S. minorities may have contributed to the relative vigor and prominence of religious practices in the U.S. as compared with Canada.

We also believe, however, that scholars interested in the comparative study of religious freedom in the two countries would profit from paying more attention to another constitutional difference between them—namely, the greater fragmentation of political power in the United States. Sociologists have identified jurisdictional fragmentation as one source of religion's vigor in the United States: fragmentation enhances the capacity of religious organizations to deliver valued services to their members, either by controlling local jurisdictions or by filling the gaps in social services that result, in part, from the presence of so many veto points in U.S. politics. We suspect that fragmentation has also played a role in shaping litigation about religious freedom in the United States. Religious minorities that lose in local politics have an incentive to renew their argument at the state or federal level, and litigation is one mechanism for doing so. This dynamic increases the likelihood that political and cultural disputes about religion in the United States will evolve into legal ones. As a result, fragmentation may help to explain why legal controversies about religious freedom are more frequent and more intensely contested in the United States than in Canada, even if it does not influence the principles used to resolve them.