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# From *Saumur* to *L. (S.)*: Tracing the Theory and Concept of Religious Freedom under Canadian Law

Faisal Bhabha \*

## I. INTRODUCTION

Religious freedom under the Canadian Constitution<sup>1</sup> has received sustained attention over the past 30 years but remains a concept in search of a theory. Cases have tended to be dealt with in one of two ways: either as religious claims in tension with government objectives in policy or law, or as religious claims that risk harm to others, or exact a cost or benefit from others. The test, as set by the Supreme Court of Canada in the paradigmatic judgment in *Syndicat Northcrest v. Amselem*,<sup>2</sup> calls for a non-evaluative identification of the claimant's religious belief or practice. A claimant need only establish a subjective, sincerely held belief in order to attract the protection of the *Canadian Charter of Rights and Freedoms*<sup>3</sup> or human rights law. Under existing doctrine, no limits are imposed on the potential scope of protected beliefs or activities. The primary limiting principle of religious accommodation is the "undue hardship" test in statutory human rights<sup>4</sup> or the section 1 "*Oakes* test"

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<sup>1</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>2</sup> [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551 (S.C.C.) [hereinafter "*Amselem*"].

<sup>3</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

<sup>4</sup> See *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] S.C.J. No. 46, [1999] 3 S.C.R. 3 (S.C.C.) [hereinafter "*Meiorin*"].

for Charter cases.<sup>5</sup> In *Amselem* and *Multani v. Commission scolaire Marguerite-Bourgeoys*<sup>6</sup> the Supreme Court of Canada did not find convincing justificatory arguments under section 1; in *Alberta v. Hutterian Brethren of Wilson Colony*<sup>7</sup> it did. These cases were decided under a doctrine of accommodation that conceives of only *practical* limits to freedom. Derived from a liberal theory of justice in which maximum individual autonomy is paramount, any need to limit freedom within the accommodation framework is conceptualized as a practical obstacle created by the inconveniences of social life. Pure, or idealized, freedom is unrestrained; practical freedom requires balancing competing interests and rights.

It is this paper's contention that accommodation analysis proves a shaky framework for adjudicating religious freedom issues that involve deep normative disputes in which a variety of social interests are at play. In some cases, for example, government action may seek to compel the promotion of a particular norm — such as acceptance of others — that may be contrary to the deeply held views of an individual or group. When this happens, religious freedom's intersection with equality and other constitutional values, such as multiculturalism and minority protection, suggest a more holistic conception of freedom that accounts for relational interests. While accommodation often demands special treatment, constitutional and public values may not warrant affording such treatment to all religious claims. The specific impact of *Amselem* was limited, but the analysis used to create the accommodation exception generated doctrinal instability, and dangerous indeterminacy in the potential scope and singularity of future claims. Courts are often compelled to consider content and normativity when considering claims of religious freedom, despite the law's efforts to render religion "neutral".<sup>8</sup>

This paper's discussion of the recent Supreme Court decision in *L. (S.) v. Commission scolaire des Chênes*<sup>9</sup> illustrates how the govern-

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<sup>5</sup> Proportionality is at the heart of Canada's Charter analysis, with government afforded an opportunity to limit virtually any right or freedom on the basis of it being demonstrably justified in a free and democratic society. See *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

<sup>6</sup> [2006] S.C.J. No. 6, [2006] 1 S.C.R. 256 [hereinafter "*Multani*"].

<sup>7</sup> [2009] S.C.J. No. 37, [2009] 2 S.C.R. 567 (S.C.C.) [hereinafter "*Hutterian Brethren*"].

<sup>8</sup> See Benjamin Berger, "Law's Religion: Rendering Culture" (2007) 45 Osgoode Hall L.J. 277, at 281 [hereinafter "Berger, 'Law's Religion'"], arguing that adjudicating religion is never value neutral. See also *Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87, [2002] 4 S.C.R. 710, at para. 130 (S.C.C.), foretelling the doctrinal challenge of adjudicating competing values: "In an instance where belief claims seem to conflict, there will be a need to strike a balance, either by defining the rights so as to avoid a conflict or within a s. 1 justification."

<sup>9</sup> [2012] S.C.J. No. 7, 2012 SCC 7 (S.C.C.) [hereinafter "*L. (S.)*"].

ment action at issue — a multi-faith and ethics educational program designed to promote secular-egalitarian values that were in tension with the values of the claimants in the case — would have been vulnerable under the scrutiny of established religious accommodation law. For this reason, this paper warns that the *Amselem* framework proves untenable, for it invites a potentially limitless range of individual accommodation claims without any workable and transparent mechanism for reviewing, and judging, the content of those claims. In some cases, a specific government objective might justify limiting a freedom. But the question for courts in such cases is not only how far religious freedom should go and where the limit of freedom lies (in terms of undue hardship or minimal impairment). It also asks what religious freedom should mean conceptually. By “conceptual”, I refer to the definitional qualities of religious freedom. What is its character? What value does it promote? What does it give and what does it demand?

Most commentary on freedom of religion looks at jurisprudence in the era of statutory human rights and the Charter. I wish to step back further, to begin the story of religious freedom at a time of nascent doctrine. Given the statutory and formal constitutional lacuna, the early Supreme Court jurisprudence developed foundational constitutional concepts of religious freedom. This paper revisits three Supreme Court religion cases from the 1950s, *Saumur*, *Chaput* and *Roncarelli*.<sup>10</sup> In these judgments, we see how the Court grounded its protection of religion and religious freedom in historical and contextual considerations, philosophical values, cultural norms and unwritten constitutional principles. The Court engaged in conceptual analyses about freedom and the role of religion in public life. It decided constitutional rights without reference to positive law — only to norms and values. Freedom was understood then as a moral and political concept, if not yet a legal right. Injecting its assessment of the “good” into its determination of the just, the Court articulated a proto-doctrine of constitutional religious freedom.

In its judgment in *L. (S.)*, the Supreme Court found itself again engaging with conceptual issues related to religious freedom, but within the doctrinal framework of section 2(a). In particular, the governing analysis of *Amselem* rested on an assumption of conceptually limitless freedom, and used proportionality to rein it in under section 1. In contrast, the

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<sup>10</sup> *Saumur v. Quebec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299 (S.C.C.) [hereinafter “*Saumur*”]; *Chaput v. Romain*, [1955] S.C.J. No. 61, [1955] S.C.R. 834 (S.C.C.) [hereinafter “*Chaput*”]; *Roncarelli v. Duplessis*, [1959] S.C.J. No. 1, [1959] S.C.R. 121 (S.C.C.) [hereinafter “*Roncarelli*”].

conceptual questions in *L. (S.)* focused the Court on defining freedom, using reference to public values.

*L. (S.)* dealt with a challenge to the public school curriculum in Quebec. The claimants sought an exemption for their children from a mandatory “ethics and religious culture” course on the basis that it interfered with their parental right to transmit the tenets of the Catholic faith to their children. In denying the appellants’ claim, and requiring their children to enrol, the Court upheld compulsive diversity and ethical pluralism pedagogy as a legitimate mandatory component of public school education. In its decision, the Court emphasized the “neutrality” of the secular educational program as justification for refusing the exemption. However, it did not explain how granting an exemption would have undermined the program’s neutrality. There would have been little identifiable harm caused by exempting the appellants’ children from the course. But public education is, by definition, about instilling public values, some of which may not match all of the personal values of all recipients of public education. It is well established that some beliefs and opinions are not accommodated in the public school classroom.<sup>11</sup>

Yet, the Court faced a knotty task in a liberal rights setting, due to political liberalism’s persistent discomfort with regulating public values and expressive content. Religious freedom under the Charter was still a concept in need of a theory. The Court in *L. (S.)* contributed to a growing jurisprudence to this end. However, it rested its reasoning on a flawed and fraught premise of “neutrality” in government action. Analyzing *L. (S.)* within the trajectory of recent related jurisprudence, I observe that the Supreme Court appears to have embraced a definition of religious freedom that has internal conceptual limits which constrain the kinds of claims that will be covered by section 2(a). It has, however, only vaguely begun to articulate this conception.

To illustrate the way freedom may be limited within a rights-definition framework that engages in normative assessments, I draw a descriptive distinction between *practical* and *conceptual* limits to religious freedom. Practical limits are justified by a specific policy or legislative objective that necessitates restricting the right in particular circumstances, such as courts and tribunals do under section 1 and undue hardship analyses. These are freedom claims that are unrealizable, or that carry too high a cost on the state or on others. Conceptual limits, mean-

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<sup>11</sup> See, e.g., *Ross v. New Brunswick School District No. 15*, [1996] S.C.J. No 40, [1996] 1 S.C.R. 825 (S.C.C.).

while, are tied to the definitional bounds of freedom, as defined by foundational constitutional, political and social values. Some claims are simply beyond the protective reach of the law, even where they are subjectively sincere and are grounded in personal morality.

Canadian constitutional law, being rooted in the liberal-democratic political tradition, has inherited a particular, liberal conception of freedom as being conceptually limitless. This conception is based on a view of freedom that is centred on the individual in society. Neo-republican political philosopher Philip Pettit argues for a conception of democratic freedom that is relational — one that sees human freedom as being not only individually held, but as socially contingent and mutually reinforcing.<sup>12</sup> Because we cannot live without others (in a political sense), Pettit suggests that it is unrealistic to shape our understanding of liberty in accordance with fantasies of an unencumbered or unbounded existence. Rather, freedom exists in a social context and, because it does, the courts must carefully define it in any given circumstances in accordance with shared values. Objective review of subjective beliefs, the exercise which the Supreme Court has approached with great reluctance,<sup>13</sup> would not only be justifiable, in some cases, it would be inevitable. Perhaps some beliefs are undeserving of protection, and others so valuable as to warrant mandatory enforcement through public institutions.

In the final part of this paper, I return to the tension between conceptual and practical limits. Political theory serves as an interpretive aid to understanding the kinds of limits to freedom being considered. It can help articulate reasons for and justifications for public interference, or non-interference, with personal choice. I turn to neo-republican democratic theory to offer an account of what courts do when they choose between competing subjectivities — the disharmony of deeply held personal experiences and normative views. Rather than imposing limits on individual autonomy, republicanism accepts that within democratic theory the manifestation of personal beliefs will at times need to yield to general norms.

The break from accommodation analysis in the Supreme Court's recent judgment in *L. (S.)* presents an opportune occasion to both critique how the Court handled the issues, and to apply a close read of the judgment, looking between the lines for a sense of the *concept* of

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<sup>12</sup> Philip Pettit, "Law and Liberty" in Samantha Besson & Jose Luis Marti, eds. *Law and Republicanism* (Oxford: Oxford University Press, 2009) [hereinafter "Pettit"].

<sup>13</sup> *Amsalem*, *supra*, note 2, at paras. 47-52 ("... nothing short of a religious inquisition would be required to decipher the innermost beliefs of human beings").

religious freedom. Legal formalism and liberal concerns about legitimacy make it difficult for courts and tribunals to pronounce on normative conceptual matters. Nonetheless, a realistic assessment of what decision-makers do reveals that they are often required to choose between competing values, and in fact do this already, albeit indirectly and inferentially. Better elaboration in reasons for judgment will help strengthen the law's defence of legitimate and egalitarian public policy in the face of greater individualized claims.

## II. FREEDOM AS EQUALITY OF RELIGIONS

The Supreme Court of Canada recognized religious freedom and equality as fundamental constitutional rights in a time long before the Charter or human rights legislation was enacted. Early Supreme Court conceptions of religious rights and freedoms linked religious liberty to the *equality of religions*, the *rule of law* and fundamental *democratic principles*. Within this description, there is a theory of constitutional protection of religious freedom that is both reinforced in, and distinct from, later Court articulations of the freedom. The dominant feature to which I wish to draw attention is that the protection of religion within Canadian constitutional jurisprudence has, from its inception, included a dual recognition of both the group and individual bases of religious practice and identity. More notably, individual freedoms appear to be derived from the acknowledgment and affirmation of religion as a legitimate moral and institutional player with status and interests.

Within constitutional interpretation, the individual's religious liberty was intertwined with the basic equality of all religions (comprising sets of individuals, practices, culture, *etc.*). The foundational principle is the equality of religions. The Court declared, in 1955, that: "In this country, there is no state religion and all denominations enjoy the same degree of freedom of speech and thought."<sup>14</sup> Through non-establishment, we arrived at the equality principle.<sup>15</sup> Reflecting on the Court's emphasis on equality over liberty, reveals, it seems, the normative world in which the mid-20th-century bench operated. The principle of religious equality presupposed that religion, *qua* religion, has important collective value and is a

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<sup>14</sup> *Chaput, supra*, note 10.

<sup>15</sup> Subject, of course, to the special constitutional protection given to denominational education rights that existed at the time of Confederation. See s. 93 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

social good. It was simply a given, in the 1950s, that religion — its history, status and privileges — was owed respect and deference, even if no “right” existed in any constitutional or statutory instrument. Early conceptions of religious freedom saw religious practitioners as, necessarily, members of religious *communities*.

In *Saumur*<sup>16</sup> the Court struck down a Quebec by-law that banned the public distribution of literature. The claimant was a practising Jehovah’s Witness who asserted that the prohibition impeded a fundamental tenet of his faith and, as such, amounted to a breach of his freedom of religion. Analyzing the claim in the absence of any formal, rights-conferring legislation or constitutional provision, Estey J. traced the history of religious liberty in Canada. He located the first expressions of Canadian religious freedom in the 1760 *Treaty of Paris* on the occasion of the British acquisition of French colonies, whereby Great Britain agreed “to grant the liberty of the Catholick religion to the inhabitants of Canada”.<sup>17</sup> The wording of this is noteworthy; it speaks to the liberation of religion, not to people. Justice Rand concurred, ruling: “[T]hat the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the *greatest constitutional significance* throughout the Dominion is unquestionable.”<sup>18</sup> Relying formally on a division of powers analysis for the remedy, the majority judgments were a resounding embrace of religious freedom as a “principle of fundamental character”.<sup>19</sup>

Two years later, in *Chaput*,<sup>20</sup> the Supreme Court confirmed the Jehovah’s Witnesses’ freedom to assemble, again affirming the fundamental equality of religions. The police had raided the home of Jehovah’s Witnesses engaged in worship, seizing Bibles and other religious material. No warrant had been obtained and no charges were laid. In making a civil finding and an award of damages against the police, the Court summarized the facts: “The appellant suffered an invasion of his home and his right of freedom of worship was publicly and peremptorily interfered with.”<sup>21</sup> The Court used the opportunity to confirm that: “In

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<sup>16</sup> *Supra*, note 10. The Court was deeply divided, splitting 5-4. The five majority judges each wrote separate judgments, and there were two pairs of dissenters, each with reasons.

<sup>17</sup> *Id.*, at 357.

<sup>18</sup> *Id.*, at 327 (emphasis added).

<sup>19</sup> *Id.*

<sup>20</sup> *Supra*, note 10.

<sup>21</sup> *Id.*, at 859.



this country, there is no state religion and all denominations enjoy the same degree of freedom of speech and thought.”<sup>22</sup>

Similarly, in the well-known *Roncarelli* case, the Supreme Court of Canada found that the Premier of Quebec had acted with an improper intent and in contravention of the rule of law when he interfered with the appellant’s liquor licence application. The Court ruled that, in revoking the appellant’s liquor licence, the Premier used his elected power “as a means of bringing to halt the activities of the [Jehovah’s] Witnesses to punish the appellant for the part he had played”.<sup>23</sup> In his judgment, Rand J. described the appellant’s practice of religion as an “unchallengeable right”.<sup>24</sup>

Thus, early religious freedom doctrine laid the groundwork for a basic protection from state coercion. Minority religions could rest assured that the Constitution would defend against state interference in matters of conscience. In the 1950s, the Court did not directly apply a constitutional freedom to worship to produce a remedy, but rather used religious freedom as a value that informed its application of other legal rules. The principle of equality of religions held that the state must ensure sufficient room for religion to flourish. The role of law was to be neutral, so as not to favour any one religion over another. State neutrality, then, was synonymous with equality between religions, and presupposed a general respect and protection of all faith groups.<sup>25</sup> Thus, Jehovah’s Witnesses, a historically distrusted minority<sup>26</sup> that was openly hostile to Protestants, Catholics and Jews alike,<sup>27</sup> came to be victors in the formative religious freedom jurisprudence.

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<sup>22</sup> *Id.*, at 835 (per Kerwin C.J.C., Taschereau and Estey JJ.).

<sup>23</sup> *Roncarelli*, *supra*, note 10, at 133.

<sup>24</sup> *Id.*, at 143.

<sup>25</sup> “Neutrality” was also conditioned on the supremacy of God, a doctrine that is paired with the rule of law in the preamble to the Charter. God’s supremacy remains an open question under constitutional jurisprudence. The Supreme Court was, quite notably, silent on the question of God’s supremacy in the 1998 *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.), a judgment which described the foundational constitutional norms. In its discussion of democracy and constitutionalism, the Court emphasized the supremacy of the Constitution — but even this is seen as a transition from parliamentary supremacy to constitutional supremacy. God is simply absent. In *R. v. Sharpe*, [1999] B.C.J. No. 1555, 1999 BCCA 416, 175 D.L.R. (4th) 1, at paras. 79 and 80 (B.C.C.A.), the British Columbia Court of Appeal, with Nietzschean flare, pronounced the Preamble a “dead letter”, though it left it open to the Supreme Court to resurrect God’s supremacy.

<sup>26</sup> See Gary Botting, *Fundamental Freedoms and Jehovah’s Witnesses* (Calgary: University of Calgary Press, 1993).

<sup>27</sup> In a dissenting judgment in *Saumur*, *supra*, note 10, at 117, penned by Rinfret C.J.C. (Taschereau J. concurring), the Court reviewed evidence from the record in which a representative of

### III. FREEDOM AS INDIVIDUAL ACCOMMODATION

Religious freedoms lie, historically, in the experience of religious minorities needing protection from the enforcement of majority religious norms through state institutionalization. While the Canadian Constitution, unlike its U.S. counterpart, does not require a religiously neutral state, there is no state-established religion in Canada and early religious freedom doctrine established the principles of basic protection from coercion, upon which subsequent approaches to religious freedom would be based.

The 1960s saw significant changes in the law. The adoption of statutory human rights instruments, and the first *Canadian Bill of Rights*, was the local manifestation of enthusiasm for universal human rights globally, and for the civil rights movement in the United States. Writing in a special human rights edition of the *Canadian Bar Review* in 1968, J.G. Castel addressed the status of provincial human rights codes and the *Canadian Bill of Rights*,<sup>28</sup> concluding that Canada's laws relating to the protection of rights and freedoms were, at the time, insufficiently strong:

It is a pity that these statutes are often narrow and quite ineffectual. Furthermore, Canadian courts have tended to emasculate the federal Bill of Rights and to consider civil liberties as a constitutional division of powers issue only. There has been a strong judicial tendency to assume that Parliament did not intend by the Bill of Rights to alter specific pre-existing inconsistent federal statutory provisions.<sup>29</sup>

The sea change in Canadian law came in the 1970s with the embrace of the "duty to accommodate", lifted from American civil rights jurispru-

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the Jehovah's Witnesses testified as to his religious beliefs. The questions ("Q.") and answers ("A.") proceed as follows:

Q. Do you consider necessary for your organization to attack the other religions, in fact, the Catholic, the Protestant and the Jews? — A. Indeed. The reason for that is because the Almighty God commands that error shall be exposed and not persons or nations.

Q. You are the only witnesses of the truth? — A. Jehovah's Witnesses are the only witnesses to the truth of Almighty God Jehovah ... Q. Is the Roman Catholic a true church? — A. No.

Q. Is it an unclean woman? — A. It is pictured in the Bible as a whore, as having illicit relationship with the nations of this world, and history proves that fact, history that all have studied in school.

<sup>28</sup> S.C. 1960, c. 44.

<sup>29</sup> J.G. Castel, "International Year for Human Rights 1968" (1968) 46 *Can. Bar Rev.* 545, at 545-46.

dence.<sup>30</sup> The doctrine was developed as an anti-discrimination protection for religious minorities against the disparate impact caused by neutral rules, mostly in the workplace. Labour arbitrators and statutory human rights boards were the first to apply it.<sup>31</sup> With the adoption of the Charter in 1982, accommodation analysis came to be the defining doctrinal framework for adjudicating freedom of religion claims.<sup>32</sup> The anti-discrimination function of accommodation analysis in the religious context was bolstered by the inclusion of section 15 equality in the Charter, and by the increasing harmonization of Charter analysis and statutory anti-discrimination law, in particular with respect to limiting exercises under section 1 and undue hardship, respectively.<sup>33</sup>

Religious accommodation attained unprecedented heights in the workplace when, in 1992, the Supreme Court of Canada ruled that near-sacred seniority rules in a unionized workplace would have to yield to an individual worker's religious needs.<sup>34</sup> This necessitated a redistribution of something tangible — choice of hours of work. There are only so many Saturdays off to go around the workplace. The Saturday Sabbath observer was entitled to jump the queue because his interest in not working on Saturday was prioritized over the interests of others *because of religion*. This showed how the duty to accommodate could generate an entitlement to something, not just to a guarantee of non-interference. The freedom necessarily required “special” treatment in public services and

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<sup>30</sup> See *Ontario (Human Rights Commission) v. Simpsons-Sears*, [1985] S.C.J. No. 74, [1985] 2 S.C.R. 536, at para. 20 (S.C.C.) [hereinafter “*O'Malley*”], citing *Reid v. Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972) and *Riley v. Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972). According to the Supreme Court of Canada, “Statutory authority for this approach in the United States is said to be found in the provisions of the 1972 amendment to the *Civil Rights Act of 1964* — see: *Civil Rights Act of 1964*, 42 USCS § 2000e(j); see also *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).”

<sup>31</sup> See, e.g., *Canada Valve Ltd. v. International Molders & Allied Workers' Union, Local 279* (1975), 9 L.A.C. (2d) 414, at paras. 30-31 (an employer has a duty to balance the worker's religious interests with the company's commercial interests. Refusing to grant leave to observe a religious holiday must be supported with valid reasons and objective review of relevant workplace needs). See also *Ishar Singh v. Security Investigation Services Protection Co.* (May 31, 1977, unreported decision of the Human Rights Tribunal of Ontario), at 16-17 (adverse religious effects arising from a neutral workplace rule need not be intentional to be discriminatory; to be found reasonable, the employer must demonstrate that the rule was adopted in good faith and is reasonably necessary to the employer's business interests).

<sup>32</sup> *O'Malley*, *supra*, note 30.

<sup>33</sup> Janet Epp Buckingham, “Drivers Needed: Tough Choices from *Alberta v. Wilson Colony of Hutterian Brethren*” (2009-2010) 18 Const. F. 109, at 113. See also Lorne Sossin, “God at Work: Religion in the Workplace and the Limits of Pluralism in Canada” (2008-2009) 30 Comp. Lab. L. & Pol'y J. 485, at 491.

<sup>34</sup> *Central Okanagan School District No. 23 v. Renaud*, [1992] S.C.J. No. 75, [1992] 2 S.C.R. 970 (S.C.C.) [hereinafter “*Renaud*”].

the workplace, and called for policing state action so as to protect religious minorities from the “tyranny of the [religious] majority”.<sup>35</sup> In this vein, the Court in *R. v. Big M Drug Mart Ltd.* described section 2(a) as protecting “both the absence of coercion and constraint, and the right to manifest beliefs and practices”.<sup>36</sup>

With accommodation woven into its constitutional fabric, religious freedom was girded with a sword: the right to *manifest* beliefs. Sometimes manifestation required “special” arrangements: time, effort, material, resources, *etc.* The “something” to which accommodation created an entitlement would almost always be scarce. For that reason, the exercise of identifying appropriate accommodation would need to be context-specific, depending on what is needed in the circumstances to offset the adverse consequences of a neutral rule. The right is strong: it goes as far as necessary. The limit is undue hardship: not all that is necessary is just or fair in the overall circumstances. Hardship is measured by the impact that altering a neutral rule will have on individuals.<sup>37</sup> *Big M* described limits broadly to include, in addition to health and safety, “order”, “morals” and “the fundamental rights and freedoms of others”.<sup>38</sup>

Armed with the sword of accommodation, claims raised in Canadian courts and statutory human rights tribunals these days increasingly push the limits of doctrinal interpretation.<sup>39</sup> Courts and tribunals are asked to interpret fundamental conceptual questions within the constraints of statutory and constitutional language. Such cases have challenged assumptions and values that underlie many of society’s established norms and traditions. Beyond being a “defence” against adverse-effects discrimination, accommodation can be deployed in ways that directly target systemic discrimination and seek to transform the way society and the public realm are themselves constructed.

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<sup>35</sup> [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at para. 96 (S.C.C.) [hereinafter “*Big M*”].

<sup>36</sup> *Id.*, at para. 95.

<sup>37</sup> Bruce Ryder, “The Canadian Conception of Equal Religious Citizenship”, in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008), at 1, 2.

<sup>38</sup> *Big M*, *supra*, note 35, at para. 95.

<sup>39</sup> See *R. v. S. (N.)*, [2010] O.J. No. 4306, 2010 ONCA 670 (Ont. C.A.) [hereinafter “*S. (N.)*”] (a witness/complainant in criminal trial was seeking a right to testify while wearing a *niqab*, on the basis that covering her face in public is a religious commitment); and *Whatcott v. Saskatchewan (Human Rights Tribunal)*, [2010] S.J. No. 108, 2010 SKCA 26 (Sask. C.A.) [hereinafter “*Whatcott*”] (whether freedom of religion and expression protects the distribution of literature that contains crude, harsh and demeaning comments about potential sexual practices of homosexuals). Both cases were heard by the Supreme Court of Canada in late 2011 and, at the time of writing, are pending judgment.

As Canadian society has diversified and minority aspirations blossom, the pressure on accommodation will continue to grow. Many current religious freedom claims are closely tied to culture, community and identity. They reflect individual struggles to realize the self in a world of difference. While state-imposed religion has been virtually banished from public space, members of minority religions are able to employ accommodation to gain greater claims to it, even redefining it.<sup>40</sup> Religious accommodation today is, therefore, as much about cultural integration and social cohesion as it is about individual rights.

The pervasiveness of accommodation analysis in deciding issues of religion and public life risks reifying the right and forcing the remedy. By this I mean to suggest that, while a strong approach is sometimes necessary to give meaning to the right being protected, excessive focus on the means rather than the goal can exclude consideration of other relevant factors of a social or interpersonal nature. The liberal construction of religion in the courts<sup>41</sup> has fit squarely within the individualist accommodation approach. Indeed, accommodation is the Charter's best mechanism to advance claims based primarily on individual, as opposed to collective, interests.<sup>42</sup> Claims of this sort have been the hallmark of the protective reach of section 2(a); claims based on group or community rights, on the other hand, have been generally unsuccessful.<sup>43</sup>

The Court's analysis in *Amselem* and *Multani* create the risk of potentially limitless individual claims of religious accommodation. Under the approach articulated in *Amselem*, those who owe the duty to accommodate — employers, school boards, condominium boards, those offering goods and services, all branches of government and public offices — are subject to the sincerely held beliefs of others, regardless of how different they might be. The only limit to this duty is harm, which has operated only as a practical limit on unrestrained freedom. This has led observers to note that “establishing a *prima facie* infringement of section 2(a) is straightforward (because the right is defined broadly and from an almost

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<sup>40</sup> Consider the case of the middle-school cafeteria converted into a Friday prayer hall to meet the needs of many of the school's overwhelmingly Muslim population. See Louise Brown, “Friday prayers return at Valley Park” *The Toronto Star* (November 21, 2011).

<sup>41</sup> Berger, “Law's Religion”, *supra*, note 8, at 281.

<sup>42</sup> Faisal Bhabha, “Between Exclusion and Assimilation: Experimentalizing Multiculturalism” (2009) 54 McGill L.J. 45, at 53.

<sup>43</sup> Berger, “Law's Religion”, *supra*, note 8, at 289-90.

completely subjective viewpoint); and there is more scrutiny of state justification [under section 1]”<sup>44</sup>

It certainly appeared in decisions over the past decade that the Supreme Court of Canada was developing a jurisprudence of section 2(a) that recognizes a broad conception of religious freedom, and indeed one that has tended to promote a more robust approach to equality than under section 15 during the same period.<sup>45</sup> Berger has argued that the “great difficulty of the constitutional protection of religion is emphatically not found in navigating the internal requirements of section 2(a)” but rather in the “sheer scope of possible conflict between religion and government objectives”.<sup>46</sup> Thus, it is at section 1 that the Court has used proportionality analysis to balance the government’s need to regulate for a diverse society with the inevitable claims of those who are adversely affected. In *Hutterian Brethren*, McLachlin C.J.C., while acknowledging that section 2(a) creates a broad right indeed, noted that giving effect to every religious claim could undermine the universality of many government programs.<sup>47</sup>

Of course, the effect of accommodation analysis is always to interrogate, if not undermine, the universality of regulatory programs, to the limited extent to which they negatively impact on people’s religious beliefs or practices. Accommodation looks closely at the practical implications of unrestrained freedom and the ways that established norms can be stretched. But it fails to offer the tools for closely examining the content of the freedom claim and whether the rule ought to be accommodating in the first place. It is this distinction to which I now turn, with a view to developing a theoretical understanding of rights definition that both acknowledges the normative content of religious freedom claims, and legitimizes adjudicative wading into normativity.

#### IV. THEORETICAL CONCEPTIONS OF FREEDOM

No single understanding of freedom can be taken as a given. Any legal doctrine, rule or definition will be informed by ideas about politics

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<sup>44</sup> Carissima Mathen, “What Religious Freedom Jurisprudence Reveals about Equality” (2009) 6:2 J.L. & Equality 163, at 163.

<sup>45</sup> *Id.*

<sup>46</sup> Benjamin L. Berger, “Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of *Alberta v. Hutterian Brethren of Wilson Colony*” in J. Cameron & B. Ryder, eds. (2010) 51 S.C.L.R. (2d) 25, at 26-27 [hereinafter “Berger, ‘Assessing the Impacts’”].

<sup>47</sup> *Hutterian Brethren*, *supra*, note 7, at para. 36.

and social life.<sup>48</sup> Canada's judges not only operate within a constitutional framework of parliamentary democracy, but they also understand the concepts and institutions of democracy from the perspective of political liberalism. In the discussion that follows, I describe the limits of conventional liberalism to understanding the role of the courts in defining rights and freedoms. Because of its discomfort with adjudicating normative substance, and its sensitivity to state action (coupled with a preference for state *inaction*), liberalism fails to accurately account for the ways in which the state enforces norms and values through law and regulation. Beginning with the communitarian critique of liberalism, I move on to draw from the republican democratic tradition a theoretical framework that, I suggest, illuminates what courts have been doing in religious freedom jurisprudence. I also suggest that this framework may be of some relevance as courts and decision-makers will find themselves increasingly having to engage meaningfully with social norms and public interests, and to make normative assessments about the content of religious beliefs.

According to political philosopher Michael Sandel, it is useful to think about two types of limits inherent in our understanding of justice within a liberal rights paradigm: practical and conceptual.<sup>49</sup> Practical limits refer to problems of application — the kinds of paradoxes that he says liberalism produces: abutting and conflicting rights requiring constraints and rationalizations. Such analysis is what leads to the kind of balancing the courts engage in when applying proportionality assessments, such as under section 1 of the Charter or the undue hardship defence. At the core of liberalism's freedom paradox is the concept of "personhood", and what it means to be a free person. Liberalism, according to Sandel, is tied to a view of the "person" that inevitably reproduces a paradox of conceptually limitless, but practically constrained, freedom. Liberal rights, informed by the political philosophy of John Rawls, are typically conceptualized with a view of "personhood" in an abstract, idealized, "pure" form — what Rawls dubs the "original position", where freedom is unconstrained.<sup>50</sup>

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<sup>48</sup> By "politics", I refer to social relationships and structures of authority in which power is distributed and exercised.

<sup>49</sup> Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982).

<sup>50</sup> John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 1971).

Sandel argues that the Rawlsian conception of the “person” is flawed, precisely because it is unrealistic. He describes Rawls’ original position as an abstraction, an idealized “unencumbered self”, that is not a helpful conceptual starting point for thinking about questions of justice. For Rawls, it is essential to strip away certain personal and social knowledge — to step behind the “veil of ignorance” — in order to determine fair principles of justice. Thus, one of the “essential features of this situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like”.<sup>51</sup>

This position of absolute neutrality — of perfect, if not imaginary, equality — may be philosophically useful, in the abstract, for articulating a universal conception of the good. But it can also be seen as counter-productive because it strips the “person” of many of the characteristics that give life worth and meaning. Can questions of justice really be separated from questions of interests? Can the “person” conceptually be separated from communal attachments? For Sandel, the “person” is already encumbered in numerous ways — by family ties, associational ties, religious ties, *etc.* These ties are so integral to the self that they can only be set aside at great personal cost, if at all.<sup>52</sup>

Because Rawls’ idea of the pre-encumbered self is an abstract ideal, any notion of freedom constructed from that starting position risks creating norms out of fallacies.<sup>53</sup> Fine-tuning the liberal conception of freedom is necessary because, as Sandel notes, the relationship between freedom and justice will be distinct depending on whether the political theory on which they are respectively constructed begins from a conception of an atomized, individualistic society, or one that is inherently interconnected and interdependent. The form and content of doctrines of constitutional and statutory interpretation invariably will be shaped by the underlying conceptions of freedom and justice that define the constitutional or quasi-constitutional protections. Greater clarity from courts and tribunals about the underlying values shaping the freedoms they are defining and interpreting in the context of specific case facts

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<sup>51</sup> *Id.*, at 12-13.

<sup>52</sup> This analysis has been adopted in the Supreme Court’s approach to “immutable” characteristics and grounds under s. 15 equality of the Charter. See *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203, at para. 13 (S.C.C.) (describing religion as “constructively immutable”).

<sup>53</sup> For the communitarian critique, see also Charles Taylor, *Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985) [hereinafter “Taylor”]; Amitai Etzioni, *The Monochrome Society* (Princeton, NJ: Princeton University Press, 2003).



would offer greater assistance to understanding the potential breadth and scope of these protections.

Distinguishing between types of limits to freedom is both descriptive and normative. The values that define the starting position of the individual in society will largely determine the form and scope of legal rights. For example, a society built on a conception of justice that prioritizes boundless individual liberty is likely to do less about pursuing a shared conception of the good. A theory that is uncomfortable with creating out of rights “positive” obligations for the state is also likely reluctant to impose heavy obligations on citizens. Conversely, a regime which conceives of rights and freedoms as relational may have less difficulty nurturing expectations of the state to provide and redistribute, while also enforcing a concomitant principle of obligation and belonging on citizens.<sup>54</sup>

The work of Philip Pettit encapsulates the republican,<sup>55</sup> or what Pettit calls a “pre-liberal”, theory of liberty.<sup>56</sup> Underlying this understanding is the idea that freedom is always constrained in any social or political context. The inherent constraints of liberty stem from the founding arrangement of political organization: individual restrictions promote liberty as a whole. For Pettit, law is the means by which citizens control themselves so as to *enable* their freedom. Rather than creating a paradox, if we accept that there is a fixed amount of the material or substance of freedom (that is, in a tangible sense), the freedom of any individual is inherently limited by the reality of scarcity. Pettit distinguishes the republican view from that of classical liberalism as follows:

Rousseau said that man is born free and is everywhere in chains — everywhere bound in the chains of law. The truth is that not only are people everywhere in chains, they are everywhere born in chains; there is no such thing as a State-less, uncoerced existence. Call this the fact of territorial scarcity.<sup>57</sup>

The republican tradition of freedom, then, is premised not on a normative view of how the individual ought to exist in the world, but rather on a conception of how human life actually is. Pettit echoes Sandel’s claim that we are all born with encumbrances; but they need not be

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<sup>54</sup> See Taylor, *id.*, at 188-89.

<sup>55</sup> This includes neo-republican strands of thought, which build on the principles of classical republicanism but include important, egalitarian modifications.

<sup>56</sup> Pettit, *supra*, note 12.

<sup>57</sup> *Id.*, at 52.

viewed as “chains”. The limits inherent in being human also enable us to be free. They provide protections and permissions that open possibilities for a rich life, represented in freedoms of conscience, expression and association. Thus, for Pettit, not all interference reduces freedom — only such interference that interferes *arbitrarily* with one’s ability to believe, express and associate.

If law is the way that people control themselves, then when the legitimate, positivist system of law legitimately interferes with one’s natural choices, it can be viewed as a form of collective self-control. For example, the fact that a person is prohibited by law from killing another is a form of constraint that may interfere with one’s natural choice or preference in any given circumstances. But the social good of having such laws is easily justifiable on universal principles. At the same time, there is sufficient flexibility in the law to recognize exceptions and mitigating factors that will, at times, permit a person the freedom to kill: consider the doctrines of necessity or self-defence. Freedom, conceived this way, then, is relational, contextual and rational.

But there are important conditions that the law must meet in order to be considered legitimate and, thereby, freedom-enhancing.<sup>58</sup> As long as the laws are controlled by the people subject to them, there can be no injury to freedom, even as the law itself regulates zones of individuals’ overlapping choices. Overlap refers to domains where others can be simultaneously free to exercise choice. The important thing, for Pettit, is non-domination; in other words, that *equality* in the protection of choice is assured. It is through the principle of equality that restrictions on choice may be justified under this theory of democratic legitimacy. As long as everybody is equally deprived, there can be no loss of freedom.

The republican conception of freedom reflects a communitarian ethic, one in which every individual’s interests are bounded up in the interests of others. This is not based on a normative view about the way people ought to live together in society (though it may be). More important is its acceptance that human interdependency is a given — a fact, as it were. This idea rests on the concept that the realization of freedom does not lie solely in the removal of encumbrances on the individual, but more importantly on constructing legal norms that promote freedom-enhancing social equality.<sup>59</sup> Not only is the Rawlsian liberal

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<sup>58</sup> *Id.*, at 53-55.

<sup>59</sup> *Id.*, at 48. Pettit recognizes that “[f]reedom in a republic may not be perfectly provided for all members — the society may be less than perfect — but at least it should be a status that is capable in principle of being equally provided for all.”

idea of an unencumbered self unrealistic, as Sandel notes, but it is also undesirable and even anti-social: the freest individuals would be those who demonstrate no need (or desire) for social connection or community at all.

To be free in the republican sense implies being supported and protected in the world — connected to others and interdependent.<sup>60</sup> Freedom and equality in this paradigm are mutually reinforcing. For many liberals, in contrast, equality creates a rights paradox<sup>61</sup> because it requires restraining or depriving the strong in order to support and advance the weak. If constitutional rights and freedoms are conceived of as a vehicle to promoting the unencumbered self, then taken to its extreme, this sort of hyper-individualism will view virtually all forms of social or political organization, and the collective responsibility that comes with it, as anathema to freedom. This is how liberalism morphs into libertarianism.<sup>62</sup>

Theoretical questions about conceptions of freedom are very much of practical relevance. Theories and concepts underlie legal rules and doctrines and always inform judicial reasoning, even if judges do not always articulate their theoretical assumptions. Many of the difficult questions facing policy-makers and judges concerning claims of religious freedom in the contemporary Canadian political order will be shaped by what meaning is given to the constitutional protection of freedom. For example, when the Court decided to permit compelled secular instruction about religion, it decided that religious freedom does not include a parental right to pick and choose from the curriculum.<sup>63</sup> A different conception of freedom might have concluded the opposite. Similarly, the Court in *S. (N.)* is expected to resolve whether a woman who wears a religious veil should be compelled to show her face in court in order to testify in a criminal proceeding.<sup>64</sup> One conception of freedom may view the veil as excessively anti-social or contrary to Charter values, and therefore unworthy of protection.<sup>65</sup> Another conception of freedom may

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<sup>60</sup> *Id.*

<sup>61</sup> See, e.g., Thomas Nagel, *Equality and Partiality* (Oxford: Oxford University Press, 1991).

<sup>62</sup> See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) (articulating his philosophical defence of the libertarian ethos, namely, to shrink the size of the state and halt wealth redistribution in the name of freedom).

<sup>63</sup> *L. (S.)*, *supra*, note 9 (see discussion below).

<sup>64</sup> *Supra*, note 39.

<sup>65</sup> See John R. Bowen, *Why the French Don't Like Headscarves: Islam, the State, and Public Space* (Princeton NJ: Princeton University Press, 2008) (explaining, from an anthropological, historical and sociological perspective, French discomfort with religion in public life leading to the 2004 ban on the *hijab* in public schools).

view the rule of testifying with an exposed face as excessively harsh and arbitrary when enforced against a woman who believes that covering her face in public is a religious duty.

These challenging fact scenarios are not necessarily, or exclusively, about competing rights. They are often about conflicting values. They provide the backdrop for the practical application of human rights provisions to “hard cases”, involving contested claims to religious freedom in a complex societal setting with competing interests. Such cases often strike to the core, simultaneously, of what it means for a person to be free, and for a society to be just. In the next part, I return to *L. (S.)* to explore these themes, and analyze the decision with a view to identifying a theory of conceptual limitation that moves beyond accommodation and constructions of competing rights.

## V. CONCEPTUAL AND PRACTICAL LIMITS TO RELIGIOUS FREEDOM

The Supreme Court’s recent religious freedom jurisprudence reveals a tension between two types of limits: conceptual and practical. Section 1, which provides for limits of constitutional rights where they are “reasonable” and “demonstrably justifiable in a free and democratic society”, establishes the definitive test for practical limits on religious freedoms. The government bears the onus of defending a policy or measure which has a limiting effect on a *bona fide* religious practice. The courts assess whether the restriction is minimally impairing and/or whether the salutary benefits of the government restriction outweigh the deleterious effects.<sup>66</sup> A similar approach is used in the accommodation analysis most often applicable to statutory religious rights claims.<sup>67</sup>

What is less developed is the Court’s articulation of a theory of conceptual limitation. *Amselem* established a conceptual framework for section 2(a) of virtually limitless freedom. To find a Charter breach, the Court would only need to be persuaded that subjective sincerity was established, and a harm identified.<sup>68</sup> The “subjective sincerity” test could be interpreted to mean that the Charter deems worthy of protection boundless freedom, as long as it is based on a subjectively sincere

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<sup>66</sup> See Berger, “Assessing the Impacts”, *supra*, note 46, for a good treatment of the Supreme Court’s approach to s. 1 within religious freedom doctrine.

<sup>67</sup> See *Meiorin*, *supra*, note 4, at paras. 54-55, explaining the “undue hardship” test, which is similar in methodology to the *Oakes* test under the Charter.

<sup>68</sup> *Amselem*, *supra*, note 2, at paras. 50-56.

religious belief. The reluctance of the Court to involve itself in substantive review of religious doctrine, removing any objective consideration of the content of expression,<sup>69</sup> has led to a conception of section 2(a) that is “so capacious as to be largely analytically vacant”.<sup>70</sup>

Since *Amselem*, the Supreme Court has been retreating from its construction of religious freedom, attaching caveats at various opportunities. In *Bruker*, for instance, Abella J. stated that: “Not all differences are compatible with Canada’s fundamental values and, accordingly, not all barriers to their expression are arbitrary.”<sup>71</sup> The Court described the fundamental values at stake in that case, but it remains unclear whether an exhaustive list of fundamental values exists, and what its contents are. Identifying values that underlie constitutional law and deciding how they shape public law’s treatment of religion is not a simple matter of judicial interpretation. It involves choices and decisions about the values that *should* shape our freedoms. As much as the Court wishes to evade adjudicating moral questions, it is inescapable.

It is essential to confront the fact that neutrality in rights adjudication is impossible in contemporary Canadian society. If the constitutional commitment to multiculturalism means anything, people’s beliefs ought to be taken seriously on their own terms. The difficult task is adjudicating between competing normative outlooks. Courts and tribunals are increasingly called upon to make value judgments about matters of conscience that often stem from moral worldviews that are foreign to the decision-maker. Many of the contemporary claims involve marks of identity — the attire, symbols and deeply personal behaviours of the claimant — and sit at the intersection of individual autonomy and group belonging.

The Charter can protect an individual’s interests as a member of a group in Canadian society, but not as an individual within that group. Religious organizations are not subject to the Charter and are statutorily shielded from human rights legislation. As a result, members of minority or religious communities can use the law to remove barriers and claim greater autonomy and space only in relation to those outside their group.

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<sup>69</sup> Richard Moon, “The Supreme Court of Canada’s Attempt to Reconcile Freedom of Religion and Sexual Orientation Equality in Public School” in D. Rayside & C. Wilcox, eds., *Faith, Politics and Sexual Diversity* (Vancouver: UBC Press, 2011), at 329 (noting that in *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772 (S.C.C.), the Court seemed eager to avoid repudiating the content of religious beliefs).

<sup>70</sup> Benjamin L. Berger, “The Cultural Limits of Legal Tolerance” (2008) 21(2) *Can. J.L. & Jur.* 245, at 257.

<sup>71</sup> *Bruker v. Marcovitz*, [2007] S.C.J. No. 54, [2007] 3 S.C.R. 607, at para. 2 (S.C.C.) [hereinafter “*Bruker*”].

While a woman can claim a constitutional right to testify in court in a *niqab*, she cannot assert a constitutional right to assume the *minbar* (pulpit) in her mosque. There is no legal obligation on religious communities to create Charter-compliant conditions within their institutions, families and social practices.

Thus, while contentious cases, such as prayer in school cafeterias, *niqabs* in court, scrolls in cabs,<sup>72</sup> *etc.* are framed, at law, as claims by an affected individual against the “neutral” public, what is often at play is a deep disagreement about how a diverse society is, and should be, structured. Accommodation analysis frames such cases as mostly involving private interests of conscience and identity. Yet, the public interests are present and often captivate media attention. This was apparent in the highly publicized Ontario case involving Muslim prayers in the cafeteria of Valley Park Middle School in Toronto’s Thorncliffe neighbourhood.

The school had a Muslim student population of more than 800, about one-half of whom attended weekly prayers.<sup>73</sup> Before prayers were offered in the school cafeteria, students had been travelling to neighbourhood mosques each week and many were missing Friday afternoon classes.<sup>74</sup> A straightforward accommodation analysis led to the practical solution that, instead of having hundreds of students leave school in the middle of the day, it would be more efficient to provide space for the event to occur at the school. The duty to accommodate would not necessarily obligate the school to provide anything more than space and time. Indeed, this is precisely the arrangement that had been in place for three years.<sup>75</sup> It only became an issue of national interest in 2011 after activists led by a group called Canadian Hindu Advocacy sought to expose the issue to public scrutiny.<sup>76</sup>

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<sup>72</sup> In 2011, a Jewish taxi driver in Montreal was ordered, pursuant to municipal law, to remove religious objects from his taxi. While his argument for religious freedom was unsuccessful before a municipal board, he reached a compromise with city officials and dropped his appeal. See Ingrid Peritz, “Montreal cabbie wins right to display religious objects in his taxi” *Globe and Mail* (March 24, 2011).

<sup>73</sup> Natasha Fatah, “Allah in the Cafeteria: Inside the school prayer scandal at Valley Park Middle School” *Toronto Life* (March 21, 2012) [hereinafter “Fatah”].

<sup>74</sup> *Id.*

<sup>75</sup> Jackson Doughart, “Muslim prayer in school exposes flaws of religious accommodation” *National Post* (July 11, 2011) [hereinafter “Doughart”].

<sup>76</sup> Ron Banerjee, “Response to ‘Opposing prayer in Toronto public schools, with dignity’” *Macleans* (July 29, 2011). Defending himself against accusations of being driven by Islamophobia in opposing the Valley Park accommodation, he stated: “We have formed a multi faith coalition with the Christian Heritage Party and Jewish Defence League of Canada. We will work to restore

There was little dispute that the arrangement was, strictly speaking, legal.<sup>77</sup> Indeed, under a strict application of the *Amselem* test for religious accommodation, subject to any practical limits — cost, safety, *etc.* — there appeared to be no sound reason to deny the accommodation, assuming the students could demonstrate a sincere belief that attending weekly congregational prayers at the stipulated time is a religious obligation. For some, the fact that Muslims were holding mass prayer sessions in the public school cafeteria was wrong for other reasons. To critics, there was nothing neutral about accommodation in this instance: it gave public endorsement to a particular religion. This raised both a moral problem<sup>78</sup> and a political problem.<sup>79</sup> According to one unhappy commentator:

The school may be following a policy of accommodating special requests, but there's a striking difference between designating a room for a handful of students and converting the largest room in the building for group prayer. The school becomes, in effect, a mosque.<sup>80</sup>

Indeed, when you have a school full of Muslims who overwhelmingly believe in weekly congregational prayer that happens to occur during school hours, the practical solution is to transform part of the school into a space for worship. The “problem”, it seems, stems from the social fact of people of particular religious backgrounds becoming concentrated in particular neighbourhoods. Where there are many

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Canadian values of democracy and freedom, which are themselves a combination of both Hindu and Judeo Christian principles.”

<sup>77</sup> Doughart, *supra*, note 75: “While the formation of faith-based extra-curricular student groups is defensible on the grounds of free association, allowing religious groups to conduct services in public schools during school hours is an encroachment of religion into secular education, to which both religious and non-religious people should object.” [Reprinted with the express permission of National Post, a division of Postmedia Network Inc.]

<sup>78</sup> The moral problem arose from endorsing, or appearing to endorse, the content and form of religious practice. For example, the prayer sessions were gender segregated, and much of the service involved recitation in Arabic, the content of which could not be monitored, both of which concerned some observers.

<sup>79</sup> The political problem concerned the separation of church and state, and what was perceived by some to be an improper injection of religion in public administration that could have coercive effects, or undermine the dignity of non-believers. One commentator analogized it to the Lord's Prayer issue of the 1980s, when the Ontario Court of Appeal ruled that the daily Christian ritual, practised in schools for generations, was unconstitutional. See Doughart, *supra*, note 75: “At Valley Park Middle School, it is certain that having Friday Muslim prayers will result in unfair pressure on students who choose not to participate. ... Protecting non-conformists is an extremely important characteristic of public education that cannot be compromised in the name of religious accommodation.” [Reprinted with the express permission of National Post, a division of Postmedia Network Inc.]

<sup>80</sup> Fatah, *supra*, note 73.

Muslims who share a high level of religious observance, the public space will be transformed. This is the practical implication of the constitutional commitment to multiculturalism. Much of what makes contemporary religious freedom cases so challenging is that diversity compels a re-examination of basic concepts. Making adjudication even harder is the need to analyze concepts through intersectional lenses, given that many contemporary religious freedom claims occur in a racialized and gendered context. All of this means that the social environment in which many accommodation claims arise involve constructions of “the other” and problems of objectification. At the same time, the legal process necessarily co-opts; it demands that subjective experiences and perspectives be objectively verifiable. So, we are always looking at others through our own subjective lens.

*L. (S.)* was not a case that involved minority integration or the unknown “other”, but rather touched on Quebec’s particular history with the Catholic Church. Aggressive secularization beginning in the 1960s led to a purging of religion from public education, and the dismantling of denominational schools. The appellants in *L. (S.)* were devout Roman Catholics who asserted a right to withdraw their children from a mandatory middle school class about “religious culture and ethics”. Because the impugned course provided “neutral” (*i.e.*, secular) instruction about various religions and philosophical traditions, the appellants argued that their right as parents to fulfil their religious duty to transmit their faith was obstructed.

The Court was unanimous in refusing to accept that the appellants had established *in fact* any interference with the fulfilment of their sincere belief. For LeBel J. (with Fish J. concurring), there was not only insufficient evidence about the effects of the program, but there was also insufficient evidence about the program’s content and goals.<sup>81</sup> There could be no evidence that the program *actually* prevented the appellants from transmitting their faith to their children. The children had never been enrolled in the course — it was not even offered yet — and the parents’ anticipation of interference could not ground an objective finding of religious encroachment. Essentially, the Court found that the

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<sup>81</sup> *L. (S.)*, *supra*, note 9, at paras. 55-56:

Even after a careful reading, it is not really possible to assess what the program’s implementation will actually mean. As a result, it is hard to tell what the emphasis [*sic*] the program will place on Quebec’s religious heritage and on [*sic*] the cultural and historical importance of Catholicism and Protestantism in that province will mean.



appellants were conflating the subjective and objective parts of the *Amselem* test.

While the reasoning appears to make sense — how can a claimant’s subjective belief alone predict an objective finding of fact? — it obscures the more fundamental question of whether the school board had a duty to accommodate the parents’ wishes. The claimants were asking the Court to find a constitutional obligation on the public education system (which sets curriculum based on normative goals and public interests) to allow individuals to select items on the educational menu, and to reject others, in accordance with purely subjective religious views. The Court did not find the duty to accommodate was engaged because the religious obstruction was unproved.

But the question remains: Imagine if the appellants had articulated their claim as a sincerely held belief that mere exposure to other religions is contrary to their beliefs. The objective question of harm is irrelevant to the subjective question of belief. If this is what they believed, would the Court demand objective evidence to support the subjective belief as fact? It is evident that answering this question, without noting a fundamental flaw in the *Amselem* test, would be untenable. Instead, the Court ducked dealing with the appellants’ beliefs *as beliefs*, and treated them as “unproven facts” (fallacies? myths?).

A fair treatment of the appellants’ belief would have acknowledged that their belief consisted of both a “factual” (and therefore objective) problem, but also a problem of conscience (and therefore subjective). Belief that one’s faith is threatened is itself evidence of the threat. Conscience must, by definition, include dominion over all matters of personal, cognitive space, including the content of one’s thoughts and convictions. This is, it seems, the logic by which the Constitution protects people’s belief in God even though God’s existence cannot be proven in court.

There are other ways of imagining the *L. (S.)* appellants’ claims plausibly, at least to the extent of being able to establish, on objective evidence, a limit on their Charter rights. The challenge is not interpretive but rather textual. Suppose the appellants had asserted a claim to the effect that secular instruction about morality is itself a sin. *What if my religion tells me that I am only permitted to learn about morals and ethics from a religious teacher or from my parents?* There could be no doubt that the education program at issue in the case would adversely affect adherence to this religious rule. When the state encroaches on a tenet of faith, the law does not typically look at the tenet, but rather at the

encroachment. However, with the widening scope of diversity, and the infinite possibilities in the kinds of claims that could come before courts and tribunals for protection of religious beliefs and practices, the law is going to find itself speaking to elemental conceptual questions about freedom and equality more regularly.

Imagine the challenge of a religious adherent who asserts a tenet of exclusive conviction — that is, the view that only one’s own worldview is legitimate and worthy of contemplation. A similarly strong accommodation claim could be made by those of a more atheistic or anti-deistic persuasion. Consider a parent seeking an exemption from any legitimation of religion, arguing that true neutrality requires a complete absence of religion in educational institutions. This claim might argue that any “neutral” (*i.e.*, non-evaluative) instruction about religion creates a veneer of legitimacy, privileging these worldviews over others, and breaching the freedom of conscience of non-believers. In either of these examples, the claim would, following *Amselem*, be based on a subjective, sincere belief. For the religious isolationists, the belief would be that their religion forbids early childhood education about other religions, and any form of secular education about religion generally. For the atheists, the claim would be that their conscience forbids them from exposing their children to instruction about any religion unless the purpose is to discredit it.

By reconstructing the *L. (S.)* claim in these various ways, we can peel beneath the analysis employed by the Court to reveal unresolved tensions in the analytical approach applied to section 2(a). It is becoming apparent that the Court would not accept all beliefs as equally protected under section 2(a). The hierarchy of beliefs would see only those practices that are acceptable or tolerable to certain core values earning Charter protection. Those that offend a core Canadian value, like gender equality or multiculturalism, will fail to earn strong protection. This does not mean that the courts are going to police the beliefs and practices of the nation, nor does it mean that the state apparatus has *carte blanche* to persecute such practitioners.<sup>82</sup> But the Charter will only embrace those beliefs that pass a threshold values test. How that test looks, and how it will be explained and rationalized, are mostly unknown. We can surmise that the enforcement of such values in the form of a legal test must be non-arbitrary, and that its content must be “neutral”.

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<sup>82</sup> Of course, concerns about stereotyping, scapegoating and any other discriminatory consequences should be taken seriously.

## VI. NEUTRALITY IS DEAD: LONG LIVE NEUTRALITY

As Berger notes, court interpretations of religion tend to reinforce through “objective” analysis a particular liberal perspective which is never neutral.<sup>83</sup> It is best described as *agnostic*. Courts are neither enforcing majoritarian religious norms on minorities, nor acting upon anti-religious animus. Rather, neutrality has come to represent an official doctrine of agnosticism, which formally holds no opinion, but in practical terms contemporaneously holds possibility and doubt with respect to the divine. Its effects can be both protective and harmful. The only thing about which neutrality is absolute is itself. In *L. (S.)* the majority of the Court conceded that, “from a philosophical standpoint, absolute neutrality does not exist”.<sup>84</sup> Presumably this is a good thing, because “absolutes hardly have any place in the law”.<sup>85</sup> And, of course, “no right is absolute”.<sup>86</sup>

While the Court seemed to admire neutrality, even if it is always imperfect and never achieved, Deschamps J. explained that the law also dislikes absolutes. This makes sense, given that absolute neutrality does not exist. But she offered no explanation for what exists instead of absolute neutrality. Partial neutrality? Absolute partiality? We learn not whether any other absolutes *could* exist or be contemplated within the law, such as absolute belief. This was, in effect, the nature of the claim being asserted by the appellants in *L. (S.)*. There was no way of slicing and dicing or recasting their interests: they simply believed that the course in question was harmful to their religious duty.

In order to take on the challenge of absolute belief — how to negotiate with a non-negotiable position — the Court adopted a novel approach that it described as “realistic and non-absolutist”.<sup>87</sup> The purpose of this approach, it explained, was to assure state neutrality, a goal which the Court had already acknowledged is not always possible or perfect. The primary condition, according to the Court, was that “the Quebec government cannot set up an education system that favours or hinders any one religion or a particular vision of religion”.<sup>88</sup> Religions and religious faith could only be taught as options, *not* as authority, and as

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<sup>83</sup> Berger, “Law’s Religion”, *supra*, note 8, at 311-12.

<sup>84</sup> *L. (S.)*, *supra*, note 9, at para. 31.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*, at para. 32.

<sup>88</sup> *Id.*, at para. 37.

general principles, *not* as commandments. This is the non-absolutist approach — enforced agnosticism.

Yet, promoting “neutrality” and non-absolutism led to the conclusion that there was no basis to exempt the appellants’ children from the course. Accommodation is not a free-standing right: it only arises where there is a verifiable adverse effect, and the Court saw no actual infringement of a freedom. The appellants thus found themselves bound by an inflexible rule enforcing mandatory secular instruction about religion. This sort of rule would appear to the religious absolutist to be favouring a “particular vision of religion” — namely, an agnostic or secular view that posits all religions as morally neutral and equally worthy of contemplation — precisely the kind of purpose the Court said government should be prevented from pursuing. While secular education about religion may seem “neutral” and unobjectionable to most people in the society, the effects for some individuals will manifest as an encroachment on a fundamental aspect of their belief system.

Aspiring to an impossible goal of perfect neutrality might be laudable and justifiable, but in practice it will always come with real costs. Being realistic in respect of an aspiration to an ideal does not mean ignoring potential adverse consequences; on the contrary, it requires creating mechanisms that account for the unequal consequences of neutral constructs. Problematizing neutrality, therefore, especially in the context of the rule of law, requires a full account of the risks and harms. The positions of the appellants and of the government in *L. (S.)* were remarkably symmetrical. The appellant’s claim was essentially based on the rejection of *legitimate* religious difference. For the appellants, the fact that people are free to belong to different religions in our society does not mean that the state should endorse the content of those differences, or promote them as equally legitimate. Any teaching of religion, from this view, would privilege a perspective on religion — in this case, a secular, humanistic ethical perspective — which, for some religious people, will be offensive. Veiling a particular (*i.e.*, secular) perspective under the label of neutrality was, for the appellants, precisely what they argued leads to the infringement of their freedom to transmit their religion. The argument was essentially that there is value in the manner and context of instruction: no secular education system could ever teach religion in a manner equal to faith-based instruction. The exemption request, then, was to protect children from the corruption of non faith-based instruction about religion. The fact of secular teaching itself was the alleged harm.

The Court would not find that secular teaching of religion, by definition, impedes a parents' ability to transmit religion. It carefully avoided adopting an accommodation analysis. Accommodation arises precisely in such situations where neutral measures have an adverse effect on an individual or group. Here, the curriculum sought to give a secular treatment to religious and philosophical texts, privileging the state's particular moral perspective, which was, *a priori*, in tension with the appellants' moral perspective.

The Court's avoidance of accommodation is surprising given that it acknowledged that state neutrality is not absolute. It flows logically that, at times, there are effects of state non-neutrality that will have a significant impact on certain individuals. Accommodation is what mitigates these adverse effects. Analogizing to the disability context, the recognition that the constructed world is not neutral gives rise to the duty to accommodate as a measure of fundamental protection against invidious harm.<sup>89</sup> In the disability accommodation context, it is more obvious, conceptually speaking, that the physical world is *constructed*. No construction can be purely neutral, but, for example, in architecture "universal design" is an approach that pre-emptively mitigates many of the adverse effects of the constructed world on people with physical disabilities.<sup>90</sup> Universal design reduces the need for accommodation, but it does not eliminate it.

It is helpful to think about beliefs, morals and social norms as being, like physical spaces, constructed in a particular image. While "neutral" approaches seek to universalize across spectrums of difference, they cannot eliminate the potential for difference-based exclusion. Recall that the *L. (S.)* case began as a simple exemption request. The appellants had gone to the courts after reaching an impasse with the school board. They sought judicial review of the decision refusing to grant an exemption from the course. The appellants only later added claims of statutory breach and constitutional violation.<sup>91</sup> In both the administrative review and the declaratory challenge, the parents were seeking the same remedy:

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<sup>89</sup> See Michael Ashley Stein, "Same Struggle, Different Difference: ADA Accommodation as Antidiscrimination" (2004) 153 U. Pa. L. Rev. 579.

<sup>90</sup> For example, the latest international human rights instrument, the *Convention on the Rights of Persons with Disabilities*, GA Res. A/61/611 (2006), Art. 2, defines "universal design" as: "... the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design". The Convention integrates both concepts of universal design and reasonable accommodation into its framework for disability rights enforcement.

<sup>91</sup> *L. (S.) v. School Board of the Oaks*, [2009] Q.J. No. 1896, 2009 QCCS 973 (Que. S.C.).

an exemption for their children from the mandatory class. Was it unreasonable for the school board to refuse? Was it unconstitutional for the province to design an inflexible mandatory curricular program?

The Court answered “no” to a different question altogether: it looked for evidence that a “neutral” program had done anything harmful, and found that it had not. That the Court did not employ an accommodation analysis may be due to the manner in which the case was pleaded by the appellants. This allowed the Court to avoid the formal structure of an individual freedom claim, and the inevitable impossibility of *Amselem*, and engage in a conceptual analysis of what freedom means in a society that has defined the common good in terms of diversity and multiculturalism.<sup>92</sup>

## VII. UNCONSTRAINED FREEDOM, HARM AND PROPORTIONALITY

*L. (S.)* revealed that *Amselem*’s clarity about subjective and objective levels of analysis is fragile. An accommodation analysis, applied to the religion context, necessitates some objective review of the underlying belief that grounds virtually any claim to freedom. It is folly to imagine that a court can split (or expand) the pie if it does not know all the ingredients. While in theory, accommodation is a matter of legal reasoning, in practice it looks a lot more like bargaining, with courts and adjudicators weighing the competing interests when parties are unable to work it out for themselves.

Accommodation, best conceived, creates conditions in which freedom can be enjoyed by all. It is, at its core, a mechanism for combatting discrimination. As a result of the historical and philosophical background of religious rights in Canada, described above, *equality* of religious practice is intertwined with *freedom* of religious practice.<sup>93</sup> Under accommodation analysis, where individual restrictions are necessary, the

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<sup>92</sup> Though the Court did not invoke s. 27, the multiculturalism provision of the Charter, these passages suggest that the authority of s. 27 is interpretive in nature. But the extent of its interpretive power appears to include defining foundational, normative frameworks that constrain the substantive content of Charter rights and freedoms. See, generally Faisal Bhabha, “Navigating the Spheres of Multiculturalism, Bilingualism and Federalism: Theoretical, