

# Law's Religion: Rendering Culture

Benjamin L. Berger

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# Law's Religion: Rendering Culture

## **Abstract**

This article argues that constitutional law's inability to deal with religion in a satisfying way flows, in part, from its failure to understand religion as, in a robust sense, culture. Once one begins to understand the Canadian constitutional rule of law itself as a cultural form, it becomes apparent that law renders religion in a very particular fashion, and that this rendering is a product of law's symbolic categories and interpretive horizons. This article draws out the elements of Canadian constitutionalism's unique rendering of religion and argues that, although Canadian constitutionalism claims to understand religion as a culture, this is true only in the thinnest of senses. More accurate (and more illuminating) is the claim that law's view of religion is, itself, profoundly cultural.

## **Keywords**

Constitutional law; Religion; Canada; Culture

# LAW'S RELIGION: RENDERING CULTURE<sup>©</sup>

BENJAMIN L. BERGER\*

This article argues that constitutional law's inability to deal with religion in a satisfying way flows, in part, from its failure to understand religion as, in a robust sense, culture. Once one begins to understand the Canadian constitutional rule of law itself as a cultural form, it becomes apparent that law renders religion in a very particular fashion, and that this rendering is a product of law's symbolic categories and interpretive horizons. This article draws out the elements of Canadian constitutionalism's unique rendering of religion and argues that, although Canadian constitutionalism claims to understand religion as a culture, this is true only in the thinnest of senses. More accurate (and more illuminating) is the claim that law's view of religion is, itself, profoundly cultural.

Cet article avance que l'incapacité du droit constitutionnel à composer avec la religion de manière satisfaisante découle, en partie, de son insuccès à comprendre la religion comme une culture—dans un sens plein. Une fois que l'on commence à comprendre la primauté du droit constitutionnel canadien elle-même comme une forme culturelle, il devient évident que le droit interprète la religion d'une façon très particulière, et que cette interprétation est un produit des catégories symboliques et des horizons interprétatifs du droit. Cet article extrait du constitutionnalisme canadien les éléments de l'interprétation unique de la religion, et affirme que même si le constitutionnalisme canadien prétend comprendre la religion comme une culture, ceci n'est vrai que dans le sens le plus restreint. Plus exacte (et plus édifiante) est la prétention que la façon dont le droit voit la religion, est, elle-même, profondément culturelle.

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Since the introduction of the *Charter*<sup>1</sup> in 1982, a tradition of critical legal scholarship has attempted to understand the various ideological and political commitments that inform and, indeed, often determine the shape of constitutional adjudication. This tradition can be traced to early critics who argued that the *Charter*'s roots in liberal ideological commitments would prevent the progressive hopes surrounding it to be ultimately—or perhaps even passingly—realized in the realms of political, social, and economic injustice.<sup>2</sup> Others have extended this form of critical analysis to draw out the structural and ideological limitations of *Charter* adjudication of particular rights. Joel Bakan, for example, exposes the embedded assumptions within areas such as expressive and associational rights.<sup>3</sup> Addressing freedom of expression, Bakan argues that “the liberal conception of freedom of expression that dominates the Court’s jurisprudence on section 2(b) and popular debate about free speech cannot accommodate a progressive politics of communication.”<sup>4</sup> Others have applied this critical lens to the development of equality jurisprudence in Canada, and have shown that, despite a rhetoric of substantive equality, the analytic approach to section 15 effects a kind of progressively intensive context-stripping that has left us with a concept of equality that is largely formal.<sup>5</sup> The very

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<sup>1</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

<sup>2</sup> See e.g. Allan C. Hutchinson & Andrew Petter, “Private Rights-Public Wrongs: The Liberal Lie of the *Charter*” (1988) 38 U.T.L.J. 278; Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989); and H.J. Glasbeek, “A No-Frills Look at the Charter of Rights and Freedoms or How Politicians and Lawyers Hide Reality” (1989) 9 Windsor Y.B. Access Just. 293. For a recent critique of the capacity of rights constitutionalism to achieve social democratic ends, see Gavin W. Anderson, “Social Democracy and the Limits of Rights Constitutionalism” (2004) 17 Can. J.L. & Jur. 31.

<sup>3</sup> Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997). In his treatment of freedom of association, Bakan concludes (at 85) that “[b]ecause of its dyadic, negative, and anti-statist form, freedom of association can contemplate only restrictions on workers’ collective action directly imposed by the state. Though such restrictions are not insignificant, they are only part of labour’s problem. Economic forces are primarily responsible for eroding labour’s power.” For another critical piece in this tradition written from a class-based perspective, see Judy Fudge & Harry Glasbeek, “The Politics of Rights: A Politics with Little Class” (1992) 1 Soc. & Leg. Stud. 45.

<sup>4</sup> Bakan, *ibid.* at 76.

<sup>5</sup> Hester Lessard, “Mothers, Fathers, and Naming: Reflections on the *Law* Equality Framework and *Trociuk v. British Columbia (A.G.)*” (2004) 16 C.J.W.L. 165. Lessard demonstrates at 174 that the “sequential logic driving the organization of the *Law* framework too often converges with the political logic of formal equality, greatly constraining” the capacity of the law to address

analytical structure applied peels away the historical and social dimensions of inequality, focussing instead on concepts critical to law's own neo-liberal political assumptions, concepts such as choice and negative freedom. This tradition of critical analysis of *Charter* constitutionalism has also informed the debate surrounding the legitimacy of judicial review and, most recently, has been one face of the academic response to the controversial constitutionalization of the healthcare debate.<sup>6</sup>

This critical tradition has, however, largely bypassed the analysis of religious liberties in Canada. At the level of political and legal rhetoric, the protection of religious liberties symbolizes Canadian constitutionalism's commitment to multiculturalism and the protection of plural cultural forms.<sup>7</sup> The conventional narrative casts constitutional law as the mechanism for the recognition and accommodation of diverse cultures and section 2(a) of the *Charter* as the specific conduit for considering and making legal space for religious claims within a polity devoted to cultural pluralism. In this conventional account, it is assumed both that law does indeed treat religion as a form of culture and that law

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the substantive aspects of unequal treatment. At 183, Lessard argues further that such a context-stripping methodology, "especially one aimed at the context of social and material disadvantage, reinforces rather than destabilizes the distinction that underpins formal conceptions of equality, between public, legally recognized inequalities and private, social inequalities." In effect, the structure of equality adjudication has a cascading effect that tends to collapse substantive equality claims into the neo-liberal logic of formal equality. For an early analysis of the limits of rights-based equality that focuses on the private-public distinction see Judy Fudge, "The Private-Public Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485.

<sup>6</sup> See *Chaoulli v. Quebec (A.G.)*, [2005] 1 S.C.R. 791 [*Chaoulli*], as well as Andrew Petter, "Wealthcare: The Politics of the *Charter* Revisited" in Colleen M. Flood, Kent Roach & Lorne Sossin, eds., *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) 116. See also Benjamin L. Berger, "Using the Charter to Cure Health Care: Panacea or Placebo?" (2003) 8:1 Review of Constitutional Studies 20 (questioning the possibilities of progressive change to the healthcare system through *Charter* adjudication) [Berger, "Panacea or Placebo"].

<sup>7</sup> On freedom of religion in Canada see generally Richard Moon, "Liberty, Neutrality, and Inclusion: Religious Freedom Under the Canadian Charter of Rights and Freedoms" (2003) 41:3 Brandeis L.J. 562; Benjamin L. Berger, "The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State" (2002) 17:1 C.J.L.S. 39 [Berger, "Limits of Belief"]; and Paul Horwitz, "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond" (1996) 54 U.T. Fac. L. Rev. 1. For an historical exploration of the relationship between religious communities and the law in Canada, see John McLaren & Harold Coward, *Religious Conscience, the State, and the Law: Historical Contexts and Contemporary Significance* (Albany: State University of New York Press, 1999).

itself is separate from and above the cultural fray. This article will critically examine and challenge this conventional discourse by asking the question “is law’s understanding of religion a ‘cultural’ one?”

The answer turns out to be interestingly ambivalent, and this ambivalence turns on an appreciation of the thickly cultural nature of Canadian constitutionalism. As such, the goal of this article is to combine the study of religious liberties in Canada with the critical tradition described above, but to do so in the context of a larger project aimed at exploring the extent to which the modern interaction of law and religion is best understood as a meeting of meaning-laden cultural forms.<sup>8</sup>

When Canadian constitutional law turns its attention to religion, religion takes on a very particular shape that emphasizes certain aspects of religious conscience and practice while obscuring others. Law renders religion in a unique fashion, which can be exposed by drawing upon the discourse of the Supreme Court of Canada in its treatment of claims of religious freedom. This article’s guiding question is as follows: if one’s only source of information were the constitutional discourse of the courts, what would one conclude about the nature of religion? Otherwise put, what does religion look like when viewed through the lens of modern Canadian constitutional law? By answering this question we can both gain insight into the way that religion is conceived of in modern public debate and identify the ways in which the phenomenon of religion is tailored to fit within—and be digested by—the legal and political imagination.

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<sup>8</sup> The claim that Canadian constitutionalism can be understood as a “culture” obviously demands careful attention to and precise definition of the concept of “culture” itself. As I mention later in this article, I take “culture” to refer to an interpretive horizon, composed of sets of symbols and categories of thought, out of which meaning can be given to experience. It is a system of background understandings that inform—and the process by which we generate—our interpretations of our world. Although a full discussion and careful justification of this definition is beyond the scope of this piece, in the larger project of which this article is a part, I derive this conception of “culture” from an analysis of the term’s treatment in two academic traditions, interpretive anthropology and philosophical hermeneutics. For the text of a public address that gives an account of this larger project, see Benjamin L. Berger, “Understanding Law and Religion as Culture: Making Room for Meaning in the Public Sphere” (2006) 15 Const. F. 15 [Berger, “Law and Religion as Culture”].

Just as has been the case in the modern theory of religion,<sup>9</sup> when religion is put before the bar of law, law understands and casts its subject in accordance with its own informing commitments. As the various features of law's peculiar understanding of religion are identified and described in this article, it will become clear that modern Canadian constitutional law casts religion in terms compatible with its own structural assumptions, as well as symbolic and normative commitments, which are themselves informed by the contemporary political culture of liberalism. Although this imagining of religion has a potentially reductionist and context-stripping effect, it is not simply a defect that calls for remedy; rather, the law has no choice but to conceive of religion in terms cognizable within constitutional liberalism. The result of this selective rendering, however, is to substantially impoverish the assertion that religion is a culture.

