4

Models of Religion–State Relations

I. Introduction

In this chapter we survey the various types of interaction between religion and government. The object is not to posit yet another typology of religion–state[1] relations—although it is helpful to have such frameworks expounded[2]—but to consider which model or models best advance religious freedom in a liberal state. Are some models simply incompatible with freedom of religion?

Two important preliminary points require mention. First, and building from our discussion in Chapter 3, one's view of the appropriate relationship between religion and state cannot be 'neutral'.[3] It would be hoping for too much to expect that one's favoured model would satisfy all constituencies and world views.[4] Criticism or defence of a particular model will reflect one's largely unarticulated premises concerning the purpose of the Church (or other organized religious community), the role of the state, and so on. Carl Esbeck puts it well:

> there is no truly neutral position concerning these matters, for all models of church/state relations embody substantive choices . . . Separationism is a value-laden judgment that certain areas of the human condition best lie within the province of religion, while other areas of life are properly under the authority of civil government. Separationism . . . is in no sense the inevitable product of objective reason unadulterated by an ideological commitment to some higher point of reference. Separationism cannot stand outside of the political and

[1] We have adopted the phrase 'religion and state (or government)' instead of 'church and state'. The former is more accurate in a religiously plural society, although we realize church and state is an accepted shorthand label for the generic issue.

[2] For helpful schema, see A Hastings, 'A Typology of Church–State Relations' in his *The Faces of God* (London, 1976), ch 5; C Esbeck, 'A Typology of Church–State Relations in Current American Thought' in L Lugo (ed), *Religion, Public Life and the American Polity* (Knoxville, Tenn, 1994); Cookson, *Regulating Religion*, ch 3; M Rosenfeld, 'Introduction: Can Constitutionalism, Secularism and Religion be Reconciled in an Era of Globalization and Religious Revival?' (2009) 30 *Cardozo L Rev* 2333, 2349–51; J Temperman, *State–Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance* (Leiden, 2010); C Laborde, 'Political Liberalism and Religion'; R Albert, 'The Separation of Higher Powers' (2012) 65 *SMU L Rev* 3, 45ff; N Doe, *Law and Religion in Europe: A Comparative Introduction* (Oxford, 2011), 28–39.

[3] See Esbeck, 'A Typology of Church–State Relations', 5–6.

[4] 'All of [the various models] are beset by serious shortcomings' suggests Rosenfeld, as 'they completely fail the ideal of areligious secularism, but they also frustrate the aims of the religious, or of the non-religious, or of minority religions, or in some cases, the aims of all three': 'Introduction: Can Constitutionalism', 2350.

Religious Freedom in the Liberal State. Second Edition. Rex Ahdar and Ian Leigh.

religious milieu from which it emerged and honestly claim to be neutral concerning the nature and contemporary value of religion or the purposes of modern government. The same must be said for its primary competitor, the neutrality theory. Indeed, to demand that any theory of church/state relations transcend its pedigree or its presuppositions and be substantively neutral is to ask the impossible.[5]

Our evaluation of the merits of the models to be examined is undertaken from a non-neutral vantage point. We analyse the models from a Christian perspective drawing from the virtues and principles we posited in Chapter 2—the emphasis upon voluntariness in matters of faith, the dual authorities, and so on.

Second, in outlining the major models of religion–state interaction we are guided at first instance by the formal constitutional linkages. We are well aware there is more to religion and state than this. Whatever the institutional connection, there are myriad diffuse and intangible influences that the state exerts upon religion, and vice versa.[6] A range of social, cultural, and other factors exacerbate (or attenuate) the actual degree of influence exercised by each upon the other: 'seeming power may sometimes become powerlessness, and on the other hand, religions outside the state's cold embrace can occasionally become very powerful indeed.'[7] The *de jure* relationship between religion and state may not necessarily coincide with the *de facto* connection.[8] At the level of beliefs and ideology, the state may be predisposed, or hostile, to a religion (or religions generally) whatever the official constitutional position espoused.

With these important caveats in mind we turn now to the models. Table 4.1 depicts the major types along a continuum. At a structural or institutional level are the polar extremes of complete unity and complete separation. The monistic models can take a theocratic (religion controls the state) or an Erastian (the state controls religion) form. At the other end of the spectrum is complete separation, institutionally speaking, of religion and government. Both extremes are pure or ideal types. There is an inevitable co-mingling of religion and government. Pure unity is impossible for there are always awkward dissenters from any state-imposed orthodoxy and always 'leakages' between religion and government,

[5] 'A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers' (1997) 46 *Emory LJ* 1, 5. See, similarly, S Feldman, *Please Don't Wish Me a Merry Christmas: A Critical History of the Separation of Church and State* (New York, 1997), 27: 'an individual's conception of the proper relation between church and state reflects, in part, that individual's own religious orientation.'

[6] See N Demerath III, 'Religious Capital and Capital Religions: Cross-Cultural and Non-Legal Factors in the Separation of Church and State' (1991) 120 *Daedalus* 21, 28, 38.

[7] ibid 37. As he puts it (ibid 21): 'religion's capital is frequently maximized when it is not a capital religion.' Similarly, Feldman, *Please Don't Wish Me a Merry Christmas*, 267, reflecting upon the US, comments: 'the existence or non-existence of an officially… established church does not necessarily affect the power of Christianity pulsing through the social body; in some instances, official establishment might not alter the degree of Christian imperialism.'

[8] See A Sajo, 'Preliminaries to a Concept of Constitutional Secularism' (2008) 6 *I.CON* 605, 610; R Hirschl, 'The Rise of Constitutional Theocracy' (2008) 49 *Harv Int LJ Online* 72, 74.

Table 4.1. A religion–state continuum

	Unity		Hybrid		Separation	
	(monism)		(cooperation)			
Structural/ institutional	theocracy	Erasti-anism	*de jure* establishment single v multiple comprehensive v partial symbolic v substantive		strict (no-aid) separation	
Beliefs			*de facto* establishment			*de facto* secularism hostile separation irreligion
Legal stance				substantive neutrality	formal neutrality	
			non-preferentialism (assistance for all religions vis-à-vis secular entities/ activities)	equal treatment (of religious and secular groups)	no assistance (for any religion)	
				accommodation	no accommodation	
	monopoly			competition		
Regulation			partial regulation	deregulation		partial regulation

given the same persons may inhabit each realm (Augustine's dual citizenship of the two cities again).[9]

Between the extremes lie various intermediate or hybrid models where religion and state cooperate together. These are, realistically, the main alternatives in a modern liberal democracy. Legal establishments of various forms may give a religion (or religions) special preferences and privileges. Alternatively, the state may aim for a broad even-handedness amongst faiths under some rubric of 'neutrality'. Table 4.1 also includes the economic labels of monopoly, regulation, and competition. This captures the insights of recent literature applying simple economic models to religion: should the state endorse a monopoly faith or is a 'free market' in religion preferable?

[9] 'We know very well from centuries of constitutional government that religion and government cannot be kept entirely separate. There must necessarily be some intermingling of the two, if not to allow religion and religious organizations to operate with the protection of the state, then at least to require the state to create sufficient space for citizens to manifest the sacrality of our religious convictions': Albert, 'Higher Powers', 37.

II. Major Types

Theocracy

The first of the two models that fuse religion and state is theocracy. The Greek roots of the word reveal its essence: 'rule by the deity'.[10] This model assumes that religion is supreme and that the machinery of state is to further religious interests.[11] It describes regimes in which the rulers purport to represent the Divine on earth both directly and immediately.[12] The rulers are God's spokespeople. The ruling and priestly roles may be combined, or the king and the priest may be separate, albeit the former being under the authority of the latter. The rulers claim to interpret God's will for the nation. A primary purpose of the government is to implement and enforce divine laws.

Various ancient and some modern civilizations follow the theocratic pattern. The ancient Egyptians, Tibetans, and Hebrews are examples.[13] Contemporary Islamic theocracies have been tried in Iran and Afghanistan, where clerics exercise ultimate political authority and society is ordered according to the Shari'a.[14] In Western history there were notable attempts by various Popes (such as Innocent III) to create theocratic states as well as smaller-scale ventures such as that of Geneva under John Calvin and the New England colonies under the Puritans.[15]

Paul Weber is probably right in describing theocracies as short-lived.[16] The reasons are many. Religious leaders seldom possess the extensive secular skills and wherewithal to run a modern economy. Resentment often builds as the strictures of religious law become harsher. Clerics or other spiritual leaders may be reluctant to entertain the inevitable compromises required in political life and international

[10] P Weber, 'Theocracy' in R Wuthnow (ed), *The Encyclopaedia of Politics and Religion* (Washington, 1998), vol 2, 733.

[11] L Pfeffer, *Church, State and Freedom*, rev edn (Boston, 1967), 26.

[12] Weber, 'Theocracy', 733.

[13] See ibid and Pfeffer, *Church, State and Freedom*, 5. J Wood, 'The Biblical Foundations of Church–State Relations' in J Wood, E Thompson, and R Miller, *Church and State in Scripture, History and Constitutional Law* (Waco, 1985), 13–14, argues that the Hebrew theocracy was different to the others: the rulers were not deified nor did the Israelite kings (generally) assume priestly functions.

[14] The European Court of Human Rights has declared that 'sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention': *Refah Partisi* (*The Welfare Party*) *v Turkey* (2003) 37 EHRR 1, [123]. The Court cited (ibid) divergences 'from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts'. The Court found the banning of the applicant party for 'unconstitutional activities' not to violate Arts 11 or 9. The Party's policy, however, was not the introduction of full Shari'a law, but rather of a plurality of legal systems by which Muslims would be governed by private law founded on religious principles, something the Court found to be equally incompatible with the Convention: ibid [119].

[15] See generally Pfeffer, *Church, State and Freedom*, ch 1; S Cobb, *The Rise of Religious Liberty in America: A History* (New York, 1902, repr 1970), ch 2.

[16] Weber, 'Theocracy', 735.

statecraft. Complete religious domination is surely impossible to achieve and dissenters have the potential—especially if assisted by external forces—to foment dissatisfaction and the eventual overthrow of the theocratic state.

Erastianism

The second of the two models fusing religion and state is named after the German physician Thomas Erastus.[17] Erastianism assumes the state is ascendant and that religion is to be used to further state policy.[18] The church, or other organized religious entity, is under the direct control of the state. Also called 'Caesaropapism',[19] this version of a monistic policy, with religion subservient, is, historically, the more prevalent outcome of unifying government and faith.[20] Pfeffer provides a mundane example of Erastianism from seventeenth-century England. Parliament enacted a statute in 1678 designed to encourage the wool trade: all clergymen were obliged to ensure that no person was buried in a shroud made of anything other than wool.[21] The religion adopted by the state gains various privileges and favours but this comes at a price—state interference with religious affairs.

The history of Christianity is marked by various phases of Erastianism, beginning with the adoption of Christianity by Constantine in the fourth century through to the pervasive reliance upon this model throughout Europe after the Reformation.[22] A modern Erastian example is China. Liu Peng observes:

> The dominance of state authority over religious authority is evident in the very fact that the state defines the official religious groups—Buddhism, Daoism, Islam and (separately) Protestantism and Catholicism. These religious groups have the duty to carry out the policies of the Party and the government and to be managed by the government. Therefore, while the religious groups are independent in terms of administrative and organisational relationship, yet politically, they are no different from those institutions under the direct leadership of the government.[23]

In Max Weber's words: 'Caesaropapist government treats ecclesiastic affairs simply as a branch of political administration.'[24] The religious impulse being impossible to quench entirely, the state finds it expedient to court and domesticate religion for its purposes.

[17] Pfeffer, *Church, State and Freedom*, 26; Cobb, *Rise of Religious Liberty*, 58.
[18] Pfeffer, *Church, State and Freedom*.
[19] See Max Weber, *Economy and Society* (Berkeley, 1978), vol 2, 1159–62; A Hastings, *Church and State—The English Experience* (Exeter, 1991), 7.
[20] S Krislov, 'Alternatives to Separation of Church and State in Countries Outside the United States' in J Wood (ed), *Religion and the State* (Waco, 1985), 439.
[21] Pfeffer, *Church, State and Freedom*, 27.
[22] See ibid, ch 1.
[23] 'Church and State Relations in China: Characteristics and Trends' in B Leung (ed), *Church & State Relations in 21st Century Asia* (Hong Kong, 1996), 41, 43.
[24] Weber, *Economy and Society*, 1162.