Before turning to the jurisprudence as a resource from which to draw out Canadian constitutional law's particular understanding of religion, it is worth pausing to acknowledge that by focussing attention upon the constitutional discourse of the courts I am narrowing the inquiry to one particular source of information about the state's treatment of religion. The image of religion generated by debates in Parliament or speeches made by members of the executive branch may differ from the image that emerges from the work of the judicial branch. The goal, however, is to deepen our sense of the way in which law understands religion and the respects in which this image diverges from a robust conception of religion as culture. With this appreciation in hand, we are equipped to better understand the nature and challenges of the relationship between religion and the Canadian constitutional rule of law. The courts hold a privileged position in managing this

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<sup>9</sup> See e.g. Emile Durkheim, *The Elementary Forms of Religious Life*, trans. by Karen E. Fields (New York: The Free Press, 1995) [originally published 1912], in which Durkheim offers his theory that religion is a symbolic means of binding the individual to the group and committing this individual to the group's welfare; Sigmund Freud, "Totem and Taboo: Some Points of Agreement between the Mental Lives of Savages and Neurotics" in Albert Dickson, ed., *The Origins of Religion*, vol. 13 (London & New York: Penguin Books, 1990) 43 [originally published in 1913]; and Sigmund Freud, "The Future of an Illusion" in Albert Dickson, ed., *Civilization, Society and Religion*, vol. 12 (London & New York: Penguin Books, 1991) 179 [originally published in 1927], in which Freud explains religion as affording a set of beliefs and practices that give us comfort in the face of our own mortality and help to justify the repression of our urges in the name of social and moral constraint.

interaction, and it is for this reason that it is to the discourse of the Supreme Court of Canada that I now turn.

## I. LAW'S THEORY OF RELIGION

Canadian constitutional law has a distinct theory of religion<sup>10</sup> and, influenced by this theory, it shapes religion in its own ideological image and likeness while notionally confining religion to discrete dimensions of human life. In this respect, constitutional analysis engages in a kind of context-stripping whereby the religious is made to fit the range of symbolic and normative commitments essential to Canadian constitutional culture. In this article I analyze claims to religious liberties under the *Charter* as means of exposing this legal rendering of religion.

This descriptive endeavour is greatly aided by the Supreme Court of Canada's decision in *Syndicat Northcrest v. Amselem*,<sup>11</sup> in which the Court discussed the legal approach to freedom of religion and offered the following definition of religion:

Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.<sup>12</sup>

Since it offers a relatively clear window into Canadian constitutionalism's particular understanding of religion, the decision in *Amselem* will serve as a principal means of exploring and defending this claim. As is always the case, however, the Court's reasoning in *Amselem* is shaped by the specific context in which the issues arose. In particular, *Amselem* is a case about the interaction between public norms and the contractual rights of individuals, and there can be little doubt that this factual matrix colours the judges' reasons. However, in the context of

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<sup>10</sup> Though distinct, this theory may well not be unique. To the extent that other constitutional orders share the cultural commitments that I describe below—cultural commitments that I expect would be found in most modern liberal constitutional democracies—I strongly suspect that a similar rendering of religion takes place. Culturally specific analysis would be needed to support this larger claim, however.

<sup>11</sup> *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 [*Amselem*].

<sup>12</sup> *Ibid.* at para. 39.



the Supreme Court's *Charter* jurisprudence on the constitutional status of religion, *Amselem* points to the elements of Canadian constitutionalism's theory of religion. As I unpack *Amselem*, and add other strands of jurisprudence to enrich the picture, it becomes manifest that law's sense of religion, though complex, can only be considered a "cultural" conception of religion in the thinnest of senses.<sup>13</sup>

The argument that will emerge is that Canadian constitutional law's image of religion is best understood as comprising three elements, each of which lead into and mutually support the others. The result is a cohesive and particular theory of religion. The elements of this conception are: (a) religion as essentially individual, (b) religion as centrally addressed to autonomy and choice, and (c) religion as private. Though each will be considered separately, this separation is somewhat artificial given that the three elements are mutually informing. As a result, certain observations could be made in the context of a discussion of more than one of the elements. In the end, the point is that the three elements tie together into Canadian constitutionalism's single, integrated rendering of religion, whose informing source—the origin from which these elements are reflected—is the political culture of liberalism.<sup>14</sup>

## II. LAW'S RELIGION AS ESSENTIALLY INDIVIDUAL

Religion cuts its primary constitutional figure in the protection of religious freedoms. Once religion is embedded within a rights-protecting instrument, as it is in the *Charter*, law's conception of religion

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<sup>13</sup> I use the term "thin" here to echo contrastively with Clifford Geertz's conception (itself borrowed from Gilbert Ryle) of "thick description," which is an account that not only describes behaviour, but attends to the "meaningful structures" in which a given cultural practice is "produced, perceived, and interpreted"; in short, an account that attends to the *meaning* of the object of description. Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973) at 7. In stating that law's sense of religion is only cultural in a "thin" sense, I do not mean to suggest that Canadian constitutional law's sense of religion is entirely without a cultural dimension. As Richard Moon explains, the priority thus far given by the courts to religious claims in its section 2(a) jurisprudence (rather than other conscientiously based claims) arguably marks a somewhat cultural or identity-based aspect to law's understanding of religion. Richard Moon, "Religious Commitment and Identity: *Syndicat Northcrest v. Amselem*" (2005) 29 Sup. Ct. L. Rev. (2d) 201. See especially 213-19. My claim, which I will explore further below, is that from this analytic point on, however, the cultural component of Canadian constitutional law's religion is deeply attenuated and largely inattentive to the meaning and significance of the beliefs and practices that comprise this "culture."

<sup>14</sup> See Paul W. Kahn, *Putting Liberalism in its Place* (Princeton: Princeton University Press, 2005) at 29 (distinguishing liberalism as (a) "a family of political theories"; (b) "a partisan political practice"; and (c) "a political culture").

quite naturally assumes certain characteristics of the philosophical idiom in which it is placed. The modern drive to universal human rights has been dominated by a focus on the rights of the individual. This is eminently true of the *Charter*, which, with the exception of Aboriginal and language rights, attaches its protections to the individual. From the fundamental freedoms found in section 2 to the legal rights of sections 7 to 14 and the equality guarantee in section 15, the *Charter* conceives of legally cognizable interests and redressable harms as being enjoyed by the individual. Even freedom of association essentially redounds to the benefit of the person, not to that of the group. This pixilation of human experience has been the subject of academic critique,<sup>15</sup> but is characteristic of the structure of rights protection and constitutional adjudication.

The conceptual individualization of religious experience prepares it for its life in the context of constitutional atomism. The individual is the dominant unit of constitutional rights analysis. It is natural, then, for law to conceive of religion, the protection of which is "one of the hallmarks of enlightened democracy,"<sup>16</sup> in a way that can be assimilated into the analytic structure of constitutionalism. In *R. v. Big M Drug Mart Ltd.*,<sup>17</sup> the first significant *Charter* case on freedom of religion, Justice Dickson (as he then was) suggested exactly this impact of the *Charter* on legal thinking about religion: "With the *Charter*, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be."<sup>18</sup> But the structure of Canadian constitutionalism is really only the vehicle for the transmission of—or perhaps a symptom of—the more foundationally informing political culture of liberalism, which is itself deeply committed to the primacy of the individual. Liberalism understands the individual to be "the elementary unit of explanation"<sup>19</sup> and therefore has difficulty assimilating the religious other than in its individual dimensions.<sup>20</sup> It

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<sup>15</sup> See Bakan, *supra* note 3.

<sup>16</sup> *Amselem*, *supra* note 11 at para. 1.

<sup>17</sup> [1985] 1 S.C.R. 295 [*Big M*].

<sup>18</sup> *Ibid.* at para. 135.

<sup>19</sup> Kahn, *supra* note 14 at 218.

<sup>20</sup> Charles Taylor identifies this liberal individualism as a key feature of modernity leading to, what he calls, the ideal or ethic of "authenticity" that is peculiar to modern culture. Charles Taylor, *The Malaise of Modernity* (Concord: House of Anansi Press, 1991) at 2ff [Taylor, *Malaise*

ought to come as no surprise, then, that the dominant thread in the Court's definition and discussion of religion is its focus on religion as a fundamentally individual phenomenon.

Before drawing out this element of law's religion, it is worthwhile to pause to consider two objections to my argument. First, to be sure, since *Big M*, religious liberties in Canada have been spoken about in a language thick with conceptions of equality. To some, given the abstract connection between conceptions of equality and group belonging, the equality language that runs through the section 2(a) jurisprudence suggests a more robust role for the group in law's understanding of religion than I assert. Yet, as others have shown, this prima facie association between equality and the group has been deeply attenuated in Canadian equality law, as have been the points in the equality analysis that hold out the promise of some textured assessment of social context and the dynamics of group identity.<sup>21</sup> In the end, even equality claims are atomized in the adjudicative realities of Canadian constitutional culture, always returning to a commitment to the primacy of the individual.<sup>22</sup> The presence of concepts of equality in discussions of religious liberty thus offers no rescue from the individualistic orientation of the section 2(a) jurisprudence.

It is also certainly true that there are aspects of Canadian constitutionalism that offer protections to religious groups, and that notes of regard for the collective dimensions of religious experience sound in the jurisprudence. Most prominent are the rights and liberties afforded to the Roman Catholic Church in Canada's early constitutional documents<sup>23</sup> and, more recently, the as-yet-unfulfilled promise of group-

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*of Modernity*]. Although he addresses a number of ways in which the ideal of individual authenticity can lead to richer modes of existence, Taylor's concern is that, taken to its full extent, this atomism can lead to the abolition of "all horizons of significance," which "threatens us with a loss of meaning and hence a trivialization of our predicament." Taylor, *Malaise of Modernity* at 68.

<sup>21</sup> See notes 76 to 79, below, and accompanying text.

<sup>22</sup> This is particularly apparent in the Court's focus on subjective/objective analysis of harm to dignity that has been installed at the core of the section 15(1) analysis. As I will show in the next part, there is a similar return to the centrality of autonomy and choice, rather than identity, despite the formal and rhetorical presence of this dimension of equality in religious freedom.

<sup>23</sup> See e.g. *Treaty of Paris* (1763), Britain, Spain and Portugal, 10 February 1763, reproduced in W.P.M. Kennedy, ed., *Statutes, Treaties and Documents of the Canadian Constitution, 1713-1929*, 2nd ed. (Toronto: Oxford University Press, 1930) 31, online: Early Canadiana Online <<http://www.canadiana.org>>; *Quebec Act* (1774), 14 George III, c. 83 (U.K.);

based protections for Aboriginal spiritual traditions and practices.<sup>24</sup> But the purpose of what follows is not to argue that Canadian constitutional law has no regard whatsoever for the collective dimensions of religious experience. Instead, the claim is that, at base, law's understanding of religion is powerfully individualistic and that, wherever else its eyes might wander, in the contemporary treatment of religious liberties, Canadian constitutional law invariably returns to a sharp focus on the individual.

Nowhere is this clearer than in the Court's attempt to define the very subject matter of section 2(a). "In essence," said the majority in *Amselem*, "religion is about freely and deeply held *personal convictions or beliefs*."<sup>25</sup> The majority makes clear that these personal convictions are religious to the extent that they connect with "an *individual's* spiritual faith."<sup>26</sup> Religion is a personal, not a social, phenomenon and is located in the individual, not group-based. The end of religion is also conceived of as individual or personal rather than as some good that redounds to a traditional or historical community; religion is about "an individual's self-definition and fulfillment."<sup>27</sup>

In *Amselem*, this focus on the individual finds expression in the Court's treatment of the doctrinal dispute, internal to Judaism, of whether a personal succah is required or whether a communal one will suffice.<sup>28</sup> The telling point is not the majority's conclusion that the *personal* succah is to be permitted, although this conclusion supports my argument. Rather, the treatment of this dispute is telling because the Court rejects the notion that, for the purposes of the law, religious freedom depends in any way on collective conceptions of religious precept.<sup>29</sup> There is a tone of discomfort with the collective or the

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*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 93, reprinted in R.S.C. 1985, App. II, No. 5; and *Reference Re Bill 30, an Act to amend the Education Act (Ontario)*, [1987] 1 S.C.R. 1148.

<sup>24</sup> *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>25</sup> *Amselem*, *supra* note 11 at para. 39 [emphasis added]. For an account of *Amselem* that explores the tensions produced by this individualist casting of religious liberty, see Moon, *supra* note 13.

<sup>26</sup> *Amselem*, *ibid.* [emphasis added].

<sup>27</sup> *Ibid.* at para. 42.

<sup>28</sup> The succah is a temporary shelter that is erected outdoors for the duration of the Jewish festival of Succot.

<sup>29</sup> As I will discuss below, this rejection of doctrinal or community views as determinative of the issue of religious practice as raised in *Amselem* also evinces the third element of Canadian constitutional law's theory of religion: religion as private. See text accompanying notes 113 and 114.

institutional in the majority's holding that religious practices are protected irrespective of whether they are "required by official religious dogma" or are "in conformity with the position of religious officials."<sup>30</sup>

In this respect, the position articulated in *Amselem* is consistent with the much earlier decision in *Ross v. New Brunswick School District No. 15*,<sup>31</sup> in which the Court accepted that Ross's anti-Semitic communications were "of a religious nature"<sup>32</sup> and, thus, protected by section 2(a). Justice La Forest, for a unanimous court, held that it "is not the role of [the] Court to decide what any particular religion believes."<sup>33</sup> This reticence to pronounce on the content of a particular religion's beliefs is understandable and, indeed, the Court reaffirmed this point in *Amselem*. But if this is the case, how then does the Court know which communications are of a religious nature and which are not? In *Ross*, and again presaging *Amselem*, the Court's exclusive referent is the individual. That Ross might have been reflecting an entirely idiosyncratic view was of no consequence for the Court; the fact that it was his conscientiously held view made it religious. Because "freedom of religion ensures that every individual must be free to hold and to manifest without State interference those beliefs and opinions *dictated by one's conscience*,"<sup>34</sup> a Human Rights Commission's order restricting Ross's capacity to express these views offended his religious freedom.

Nevertheless, aspects of this limitation on Ross's religious freedoms were ultimately justified. In some respects, this justification under section 1 of the *Charter* might indicate that Canadian constitutional law's commitment to the individual dimension of religion is not as strong as I have suggested, ultimately giving way to group interests: in this case, the group interests of Jews. To be sure, individual religious liberties sometimes give way to collective goods under section 1 of the *Charter*, and this may well be an aspect of what was going on in

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It is interesting to note that, although one could readily imagine the Court refusing to resolve this dispute on the basis of a doctrine of non-justiciability, perhaps informed by concerns about institutional competence, this is not how the Court explains its approach to this issue.

<sup>30</sup> *Amselem*, *supra* note 11 at para. 46.

<sup>31</sup> [1996] 1 S.C.R. 825 [*Ross*].

<sup>32</sup> *Ibid.* at para. 67.

<sup>33</sup> *Ibid.* at para. 70.

<sup>34</sup> *Ibid.* at para. 72 [emphasis added].

*Ross*. This is, however, just part of the picture gleaned from a treetops view. A closer look reveals that, as is so often the case, the justificatory logic has a decidedly individualistic flavour to it. When Justice La Forest explains why *Ross's* religious freedoms can be justifiably limited under section 1, his reasoning is that the protection of *Ross's* religious freedoms is weakened because, in his religious expression, he has undermined the very purpose of religious freedom:

[A]ny religious belief that denigrates and defames the religious beliefs of others erodes the very basis of the guarantee in s. 2(a)—a basis that guarantees that every individual is free to hold and to manifest the beliefs dictated by one's conscience. The respondent's religious views serve to deny Jews respect for dignity and equality said to be among the fundamental guiding values of a court undertaking a s. 1 analysis.<sup>35</sup>

*Ross* loses the protection of section 2(a) because his religious views deprive other individuals of their parallel right to believe whatever their consciences dictate, and to do so equally and with dignity. *Amselem* and *Ross* demonstrate that, for the law, what counts as religious is that which is meaningful to the individual; institutions and collective traditions are only of derivative importance to the law.<sup>36</sup> Law's approach to religion is characterized by "the centrality of the rights associated with freedom of individual conscience."<sup>37</sup>

This focus on the individual was inscribed into the *Charter* protection of religion in *Edwards Books*,<sup>38</sup> in which Chief Justice Dickson explained that "[t]he purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being."<sup>39</sup> The individual's sense of his or her own relationship to the divine or to the object of faith is what lies at the core of law's imagining of religion.<sup>40</sup> As I have explained, this focus on the individual is

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<sup>35</sup> *Ibid.* at para. 94.

<sup>36</sup> This is even true of Bastarache J.'s judgment in *Amselem*, despite being the only judgment to refer to the social dimensions of religion. Although he speaks of the "social significance" of religion, "social significance" refers to formal religious rules and doctrine. This set of rules operates only as an objective limit on the assertions of the individual, who remains always at the centre of his analysis.

<sup>37</sup> *Big M*, *supra* note 17 at para. 122.

<sup>38</sup> *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 [*Edwards Books*].

<sup>39</sup> *Ibid.* at para. 97.

<sup>40</sup> More than once, the Court invokes the term "faith" as important to religion. It is unclear, though an interesting question, what the Court understands this term to mean.

not unique to religious freedoms; rather, it is a product of the structure and the informing ideology of the *Charter*. One of the hallmarks of the *Charter's* individualism is its difficulty in taking cognizance of rights claims and social policy measures that seek to empower the groups or institutional contexts that lead to the full enjoyment of the human goods that the Constitution purports to protect. Not only does the prevailing equality analysis tend powerfully to extract the individual from her meaningful group context, but breaches of section 15 with clear group dimensions have been justified as reasonable under section 1.<sup>41</sup> Likewise, in *Chaoulli v. Quebec (A.G.)*,<sup>42</sup> in order to vindicate a wealthy doctor's section 7 right to contract privately for the provision of health care, the Court struck down legislative restrictions on private health insurance that were designed to protect a public health care system. The *Chaoulli* decision dramatically emphasized the extent to which the dedicated individualism of *Charter* rights makes the law insensitive to the collective dimensions of social policy. This resistance to addressing the group and institutional contexts in which rights are enjoyed has an economic face that is tied to the positive/negative rights divide, but it also has a deeper informing structure that relates to constitutional law's liberal capacity to see the individual far more clearly than the group.

As with associational and equality rights, law's emphasis on the individual comes clearly into view when one looks to claims to religious protection that involve collective religious endeavours or institutions. We see this in *Adler v. Ontario*,<sup>43</sup> in which a group of parents argued that the state's failure to fund private non-Catholic religious schools was contrary to their section 2(a) freedom of religion rights.<sup>44</sup> Justice Sopinka, writing for the judges who addressed the section 2(a) argument, rejected the claim on the basis that each individual parent has the choice to send a child to a funded public school. As such, if they chose to send their children to a religious school, Justice Sopinka held:

[They] have no claim cognizable in law since the disadvantage they must bear is one flowing exclusively from their religious tenets.

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<sup>41</sup> See *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, [2004] 3 S.C.R. 381.

<sup>42</sup> *Chaoulli*, *supra* note 6.

<sup>43</sup> [1996] 3 S.C.R. 609 [*Adler*].

<sup>44</sup> Section 93 of the *Constitution Act, 1867*, *supra* note 23, provides that the state is required to fund private Roman Catholic schools in the province of Ontario.

... The fact that no funding is provided for private religious education cannot be considered to infringe the appellants' freedom to educate their children in accordance with their religious beliefs.<sup>45</sup>

This decision emphasizes law's focus on religion as choice, which I will discuss more fully in Part III, below, but also manifests law's deafness to the centrality of community in the exercise of rights. At one level, the reasoning in this case might simply manifest a prudential desire to keep the state distant from religious teaching.<sup>46</sup> But at a more fundamental level, *Adler* exposes Canadian constitutional law's awkwardness when claims to religious freedom are made in service of the collective dimension of religious life.<sup>47</sup> The deep logic of this decision is that religious freedom is fundamentally about the right (in this case) of an individual parent to choose how to educate his or her child. Cast in this light, the state's failure to fund religious schools in the context of universally-mandated education does not impose a significant burden on the enjoyment of this parent's rights; parents can individually take steps to teach their children as they see fit.

If Canadian constitutional law's atomism were set aside and one focused upon the centrality of a collective project of education in creating and perpetuating religious community, the issue might assume a different complexion. Perhaps an accessible system of community-based education is essential to cultural integrity, including the enjoyment of religion, conceived of as a collective and trans-generational phenomenon. This is not to say that the result in *Adler* is wrong or that the state ought to fund religious schools beyond those

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<sup>45</sup> *Adler*, *supra* note 43 at paras. 174-75.

<sup>46</sup> For a discussion of the Canadian conception of "state neutrality" in the constitutional protection of freedom of religion, and how it differs from the non-establishment tradition in the United States, see Bruce Ryder, "State Neutrality and Freedom of Conscience and Religion" (2005) 29 Sup. Ct. L. Rev. (2d) 169. See also David M. Brown, "Neutrality or Privilege? A Comment on Religious Freedom" (2005) 29 Sup. Ct. L. Rev. (2d) 221 at 229-35.

<sup>47</sup> A similar awkwardness can be seen in the courts' treatment of claims to religious freedom made by the Hutterite communities in Canada. See Alvin Esau, *The Courts and the Colonies: The Litigation of Hutterite Church Disputes* (Vancouver: UBC Press, 2004); and Alvin Esau, "Communal Property and Freedom of Religion: *Lakeside Colony of Hutterian Brethren v. Hofer*" in John McLaren & Harold Coward, eds., *Religious Conscience, the State, and the Law* (Albany: SUNY, 1999) 97. Esau's analysis demonstrates that, although in some cases the communal property of the religious community was ultimately protected, the courts frequently relied upon individualist contractual notions and concepts of individual natural justice quite extrinsic to the community's traditions and self-conception. The courts' analytic focus seems irresistibly to return to the individual religious adherent within a given group, rather than the group itself.



guaranteed for historical reasons in the constitutional compact. Rather, the point is an entirely descriptive one: when religion is set before the bar of *Charter* rights, such considerations are not readily cognizable by the law. These dimensions of religious life are filtered out by the structure and commitments of contemporary constitutionalism.

From *Big M* to *Amselem*, the jurisprudence shows that, in its deep logic, contemporary Canadian constitutionalism understands religion as a phenomenon that is fundamentally located within the individual and whose goods redound to the individual. In so doing, important dimensions of religious culture may be obscured from the analytic gaze of Canadian constitutionalism. Yet my argument is not that law has “erred” in conceiving of religion in this way, at least not in a way that is the product of a set of doctrinal defects amenable to a quick jurisprudential fix. Rather, law is—quite naturally—viewing religion in those terms indigenous and, therefore, sympathetic to this aspect of the ideological structure of modern Canadian constitutional law. Otherwise put, law’s commitment to religion as fundamentally individual renders religion in a highly digestible state for the purposes of modern, secular constitutionalism, itself informed by liberal individualism.

### III. LAW’S RELIGION AS EXPRESSION OF AUTONOMY AND CHOICE

I have pointed to liberalism’s commitment to the priority of the individual as the ideological basis for law’s individualistic rendering of religion. But liberalism’s commitment to the individual has aspects of significance that ramify further into law’s understanding of religion. The basis for liberalism’s focus on the individual is its commitment to the goods of autonomy and individual liberty as the mechanism for human flourishing. Liberalism understands the individual as best served when left to his or her own devices and free to make his or her own choices, unencumbered by contextual constraints. In particular, liberalism’s political culture emphasizes the need to free the individual from the interference of its primary antagonist, the state.

Having isolated the individual as the entity of explanatory and experiential priority, liberalism turns to the question of how to empower this entity. In a fusion of Enlightenment individualism and Romantic

authenticity,<sup>48</sup> liberalism takes the view that the individual is best able to flourish when left to exercise free choice with respect to the good. On this view of human flourishing, the obligations of the public are twofold: first, not to interfere with individual autonomy and, second, to intervene wherever free choice is constrained. Self-realization is the goal, and autonomy is the mechanism.<sup>49</sup> This emphasis on individual autonomy at the core of liberal political culture is the source of the negative conception of liberty.<sup>50</sup> Freedom is secured when the individual can choose freely, and liberty inheres in being left alone. Any social—and, in particular, *state*—actions that impair this autonomy are, by definition, evils to be guarded against. So, within the liberal imagination, it is impossible to disassociate the priority placed on the individual from the ultimate valuation of autonomy and free choice.

In Canada, this liberal political culture of autonomy and choice is reflected in the structures of constitutionalism. *Charter* rights are essentially negative in their orientation, guaranteeing a sphere of immunity from state action rather than requiring positive conduct on the part of the state. Although, in recent years, certain notes sounding in positive liberty have issued from the Court, such instances remain either conceived of as exceptional,<sup>51</sup> or confined to dissenting opinions.<sup>52</sup> In law's view, "[f]reedom can primarily be characterized by the absence of coercion or constraint."<sup>53</sup> Indeed, in defining the very concept of liberty for the purposes of the *Charter*, the Court has articulated a thoroughly negative conception that also demonstrates the centrality of autonomy and choice to contemporary Canadian constitutional law:

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<sup>48</sup> See Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge: Cambridge University Press, 1989).

<sup>49</sup> Taylor links this focus on choice to the contemporary liberal culture of authenticity, noting that, with the attenuation of other horizons of meaning, "the ideal of self-determining freedoms comes to exercise a more powerful attraction. It seems that significance can be conferred by *choice*, by making my life an exercise in freedom, even when all other sources fail. Self-determining freedom is in part the default solution of the culture of authenticity" (Taylor, *Malaise of Modernity*, *supra* note 20 at 69).

<sup>50</sup> See Isaiah Berlin, "Two Concepts of Liberty" in Robert E. Goodin & Philip Pettit, eds., *Contemporary Political Philosophy* (Oxford: Blackwell Publishers, 1997) 391.

<sup>51</sup> *Dunmore v. Ontario (A.G.)*, [2001] 3 S.C.R. 1016.

<sup>52</sup> *Gosselin v. Quebec (A.G.)*, [2002] 4 S.C.R. 429, Arbour J., dissenting.

<sup>53</sup> *Big M*, *supra* note 17 at para. 95: "If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free."

[L]iberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.<sup>54</sup>

The centrality of autonomy, in the form of unencumbered choice, to the Canadian legal imagination is reflected in the fact that the Court has inscribed autonomy as one of those “*Charter* values”—essentially constitutional *grundnorms*—that subtend the whole of the rights-protecting instrument and must be considered in making all legal decisions.<sup>55</sup>

When cast within this constitutional context, religion quite naturally takes on a shape consistent with its mould. Having defined religion in the individualist terms discussed above, the majority in *Amselem* turns to explain the principled basis for the protection of religion. Freedom of religion, the majority asserts, “revolves around the notion of personal choice and individual autonomy and freedom.”<sup>56</sup> Religion is to be protected by the law because it is “integrally linked with an individual’s self-definition and fulfillment and is a function of personal autonomy and choice.”<sup>57</sup> On this view, the value of religion inheres in the fact that it is one of many possible options that individuals might select as an aspect of his or her self-definition and authentic experience. The evil of interfering in religious beliefs and practices is that to do so would

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<sup>54</sup> *R.B. v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 [*Children’s Aid Society*] at para. 80, La Forest J. See also *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at para. 230, Wilson J.

Thus, an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

<sup>55</sup> Autonomy is listed in the jurisprudence as “a fundamental value reflected in our society’s Constitution or similar fundamental laws, like bills of rights.” *R. v. Labaye*, [2005] 3 S.C.R. 728 at para. 33. In *Health Services and Support—Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27 at para. 81, Chief Justice McLachlin and Justice LeBel state: “Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underly the *Charter*,” which was explained at para. 80, that “[t]he *Charter* ... should be interpreted in a way that maintains its underlying values.” In *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 at para. 92, the Court states: “the *Charter* represents a restatement of the fundamental values which guide and shape our democratic society and our legal system.” It is, thus, appropriate to consider these “*Charter* values” as a species of Kelsen’s *grundnorm*, understood as “the postulated ultimate rule according to which the norms of [a legal] order are established and annulled, receive and lose their validity.” Hans Kelsen, *General Theory of Law and State*, trans. by Anders Wedberg (New York: Russell & Russell, 1961) at 114.

<sup>56</sup> *Amselem*, *supra* note 11 at para. 40.

<sup>57</sup> *Ibid.* at para. 42 [emphasis added].

constrain freedom and liberty. Religion is cast as one possible component of the autonomous life and, concomitantly, is essentially conceived of as a choice. As the majority states, “[t]he emphasis ... is on personal choice of religious beliefs.”<sup>58</sup> Law understands religion as a product of choice and, hence, as connected to the liberty and autonomy of the subject.

This aspect of law’s rendering of religion also appears in *Amselem* in the dissenting judges’ reasoning. Justice Binnie, writing for himself, focussed his attention on the fact that the claimants had voluntarily bound themselves to the terms of the contract and, therefore, could not fairly invoke their religious liberties. In this reasoning, religion stands as equivalent to geography and aesthetics, both subjects of autonomous choice in the selection of a home. If the appellants were unencumbered in their choice of this building then, in compliance with the logic of autonomy and self-determination, the choice cannot be interfered with even if to do so would be in the name of religious liberties. “It was for the appellants ... to determine in advance of their unit purchase what the appellants’ particular religious beliefs required. They had a choice of buildings in which to invest.”<sup>59</sup> In the end, putting up a succah is a choice to be analyzed against other choices like hanging a garden trellis or opting for satellite television over cable.

This conception of the protection of religious belief as centrally concerned with individual autonomy and choice was inscribed at the foundation of *Charter* jurisprudence on freedom of religion with *Big M*. In finding that the Sunday closing law at issue was unconstitutional, the Court ruled that the legislation did not have a secular purpose but, rather, “binds all to a sectarian Christian ideal.”<sup>60</sup> According to Justice Dickson, the essential constitutional infirmity was that the impugned Act “works a form of coercion inimical to the spirit of the *Charter*,”<sup>61</sup> a spirit that is centrally concerned with ensuring equality and freedom. “The essence of the concept of freedom of religion,” wrote Justice Dickson, “is the right to

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<sup>58</sup> *Ibid.* See also Justice L’Heureux-Dubé’s dissent in *Adler*, *supra* note 43, in which she states at para. 72 that “s. 2(a) of the *Charter* is primarily concerned with the necessary limits to be placed on the state in its potentially coercive interference with the original, objectively perceived religious ‘choice’ that individuals make.”

<sup>59</sup> *Ibid.*, at para. 185.

<sup>60</sup> *Big M*, *supra* note 17 at para. 97.

<sup>61</sup> *Ibid.*

entertain such religious beliefs as a person chooses.”<sup>62</sup> On this view, protecting autonomy is the core element of religious liberty, and autonomy is secured by ensuring an absence of coercion or restraint. In Justice Dickson’s words, “whatever else freedom of conscience and religion may mean, it must at the least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose.”<sup>63</sup> Indeed, this anti-coercion or “protection of autonomy” core of religious freedom was reaffirmed in the *Reference re Same-Sex Marriage*,<sup>64</sup> in which the Court held that, although the proposed same-sex marriage legislation was constitutionally sound, any state compulsion of religious officials to perform such marriages would offend section 2(a) of the *Charter* because it would interfere with “the right to believe and entertain the religious beliefs of one’s choice.”<sup>65</sup> Since *Big M*, the clear and consistent jurisprudential message has been that religion has constitutional relevance because it is an expression of human autonomy and choice.

This logic of autonomy is similarly deployed in Canadian decisions regarding school prayer. *Zylberberg v. Sudbury Board of Education (Director)*,<sup>66</sup> involved a claim by three parents—one Jewish, one Muslim, and one non-practicing Christian—who challenged an Ontario Regulation requiring that schools open or close each day with a reading from the Christian Scriptures and a recitation of the Lord’s Prayer. The Ontario Court of Appeal agreed and self-consciously reflected on the evolution of constitutional thought about the nature of religion:

In an earlier time, when people believed in the collective responsibility of the community toward some deity, the enforcement of religious conformity may have been a legitimate object of government, but since the *Charter*, it is no longer legitimate. With the *Charter*, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be ...<sup>67</sup>

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<sup>62</sup> *Ibid.* at para. 94.

<sup>63</sup> *Ibid.* at para. 123.

<sup>64</sup> [2004] 3 S.C.R. 698.

<sup>65</sup> *Ibid.* at para. 57. The Court went on to suggest that such an infringement would likely be unjustifiable under section 1 of the *Charter*.

<sup>66</sup> (1988), 65 O.R. (2d) 641 (Ont. C.A.) [*Zylberberg*].

<sup>67</sup> *Big M*, *supra* note 17 at para. 135. Quoted at *ibid.* at 589.

No longer a matter of collective or community concern, religious practice has, in the eyes of the law, been decentralized into an expression of individual autonomy. The constitutional defect in this legislation was its coercive nature, interfering as it did with the right of each individual to make choices about religious observance. Indeed, this was so despite the existence of an “opt-out” clause in the legislation, which allowed a parent to claim an exemption from any religious exercises. The court reasoned that the appearance of choice here was illusory, and that the true effect of this exclusion clause was a “compulsion to conform to the religious practices of the majority.”<sup>68</sup> The court demonstrated its deep sensitivity to possible constraints on free choice by noting that the exemption is unlikely to be exercised given “the fact that children are disinclined at this age to step out of line or to flout ‘peer-group norms.’”<sup>69</sup> The clear concern of the law is to protect religion as an expression of choice. Any factor—legal or contextual—that might interfere with the autonomy-based core of religious freedom is suspect in the eyes of contemporary constitutionalism. The courts have similarly held that religious education in public schools can be problematic because “teaching students Christian doctrine as if it were the exclusive means through which to develop moral thinking and behaviour amounts to religious *coercion* in the class-room.”<sup>70</sup> The issue is not the separation of church and state per se, but a concern for the autonomy of the child.

*Big M* and *Zylberberg* are particularly interesting cases displaying law’s rendering of religion because both cases draw out a seeming tension between the centrality of autonomy and choice, which I have been emphasizing, and the presence of language and reasoning that appears to invoke notions of equality and, with it, identity. There has always been a note of equality language in the Supreme Court’s section 2(a) jurisprudence. Themes of equality seem to emerge in places where the Court speaks of the communicative harm done by favouring

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<sup>68</sup> *Zylberberg*, *ibid.* at 591.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Canadian Civil Liberties Association v. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341 (Ont. C.A.) [*CCLA*] at 363 [emphasis added]. The court went on (at 364) to note that its basis for concluding that s. 2(a) had been offended is “probably best summed up” by Justice Dickson’s comments in *Big M*, *supra* note 17 at para. 135, that “it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be.”

one religion over another, even where the interference with the autonomy of the religious claimant is less than clear. Both *Big M* and *Zylberberg* are examples of such cases. In addition to describing a free society as one in which fundamental freedoms are *equally* enjoyed,<sup>71</sup> Chief Justice Dickson in *Big M* described the harm of the Sunday closing legislation as follows: "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."<sup>72</sup> Similarly, in *Zylberberg* the Court spoke of the school prayer, despite its provision to opt-out, as "depreciat[ing] the position of religious minorities"<sup>73</sup> and "stigmatizing [students] as non-conformists and setting them apart from their fellow students who are members of the dominant religion."<sup>74</sup> Again, there are notes in this language that seem to sound in the register of equality.

In some respects, this language of equality appears to be in tension with the focus on autonomy and choice described in this section. In the language of equality there is a seeming invocation of conceptions of cultural identity rather than autonomy: equality logic is about protection from identity-based harms. It might be thought, therefore, that when the Court invokes the language or logic of equality in its section 2(a) cases, it is appealing to a sense of religion as a cultural or identity-based concept rather than the autonomy-centred phenomenon that I have argued is at the centre of the Court's treatment of religion. With the language of equality, the message seems more that religion *as an aspect of one's identity* is what is of central concern to the law.

There is no doubt that there is some dimension of religious freedom that has a cultural or identity-based component. Most simply, religion is not merely a choice like any other; not all choices are treated with the constitutional protection that religion enjoys.<sup>75</sup> My claim is not that Canadian law's understanding of religion is bereft of a cultural or identity-based dimension. However the work that "identity" does in

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<sup>71</sup> *Big M*, *supra* note 17 at paras. 94-95.

<sup>72</sup> *Ibid.* at para. 97. The concern in *Edwards Books*, *supra* note 38, with competitive disadvantage occasioned by preferential treatment of one religion over another similarly evokes equality-based themes.

<sup>73</sup> *Zylberberg*, *supra* note 66 at 592.

<sup>74</sup> *Ibid.*

<sup>75</sup> On this point see Moon, *supra* note 13.

Canadian adjudicative culture is comparatively light, and this holds true not only for religion, but also for the constitutional guarantee of equality. As others have argued, although the concept of listed and analogous grounds in section 15 of the *Charter* might have been used to emphasize the significance of identity as an indispensable dimension of legal equality, the law has substantially denuded those grounds of potential analytic force or substantive meaning in the equality analysis itself.<sup>76</sup> Similarly, recent cases have shown that the aspects of the test enunciated in *Law v. Canada (Minister of Employment and Immigration)*<sup>77</sup> that might have promised some contextual assessment of the socially-embedded complexities of identity politics, such as the historical disadvantage test, have been marginalized,<sup>78</sup> and “choice” has become the dominant juridical concept in governing constitutional equality.<sup>79</sup> Under the prevailing interpretation of constitutional equality, the wrong of discrimination is state-imposed disadvantage based on identity traits rather than based on autonomous choices. Dignity, the lodestar of equality, is affected when the government treats an individual as other than an autonomous chooser. As the Court stated in *Law* and has since reinforced, in law’s understanding, “the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination.”<sup>80</sup> That there has been some legal statement made about the value of your identity gets you in the section 15 door; once there, however, the analytic force of the identity judgment is largely spent.

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<sup>76</sup> Dianne Pothier, “Connecting Grounds of Discrimination to Real People’s Real Experiences” (2001) 13:1 C.J.W.L. 37. On the way in which the “grounds” analysis has become (particularly after *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203) an impediment to, rather than enriching of, the analysis of substantive equality, see Lessard, *supra* note 5 at 190–91.

<sup>77</sup> [1999] 1 S.C.R. 497 [*Law*].

<sup>78</sup> See *Trociuk v. British Columbia (A.G.)*, [2003] 1 S.C.R. 835 and Lessard, *supra* note 5.

<sup>79</sup> Diana Majury, “Women are Themselves to Blame: Choice as a Justification for Unequal Treatment” in Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 209; Hester Lessard, “Charter Gridlock: Equality Formalism and Marriage Fundamentalism” in Sheila McIntyre & Sandra Rodgers eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham: LexisNexis, 2006) 291.

<sup>80</sup> *Law*, *supra* note 77 at para. 53. This understanding of the gravamen of equality was clearly displayed in *Nova Scotia (A.G.) v. Walsh*, [2002] 4 S.C.R. 325, in which the Court’s finding that there was no breach of section 15(1) turned on the majority’s conclusion that the distinction in question was calibrated to the claimant’s choices and, as such, “respects the fundamental personal autonomy and dignity of the individual” (at para. 62).



The same is true of concepts of equality and identity in religious freedoms. The law sometimes invokes a sense of religion as protected because of some link to identity, but when one moves to the next question about why we want to protect individuals from identity-based mistreatment or harm, the answer collapses the focus back onto conceptions of autonomy and choice. Although the jurisprudence sometimes evokes notions of equality, and hence identity, one cannot stop there. Just as the "identity" aspect of equality has been eclipsed by the concept of choice, the equality/identity aspect of religion is ultimately little more than a marker for a particularly valued manifestation of choice.<sup>81</sup> In both cases—in equality and in religion—law's central concern is to treat the individual fairly as an autonomous choosing agent. Identity itself is valued because it is an expression of who the subject wants to be and to become. So when, in its religion cases, the Court invokes language and approaches that sound in equality, this does not represent a break from the focus on autonomy and choice that I have described; rather, it is the same concern expressed from a different angle. To send the message that someone is less worthy of regard on the basis of his or her religious identity is to fail to respect a choice particularly close to their autonomous self-definition. In this way, although there is a natural note of identity in law's understanding of religion, the major tone turns out always to be the liberal focus on choice and autonomy.<sup>82</sup>

The strength of law's rendering of religion as centrally about autonomy and choice emerges most clearly when one looks to cases in which the quality of the religious subject's autonomy or capacity for choice is somehow in question. Liberalism, and the legal structures that it inspires, has great difficulty with claims to autonomy and personal freedom made by children, the elderly, and the ill or disabled. Law's conception of liberty is centred on free choice and, for these individuals, the law often fears that the choice is not truly free.<sup>83</sup> If choice is not truly

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<sup>81</sup> This point is made clearly in *Adler*, *supra* note 43 at para. 208, when McLachlin J. (as she then was) states: "The essence of s. 15 is that the state cannot use choices like the choice of religion as the basis for denying the equal protection and benefit of the law."

<sup>82</sup> As the Court says in *Amselem*, *supra* note 11 at para. 43: "The *emphasis* ... is on personal choice of religious beliefs" [emphasis added].

<sup>83</sup> A large and interesting question is under what conditions law is prepared to question the freedom of a given choice. I have identified age and disability as classic bases upon which the law begins to question the *quality* of a given choice, but perhaps the most contentious current point of

free, then the authenticity of autonomy is imperilled and all bets are off. Thus, given an understanding of religion as choice, if the genuineness of the choice is in question, the force of religion's claim dissipates in the legal imagination. Take, for example, Canadian jurisprudence regarding the right to refuse life-saving blood transfusions on the basis of religious objection. It is clear that a capable adult is entitled to make such a decision. This is a choice so clearly within the protected realm of personal autonomy that law can make no move to limit the decision, no matter how fundamentally general public attitudes might conflict with this choice. Indeed, to fail to comply with these wishes is viewed by law as an actionable wrong.<sup>84</sup> When the patient is a child, however, the discourse of choice and autonomy shifts and is instead deployed against the claims that religion might make.

Such was the case in *Children's Aid Society*,<sup>85</sup> in which the Court accepted the sincerity of the parents' convictions that led to their decision not to permit a blood transfusion for their child, but unanimously held that the *Charter* did not ultimately protect this manifestation of religious belief.<sup>86</sup> One set of reasons shows the strength of law's conception of religion as choice. Justices Iacobucci and Major reasoned that the child had only been born into the religion and had "never expressed any agreement with the Jehovah's Witness faith."<sup>87</sup> Respect for the child's autonomy meant that she had "the right to live long enough to make [her] own reasoned choice about the religion [she] wishes to follow as well as the right not to hold a religious belief."<sup>88</sup> As compared to the case of the refusing adult, the individual whose autonomy is in question is now not able to exercise choice, and this makes all the difference in the eyes of the law. The point is not that the decision should be otherwise. The point is to appreciate that

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debate is the relationship between culture *itself* and choice. For an insightful discussion of this theme arising from the recent debate on the place of Shari'a law in Ontario family arbitration, see Natasha Bakht, *Arbitration, Religion and Family Law: Private Justice on the Backs of Women* (Ottawa: National Association of Women and the Law, 2005) at 17-20.

<sup>84</sup> See e.g. *Malette v. Shulman* (1990), 72 O.R. (2d) 417 (C.A.).

<sup>85</sup> *Supra* note 54.

<sup>86</sup> The majority reasoned that freedom of religion had been offended, but that it was a justified infringement under section 1 of the *Charter*.

<sup>87</sup> *Supra* note 54 at para. 231.

<sup>88</sup> *Ibid.*

religion has force in the eyes of the law to the extent that it is aligned with autonomy and choice.<sup>89</sup>

Since *Big M*, the clear and consistent jurisprudential message has been that religion has constitutional relevance because it is an expression of human autonomy and choice. Law understands religion as an aspect of personal self-fulfillment. Religion is essentially individual and, correlatively, has its force in law because it is an expression of liberty through choice. Recognizing law's religion as personal and important owing to its nature as preference leads us to a final, and deeply interrelated, feature of law's rendering of religion: law assigns religion clearly, albeit unstably, to the realm of the private rather than to the public.

#### IV. LAW'S RELIGION AS PRIVATE

The political culture of liberalism sees meaning as the exclusive concern of the private. Meaning is aligned with preference and choice and, given the commitment to robust autonomy as the path to authentic choice, meaning is something that must be sought and embraced within the private sphere. The quintessential domains of interest in liberal thought are the market, the family, and religion. These are private domains in which we are governed in our actions and dispositions not by the universalism of reason but by the particularities of love, preference, and belief. The role of the public, by contrast, is simply to create a set of procedural conditions that will guarantee sufficient autonomy and to remain agnostic as to the good—as to meaning. This is the essence of the “view from nowhere”<sup>90</sup> and theorizing about the “original position.”<sup>91</sup> The point is to banish interest and preference from the realm of public debate, which is instead consecrated to reason. Despite the range of liberal political theories, this feature—the assignment of choice and interest to the realm of the private and a commitment to

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<sup>89</sup> Another illuminating recent example comes from *S.J.B. (Litigation Guardian of) v. British Columbia (Director of Child, Family and Community Service)* (2005), 42 B.C.L.R. (4th) 321, in which the court held that an almost 15 year old girl who did not wish to receive a life-saving blood transfusion on the basis of her Jehovah's Witness faith was nevertheless required to receive the treatment.

<sup>90</sup> See Thomas Nagel, *The View from Nowhere* (New York: Oxford University Press, 1986).

<sup>91</sup> See John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971).

keeping the public agnostic as to meaning—is remarkably constant.<sup>92</sup> As Paul Kahn writes, what ultimately characterizes the political culture of liberalism is that it “aims to establish a framework of just rules that operate as conditions within which individuals must make their own choices about meaning.”<sup>93</sup>

Kahn explains that the public/private divide that is so central to liberalism is, in essence, a metaphor for the dividing line between reason and choice or preference. That which is public must be governed by reason.<sup>94</sup> When choice and preference enter the picture, we have shifted into the private, and reason is no longer the governing principle. Thus, political liberalism understands the scope of the claims that the state can make on the individual as being confined to *reasonable* demands. If the public begins to present itself in a way that manifests interest or choice as among reasonable alternatives, it acts without legitimacy.

Canadian constitutional law expresses this commitment to a durable divide between the private and the public, as well as the criteria that set these borders, through a number of its doctrines and features. The doctrine of applicability means that the *Charter* binds only government decision-making and leaves the realm of the private to regulation through other mechanisms.<sup>95</sup> Furthermore, a person’s enjoyment of his or her *Charter* rights varies depending on whether the particular activity in question is a private or public act; specifically, reason will have a greater limiting claim on public conduct. The constitutional protection of privacy reflects the importance of this distinction. For example, within the framework of constitutional logic, the right to privacy protected in sections 7 and 8 of the *Charter*, which is fundamentally a right to the integrity of one’s private domain, is

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<sup>92</sup> Kahn, *supra* note 14 at 123: “Arguments among competing conceptions of liberalism are arguments over the location of the border of the public and the private, that is, over the point at which there is a crossing from reason to unreason.”

<sup>93</sup> *Ibid.* at 116.

<sup>94</sup> Kahn describes this as liberalism’s own imperial ambition—to claim the whole domain of reason and, thereby, to occupy the whole field of public values. *Ibid.* at 120.

<sup>95</sup> For a discussion of the impact of doctrines of applicability on rights constitutionalism, see Gavin W. Anderson, “Social Democracy and the Limits of Rights Constitutionalism” (2004) 17 *Can. J.L. & Jur.* 31. Anderson demonstrates that even broader doctrines of rights applicability than that found in the *Charter* end up replicating this private/public distinction so deeply ingrained in the culture of political liberalism.

essential because it protects a sphere of autonomy.<sup>96</sup> One's liberty within this sphere of autonomy allows the pursuit of personal interests, the making of personal choices, and the development of one's own sense of the good. The boundary between this sphere and the public is, however, policed by the logic of reasonableness: one's expectation of privacy must be a *reasonable* one, and one's interests and choices must be acted upon in a *reasonable* manner, specifically in a manner that gives due regard to the parallel rights of others. In these ways, Canadian constitutionalism expresses liberal political culture's sense of the public and private as the domains of reason and interest, respectively.

Again, it ought to come as no surprise that, when it turns its analytic gaze to the phenomenon of religion, Canadian constitutional law, itself informed by liberal political culture's commitments, views religion in a manner that comports with the taxonomy of public/private and reason/interest. The primary way in which we see this rendering manifest in *Amselem*, and in other cases, is in the assertion that religion is fundamentally a question of belief. Religion is defined as "freely and deeply held personal *convictions and beliefs*."<sup>97</sup> The rhetorical focus on belief is not without complication. In places, the Court speaks of the importance of religious practice,<sup>98</sup> going so far as to note that "[t]he performance of religious rites is a fundamental aspect of religious practice."<sup>99</sup> Although the Court does not entirely blind itself to the practiced or lived dimension of religion, close attention to the jurisprudence demonstrates that law manifests a degree of comfort with religion as belief and displays a kind of anxiety and awkwardness with religion as practice. These respective reactions to belief and practice fit comfortably within the liberal framework of constitutional rights. When a belief is made manifest in conduct, its presence as an expression in the world pushes it closer to—or into—the public and, in so doing, threatens the introduction of interest and preference into the realm of reason.

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<sup>96</sup> *R. v. Tessling*, [2004] 3 S.C.R. 432 at para. 15: "Building upon the foundation laid by the common law, s. 8 of the *Charter* creates for '[e]veryone' certain areas of personal autonomy where 'all the forces of the Crown' cannot enter." (Quoting William Pitt (the Elder) in a 1763 speech before Parliament, reproduced in Lord H. Brougham, *Historical Sketches of Statesmen Who Flourished in the Time of George III* (1855), vol. I, at 42.)

<sup>97</sup> *Amselem*, *supra* note 11 at para. 39 [emphasis added]. See also *Big M*, *supra* note 17 at paras. 94-95.

<sup>98</sup> See *Big M*, *ibid.*; *Reference re Same-Sex Marriage*, *supra* note 64 at paras. 56-59.

<sup>99</sup> *Reference re Same-Sex Marriage*, *ibid.* at para. 57.

Law's comfort with religion as belief and discomfort with religion as (potentially public) practice appears clearly in *Trinity Western*,<sup>100</sup> which considered Trinity Western University's requirement that all students sign a code of conduct that, among other things, prohibited certain practices "that are biblically condemned," including "homosexual behaviour."<sup>101</sup> Since this code expressed a discriminatory view, the British Columbia College of Teachers (BCCT) refused to certify the University's education program, thus preventing its graduates from serving as public school teachers. The BCCT's refusal was based, at least in part, on its conclusion that students who signed such a code of conduct must have held the belief that homosexual conduct was immoral. Public teachers, the BCCT reasoned, were required to uphold and teach the principles of equality and non-discrimination, and there was no reasonable prospect that a student who signed this code of conduct could be relied upon to carry out these public responsibilities:

The Court held that the apparent conflict between equality and religious freedom would be avoided by "properly defining the scope of the rights"<sup>102</sup> involved. In this case, "the proper place to draw the line ... is generally between belief and conduct."<sup>103</sup> Why? The scope of law's protection for conduct is narrower precisely because, once implemented in action, beliefs take on a more public aspect. The Court concluded that the BCCT had improperly based its ruling on the "mere" presence of a religious belief, rather than upon evidence that such belief translated into discriminatory conduct in the public realm. Even if the code of conduct was an accurate insight into the beliefs held by the graduates of Trinity Western University, the constitutional ethics of equal treatment and non-discrimination are concerned with public conduct, and the Court was not prepared to predict future conduct based on past evidence of belief. In so ruling, the Court effectively translated the issue into an evidentiary matter, but one that discloses the strong manner in which the constitutional imagination associates religion with the realm of the private. As belief only, religion is a preference that remains solidly and unproblematically within the realm of the personal. Once

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<sup>100</sup> *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 [*Trinity Western*].

<sup>101</sup> As cited in *ibid.* at para. 4.

<sup>102</sup> *Ibid.* at para. 29.

<sup>103</sup> *Ibid.* at para. 36.

released into action, however, it might seep into the realm of the public where interest and preference have a troublesome status.

Law's sense of the rightful presence of the private in the public is, of course, complicated. For example, the status of interest and preference as legitimate aspects of public decision-making varies with context. Accordingly, law's understanding of religion as private has complex implications for the place of religion in the public sphere.<sup>104</sup> At one end of the spectrum, the justifiability of the influence of religion on the way in which an individual casts his or her ballot is hardly questioned. One might disagree with the religious principles brought to bear, or whether the voter *ought* to be a religious person, but the idea that religious beliefs can legitimately influence voting is not generally in question. At the other end of the spectrum, from within the contemporary imagination of the Canadian constitutional rule of law, it would seem anathema to have a judge reason from religious principles in a decision about the validity of a contract or the appropriate division of matrimonial assets upon divorce. Somewhere in the middle, and most contested, is the rightful place of religious principle in representative decision-making.<sup>105</sup> Should a Prime Minister be informed by his or her religious views when making policy decisions? Although the current tendency in Canada is to reject such a role for *private* religion,<sup>106</sup> there is a broader spectrum of opinion on this point. So my claim is not that, within the Canadian constitutional rule of law, religion has no place in the public; rather, law's rendering of religion as belief strongly aligns it with the private and, given legal liberalism's commitment to the

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<sup>104</sup> David Seljak provides an interesting example of the complexity of religion's role in Canadian public decision making, noting that "[i]n both the 1980 and 1995 referenda, Catholic groups attempted to redefine a public role for the Church in Quebec society." David Seljak, "Resisting the 'No Man's Land' of Private Religion: The Catholic Church and Public Politics in Quebec" in David Lyon & Marguerite Van Die, eds., *Rethinking Church, State, and Modernity: Canada Between Europe and America* (Toronto: University of Toronto Press, 2000) 131 at 144. Seljak notes further at 145 that these groups' "attempts at the 'deprivatization' of religion take the form of resistance to the dominant political culture, which would relegate both religion and alternative ethical perspectives to the 'private' realm of subjective values and experiences."

<sup>105</sup> For an argument in defence of reliance upon religious beliefs in public decision-making see Michael J. Perry, "Why Political Reliance on Religiously Grounded Morality is not Illegitimate in a Liberal Democracy" (2001) 36 *Wake Forest L. Rev.* 217.

<sup>106</sup> The stance taken by Prime Ministers Jean Chrétien and Paul Martin (both Catholics) on same-sex marriage are cases in point. Both disavowed the legitimacy of basing the decision on legalizing same-sex marriage on Catholic dogma, and this in spite of Papal encyclicals calling upon public decision makers to do just this.

public/private divide, this association creates identifiable tensions for law's treatment of public expressions of religious commitment.

An example of this complex role for religion-as-interest in public decision making is *Chamberlain v. Surrey School District No. 36*.<sup>107</sup> In this case, the Court quashed the decision of a School Board that, influenced by the existence of religious objections to same-sex relationships among the parents in the community, refused to approve the use of books that depicted same-sex parented families for a Kindergarten/Grade One curriculum. The Board's decision was challenged on the ground that, by deferring to certain religious views in the community, it had acted contrary to section 76 of its enabling legislation, which required that all schools be conducted on "strictly secular and non-sectarian principles."<sup>108</sup>

The Court rejected an interpretation of this demand for "secularism" that would prohibit religious concerns from informing the Board's decision-making altogether. Instead, the section meant that, if the Board gave credence to the religious views in the community, it had to ensure that it did so "in a manner that gives equal recognition and respect to other members of the community."<sup>109</sup> The Court explained that the role of the Board as a public decision-maker and the role of parents were manifestly different. Whereas individual parents are entitled to advocate for policies that are consonant with their religious views,<sup>110</sup> as an elected body exercising powers pursuant to public legislation, the Board "must not allow itself to be dominated by one religious or moral point of view, but must respect a diversity of views."<sup>111</sup> Critically, the Board must also be subject to judicial review for *the reasonableness of its decisions*. In this case, the Court found that the

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<sup>107</sup> [2002] 4 S.C.R. 710 [*Chamberlain*].

<sup>108</sup> *School Act*, R.S.B.C. 1996, c. 412, s. 76. The board's decision was also challenged on *Charter* grounds, but the Court disposed of the case based on administrative law principles.

<sup>109</sup> *Chamberlain*, *supra* note 107 at para. 19. For a discussion of the meaning of the term "secularism," see Berger, "Limits of Belief" *supra* note 7. Cf. Iain T. Benson, "Considering Secularism" in Douglas Farrow, ed., *Recognizing Religion in a Secular Society* (Montreal & Kingston: McGill-Queen's University Press, 2004) [Farrow] 83 and Iain T. Benson, "Notes towards a (re)definition of the 'secular'" (2000) 33:3 U.B.C. L. Rev. 519. See also Douglas Farrow, "Of Secularity and Civil Religion" in Farrow 140.

<sup>110</sup> *Chamberlain*, *ibid.* at para. 20: "Parents need not abandon their own commitments, or their view that the practices of others are undesirable."

<sup>111</sup> *Ibid.* at para. 28.



Board's decision was unreasonable, in part on the basis that it had deferred to the particular religious views of certain parents without considering the multiplicity of views that might be represented in the community, as mandated by the *School Act's* requirement for secularity.<sup>112</sup> The underlying dynamic at play in this case is one in which, when anchored in the private, law is unconcerned with the existence of religious preference; however, when wielded by public authority, law is less comfortable with religion and requires that it be tested against the dictates of reason. As private religion becomes increasingly associated with the sphere of public decision-making, it leaves the permissive jurisdiction of interest and enters the scrutinizing domain of reason.

*Amselem* further dramatizes the role of the public and private as symbolic markers for the distinction between interest and reason, as well as law's assignation of religion to the realm of the private/interest. One of the important issues in *Amselem* was how to determine whether a claimant's religious belief is cognizable by law. Specifically, the question was whether the Court needed to decide whether or not the claimants were correct in their belief that Judaism required a personal, rather than a communal, *succhah*. The majority reasoned that it would be inconsistent with law's commitment to individual autonomy (and here we see the interaction among all three elements of law's vision of religion) "to rule on the validity or veracity of a given religious practice or belief."<sup>113</sup> Instead, the courts should confine themselves to determining whether or not the claimant "is sincere in his or her belief."<sup>114</sup> Reflecting this distinction back on the public/private dichotomy, it becomes apparent that veracity has no place in the realm of interest—all that matters is the sincerity of one's preference. If this test is satisfied, analysis in the private realm is, for law's purposes, exhausted. By contrast, truth is the ultimate test in the realm of reason.

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<sup>112</sup> *Ibid.* at paras. 57-59.

<sup>113</sup> *Amselem*, *supra* note 11 at para 51.

<sup>114</sup> *Ibid.* at para. 56. This approach was confirmed in *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256. Paraphrasing *Amselem*, Charron J. summarized the analytical approach under section 2(a) of the *Charter* at para. 34:

in order to establish that his or her freedom of religion has been infringed, the claimant must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned conduct of a third party interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief.

If true, a proposition binds all reasonable persons. Veracity is for the public, sincerity is for the private, and all that the law requires of religion is sincerity of belief. Within law's imagination, religion takes on a strong sense of "interest," and a concomitant association with the private, such that an inquiry into truth does not fit comfortably.

Even the dissents in *Amselem* betray law's rendering of religion as, in deep ways, a matter of private interest. Justices Bastarache and Binnie both argue that the law must take cognizance, not only of the claimants' religious interests, but of the other owners' property rights, with Justice Binnie arguing that the claimants had lost their religious rights when they signed the contract. The contractual terms "express a certain style of architectural austerity or collective anonymity which the co-owners wanted to present to the world in a building shorn of any external display of individual personality."<sup>115</sup> To vindicate the religious right without regard to these aesthetic preferences would be to privilege one form of interest (belief) over another (aesthetic taste), and law, which honours the border between private and public, is extremely reticent to do so. This reasoning casts religion as a fungible interest, interchangeable through the market with other preferences. I am not suggesting that law treats religion as *nothing more* than any other interest. The *Charter* explicitly protects religious freedom, whereas it only obliquely protects other interests such as aesthetic taste.<sup>116</sup> Yet when rendered by the constitutional rule of law, religion takes on a strong sense of private interest, and this colouring affects the way that the jurisprudence treats religion; specifically, religion is drawn away from the realm of culture and into the realm of preference.

There is, of course, a strong connection between law's sense of religion as centrally a matter of individual autonomy and the translation of religious commitment into matters of preference, a link recognized as early as by Justice Dickson (as he then was) in *Big M*.<sup>117</sup> Religion is to be protected because it is the object of individual choice, and this element of choice is the means by which each individual gains the capacity to seek the satisfaction of private interest and preference. Canadian constitutionalism is committed to the view that "[a] truly free

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<sup>115</sup> *Amselem*, *ibid.* at para. 195.

<sup>116</sup> One could locate such oblique protections in the protection of freedom of expression, or even in the guarantee that liberty will not be interfered with except in accordance with fundamental justice.

<sup>117</sup> See *Big M*, *supra* note 17 and accompanying text.

society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct.”<sup>118</sup> Religion has a claim within the law, then, because it is an autonomous and private expression of one important set of preferred tastes and chosen pursuits. When pushed through the filter of Canadian constitutional law, religion comes out in a shape easily assimilated into a distinction critical to the liberal political imagination: religion is quintessentially private.

#### V. SUMMARY: LAW'S TRIPTYCH

As I have presented it, Canadian constitutional law's image of religion has three aspects. The first is that within law's imagination religion is something that essentially and most purely takes place within the individual. Viewed through the lens of constitutional jurisprudence, religion appears as a personal connection between the individual in her solitude and whatever it is that forms the object of her spiritual attention. When we ask why this commitment to the individual locus of religion is so strong in the law, we see that this conception feeds off the central philosophical commitment about the *good* that religion represents. Religion is valuable and deserving of legal protection because it is one possible expression of personal autonomy; that is, to protect religion is to protect the right of an individual to make choices about his or her spiritual life. On this view, religious freedom is a necessary outgrowth of a more general dedication to the good of freedom and autonomy. The relationship between this sense of religion as centrally about autonomy and choice, and religion as a fundamentally individual phenomenon, is apparent. We protect autonomy because we privilege the individual; equally, the individual is valued because that individual is the source of choice, which is understood as the expression of freedom and autonomy. From these intimately interrelated aspects of law's rendering of religion, the jurisprudence leads us naturally to the third aspect of law's understanding of religion—that religion is a private matter. Once religion is centred on the individual and his or her personal choices and expressions of autonomy, the constitutional imagination is led to assign religion to the realm of the private. The relationship works equally in the opposite direction. Not an independently legitimate component of public decision-making, religion

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<sup>118</sup> *Ibid.* at para. 94.

falls on the private side of law's conceptual divide. Once so designated, religion is bound not by reason, but by preference, and is therefore a matter of choice and, as such, an expression of the autonomous individual.

This is the triptych of religion painted by the brush of modern Canadian constitutionalism. Like the artistic triptych, it can be described structurally as being composed of three discrete panels. But, also like the triptych, these three faces are really aspects of one larger image. They combine to produce a coherent message, each informing the way that we interpret the others. Although aspects of the jurisprudence might emphasize one "panel" over the others, law's religion is only fully appreciated when all of these aspects are viewed together.

By identifying these features as the aspects of religion relevant to the legal imagination, we see that the resulting image circumscribes religious experience within rather fixed boundaries. The outer frame of the triptych is the limit of law's rendering of religion; the image excludes even as it displays. But what accounts for what this particular perception of religion omits and what it foregrounds? I have argued that law's understanding of religion is informed by modern Canadian constitutionalism's foundational assumptions and ideological commitments. The focus on the individual as the elementary unit of explanation, the privileging of autonomy and choice, and the fidelity to a private/public taxonomy all make this particular rendering of religion one that resonates with Canadian constitutional law's ideological underpinnings. Law shapes religion in its own ideological image and likeness and conceptually confines it to the individual, choice-centred, and private dimensions of human life. This particular iconography resonates within the meaningful and meaning-giving framework of Canadian constitutional law, deeply informed as it is by the political culture of liberalism.

I can now identify and exploit an ambiguity in the question at the centre of this article: is law's view of religion a *cultural* understanding of religion? In one important sense the answer to the question must be "yes." My analysis of law's rendering of religion shows the cultural dimensions of law. Law seeks to understand religion in terms that make sense within the horizon of significance endogenous to law. Canadian constitutional law's understanding of religion is "cultural" in the sense that it is demonstrative of the *culture of Canadian constitutional law*, understood as the framework of symbolic meaning out of which law makes sense of the world. In this respect, law's

understanding of religion is cultural. But the corollary is that law therefore processes religion in terms exogenous to religious cultures; in so doing, it may fail to take seriously the meanings and structures of significance of *religions as cultures*. In this sense law's is *not* a cultural understanding of religion. It does not seek to understand religion as an interpretive horizon, composed of sets of symbols and categories of thought, out of which meaning can be given to identity, history, and experience. Instead, it moulds religion to the shape of its own set of normative and symbolic commitments.

One might object that I am asking too much of law by questioning whether its approach to religion is cultural. Perhaps law is not excluding the cultural dimension at all but, rather, remaining agnostic on this question. Otherwise put, is law actually defining religion—making a claim about what religion *is*—or is law simply dealing with religion in the terms necessary for adjudication and withdrawing from any essential claim about the nature of religion? In my analysis, I seem to make the greater claim that law is actually asserting something about the true nature of that which it is protecting: that it is making a sociological determination about what religion *is*. But perhaps law merely takes a slice of religion—only that which is necessary to answer the question before it—and leaves open a whole set of issues about the nature of religion for others to answer. That is, it does not speak to the social, identity-based, or public facets of religion because those aspects are not at issue in a court of law and, therefore, law leaves these other aspects to be worked out and spoken to by other disciplines and other social institutions. Just as the law might not deny (or confirm) that language has a socially constructive dimension when deciding a language rights case, why would I assume that law's rendering of religion is a comprehensive claim about the very nature of religion?

There is some truth in this critique. Canadian constitutional law might not understand itself as making the larger claim about the very nature of religion at large. Law begins from the premise that it is only making the first claim—that it is merely concerned with that slice of religion necessary to decide the case before it and is quite happy to allow other understandings of religion to flourish. But law's modesty is always false. Because law defines rights and uses power and violence to enforce its vision, its claim rapidly assumes the greater form—the comprehensive claim about religion. Because it both commands the coercive power of the state and always implicitly assumes the ultimacy of its authority, law's rendering of religion assumes the force and

significance of a total claim about what matters about religion, what religion relevantly *is*. This is the essence of Robert Cover's insight that law is *jurispathic*: that, whether it intends to or not, the very nature of law is that it kills other normative arrangements and interpretations.<sup>119</sup> This is the reason that law's rendering of religion matters so much when discussing the nature of the relationship between law and religion: even when it begins with a modest claim, the nature of law and its violence is such that its claims quickly expand into a more comprehensive form. Cover calls this law's jurispathic character; I would perhaps call it epistemologically colonial—it may be that law is only saying that it is making a limited claim about religion for its own purposes, but when the courts are called upon to adjudicate upon the relationship among rights and interests, law's understanding of religion quickly becomes the only game in town. Law says “for *my purposes*, religion is the following”; however, in this modest claim is the seed of the larger: “and if you appear before me, this is the only definition that will attract the recognition of the state.”

Accordingly, to appreciate the relationship between law and religion, Canadian constitutionalism's rendering of religion takes on tremendous importance. As I have shown, law's rendering of religion is in the form of a triptych composed of three elements: religion is individual, valuable because it is an expression of choice, and essentially private. Though a manifestation of its own cultural nature, law's understanding of religion is not of religion as culture but, rather, a procrustean product of law's own symbolic commitments and frameworks of understanding.

## VI. CONCLUSION

We are left with something of a paradox concerning the place of religion in modern Canadian constitutionalism. Within the legal and political domain, religion is proclaimed to be “a culture.” And so the conventional story says that the nature of law's relationship with religion is to be understood as an encounter with culture. Yet when we look closely at what it means for law to say that religion is a culture, we come away with the sense that the legal imagination carefully fabricates a

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<sup>119</sup> Robert M. Cover, “The Supreme Court 1982 Term—Foreword: *Nomos* and Narrative” (1983) 97 Harv. L. Rev. 4.

sense of religion as culture that comports with its own fundamental legal-cultural assumptions about the structure of the state, what is of value in the human, and the nature of the religious.

A fuller exploration of law's cultural rendering of religion would go on to explore what a more robust conception of religion as culture might look like, drawing upon sources appropriate to that project. I have left that for another part of my work. For present purposes, suffice it to say that a thicker understanding of religion as culture than that reflected in the image painted by the law would open up the possibility of religion cutting across and fundamentally challenging law's rendering of religion explored in this piece. For example, a cultural understanding of religion would have to account for the possibility that a hard ethical divide between the private and public might make little sense to religion as culture. As a symbolic system expressing not only a general order for the world but distinct ontological claims, religion might also have the capacity to touch upon the whole of the committed individual or even the community. Furthermore, a robust sense of religion as culture would have to cope with the possibility that religion provokes action as much as it evokes emotion or internal dispositions. By contrast, in rendering religion through the mechanism of *Charter* protections, contemporary Canadian constitutionalism engages in a profound context-stripping that attempts to make religion much more digestible within the symbolic and normative system of constitutional cultural commitments.

The paradox of religion as culture, then, is that although law proclaims religion to be a culture, it does not actually understand it as such except in extremely impoverished terms. My claim, however, is neither that law merely "has it wrong", nor that its conception of religion must change. The meanings and symbolic commitments that inform Canadian constitutional law's understanding of religion are no more or less mutable than those that comprise a religious culture. In this way, it is not the case that law has *misunderstood* religion. Law has *understood* religion; it has simply done so in keeping with the culture of Canadian constitutionalism. As such, this understanding is just one possible rendering of religion and not one that necessarily reflects the nature of religious conviction and its relationship with the law. In particular, it does not afford religion the same significance, reach, and impact that law, however tacitly, assumes for itself.

This discussion exposes the potential for a large and durable gap between law's religion and religion viewed robustly as culture. Religion as a culture is more complex, more interpretively ambitious, and

therefore less manageable than law would have it. But if it is true that law's sense of religion breaks so strongly with the cultural claims that religion can make on communities and on individuals, then we are met with a number of profound implications for our conventional approach to making sense of the relationship between religious commitment and the Canadian constitutional order. Most profoundly, there is a fundamental, though eminently explicable, shortfall at the core of liberal legal discourse about religious liberties. Religion is not only what law imagines it to be. Law is blind to critical aspects of religion as culture. That being so, even if successful at accommodating or tolerating what it understands to be religion, aspects of religion as culture remain entirely unattended to and, therefore, unresolved in their tension with the constitutional rule of law. And with this insight we come to one important part of the explanation for why the story we tell about law and religion has proven so unsatisfactory: law—in whose capacity to tolerate, accommodate, and “make space” for cultural claims we place so much faith—fails to appreciate religion as culture.