The secular state: separationism and secularism

A 'secular state' is a concept not free from difficulty and it has been defined in various ways.[25] James Wood, for instance, observes:

> The secular state is one in which government is limited to the *saeculum* or temporal realm; the state is independent of institutional religion or ecclesiastical control and, in turn, institutional religion is independent of state or political control. It is a state that is without jurisdiction over religious affairs, not because religious affairs are beneath the concerns of the state, but rather because religious concerns are viewed as being too high and too holy to be subject to the prevailing fallible will of civil authorities or to popular sovereignty.[26]

A secular state must necessarily have a demarcation between religion and government. The separation of church and state, or 'separationism' for short, is again a deceptively simple term, carrying within it various subtleties of meaning.[27] Samuel Krislov chides: '"Separation" of church and state is an artificial concept not really capable of easy implementation or logical achievement.'[28] Christopher Eisgruber and Lawrence Sager remind us that 'the notion of literally separating the modern state and the modern church is implausible in the extreme'.[29] Martha Nussbaum concurs:

> Nobody really believes in separation taken literally across the board. The modern state is ubiquitous in people's lives, and if we really tried to separate church from state all the way, this would lead to a situation of profound unfairness. Imagine what it would be like if the fire department refused to aid a burning church, if churches didn't have access to the public water supply or the sewer system, if the police would not investigate crimes on church property, if clergy could not vote or run for office.[30]

The charge of artificiality is also directed at the fact that, while institutional separation may be achievable (and even that is difficult), a separation of ideas, beliefs, attitudes, and other ideological influences between religious entities and the state is impossible. In large part this is due, to reiterate, to the fact that

[25] See I Benson, 'Notes Towards a (Re)Definition of the "Secular"' (2000) 33 *UBCL Rev* 519.

[26] 'An Apologia for Religious Human Rights' in J Witte and J van der Vyver (eds), *Religious Human Rights in Global Perspective*, 455, 470. Wood's view resonates with what Leon Wieseltier has called 'hard secularism'. This itself comes in two forms: the separation of religion from politics because religion is (i) true (Woods' position), or (ii) false (a Marxian stance). 'Soft secularism', the other form of secularism, separates religion from politics based on indifference to the truth or falsity of religion. See Wieseltier, 'Two Concepts of Secularism' in E and A Margalit (eds), *Isaiah Berlin: A Celebration* (London, 1991), ch 5, 86 ff.

[27] P Weber, 'Separation of Church and State: A Potent, Dynamic Idea in Political Theory' in Wuthnow (ed), *The Encyclopedia of Politics and Religion*, vol 2, 684 ff. Douglas Laycock helpfully traverses the complexities in 'The Many Meanings of Separation' (2003) 70 *U Chicago L Rev* 1667.

[28] 'Alternatives to Separation of Church and State', 439.

[29] *Religious Freedom and the Constitution*, 6. 'The question that matters', they emphasize (ibid 23), 'is *how* church and state should mix, not *whether* they will do so' (original emphasis).

[30] *Liberty of Conscience: America's Tradition of Religious Equality* (New York, 2008), 11.

the same persons may inhabit each sphere and inevitably carry across influences from each.[31]

We shall divide the ensuing discussion into two distinct categories: structural (or institutional) separation and 'transvaluing' (or ideological) separation.

Structural separation

As we saw in Chapter 2 the very notion of dividing religion from the polity finds its origin in Christianity, commencing with Jesus' teaching to 'render to Caesar the things that are Caesar's', through Augustine's two cities, on to Luther's 'two kingdoms' and other similar dualisms of allegiance to authority.[32]

Following the Reformation we see two contrasting rationales for structural separation, one political, the other theological. Separation works, according to one view, to safeguard the state from the potency, unpredictability, and divisiveness of religion and, inversely, according to another view, to protect religion from the intrusions and corruptions of temporal rulers. Speaking of the American situation in the lead-up to the First Amendment, Arlin Adams and Charles Emmerich summarize:

> Both Enlightenment and pietistic separationists worked, often with great zeal, to separate church and state in an institutional sense. Those deeply influenced by the Enlightenment, such as Paine and Jefferson, adhered to anticlerical views and focused on insulating government from religious domination... Those Founders espousing pietistic separation, most prominently Backus, Witherspoon, and Sherman, inherited the emphasis of Williams and Penn on protecting religion from the corrupting effect of governmental interference.[33]

For Enlightenment separationists, separating church and state ensured dangerous religious passions and 'superstitions' would be confined to the private sphere. When religion and government mixed the outcome could be disastrous as the Wars of Religion testified. Modern liberals quickly point to the former Yugoslavia and the Middle East for contemporary confirmation. The longstanding French policy of *laïcité* exemplifies this desire to restrict, if not eliminate, clerical and religious influence, over the state. The French Parliament's ban in 2004 of conspicuous religious clothing and insignia in public schools—aimed at the wearing

[31] J T Noonan Jr, *The Believer and the Powers That Are* (New York, 1987), xvi, denounced the phrase 'church and state' as 'a profoundly misleading rubric' to the extent it suggested two mutually exclusive bodies at loggerheads: 'But everywhere neither churches nor states exist except as they are incorporated in actual individuals. These individuals are believers and unbelievers, citizens and officials. In one aspect of their activities, if they are religious, they usually form churches. In another aspect they form governments. Religious and government as bodies not only coexist but overlap. The same persons, much of the time, are both believers and wielders of power.'

[32] For a discussion of separation of religion and state in Jewish thought see S Stone, 'Religion and State: Models of Separation from within Jewish Law' (2008) 6 *I.CON* 632.

[33] *A Nation Dedicated*, 31. For a similar analysis see J Witte Jr, 'The Essential Rights and Liberties of Religion in the American Constitutional Experiment' (1996) 71 *Notre Dame L Rev* 371, 381–5.

of Muslim headscarves—illustrates this suspicion of religion and is an attempt to avert the growth and influence of an incipient Muslim fundamentalism in that nation.[34] The modern Islamic society of Turkey is similarly an example of a state founded on strongly secular principles where restrictions on individual religious liberty have been introduced to prevent pressure being exerted by the predominant religious group.[35]

The pietistic separationists advocated separation to protect the faith.[36] Roger Williams spoke of the need to maintain 'the hedge or wall of separation between the garden of the Church and the wilderness of the world'.[37] James Madison warned against the perils of ecclesiastical establishments upon 'the purity and efficacy of Religion'. He pointed to the bitter fruits of 'pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution'[38] when Christianity joined with the civil government.

Transvaluing separation

Quite distinct from structural separation is ideological separation or, as Paul Weber dubs it, 'transvaluing separation'.[39] This is the attempt to remove all religious influences from the public sphere and public institutions. Religion is, according to this view, a purely private, personal matter; political culture and public institutions are to be a 'religion free' zone. Communist nations are formally and constitutionally committed to this view. Such nations combine a structural separation with a sustained and systematic attempt at an ideological quarantining of the state from religious concerns and values. Transvaluing separation is really akin to a state commitment to 'secularism' a term of no small subtlety.

Secularism[40]

This term can mean many different things and, not infrequently, 'those involved in the discussion assume they are talking about the same idea when in reality

[34] See T J Gunn, 'Under God but not the Scarf: The Founding Myths of Religious Freedom in the United Sates and *Laïcité* in France' (2004) 46 *Journal of Church and State* 7.

[35] Restrictions on individual religious liberty based on this policy have been upheld under the European Convention on Human Rights: *Kalac v Turkey* (1999) 27 EHRR 552; *Sahin v Turkey* ECtHR, 29 June 2004, Appl No 44774/98; *Karaduman* v. *Turkey*, Appl No 16278/90, (1993) 74 DR 93. See also *Refah Partisi* (*The Welfare Party*) *v Turkey* (2003) 37 EHRR 1.

[36] Adams and Emmerich, *A Nation Dedicated*, 28–31; Witte, 'Essential Rights', 381–3.

[37] 'Mr Cottons Letter Lately Printed, Examined and Answered' (London, 1644); reproduced in Adams and Emmerich, *A Nation Dedicated*, 97.

[38] 'Memorial and Remonstrance against Religious Assessments' (*c*20 June 1785): reproduced in Adams and Emmerich, *A Nation Dedicated*, 104, 107.

[39] 'Separation of Church and State', 685.

[40] Portions of this section are taken from R Ahdar, 'Is Secularism Neutral?' (2013) *Ratio Juris.*

they have rather distinct concepts in mind'.[41] The primary and natural meaning of 'secularism', at least for law and religion purposes, denotes a *political philosophy* (or 'cluster' of philosophies[42]): one that denies the existence or relevance of a transcendental or divine dimension to public affairs. Clearly the meaning of secularism differs according to the historical and cultural context. French *laïcité* is different from Turkish, American, or Indian varieties.[43] As Nader Hashemi cautions, 'one way of advancing conceptual clarity with respect to secularism, especially its political variant, is to be sensitive to the different histories of secularism, of which there are many'.[44]

Distilling the voluminous writings on the topic, one can delineate two broad versions of secularism, a 'benevolent' form and a 'hostile' form.

Secularism of the 'benevolent' (or 'soft', 'moderate', 'negative', 'procedural', or 'passive') sort is a philosophy obliging the state to refrain from adopting and imposing *any* established beliefs—whether they be conventional religious or non-religious (atheistic) beliefs—upon its citizens. Benevolent secularism contemplates a non-confessional state; it 'suggests the possibility of a nonestablished secular order, one equally respectful of religionists and non-religionists alike'.[45] It accepts that the religious impulse is not confined solely to individuals and thus recognizes religious associations and communities. It accords religious impulses, individual and communal, due standing and equal participation in the public square. It permits, as the Canadian Supreme Court clarified, religious voices to be heard in the public square[46]—albeit they must not be permitted to drown out all others. Religion ought not to be scorned as inherently dangerous. This sympathetic view was expounded in 2007 by (then) French President Nicolas Sarkozy who adopted the term *laïcité positive* for 'an open secularism, an invitation to dialogue, tolerance, and respect'.[47] The Archbishop of Canterbury, Dr Rowan Williams prefers to label this kind of secularism as 'procedural':

> Procedural secularism is the acceptance by state authority of a prior and irreducible other or others; it remains secular, because as soon as it systematically privileged one group it would

[41] N Hashemi, 'The Multiple Histories of Secularism: Muslim Societies in Comparison' (2010) 36 *Philosophy & Social Criticism* 325, 325. The many different meanings are traversed in V Bader, 'Constitutionalizing Secularism, Alternative Secularisms or Liberal Democratic Constitutionalism? A Critical Reading of Some Turkish, ECtHR and Indian Supreme Court Cases on "Secularism"' (2010) 6 *Utrecht L Rev* 8.

[42] J Finnis, 'On the Practical Meaning of Secularism' (1998) 73 *Notre Dame L Rev* 491, 492.

[43] See A Kuru, *Secularism and State Policy toward Religion: The United States, France and Turkey* (Cambridge, 2009).

[44] 'Multiple histories of secularism', 335.

[45] W McClay, 'Two Concepts of Secularism' (2000) 24 *Wilson Quarterly* 54, 63.

[46] *Chamberlain v Surrey School District No 36* [2002] 4 SCR 710, 2002 SCC 86, [19], [59], [137].

[47] N Sarkozy, 'Allocution de M. le Président de la République dans la salle de la signature du Palais de Latran', 20 December 2007, a speech at St John Lateran Palace, Rome: available at : <http://www.lemonde.fr/politique/article/2007/12/21/discours-du-president-de-la-republique-dans-la-salle-de-la-signature-du-palais-du-latran_992170_823448.html>.

ally its legitimacy with the sacred and so destroy its otherness; but it can move into and out of alliance with the perspectives of faith, depending on the varying and unpredictable outcomes of honest social argument, and can collaborate without anxiety with communities of faith in the provision, for example, of education or social regeneration.[48]

Some are adamant that this benevolent conception of secularism is not a comprehensive philosophy at all, but rather 'a constitutional principle'.[49] A 'principle' in this context seems to suggest a mere technique or device to achieve valued societal goals, a sophisticated tuning fork to produce a better running pluralist democratic engine. 'Accommodation' and 'proportionality' are constitutional principles, but it strikes us as wrong to say secularism is one also. Secularism *does* define the relationship between the state and religions: at the very minimum they are to be kept structurally separate—and in hostile versions, the religious voice is totally excluded from the formation of public policy. Calling secularism 'constitutional' simply points to the fact that the philosophy applies to and shapes the constitutional framework and the principal participants in it. If it is principle, it is not of the Rawlsian 'thin' variety, but instead resembles a 'thick' principle whose practical workings are indistinguishable from the way a philosophy, properly called, operates.

The other version of secularism is quite different. 'Hostile' (or 'hard', 'assertive', or 'programmatic') secularism says the state should actively pursue a policy of established unbelief. This kind of secularism is 'an ideological defence of the secular cause'.[50] Williams explains that 'programmatic secularism', his preferred label, is driven by an anxiety that:

> assumes... that any religious or ideological system demanding a hearing in the public sphere is aiming to seize control of the political realm and to override and nullify opposing convictions. It finds views of the human good outside a minimal account of material security and relative social stability unsettling, and concludes that they need to be relegated to the purely private sphere. It assumes that the public expression of specific conviction is automatically offensive to people of other (or no) conviction. Thus public support or subsidy directed towards any particular group is a collusion with elements that subvert the harmony of society as a whole.[51]

This secularism resembles a fully-fledged world view or a Rawlsian 'comprehensive doctrine'. It 'tries to do too much... it insists that everyone accept a "thick" theory [of the good] that is infused with questionable content, it posits a comprehensive

[48] R Williams, 'Secularism, Faith and Freedom', Lecture delivered at the Pontifical Academy of Social Sciences, Rome, 23 November 2006, available at: <http://www.archbishopofcanterbury.org/articles.php/1175/rome-lecture-secularism-faith-and-freedom>.

[49] Some courts refer to secularism as a principle: see eg the constant allusion to 'the principle of secularism' operating in Turkey in *Refah Partisi (The Welfare Party) v Turkey* (2003) 37 EHRR 1, [66], [67], [83], [93], [105], [125].

[50] Temperman, *State-Religion Relationships*, 151.

[51] 'Secularism, Faith and Freedom'.

doctrine and insists that anyone who resists it is irrational or in the grip of self-deception, it seeks to impose rather than develop consensus'.[52] Secularism of this type imposes strong epistemological constraints. Religious thinking and reasons have no place in the public and political sphere, the latter being the exclusive domain of reason and rationality. European jurist Judge András Sajó is an advocate of this political philosophy: 'Secularism, an institutional arrangement, provides protection to a *reason-based* polity against a social (dis)order that is based on dictates of religious doctrine and *emotions*. When constitutional law insists on secularism, it insists on the possibility of a reason-based society.' Reason, he continues, has had it doubters of late, but there must be no backsliding, for 'the alternative to reason is emotional politics and an arbitrary system, where the emotional dictates of religion will rule human choices'.[53] According to this view, reason is necessarily a secular commodity and rational arguments are accessible to the many; religion, by contrast, is an emotion-laden, arbitrary creature and religious justifications are accessible only to the (believing) few.

This prompts the question of the neutrality of secularism. If one accepts our argument that secularism is best understood as a political philosophy—a set of beliefs about the nature and basis of the state and its right ordering with regard to religion—then secularism cannot be neutral. The short, almost trite, point is that no philosophy or coherent belief system is neutral in the sense that none is indifferent, impartial, or unbiased regarding its own nature or its key doctrines. Marxism is not 'neutral', in that sense, towards Capitalism, nor to the claim to the right of private property; Catholicism is not neutral to Protestantism nor to the Protestant doctrine of *sola Scriptura* (scripture alone as the authoritative standard). Monarchism that did not insist upon the continuance of hereditary kings (and queens) would not be Monarchism. No philosophy, unless it is content with its own destruction, is indifferent to or accepting of tenets that directly contradict or undermine its own central premises.

There is no doubt that a secular baseline is commonly admired by many liberals as a neutral, impartial one, but that depends entirely upon one's viewpoint. Many religious people question whether secularism is really neutral, at least in terms of its *effects*. They discern that benevolent secularism can, over time, unerringly and alarmingly slide into a hostile secularism. There is a 'slippage from secularism-as-separation to secularism-as-indifference, [one that] is hard to resist'.[54] Jonathan Chaplin suggests one reason for this slippage:

> Where society is pervasively secularized—where public life and institutions are principally governed as if transcendent religious authority is irrelevant—it will in practice almost

[52] B Scharffs, 'Four Views of the Citadel: The Consequential Distinction Between Secularity and Secularism' (2011) 6 *Religion & Human Rights* 109, 121.

[53] 'Preliminaries to a Concept of Constitutional Secularism', 624, 626 (emphases added).

[54] J Rivers, *The Law of Organized Religion: Between Establishment and Secularism* (Oxford, 2010), 332, 346.

invariably lean towards programmatic secularism, *if only by default*. Equally, in a society where public life and institutions are principally governed as if biblical authority were binding, it will in practice almost inevitably appear to be Christianised, also by default.[55]

Whether secularism takes a benevolent or hostile form will depend, under this view, on the nature and extent of secularization in the nation concerned, which itself is a matter of historical contingencies.

The non-neutrality of secularism is not surprising since, like any comprehensive philosophy, it is necessarily made up of particular beliefs, premises, and assumptions of a contested and partisan nature. These bedrock presuppositions can hardly be described as value-free or neutral. As we have seen, in its soft or passive variant, *benevolent* secularism advocates treating religious and secular world views even-handedly. This a particular philosophy with specific controversial (or at least contestable) beliefs and premises: all religions are equal or at least are worthy of equal respect and may participate in the public sphere; none, not even the oldest, most culturally embedded or numerically large ones, are to be privileged; the unity of society does not require unity of faith and religion; governments are ill-suited to identify religious truth and error; laws must have a non-religious justification; any form of state coercion of religious practice is wrong; the state is to be concerned with citizens' temporal needs not their souls; and so on. The fact that these premises are now so well accepted as to have the status of unimpeachable liberal axioms does not disguise their historically controversial nature.

Hostile secularism teaches that religion is a potentially dangerous, irrational thing and thus ought to be quarantined in the private sphere. It too, even more patently, is a particular philosophy with contestable beliefs: religious reasons and arguments must be excluded from shaping public policy; religious people do not uniquely deserve exemptions from the law of the land; religious symbols and practices are relics of a bygone era that continue to exert coercive power and must be vanquished; funding of faith-based entities is divisive. This form of hard secularism does not even try to be even-handed. Just the opposite: rationalistic, scientistic secularism gives unbelief a privileged position. The partisan and controversial nature of these premises is plain.

A state that subscribes to secularism (either benevolent or hostile), that adopts this stance, cannot be neutral, any more than a state that commits itself to Catholicism, non-denominational Evangelical Christianity, Islam, Hinduism, or Marxism can say it is neutral. A state that adopts secularism is not *standpoint* neutral. If this seems a facile or banal point—to say a state adopting any 'ism' is *ipso facto* not neutral—then the implications of this are not inconsequential.

First, to reiterate from the previous chapter,[56] it reaffirms the fact a secular liberal state and its myriad policies cannot be *impact* neutral, for its consequences will disadvantage some ways of life and world views (those with 'illiberal' teachings)

[55] *Talking God*, ch 1, 23.
[56] See Chapter 3, p. 59.

more than others. Now, it might be readily accepted that a state adopting *hostile* secularism is not neutral. But is it going too far to say that a secular state that subscribes to *benevolent* secularism is not neutral? After all, soft, procedural secularism was designed to be fair to all belief systems, religious and secular. Therein lies benevolent neutrality's non-neutral impact. For, on some accounts, it has treated organized Christianity *too* well—to the detriment of freethinkers, atheists, rationalists, strict separationists (some of whom are religious), and others. For atheists, a secular state ought to exclude religious reasons and arguments from shaping public policy. Neither form of secularism is perfectly fair, nor can the consequences of the philosophy ever be evenly spread among all modes of life.

Second, the secular state may strive to be neutral or even-handed as between major faiths, religions, and world views, but it is not neutral in terms of the way it treats religious truth claims. Judge Sajó has responded vigorously to those religious critics who charge that liberal secularism is a militaristic, biased position:

> Secularism as a constitutional concept does not require agnostic background assumptions. The term 'secularism' is used herein to reflect no specific position regarding the truth of religion nor any preliminary position regarding the place of religion in society. It is not a form of atheism or secular humanism. It merely assumes a social, political, and legal arrangement that does not follow considerations based on the transcendental or the sacred.[57]

Yet, secularism most certainly *does* have a preliminary position on 'the place of religion in society': no religion has the right to be in command. In its soft, open form secularism allows religion public participation and input, whereas in its hard, closed form it excludes this; but in both variants religion must 'know its place'. For certain religious believers, a polity that does not follow considerations based on the divine or sacred is not neutral. It *has* a specific position on the claims of religion, for it has denied the existence of and relevance of the Truth (capital 't') that would speak to the governing of society, as much as matters of personal and communal piety. It is, by definition, god-less. Secularism says, with its fingers crossed behind its back: 'We do not (or cannot) know whether religion is true or not, but, in any event, it is irrelevant to the task at hand. We must govern without God—*etsi Deus non daretur*, as if God does not exist.'[58] This is, from a 'strong' religious perspective, tantamount to *practical* atheism. Secularism in the abstract is not to be conflated with atheism, but, in practice, and from a religious perspective, it tends to operate in a similar manner.

Third, it is surely doubtful that a state can, as Judge Sajó asserts, be agnostic and uncommitted in its 'background assumptions'. It is hard to conceive of a state that can survive indefinitely on a purely 'thin' minimalist consensus of the kind that agrees that theft is wrong, clean water is crucial, green means go, and 3 + 3 = 6.[59]

[57] 'Preliminaries to a Concept of Constitutional Secularism', 607.

[58] Cardinal Joseph Ratzinger, 'On Europe's Crisis of Culture.' Address given at the Convent of St Scholastica, Subiaco, 1 April 2005.

[59] S Fish, 'Stanley Fish replies to Richard John Neuhaus', *First Things*, February 1996, 35.

A state without any coherent and consistent vision of humanity, knowledge, good and evil—that is agnostic as to these background assumptions—would surely be nihilistic, anarchistic, and inherently unstable. There is always an operative world view, always implicit, tacit yet fundamental ontological, epistemological, moral, and ethical premises that those in the corridors of power act upon, whether or not they are consciously aware of them. The prevailing world view of the powers-that-be may be hard to label, and it might be a hybrid of various philosophical and religious strands. But it will exist. No state is 'neutral' in this sense.

A state religion: establishment[60]

Falling short of complete fusion of religion and state are various forms of religious 'establishment'. The state singles out a religion (or several denominations or sectors of the same religion) for special recognition and support. With endorsement comes a measure of regulation and direction over religious affairs, whether leadership, membership, doctrine, and so on. This collaboration between religion and state is typically viewed by the parties themselves as mutually advantageous. A symbiotic relationship exists whereby '[t]he state provides the church with recognition, accommodation, and often financial support; the church provides the state with an aura of legitimacy and tradition, recognition, and a sense of national unity and purpose'.[61]

'Establishment' is in fact an ambiguous term, a concept that is 'vague, imprecise and ever-changing'.[62] To take Michael McConnell's pithy definition, '[a]n establishment is the promotion and inculcation of a common set of beliefs through governmental authority'.[63] There are several overlapping meanings. In a judgment discussing section 116 of the Australian Constitution, Gibbs J identified four distinct senses in which a religion could be 'established' by law:

> The widest of these meanings is simply to protect by law... Secondly, and this is the most usual modern sense, the word means to confer on a religion or a religious body the position of a state religion or a state church... Thirdly, when used in relation to the establishment principle... the word means to support a church in the observance of its ordinances and doctrines... the establishment principle can be held by churches that are unconnected with the state, and are supported by voluntary contributions alone... A fourth possible meaning of the word 'establish' is simply to found or set up a new church or religion...[64]

[60] Portions of this section are taken from Ahdar and Leigh, 'Is Establishment Consistent with Religious Freedom?' (2004) 49 *McGill LJ* 635.

[61] S Monsma and J C Soper, *The Challenge of Pluralism: Church and State in Five Democracies* (Lanham, Md, 1997), 11.

[62] M Ogilvie, 'What is a Church by Law Established?' (1990) 28 *Osgoode Hall LJ* 179, 196.

[63] 'Establishment and Disestablishment at the Founding, Part I: Establishment of Religion' (2003) 44 *Wm & Mary L Rev* 2105, 2131.

[64] *Attorney-General for the State of Victoria; Ex rel Black v The Commonwealth* (1981) 146 CLR 559, 595–7.

In England the legal incidents of establishment are often thought of primarily with reference to three matters.[65] First, is the position of the sovereign as head of state and Supreme Governor of the Church of England.[66] Second, there is state involvement in church procedures, whether the requirement of parliamentary approval for church legislation[67] or the Crown's role in senior ecclesiastical appointments.[68] Third, there is church involvement in state processes, such as the coronation of a new monarch[69] and the representation of senior bishops in the House of Lords.[70] To these constitutional dimensions should be added the technical question of the status of ecclesiastical law as part of the common law, and the position of church courts.

Judges have been careful, however, to distinguish the Church of England from the state.[71] In *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*[72] the House of Lords held that a Parochial Church Council of the

[65] For extensive discussion of options for reform see R Morris, *Church and State in Twenty-First Century Britain: The Future of Church Establishment* (Basingstoke, 2009). See also V Bogdanor, *The Monarchy and the Constitution* (Oxford, 1995), ch 9; F Cranmer, 'Church–State Relations in the United Kingdom: A Westminster View' (2001) 6 *Ecc LJ* 111; R Evans, 'Church and State' (1976) 7 *Cambrian L R* 11.

[66] I Bradley, *God Save the Queen: The Spiritual Dimension of Monarchy* (London, 2002).

[67] Ecclesiastical Measures are made under the Church of England Assembly (Powers) Act 1919, as amended by the Synodical Government Measure 1969. To become law a Measure must first be passed by the General Synod of the Church of England, be approved by parliamentary resolution (where it is scrutinized by a special ecclesiastical committee), and then receive the Royal Assent: see N Doe, *The Legal Framework of the Church of England* (Oxford, 1996), ch 3; Morris, *Church and State in Twenty-First Century Britain*, 40–3.

[68] Bishops are appointed by the Queen, as Supreme Governor. See further Chapter 11, 400.

[69] Bradley, *God Save the Queen*, chs 8 and 9. The Coronation Oath includes a promise to defend the Church of England.

[70] Twenty-six bishops are entitled to sit: the Archbishops of Canterbury and York, the Bishops of London, Durham and Winchester, and twenty-one other diocesan bishops according to seniority, amounting to approximately 4 per cent of the membership of the interim House of Lords. Due to the failure to reach political consensus on further reform of the House of Lords, following the removal of most hereditary peers, the then government proposed that the bishops remain entitled to sit for the foreseeable future: Department of Constitutional Affairs, *Next Steps for the House of Lords* (September 2003). Subsequent attempts at further reform of House of Lords have failed to achieve political consensus. Most recently, the Coalition Government proposed legislation which would have retained the named Lords Spiritual but reduced the other sitting bishops (chosen by the Church of England) over three electoral periods from sixteen to seven: House of Lords Reform Bill 2012, Part 4. However, the Bill was withdrawn in August 2012 due to lack of support for its proposal for a four-fifths elected upper chamber. For discussion of earlier proposals see: C Smith, 'The Place of Representatives of Religion in the Reformed Second Chamber' (2003) *Public Law* 674. See also A Harlow, F Cranmer, and N Doe, 'Bishops in the House of Lords: A Critical Analysis' (2008) *Public Law* 490.

[71] See Phillimore J in *Marshall v Graham* [1907] 2 KB 112, 126: 'A Church which is established is not thereby made a department of the State. The process of establishment means that the State has accepted the Church as the religious body in its opinion truly teaching the Christian faith, and given to it a certain legal position, and to its decrees, if rendered under certain legal conditions, certain civil sanctions.'

[72] [2003] UKHL 37; [2004] 1 AC 546. For critical discussion see: C Smith, 'A Very English Affair: Establishment and Human Rights in an Organic Constitution' in Cane, Evans, and Robinson (eds), *Law and Religion*, ch 8.

Church of England was not a 'public authority' under the Human Rights Act 1998. Lord Hope of Craighead stated that such a parish council:

> plainly has nothing whatever to do with the process of either central or local government. It is not accountable to the general public for what it does. It receives no public funding, apart from occasional grants from English Heritage for the preservation of its historic buildings. In that respect it is in a position which is no different from that of any private individual.[73]
>
> The state has not surrendered or delegated any of its functions or powers to the Church. None of the functions that the Church of England performs would have to be performed in its place by the state if the Church were to abdicate its responsibility... The relationship which the state has with the Church of England is one of recognition, not of the devolution to it of any of the powers or functions of government.[74]

Lord Rodger of Earlsferry stated:

> The mission of the Church is a *religious* mission, distinct from the secular mission of government, whether central or local... This is true even though the Church of England has certain important links with the state. Those links, which do not include any funding of the Church by the government, give the Church a unique position but they do not mean that it is a department of state... In so far as the ties are intended to assist the Church, it is to accomplish the Church's own mission, not the aims and objectives of the Government of the United Kingdom.[75]

Nevertheless, citizens have a number of legal entitlements *against* the Church of England by virtue of its role as a national church which they do not have against other religious bodies. This is the only religious body legally bound to provide ministry to the whole population rather than to its own 'members', as evidenced by the duties in canon law to baptize, marry, and bury parishioners (that is, anyone living within the parish boundaries).[76]

The chaplaincy responsibility of the Anglican Church is also reflected in a small number of technical provisions giving it preferential treatment in order to pursue its national ministry in education and prisons.[77] These duties are cited by some modern defenders of establishment in response to the claim that the Anglican Church's status should be diminished because of the decline in attendance at services and the increasing pluralism and secularism of British society. They argue that

[73] [2003] UKHL 37, [59].
[74] ibid [61].
[75] ibid [156].
[76] See A Pearce, 'Religious Denomination or Public Religion? The Legal Status of the Church of England' in R O'Dair and A Lewis (eds), *Law and Religion* (Oxford, 2001), 457, 462–3; M Hill, *Ecclesiastical Law*, 3rd edn (Oxford, 2007), ch 5; Doe, *The Legal Framework of the Church of England*, 226–7, 317–18, 358 ff, 387. In *Wallbank*, Lord Nicholls of Birkenhead characterized the rights of parishioners to attend services and in respect of marriage and burial as 'public' in nature under the Human Rights Act 1998: see [16]. See also Lord Scott of Foscote, [130]; Lord Rodger, [170].
[77] See Rivers, *The Law of Organized Religions*, ch 7.

the Church of England has a distinctive status because it is a *national* church and that this depends on its role, rather than strength of numbers. The geographical reach of the parish system, together with the chaplaincy responsibilities, and the heavy involvement in church schools are all evidence of this national role. Some distinguish between 'earthed' or 'low' establishment, by which they mean the daily on-the-ground presence of the Church of England in community life, and 'high' establishment—referring to the constitutional apparatus.[78] Defenders contend that 'earthed' establishment justifies the elements of 'high' establishment.[79]

Establishment is not uniquely English and need not take this precise form. Among other European states, Denmark,[80] Finland,[81] Malta,[82] Norway,[83] and Greece[84] all have established churches. By contrast, in several European countries commonly thought of traditionally as Catholic the trend has been to separate church and state: constitutional references to a separation between church and state can be found in Spain,[85] Portugal,[86] and Ireland.[87] Rather than looking for a uniform pattern for established churches, it is probably safer to look instead for characteristics that may be present to a greater or lesser degree. This approach is geographically inclusive[88] and has received a measure of judicial backing.[89]

[78] See W Carr, 'A Developing Establishment' (1999) 102 *Theology* 2; D McClean, 'The Changing Legal Framework of Establishment' (2004) 7 *Ecc LJ* 292.

[79] In contrast, a report from a left-wing think-tank suggests that partial disestablishment (severing the connection between the monarch and the Church of England) need not affect the church's national role: Fabian Society, *The Future of Monarchy: Report of the Fabian Commission* (London, 2003), ch 5. See further I Leigh, 'By Law Established? The Crown, Constitutional Reform and the Church of England' (2004) *Public Law* 266.

[80] Under the 1953 Constitution, 'The Evangelical Lutheran Church shall be the Established Church of Denmark, and, as such, it shall be supported by the State' (s 4) and 'the King shall be a member of the Evangelical Lutheran Church' (s 6).

[81] Recognized in s 76 of the Constitution.

[82] Article 2, Constitution of Malta 1964.

[83] Under s 2 of the 1814 Constitution of Norway, the Evangelical-Lutheran religion is the 'official religion' and, under s 4, the King is the head of the church. Following disestablishment in Sweden, a Church–State Commission is currently reviewing the position in Norway.

[84] Section 3.1 of the Greek Constitution.

[85] 1978 Constitution, s 16(3).

[86] 1976 Constitution, s 41.4.

[87] 1937 Constitution, Art 44(2.2). This follows an amendment in 1972 which removed reference to the 'special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens'. Other provisions (also repealed) 'recognized' several other denominations: D Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edn (Oxford, 2002), 909. On the former position, see: *Quinn's Supermarket v Attorney-General* [1972] IR 1, 23–4.

[88] See the valuable edited collections: G Robbers (ed), *State and Church in the European Union* (Baden-Baden, 1996) and *Church Autonomy: A Comparative Survey* (Frankfurt, 2001).

[89] Referring, for the purposes of comparison with s 116 of the Australian Constitution, to the position of the Church of England, Stephen J observed: 'It may be accepted that there is no single characteristic of that Church which of itself constitutes the touchstone of its establishment. Over the centuries the rights enjoyed by the Church of England, as the established church, have greatly changed, as has that subjection to temporal authority which is the concomitant of establishment': *Ex rel Black*, 146 CLR 559, 606.

The forms of establishment differ: from formal, *de jure*, to informal, *de facto*, establishments, symbolic in contrast to substantive establishments, and establishments of a generic religion, a collection of faiths (or denominations), or just one faith.

Formal establishments of a symbolic kind are illustrated by nations whose constitutions invoke dependence upon a deity. For instance, the Canadian Constitution's preamble commences: 'Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law...'[90] The Australian Constitution recites that the people of its various states were 'humbly relying on the blessing of Almighty God' in resolving to form a federal Commonwealth.[91] Ireland's Constitution commences: 'In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Eire, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ...' These symbolic acknowledgements may end there, with no further translation of religious doctrine into public policy and institutions.

Even a symbolic reference may be divisive, however, as the abortive inter-governmental negotiations over the Constitution for the European Union demonstrate.[92] Proposals to amend the draft Preamble to include reference to Europe's Christian heritage or Judaeo-Christian inheritance were supported by representatives of Spain, Ireland, Malta, Poland, Portugal, Slovakia, and the Czech Republic. They were opposed, however, by other states, especially France, which saw even a historical reference of this kind as compromising the secular nature of the union.

Formal, *de jure* establishments may have a substantive expression where a specific religion is identified and promoted. Contemporary examples include the Church of England, the Church of Scotland, and the Lutheran Church in Scandinavian countries (Denmark, Norway, Finland, and Iceland). More than one religion may be favoured above others in this way. In Germany, for example, a diluted form of quasi-establishment persists in that the three main historical religious communities—Evangelical, Catholic, and Jewish—are public corporations and qualify for support pursuant to the church tax.[93] Furthermore, clergy and church officials have the right to take part in rendering public services. Compared to Islam or other religions, these religions could be said to be established in a formal *de jure* sense.[94]

[90] The Ontario Court of Appeal has held that the reference to the 'supremacy of God' does not limit the meaning to be given to freedom of religion under s 2 of the Charter: *Zylberberg v Sudbury Board of Education* (*Director*) (1988) OR (2d) 641, 657.

[91] On the question of an updated Preamble for the Australian Constitution see G Winterton, 'A New Constitutional Preamble' (1997) 8 *Public L Rev* 186.

[92] 'EU Seeking a Divine Definition', *International Herald Tribune*, 5 February 2003. See further: J Rivers, 'In Pursuit of Pluralism: The Ecclesiastical Policy of the European Union' (2004) 7 *Ecc LJ* 267; S Cvijc and L Zucca, 'Does the European Constitution need Christian Values?' (2004) 24 *OJLS* 739.

[93] See Monsma and Soper, *Challenge of Pluralism*, ch 6.

[94] See P Edge, 'Re-orienting the Establishment Debate: From Illusory Norm to Equality of Respect' (1998) 27 *Anglo-American L Rev* 265, 269, who argues that if the essence of establishment

Finally, there may exist informal, *de facto* establishments of religion. One particular faith may be favoured by the state in practice due to its numerical or cultural dominance in that country.[95] Alternatively, the state may promote a generic form of religion by passing laws and implementing public policies that reflect the broad tenets and ideals of a religion—for instance, laws that broadly concur with Judaeo-Christian principles.[96] Examples of this approach might include legislation recognizing religious rest days or festivals,[97] blasphemy laws that refer to one religion only,[98] or the preference for certain religions in legislative provisions governing collective worship in schools.[99]

It is the second of these types—the legal promotion of a particular religion—that is most commonly referred to as 'establishment' but the other two should be borne in mind and we will return to them. The extent of the connection between a religious body and the state can be measured in two distinct ways: first, by legal privileges granted to the body which other religions do not enjoy, and, second, by powers that the state has over the body in question (for example, to appoint and dismiss clergy or veto certain decisions). Privileges raise questions of religious liberty for other, less-favoured, religious bodies. State controls, on the other hand, raise questions of liberty for the established religion itself.

Religious privilege and state control are both matters of degree. Under some constitutional arrangements the established church enjoys considerable advantages, both symbolic and practical, over other religions. For instance, where it is legally declared to be the state religion,[100] the state collects taxes on its behalf,[101] membership is a precondition for access to public education or participation in public life,[102] or public recruitment by non-established religions may be

is special legal treatment then there may be more than one established religion or church. His own definition (ibid 271) is: 'A religious organization is established where there are laws which apply to that organization . . . which do not apply to the majority of other religious organizations.'

[95] See Monsma and Soper, *Challenge of Pluralism*, 11.

[96] See R Ahdar, 'A Christian State?' (1998–9) 13 *Journal of Law & Religion* 453.

[97] See further Chapter 6, p. 63.

[98] See further Chapter 12, p. 437.

[99] See further Chapter 8, p. 255.

[100] For example, Art 3.1 of the Greek Constitution; Art 2 of the 1814 Constitution of Norway.

[101] As in Germany and Scandinavia.

[102] As in Britain prior to the Roman Catholic Relief Act 1829. Until 1974, the Lord Chancellor could not be a Roman Catholic since he was 'keeper of the Queen's conscience' and had certain ceremonial roles, for example, in the appointment of bishops. The Lord Chancellor (Tenure of Office and Discharge of Ecclesiastical Functions) Act 1974 enables the office to be held by a Roman Catholic, in which case some of these functions are transferred to another minister. The remaining elements of official anti-Catholicism affect the sovereign personally. The sovereign is required to join in communion with the Church of England, and to make a declaration on accession to the throne that he or she is a faithful Protestant and will uphold the enactments securing the Protestant succession to the throne: Coronation Oath Act 1688, s 3; Bill of Rights 1688, s 1; Act of Settlement 1700, s 2; Accession Declaration Act 1910. The Act of Settlement 1700, s 2, also prevents the sovereign or the heir to the throne from marrying a Roman Catholic (it does not, however, forbid marriage to someone of any other non-Anglican religion, or none). Government proposals to repeal the marriage prohibitions are contained in the Succession to the Crown Bill 2012.

prohibited or controlled. A few examples of privileges for Christian churches along these lines can still be found in some European states, but the clearest contemporary examples can be found in Islamic theocracies.

In other cases establishment amounts to a weak preference—for example, minor relaxation of the formalities that apply to other religious bodies in conducting marriages, or in the entitlements of prison chaplains,[103] or an automatic right to representation in public bodies (whether it is the House of Lords or a local education committee)[104] which other religious groups do not have. Even these examples, from the United Kingdom, are ambiguous since the purpose of these advantages is to enable the church to carry out a national ministry and pastoral duties that are supposedly wider than those of other religious organizations.

State control comes in varying degrees also. In its strongest form, government and the religious organization may be inseparable: for example, the Ministry for Suppression of Vice and Promotion of Virtue under the Taleban in Afghanistan. A government minister may be the ultimate authority for important decisions about church property, appointments, and finance. Significantly weaker are arrangements where legal authority is vested in the state but a degree of practical autonomy is granted to the church, as with arrangements in the United Kingdom for church legislation and the appointment of bishops.

Legal recognition does not always result in state control over church affairs. In Belgium[105] and Luxembourg[106] legal recognition is given to several churches (and, consequently, not to other religions), but without state interference. This approach stresses the value of religion to the state, without prescribing a single, official religion, or diminishing church autonomy (for example, by control of ecclesiastical appointments).

It can be argued that the Church of Scotland is established, in the sense of being recognized and protected in statute,[107] but it is, nevertheless, jealous of its independence. The sovereign swears an oath to protect the Church of Scotland but (unlike the Church of England) she does not make ecclesiastical appointments.[108]

[103] See Marriage Act 1949; the Prison Act 1952, s 7, requires the appointment of an Anglican chaplain to every prison. The rights (and duties) of these chaplains are broader than those of other 'Prison Ministers': Rivers, *Law of Organized Religions*, 215–20.

[104] Under the Education Act 1996, revision of religious education syllabuses is in the hands of local Standing Advisory Committees on Religious Education—one of which is reserved for the Church of England, while other Christian denominations and other religions are grouped together. See further Chapter 9, p. 257.

[105] Note the following provisions of the Constitution of Belgium 1970: s 20 (no forced religion); s 21 (freedom of religious groups to appoint ministers); s 181 (state remuneration of religious and moral leaders).

[106] The Luxembourg Constitution 1868, s 22, imposes limits to state's intervention in religious appointments.

[107] Church of Scotland Act 1921. The Church of Wales was disestablished by the Welsh Church Act 1914 (which took effect in 1920), and the Church of Ireland was disestablished in 1869.

[108] See F Lyall, *Of Presbyters and Kings* (Aberdeen, 1980), chs 2–5; T Taylor, 'Church and State in Scotland' (1957) 2 *Juridical Review* 122; R King Murray, 'The Constitutional Position of the Church

Since the Treaty of Union, the Church of Scotland has enjoyed constitutional protection of its status against adverse legislation.[109] The Appendix to Church of Scotland Act 1921 contains Declaratory Articles affirming the church's long-standing claim to self-government and reflecting its 'two kingdom' theology.[110] The Scottish courts have used the Appendix as a reason for non-intervention in the church's affairs[111] but the House of Lords notably refused to follow this course in relation to a claim of sex discrimination in the *Percy* case.[112]

We have seen that establishment of religion is a question of the degree of connection, state influence, and support. This, however, has a radical implication: it suggests that other religious bodies not normally regarded as 'established' may enjoy some, though in sum not as many, of the privileges of the established church.

We conclude this section with a brief account of why establishment is thought to be worthwhile. Anyone defending establishment today must remind its numerous critics that establishment does have certain virtues, unquantifiable as they may be. Nevertheless, two significant caveats should be entered.

First, the question is misleading: no country with an established religion begins with a clean slate on which to debate the merits of introducing such arrangements. In practice, the debate is about the merits of *dis*establishment (or incremental changes in this direction). Paul Avis paraphrases T S Eliot's argument in the *Idea of a Christian Society*:

> we are not being asked whether we want to invent an establishment, but what would be the consequences of dismantling the establishment we have . . . the very act of disestablishing a church separates it more definitely and irrevocably from the life of the nation than if it had never been established in the first place.[113]

Second, the notion of a cost–benefit analysis presupposes a utilitarian world view. Part of the classical argument for establishment was, however, that it was the working out of transcendent reality—a recognition of truth about the impossibility of separating the spiritual from the secular. It is hard to understand or reclaim this perspective in a society whose dominant world view assumes the privatization of religion. Classical exponents of establishment based it on a theology of the

of Scotland' (1958) *Public Law* 155; C Munro, 'Does Scotland Have an Established Church?' (1997) 4 *Ecc LJ* 639.

[109] Although the efficacy of these provisions is a matter of debate: see Lyall, *Of Presbyters and Kings*, ch 3; C Munro, *Studies in Constitutional Law*, 2nd edn (London, 1999), 137–42; M. Upton, 'Marriage Vows of the Elephant' (1989) 105 *LQR* 79.

[110] The conundrum of self-government free from parliamentary control yet legally recognized by Parliament itself was resolved by a formula under which the Appendix became operative only after approval by the church's General Assembly.

[111] See eg *Ballantyne v Presbytery of Wigtown*, 1936 SC 625; *Logan v Presbytery of Dumbarton*, 1995 SLT 1228; *Percy v Church of Scotland Board of National Museum*, 2001 SLT 497.

[112] *Percy v Board of National Ministry of the Church of Scotland* [2006] 2 AC 28; see further Chapter 10, p. 342 below.

[113] P Avis, *Church, State and Establishment* (London, 2001), 35.

state. They saw establishment as the natural and proper relationship between two divinely ordained institutions—the church *and* the state.[114]

With those qualifications in mind, what claims do exponents of establishment make? Historical champions of establishment such as Hooker, Burke, Coleridge, Gladstone, and Arnold based their defence of the concept on several overlapping ideas about the state and society.[115] These were the moral purpose and personhood of the state, the divine calling and purpose for different nations, the dual citizenship of individual Christians, and the unification and identification of these two spheres in the dual authority of the sovereign (in England, the Supreme Governor of the Church).[116] Modern arguments emphasize that establishment is a reminder that God, rather than the state, is the ultimate source of authority and, conversely, that 'secular' institutions such as the monarchy draw legitimacy and strength from religious underpinnings. A pluralist version of the same argument is that the spiritual sphere cannot simply be ignored: hence, it is appropriate for religious representatives to take part in the legislative process—for example, in the United Kingdom, by membership of the House of Lords—alongside many other groups.

A further aspect of the classical argument was the assumption that the state had a responsibility for the spiritual welfare of its citizens. The established church discharged this by providing religious services to the population (christenings, marriages, and funerals) rather than to members alone. In some countries (for example, in Scandinavia) this responsibility was reflected in the absence of any more formal criteria for membership of the established church—the whole population were deemed to be members. Responsibility for spiritual welfare may find expression also in an official chaplaincy role, for example, to prisons, the armed forces, hospitals, and to educational bodies. In many cases the church was the sole provider of education or healthcare long before the state assumed these roles. The territorial responsibility of the church is a further aspect of the provision of services: in rural England, for example, although many community facilities such as village shops, post offices, banks, and even public houses have closed on economic grounds, the parish system ensures that the Church of England continues to offer ministry throughout the entire country.

What does an established church gain from such arrangements? Certainly establishment constitutes official recognition of the particular church's theological position conferring upon it recognition as 'the truest expression of Christianity within that country'.[117] In that sense it is necessarily considered officially superior to other faiths, even if adherents of other religions suffer no formal legal

[114] See ibid 35–6 and ch 6.

[115] See ibid, ch 6; J Morris, 'The Future of Church and State' in D Dorman, J McDonald, and J Caddick (eds), *Anglicanism: The Answer to Modernity* (London, 2003), 161.

[116] Arguably, however, it has never been possible fully to identify nation and church in England because there have always been religious minorities—Jews and Roman Catholics especially: Avis, *Church, State and Establishment*, 19.

[117] Ogilvie, 'What is a Church by Law Established?', 235.

disadvantage as a consequence. There is a degree of endorsement, even where this does not amount to the grant of a monopoly by the state. In the mild form of establishment, however, the state's imprimatur amounts to little more than, say, the public recognition given to a national sports team.

The institutional trappings of establishment may be seen as symbolizing the now controversial idea of 'Christian nationhood'. Proponents of establishment are probably not so naive, however, as to ignore statistics on religious diversity and unbelief in contemporary Western societies. Rather, they probably mean one of two things: that the place of Christianity as the dominant religion numerically, culturally, and historically should be recognized, or, that the state is not a secular one in which religion is legally privatized. The second of these arguments attracts support for the continuation of establishment from other, non-Christian religions on the basis that establishment is a visible reminder of the spiritual sphere to life. In this second symbolic sense establishment is more *anti-secularist* than it is religious.

Of course, there are critics of establishment within the church itself who argue that even the mild form found, for example, in England, compromises the church's integrity and autonomy.[118] We have seen earlier, however, that state control is a matter of degree: in England, at least, establishment does not leave the church financially beholden to the state and the church has a large measure of independence over doctrinal matters under its system of synodical government.

Pluralist models

Separationism interprets state neutrality to mean that religion and state are structurally separate and, in transvaluing separation, that all religious influences should be expunged from public life. Religion is to be privatized.

An alternative approach strives for religious neutrality but does so by recognizing and embracing the *public* dimension to religion. It attempts an 'even-handed co-operation'[119] with all religions and world views held by individuals and groups in society. As Rivers explains: 'It recognises the ultimate significance of faith in people's lives and where the functions of the state and religious concerns overlap, the state seeks to work together with the organisations or religions in question.'[120]

Following Stephen Monsma and Christopher Soper's valuable survey[121] we can identify at least two strands of pluralist model: one 'principled', the other 'pragmatic'.

[118] See eg C Buchanan, *Cut the Connection: Disestablishment and the Church of England* (London, 1994).
[119] Rivers, 'Irretrievable Breakdown?', 3.
[120] ibid.
[121] *Challenge of Pluralism*, chs 3 and 4.

Principled pluralism

Principled (or structural) pluralism was most coherently developed by Dutch thinkers such as Abraham Kuyper and Herman Dooyeweerd who coined the terms 'sphere sovereignty' and 'sphere universality'.[122]

The created order sees a rich diversity of structures or institutions (schools, churches, families, unions, the state, and so on), with each having its own authority and duties. Due to this structural pluralism or plurality of spheres, no one institution ought to usurp the power or functions of the other. 'Sphere sovereignty' captures this notion of the non-domination of one sphere by another. These various structures, moreover, ought to work together ('sphere universality') to promote the welfare of society, the common good.

There is also another kind of pluralism at work—confessional pluralism. Society is made up of persons possessing a wide range of beliefs, world views, and ideologies. While structural pluralism is, according to these Reformed theorists, normative, confessional pluralism is not; it reflects the 'fallen' nature of humankind. Nonetheless, state attempts to enforce a single religious orthodoxy, even a Christian one, are to be resisted.[123] Instead:

> the New Testament teaches that governments should accept the presence of conflicting faith communities within their borders and not discriminate against people because of the religious convictions they espouse. Therefore, the state should insure [*sic*] that all its citizens, whether they are Christians, Jews, Muslims, Hindus, Buddhists, or secular humanists, receive equal rights. Public justice must prevail; Christians should not have special privileges in society. All faith communities should have the legal right to worship, to evangelize, and to establish associations . . . to promote their way of life.[124]

Government is to be even-handed not because it is expedient to do so, but because this is the principled response. Structural pluralists deny that the state is *ipso facto* 'neutral' simply because it privatizes religion. Indeed, by failing to treat non-governmental entities performing similar functions to state institutions the same as their governmental equivalents, the state discriminates: 'pluralism means that no individual or institutional structure is [to be] discriminatorily dealt with by the state based on his or her world view.'[125]

The principled pluralist model is illustrated by the Netherlands. Under 'pillarization', many areas of life—political parties, unions, schools, social services,

[122] The following account draws from ibid, ch 3; G S Smith (ed), *God and Politics: Four Views on the Reformation of Civil Government* (Phillipsburg, 1989), 75–7; G Spykman, 'The Principled Pluralist Position', in Monsma and Soper, *Challenge of Pluralism*, ch 5; D McIlroy, 'Subsidiarity and Sphere Sovereignty: Christian Reflections on the Size, Shape and Scope of Government' (2003) 45 *Journal of Church and State* 739; J Rivers, 'Liberal Constitutionalism and Christian Political Thought' in P Beaumont (ed), *Christian Perspectives on the Limits of Law* (Carlisle, 2002).

[123] Monsma and Soper, *Challenge of Pluralism*, 12; Esbeck, 'Typology of Church–State Relations', 17.

[124] Smith, *God and Politics*, 75–6.

[125] Esbeck, 'Typology of Church–State Relations', 15.

clubs—were separately organized reflecting the different religious and secular world views.[126] Monsma and Soper observe:

> The Dutch seek to attain government neutrality on matters of religion not by a strict church–state separation . . . but by a pluralism that welcomes and supports all religious and secular structures of belief on an evenhanded basis . . . The . . . system can be seen in two basic beliefs or assumptions that undergird it. One is a pluralistic view of society that sees a variety of religious and philosophical movements—even when full participants in the public life of the nation—as normal and no threat to the unity and prosperity of society . . . A second underlying belief or assumption is that nonreligious, 'neutral' organizations are not truly neutral—as is often assumed within the liberal Enlightenment view of society—but are yet another *richting*, or direction, equally legitimate but no more legitimate than a host of other religious and nonreligious philosophies or directions. Public policies that respect, accommodate, and support public roles for a plurality of religious and secular belief structures emerge out of these beliefs.[127]

The extent to which the state, under the principled pluralist conception, *can* maintain total neutrality is questionable however. 'Government, just like individuals, cannot help but exercise preference for one set of values over others.'[128] With the modern liberal state playing such an active role in many areas of life, decisions it makes on particular issues will have the inevitable effect of disadvantaging some religions and world views and advantaging others.[129] Take the law on marriage. If the state rules that marriage is a partnership of persons of the opposite or the same sex, of uncertain duration, dissolvable by mutual consent without the need to point to fault, is this definition fair to those religious persons holding to a 'traditional' understanding of this fundamental institution (that is, that marriage is a life-long union of (two) opposite-sex persons)? If the government decides to send troops overseas is this flouting the convictions of pacifists? Whatever choice it makes (and a non-choice is still a choice) its decision will advantage some world views at the expense of others. Only in a state of the most minimal kind will the avoidance of a partisan outcome be even remotely possible.

Pragmatic pluralism

The government may adopt a policy of neutrality toward religion based not so much on high principle, but out of a pragmatic recognition of the need for

[126] Monsma and Soper, *Challenge of Pluralism*, 61.

[127] ibid 80. The European Court of Human Rights has found, obiter, that a policy of introducing 'a plurality of legal systems' which would have had the effect of imposing Shari'a law on a large portion of the Turkish citizenry, would be incompatible with the Convention: see *Refah Partisi* (*The Welfare Party*) *v Turkey* (2003) 37 EHRR 1, [127]–[128].

[128] D Cinotti, 'The Incoherence of Neutrality: A Case for Eliminating Neutrality from Religion Clause Jurisprudence' (2003) 45 *Journal of Church and State* 499, 523.

[129] See Rivers, 'Irretrievable Breakdown?', 3. For the non-attainability of neutral outcomes or effects in a liberal state see Chapter 3, p. 59.

harmony amongst the religious communities present in society.[130] Faced with several significant faith communities, even-handed treatment is sensible and politically expedient. Once more religious life is not confined to the private sphere; the state recognizes and accommodates a variety of religious groups and is, for example, prepared to fund social programmes run by faith communities, and permit religious tribunals to sit on religious questions. Religious pluralism is a fact of life and, coupled with a socially tolerant 'live-and-let-live' attitude, the neutrality approach commends itself.

Here, of course, we confront the pressing and difficult challenge of how, and to what extent, does a liberal state respond to the sincere desire of devout Muslim communities to live their lives according to the dictates of their faith, especially according to the Shari'a. Following the highly publicized statement of the Archbishop of Canterbury in February 2008, that 'it seemed unavoidable' that certain aspects of Islamic law would be recognized and incorporated into British law, the topic moved with alacrity into public consciousness.[131] The Archbishop definitely did *not* support a parallel system of law but, beyond that, just how accommodation of Muslim beliefs and practices should occur (for example, through voluntary alternative dispute resolution, mediation), in which areas (family law, but not criminal law), and subject to which safeguards (to ensure the rights of the vulnerable, especially women, are secured) remain fertile matters that require much more careful analysis. There are the resources within liberalism and Western constitutionalism to once more accommodate the Other and overcome the religious intolerance and 'politics of fear'[132] that beset all too many discussions of the topic.

Neutrality models

As with so many core concepts traversed in this chapter, neutrality is an ambiguous term. 'We can agree on the principle of neutrality', suggests Douglas Laycock, 'without having agreed on anything at all.'[133] Neutrality is not a self-defining concept,[134] but, along with its close cousin, equality, requires further amplification and context: neutral in what sense (purpose, effect, opportunity); in which ways (funding, prohibition, exemption, symbolic reception); for whom (believers, employers, state officials), and for which purposes (to advance separation, religious liberty, civil order, and so on)? In terms of the state's response, does neutrality

[130] Monsma and Soper, *Challenge of Pluralism*, ch 4.

[131] For the Archbishop's speech and the extensive analysis upon it, see R Ahdar and N Aroney (eds), *Shari'a in the West* (Oxford, 2010). See also S Ferrari and R Cristofori (eds), *Law and Religion in the 21st Century: Relations Between States and Religious Communities* (Farnham, 2010), chs 26–29.

[132] M Nussbaum, *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age* (Cambridge, Mass, 2012).

[133] 'Formal, Substantive, and Disaggregated Neutrality toward Religion' (1990) 39 *DePaul L Rev* 993, 994. See also Adams and Emmerich, *A Nation Dedicated*, 65.

[134] Laycock, 'Formal, Substantive and Disaggregated Neutrality', 994–8; Greenawalt, *Religion and the Constitution, Volume 2*, 444.

mandate disengagement towards religion, or positive, even-handed promotion of it?[135] Some have become impatient with the concept entirely: 'neutrality is an indeterminate and vacant idea'[136] charges one American writer. Nevertheless, we believe it is still important to examine neutrality models. For one thing, the European Court of Human Rights affirms a member state's 'role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs', indeed its 'duty of neutrality and impartiality'.[137] From the American church–state jurisprudence, two types of neutrality emerge: formal versus substantive.

Formal neutrality

Formal neutrality or 'religion-blindness' holds that the state should engage with the religious believer without 'seeing' her faith.[138] Religion is to be treated no differently than anything else. The American scholar, Philip Kurland, posited the best-known formulation of this kind of neutrality:

> The [religion] clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses [in the First Amendment], read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden.[139]

Christopher Eisgruber and Lawrence Sager incorporate a formal neutrality component in their much discussed recent model of 'Equal Liberty'. Since they believe that religion is not unique or special, they go on to stipulate that 'we have no constitutional reason to treat religion as deserving of special benefits or as subject to special disabilities'.[140] They advance a theory of 'equal regard' that seeks to treat religion the same as secular analogues—no better, no worse. Such an approach promises much but, in our view, its practical application is formidably difficult. The problem here, as Abner Greene so ably notes, is that, on the one hand, secular equivalents are not always obvious.[141] If the government wishes to erect a cellphone tower that would desecrate an indigenous people's scared mountain, what is the appropriate analogy? On the other hand, the universe of

[135] W Sadurski, 'Neutrality of Law towards Religion' (1990) 12 *Sydney L Rev* 420, 453.
[136] Cinotti, 'Incoherence of Neutrality', 500. Others have come to similar conclusions: see eg Smith, *Foreordained Failure*; F Ravitch, 'A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause' (2004) 38 *Georgia L Rev* 489.
[137] *Refah Partisi (The Welfare Party) v Turkey* (2003) 37 EHRR 1, [91].
[138] M Failinger, 'Wondering after Babel: Power, Freedom and Ideology in US Supreme Court Interpretations of the Religion Clauses' in R Ahdar (ed), *Law and Religion* (Aldershot, 2000), ch 5, 84–5.
[139] 'Of Church and State and the Supreme Court' (1961) 29 *U Chicago L Rev* 1, 96.
[140] Eisgruber and Sager, *Religious Freedom*, 52. For a strong defence of formal equality in matters cultural and religious see B Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Mass, 2001),
[141] A Greene, 'Three Theories of Religious Equality…and of Exemptions' (2009) 87 *Texas L Rev* 963, 1003–6.

secular analogies is potentially boundless.[142] If, for example, the police refuse to allow officers to wear beards, is the appropriate comparison the ban on those who wish to wear alternative headgear or jewellery (thus, implying no accommodation is warranted)? Or is the appropriate comparator the exemption for those who, for medical reasons, cannot shave due to skin sensitivity (thus implying an exemption is deserved).[143] In simple terms, which things are really alike and serve as an appropriate benchmark?

There is a simple elegance to formal neutrality, yet its administrability is questionable. More importantly, it also has a blunt edge when it comes to preserving religious liberty. So long as the *purpose* of government policy is neither to advantage or disadvantage religion, the fact that the *consequences* of state action may be to substantially burden the religious practice of certain believers is irrelevant. 'Equality of form can be accompanied by inequality of effect.'[144] So a Prohibition statute banning all consumption of liquor is formally neutral—it is irrelevant that it would be unlawful for a church to celebrate the eucharist by means of partaking in wine.[145] A law mandating safety helmets for all motorcyclists is acceptable despite the fact that Sikhs cannot fit a helmet over the turban. Such a religion-blind approach imposes heavy costs upon believers in certain circumstances where their faith requires some conduct that a general law proscribes. For some, this is not a cause for concern.[146] We need only recall the US Supreme Court's majority decision in *Smith* in 1990 that caused an uproar for endorsing formal neutrality.[147] The Court departed from earlier case law in holding that 'the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)"'.[148] According to this stance, an exemption (or 'accommodation' as Americans term it) from a facially neutral law of general application must be granted, if at all, by the legislature and not the courts. Whether the religious practices burdened by the law of the land are protected is thus dependent upon the political process. While this may not pose a problem for large, influential religious communities, exemptions may be considerably more difficult to achieve for small or unpopular religious minorities, the very ones in most need of legal protection.

Eisgruber and Sager contend that legislatures are better placed than courts to determine questions of exemptions from general laws. Furthermore, they

[142] ibid.
[143] ibid.
[144] Shriffin, *The Religious Left*, 30.
[145] Laycock's example: 'Formal, Substantive and Disaggregated Neutrality', 1000–1.
[146] See eg Barry, *Culture and Equality*, 18, 258, who bases his view on 'moral universalism' or the position that certain standards are true and universally valid and admit no exceptions or trumping based on one's culture or religion.
[147] See eg M McConnell, 'Neutrality, Separation and Accommodation: Tensions in American First Amendment Doctrine' in Ahdar, *Law and Religion*, ch 4.
[148] *Employment Division v Smith*, 494 US 872, 879 (1990) per Scalia J.

maintain, the American experience points to Congress being 'remarkably alert to the interests of religious minorities'.[149] In the *Smith* case itself, following the denial of accommodation by the Supreme Court, the Federal Congress granted an exemption from the narcotics laws for Native American Indians to permit them to ingest the hallucinogenic peyote, a controlled substance. However, Eisgruber and Sager's anecdotal examples are not necessarily representative of the overall pattern. Counter-examples can be pointed to where no such accommodation by the legislature was forthcoming. Moreover, as Abner Greene (reflecting upon the *Smith* case) points out: 'We should not make too much of the legislature-to-the-rescue story... the (at least doctrinally plausible, at the time) litigation might have been a key factor affecting the ultimate legislative outcomes.'[150]

What about where the effects of a facially neutral law operate this time to benefit religion? Say an education voucher programme enabling parents to use their vouchers at private schools has the effect of boosting the viability and popularity of religious schools?[151] Formal neutrality in this guise, we suggest, poses few if any problems given our acceptance of mild forms of establishment or support for religion.

To say 'formal neutrality has something to offend everybody'[152] is perhaps an exaggeration, but it does capture the hostility to this version of neutrality amongst the vast majority of scholars.[153]

Substantive neutrality

Substantive neutrality is concerned with the consequences or effects of state action upon religion. It has two related prongs: first, the government should minimize the degree to which it interferes with religion (for good or ill), and, second, it should strive to leave religion, as far as possible, to individual choice. Laycock's version reads:

> My basic formulation of substantive neutrality is this: the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance... religion is to be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible. Government should not interfere with our beliefs about religion either by coercion or by persuasion. Religion may flourish or wither; it may change or stay the same. What happens to religion is up to the people acting severally and voluntarily; it is not up to the people acting collectively through government.[154]

[149] Eisgruber and Sager, *Religious Freedom*, 243.
[150] Greene, 'Three Theories', 1002.
[151] See *Zelman v Simmons-Harris*, 536 US 639 (2002). For criticism of this decision see Ravitch, 'A Funny Thing Happened on the Way to Neutrality'.
[152] Laycock, 'Formal, Substantive and Disaggregated Neutrality', 1001.
[153] ibid 1000. See also Adams and Emmerich, *A Nation Dedicated*, 71.
[154] 'Formal, Substantive and Disaggregated Neutrality', 1001–2. See also Laycock, 'The Underlying Unity of Separation and Neutrality' (1997) 46 *Emory LJ* 43, 70 and Laycock, 'Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty' (2004) 118 *Harv L Rev* 156, 160, 243–4.

Substantive neutrality seeks even-handedness between all systems of religious belief, including those anti-religious belief systems that reject or doubt the existence of the divine, such as atheism, secularism, and agnosticism. However, non-belief *simpliciter*, namely, secular systems of thought that do not include any beliefs at all about God, the divine, the supernatural, the afterlife, the transcendent, and so on, are not included. Woljciech Sadurski explains: 'But it would be absurd to claim that "non-religion" (i.e. activities and beliefs irrelevant from the point of view of religious beliefs, and from the point of view of the religion-agnosticism-atheism disputes) must be treated the same as religion.'[155]

The proper comparison can hardly be between someone who refuses available employment to observe the Sabbath and someone who declines work because it is his golfing day; likewise '[a]n improper comparison would be between celebrating the Eucharist and skiing'.[156] One ought to compare apples and apples, that is, 'human activities or organizations that are so similar or parallel in nature that they are functionally equivalent'.[157] As Sadurski scolds, 'you cannot, without running into absurdity, be neutral between *x* and everything that is non-*x*, including those things which are totally irrelevant from the point of view of *x*'.[158]

Substantive neutrality is also called by some, 'positive neutrality' for it underscores the point that to achieve neutrality it will not always be enough for the government to simply abstain from certain activities; 'it will sometimes have to take certain *positive* actions'.[159] In the examples given earlier, the state ought to grant exemptions for sacramental consumption of wine and for Sikh motorcyclists. Although this initially appears to be a case of the state favouring religion this is not so. Rather: 'Substantive or positive neutrality, properly understood and applied, merely levels the playing field; it assures that government is not making following the dictates of one's religion either easier or harder to follow.'[160] It may look like special treatment but it is merely a limited corrective to invasive and indiscriminate government policy that has unwittingly discouraged religious practice.

The virtue of the minimal interference approach, according to its proponents, is that it works to promote the goal of maximizing religious liberty: 'Minimizing government influence maximizes religious liberty by maximizing the autonomy of religious choice.'[161] Substantive neutrality pragmatically acknowledges that pure

[155] Sadurski, 'Neutrality of Law', 454.

[156] S Monsma, 'Substantive Neutrality as a Basis for Free Exercise-No Establishment Common Ground' (2000) 42 *Journal of Church and State* 13, 33.

[157] ibid.

[158] Sadurski, 'Neutrality of Law', 454.

[159] Monsma, 'Substantive Neutrality', 26–7. See also Monsma and Soper, *Challenge of Pluralism*, 6–7.

[160] Monsma, 'Substantive Neutrality', 31.

[161] Laycock, 'Underlying Unity', 69. See also M McConnell, 'Neutrality under the Religion Clauses' (1986) 81 *Nw UL Rev* 146, 149: 'Neutrality is usually the course most consistent with religious liberty because, ideally, government action should leave untouched the existing religious mix in the community. A liberal regime should leave decisions about religious practice to the independent judgment of the people' and T Berg, 'Religion Clause Anti-Theories' (1997) 72 *Notre Dame L Rev* 693,

and unfettered freedom of choice in matters of religion is probably unattainable, especially given modern liberal states' comprehensive social activities penetrating nearly all areas of life.[162] 'Absolute zero is no more attainable in encouragement or discouragement [of religion] than in temperature. We can only aspire to minimize encouragement and discouragement.'[163]

Talking of favouring or disfavouring, encouraging or discouraging, begs the question of the appropriate baseline. What is the baseline from which deviations are to be assessed, what is the playing field being levelled?[164] Laycock is right, we suggest, to conclude there is no simple test to be uniformly applied to every dispute. Moreover, the choice of baseline is itself non-neutral.[165] Consider some of the major alternatives customarily advanced.

If the baseline is a situation where government did not exist at all, then if religion is 'better off' because government exists, then it has been 'encouraged'; if it is worse off, then it has been discouraged. Under this approach then, churches which availed themselves of the public provision of fire services and police protection would be 'encouraged' and thus transgress the neutrality principle—an 'unsupportable' conclusion.[166] Fortunately, this 'no government' baseline is, of course, a fantasy.

If the baseline is government inactivity, then doing nothing is 'neutral', for religion is neither assisted or restricted. Any government aid would be a deviation from this baseline and thus be non-neutral.[167] When the state funded very little, a baseline of government inactivity would differ little from a baseline of analogous secular activities.[168] In an era when governments spend a sizeable proportion of GDP and fund all manner of social programmes and providers, a baseline of government inactivity looks far from neutral.[169] Religion received nothing before and receives nothing now, but meanwhile secular entities have received much. As

703–4: 'government should, as much as possible, minimize the effect it has on the voluntary, independent religious decisions of the people as individuals and in voluntary groups. The baseline against which effects on religion should be compared is a situation in which religious beliefs and practices succeed or fail solely on their merits . . . '

[162] For criticism of the Laycock approach for the uncertain guidance it provides, see Eisgruber and Laycock, *Religious Freedom*, 28–9; Greenawalt, *Religion and the Constitution*, 451–6. For defence of Laycock's stance see Greene, 'Three Theories', 994–1006.

[163] Laycock, 'Formal, Substantive and Disaggregated Neutrality', 1004.

[164] Monsma, 'Substantive Neutrality', 32.

[165] Esbeck, 'Constitutional Case for Governmental Cooperation', 5. See also Ravitch, 'A Funny Thing Happened on the Way to Neutrality', 493, 506.

[166] D Giannella, 'Religious Liberty, Nonestablisment, and Doctrinal Development: Part II. The Nonestablishment Principle' (1968) 81 *Harv L Rev* 513, 520; Laycock, 'Formal, Substantive and Disaggregated Neutrality', 1005.

[167] Laycock, 'Underlying Unity', 48.

[168] This baseline is one in which a government treats religious and parallel secular persons alike. So, for example, it would fund a religious provider of medical treatment on the same basis it funded a secular clinic.

[169] Laycock, 'Underlying Unity', 49. As McConnell, 'Neutrality under the Religion Clauses', 164, contends: 'In an environment pervasively controlled by the government it is pointless to seek a strictly neutral position. It does not exist.'

one American scholar pointed out, in a totally collectivized society in which the government controlled all property, religious liberty would require the state to build churches.[170]

If the baseline is all human activities then any exemptions for religious persons appear non-neutral—why should believers be immune from general laws when those holding to sincere political, philosophical, ethical, or other beliefs are not?[171] Why should the devout Muslim or Methodist be treated any differently from the sincere pacifist, vegetarian, or environmentalist, not to mention the dedicated skier, golfer, or botanist? As we argued above, however, to place all human beliefs and activities on the same level is absurd. Surely, and we concede this reflects our value judgement, religion *is* special—it is not the same as a well-thought-out philosophy nor *a fortiori* is it a hobby or recreational pursuit.[172]

The selection of the appropriate baseline would seem to us to depend upon the goal we have in mind, namely, maximizing religious liberty. If one begins from a baseline (or presumption) of protecting liberty, and religious liberty in particular—and, to repeat, this is a non-neutral position—then the burden is on the state to show why this religious practice merits curtailment: 'the government has to earn its stripes, law by law or case by case; the justificatory burden is always on the coercive governmental entity.'[173]

Substantive neutrality seeks to minimize government incentives to change religious behaviour in either direction. Ideally then, as Laycock submits, 'the underlying criterion for choosing among baselines depends on the incentives that government creates'.[174] This, in turn, means adopting different baselines in different contexts.[175]

In situations where state largesse is at issue, the appropriate baseline would seem to be all analogous, secular activities (including the non-religious). So religious hospitals, day-care centres, and schools ought to get the same funding as their secular counterparts.[176] A university student seeking to undertake theology studies should get the same state scholarship funding as one undertaking a degree in zoology or linguistics.[177] As Scalia J, dissenting in *Locke v Davey*, stated: 'When

[170] Giannella, 'Religious Liberty, Nonestablisment, and Doctrinal Development', 522–3; quoted in Laycock, 'Underlying Unity', 49.

[171] Monsma, 'Substantive Neutrality', 32.

[172] See Greene, 'Three Theories', 986–7; Nussbaum, *Liberty of Conscience,* 169; P Garry, 'Religious Freedom Deserves More than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion' (2005) 57 *Fla L Rev* 1.

[173] Greene, 'Three Theories', 991.

[174] Laycock, 'Underlying Unity', 71.

[175] See ibid, 70–3; Laycock, 'Theology Scholarships', 244; Monsma, 'Substantive Neutrality', 32–3.

[176] Laycock, 'Underlying Unity', 70; Monsma, 'Substantive Neutrality', 30, 32.

[177] The majority of the US Supreme Court, by seven to two, recently held otherwise. In *Locke v Davey*, 540 US 712 (2004) it upheld a denial by the State of Washington of a tertiary education scholarship to Joshua Davey, a student (otherwise qualified) who sought to major in pastoral studies at Northwest College, a private Christian college. For criticism of the case see Laycock, 'Theology Scholarships' and R T Miller, 'Religion Uniquely Disfavored', *First Things*, June/July 2004, 8.

the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.'[178]

In situations where general laws impinge upon individual freedom, the correct baseline would seem to be all religious persons, groups, and activities and their secular equivalents, but not all human activities.[179] Thus Anglicans and Rationalists, but not rock climbers, might be granted an exemption from a facially neutral law that seriously impinges upon their convictions. Sometimes substantive neutrality may require religion to be treated worse than broadly similar secular activities[180]—the state can directly fund particular sporting or musical projects but not specific churches; it can insist upon physical exercises in public schools but not prayers. Substantive neutrality is, as its proponents concede,[181] harder to apply than formal neutrality but the exercise is, we suggest, worth it.

Competitive market model

Closely related to the pluralist and substantive neutrality models is the free market or competitive market model. In such an environment religion should, as the substantive neutrality advocates desire, be a matter of private, individual choice.

The idea of a 'religious market'[182] finds its origins in no less a foundational economic treatise than Adam Smith's, *The Wealth of Nations*.[183] Smith made brief, albeit telling, comments on the virtues of competition and evils of monopoly in religion in his magnum opus. A plan of 'no ecclesiastical government... [i]f it had been established... would probably... have been productive of the most philosophical good temper and moderation with regard to every sort of religious principle'.[184] A deconcentrated religious marketplace was recommended: 'yet provided those [religious] sects were sufficiently numerous, and each of them consequently too small to disturb the publick tranquillity, the excessive zeal of each for its particular tenets could not well be productive of any very hurtful effects, but, on the contrary, of several good ones...'[185]

[178] 540 US 712, 726–7.
[179] Laycock, 'Underlying Unity', 70; Monsma, 'Substantive Neutrality', 32–3.
[180] Laycock, 'Underlying Unity', 71.
[181] See Laycock, 'Formal, Substantive', 1004.
[182] See R Ahdar 'The Idea of "Religious Markets"' (2006) *2 International Journal of Law in Context* 49.
[183] For the 'discovery' of Smith's economic analysis of religion, see G Anderson, 'Mr Smith and the Preacher: The Economics of Religion in the *Wealth of Nations*' (1998) 96 *Journal of Political Economy* 1066; L Iannaccone, 'The Consequences of Religious Market Structure: Adam Smith and the Economics of Religion' (1991) 3 *Rationality and Society* 156.
[184] A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), book V, ch 1, part III, article III, in R Campbell and A Skinner (eds), *An Inquiry into the Nature and Causes of the Wealth of Nations* (Oxford, 1976), vol 2, 793.
[185] ibid 793–4.

Madison was of a similar mind. The constitutional principle of dispersing power applied equally to religion. The encouragement of a 'multiplicity of sects' was desirable, 'for where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest'.[186] The concept was carried through to the Constitution; indeed, Michael McConnell and Richard Posner submit that 'the First Amendment can be understood as positing that the "market"—the realm of private choice—will reach the "best" religious results; or, more accurately, that the government has no authority to alter such results... Freedom of religion can be understood as a constitutionally prescribed free market for religious belief...'.[187] This is, however, as Chris Beneke points out, a rather heroic and anachronistic interpretation, for it attributes twentieth-century understandings of the free market to the framers of the Constitution.[188]

Religion has, in the last two decades, increasingly become the subject of economic analysis and 'rational choice' theory.[189] Some theorists, somewhat immodestly, describe it as a 'new paradigm' in the sociology of religion.[190] Laurence Iannaccone, Roger Finke, and Rodney Stark, leading researchers in this field, explain:

> In speaking of 'religious markets' we implicitly model religion as a commodity—an object of choice and production. Consumers choose what religion (if any) they will accept and how extensively they will participate in it... People can and often do change their religion or levels of religious participation. As with other commodities, this ability to choose constrains the producers of religion. Under competitive conditions, a particular religious firm will flourish only if it provides a commodity at least as attractive as its competitors'. And as in other markets, government regulation can profoundly affect the producers' incentives, the consumers' options, and the aggregate equilibrium.[191]

The vices of monopoly in these religious markets are said to mirror the adverse results of monopoly in business markets. Basic microeconomic theory predicts decreased consumption, higher prices, restricted choice, reduced production, organizational slack, and retarded innovation. Researchers utilizing cross-national comparisons and other approaches believe the results fit the theory:

> Among Protestants, at least, church attendance and religious belief both are higher in countries with numerous competing churches than in countries dominated by a single church. The pattern is statistically significant... Church attendance rates, frequency of prayer, belief

[186] Adams and Emmerich, *A Nation Dedicated*, 15, 47; Cookson, *Regulating Religion*, 86. See further C Eisgruber, 'Madison's Wager: Religious Liberty in the Constitutional Order' (1995) 89 *Nw U L Rev* 347.

[187] 'An Economic Approach to Issues of Religious Freedom' (1989) 56 *U Chicago L Rev* 1, 14, 60.

[188] 'The Free Market and the Founders' Approach to Church-State Relations' (2010) 52 *Journal of Church and State* 323.

[189] For a comprehensive exposition see R Stark and R Finke, *Acts of Faith: Explaining the Human Side of Religion* (Berkeley, 2000).

[190] Stark and Finke, *Acts of Faith*, 27.

[191] 'Deregulating Religion: The Economics of Church and State' (1977) 35 *Economic Inquiry* 350, 351.

in God, and virtually every other measure of piety decline as religious market concentration increases . . . the vitality of a religious market depends upon its competitiveness.[192]

The United States' very high levels of religiosity are, according to these theorists, consistent with its vigorously competitive religious market, whereas the low levels of religious participation in (say) Scandinavian countries are consistent with the presence of religious monopoly, that is, a state church.[193] Monopolies are said to be marked by widespread religious apathy and low rates of active participation.[194]

Demand for religion is typically asserted to be relatively stable and constant (across history, culture, and nations).[195] The demand for spiritual answers and comfort, the need to express one's awe and devotion to the divine, the belief in another realm beyond the temporal, these and related metaphysical needs seem perennial and innate to the human condition. If conventional religious options do not appeal, many people today increasingly fashion their own spirituality, a sort of 'do-it-yourself' eclectic combination of religious themes and values moulded to suit their personal needs.[196] A self-styled 'subjective religiousness'[197] remains high in countries cited as bastions of secularization, places where the demand for religion was thought to have withered. So, in Scandinavian nations such as Iceland and Denmark, as well as European nations such as the United Kingdom and Germany, high percentages of those surveyed still believe in God or consider themselves 'religious', despite only a small percentage attending church regularly.[198] Grace Davie memorably described this phenomenon as 'believing without belonging'.[199]

Given the constancy of religious demand, the religious market theorists argue that the ebb and flow of religious activity is better accounted for by 'supply side' factors such as the number and vigour of religious suppliers and, in turn, state regulation of such supply.[200]

If the vitality of religion and the level of spiritual and ecclesiastical consumption is primarily dependent upon 'supply side' factors, the state's role becomes pivotal. A state's endorsement of a single church will have a dampening effect upon religion as measured by citizens' participation in organized religions. To the extent the religious market is already 'monopolized', state action to 'deregulate' it—by abolishing any state religion and lowering the barriers to entry to

[192] 'Deregulating Religion: The Economics of Church and State' (1977) 35 *Economic Inquiry* 350, 351–2.
[193] See ibid; R Stark and L Iannaccone, 'A Supply-Side Reinterpretation of the "Secularization" of Europe' (1994) 33 *Journal for the Scientific Study of Religion* 230.
[194] See ibid 241–4 and Iannaccone et al, 'Deregulating Religion', 362.
[195] A Gill, 'Government Regulation, Social Anomie and Protestant Growth in Latin America: A Cross-National Analysis' (1999) 11 *Rationality and Society* 287, 294, 308.
[196] L Woodhead et al, 'Introduction' in G Davie, P Heelas, and L Woodhead (eds), *Predicting Religion: Christian, Secular and Alternative Futures* (Aldershot, 2003), 8.
[197] Stark and Finke, *Acts of Faith*, 71–2.
[198] ibid 72.
[199] 'Believing Without Belonging: Is this the Future of Religion in Britain?' (1990) 37 *Social Compass* 455.
[200] See eg Stark and Iannaccone, 'A Supply-Side Reinterpretation'.

newcomers—ought to see an increase in religious vitality. The broad lesson appears to be that if a state values religion, it should create and encourage a competitive market.

There is a great deal more that could be said about this burgeoning literature but space precludes fuller exploration.[201] Moreover, the competitive market model and the rational choice theorists' work have not escaped attack. It represents, according to Steve Bruce, its most trenchant critic, 'the malign influence of a small clique of US sociologists of religion'.[202] There are, as one would expect, serious misgivings with the methodologies utilized by the rational choice researchers and whether the results actually bear out the predictions.[203] For others, the approach is overly simplistic or reductionist—a wider sociological framework is required.[204] Although the proponents of the religious market and rational choice models have, in our view, overstated their bold claims, the literature is valuable insofar as it asks new and interesting questions and challenges some of the shibboleths of traditional secularization theory. As James Spickard rightly predicted, its limitations have become apparent and, like past paradigms, its claims have become somewhat stale.[205] Yet the approach is worth persevering with, as long as the relevant subtleties of the cultural, historical, and political contexts in which competition and choice occur are not lost sight of.

III. Conclusion

Returning to our opening question of which model or models best advance religious liberty we can quickly discount the first two types.[206] Theocracy and Erastianism both fuse religion and state in a fashion that is highly deleterious. An insistence upon a distinct demarcation of temporal and spiritual authorities or kingdoms is one of the eight Christian convictions or motifs we outlined in Chapter 2. In a theocracy, the earthly authority falls into the trap of using the temporal sword to direct citizens' souls. Such a state exceeds its delegated authority. Theocratic regimes, moreover, forget that any earthly regime is led by fallible human beings (the fallibility principle). God may choose to speak through others

[201] See further Ahdar, 'Idea of "Religious Markets"', 58–62.

[202] *Choice and Religion: A Critique of Rational Choice Theory* (Oxford, 1999), 1. For further critique see P Norris and R Inglehard, *Sacred and Secular: Religion and Politics Worldwide* (Cambridge, 2004), 216

[203] See eg M Chaves and P Gorski, 'Religious Pluralism and Religious Participation' (2001) 27 *Annual Review of Sociology* 261; D Voas, D Olson, and A Crockett, 'Religious Pluralism and Participation: Why Previous Research is Wrong' (2002) 67 *American Sociological Review* 212.

[204] Lechner, 'Secularization in the Netherlands', 253, 262.

[205] 'Rethinking Religious Social Action: What is "Rational" about Rational Choice Theory?' (1998) 59 *Sociology of Religion* 99, 111.

[206] These models can also, of course, be rejected on the basis they are also incompatible with liberalism: Laborde, 'Political Liberalism and Religion', 4.

(the universal principle) and not just those who brazenly assert that this prerogative belongs to them alone. Erastianism succumbs to a similar pretension in that the earthly authority seeks to coerce and control religious communities for its own political and temporal ends and, again, it exceeds the bounds of its delegated authority.

The secular state model carries within it certain dangers. Separationism in a purely structural sense—where the state and religious bodies *qua* institutions are kept apart—is not so problematic. The 'wall' may serve religion well by protecting it from the tentacles of state interference. Separationism in its ideological form—a strict quarantining of religious ideas and influences from all public institutions and political life—is a different matter. The state here is not so much remaining neutral as adopting a philosophy of its own, namely, secularism. Whilst it is conceivable that secularism can take benign, even-handed forms which welcome religious contributions to the public sphere, the more prevalent tendency, in practice, is for secularism to be hostile to religion. Secularism seldom remains for long as a straightforward state refusal to align itself with, or establish, a particular faith; rather, experience suggests it inexorably develops a commitment to actively pursue a policy of established unbelief. A thoroughgoing privatization of religion by the state, compounded by official endorsement of secular beliefs, denies many faiths the public witness they desire, and indeed are obliged, to make.

Establishment, at least in a modern mild form exemplified by the United Kingdom, we believe is consistent with religious freedom.[207]

The pluralist models are compatible with religious freedom. They duly recognize the public dimension of religion whilst refuting the liberal claim that privatization is neutral. Religious institutions have a role to play in social programmes.

Neutrality models (which may overlap with pluralist ones) come in various forms. The formal neutrality approach endeavours to treat religious persons and groups no differently than their non-religious equivalents. But to be 'blind' to religion is sometimes to ignore genuine and important claims faith communities may have to different treatment. Much modern government regulation, although not deliberately designed to restrict religious conduct, may in practice significantly burden the practices of particular believers. The failure of formal neutrality to take into account these unintended consequences of pervasive state action has the potential to inhibit religious freedom. The alternative is a form of neutrality that does address the consequences of state action towards religion. A policy of substantive (or positive) neutrality aims to minimize the potential for governmental action to distort or influence the decisions of its citizens on matters of faith, belief, and disbelief. Ideally, religion should be left as far as is practically possible to the exercise of private judgement. Substantive neutrality accords

[207] We developed this argument more fully in the first edition of this book (2005): see chapter 5. Cecile Laborde, 'Political Liberalism and Religion', 10, concurs: 'a state of modest establishment that takes seriously the principle of equality between citizens . . . can . . . meet liberal desiderata.'

with our principles of voluntariness and unrestricted conscience from Chapter 2 which emphasize that persons should be allowed to make a personal, free, and uncoerced response to the call of conscience. Substantive neutrality may sometimes require government action supportive of religion to 'level the playing field'. So, for example, exemptions from laws of general application may be required for affected believers. This is not so much 'special treatment' but more a recognition that limited corrective action may be required to ensure that existing government policies that unwittingly discourage religious practice are ameliorated. Neutrality is neither a self-defining concept nor a value-free notion. Furthermore, neutrality models call for delicate and contentious choices of baseline to determine just when state action is not even-handed. We advocate a baseline that favours maximum religious choice and religious practice.

Finally, we turn to the competitive market model. This model yields some useful insights by reminding us that government policy to keep markets, even markets for faith, open usually works for the good of society. A general lowering of barriers to entry to the spiritual marketplace may go some way to ensuring citizens can exercise meaningful choices. It is possible to push the model too far of course. There may be all manner of 'market imperfections' that thwart the free play of market forces. For example, consumers face 'information costs' (it is not cheap to locate and study the merits of rival faiths) and 'switching costs' (changing allegiance is often no small matter given existing familial loyalties or loss of social status). There is the problem too that the state may be at once both the rule-setter and a participant in the market. The state may be an active 'competitor' in espousing a world view of its own.

Overall, it is difficult to single out one model of religion–state relationship as indisputably the best in terms of religious freedom. Several systems—mild establishment, pluralism, and substantive neutrality—seem to us to score highly in that they recognize a measure of interaction and cooperation between government and religious communities is useful. Others, by contrast, such as theocracy and Erastianism, can be safely rejected as inimicable with religious freedom. Some models, such as separationism, we suggest deserve at best only cautious approval. Its secularist philosophy can in practice produce a climate of hostility to religion and its free exercise.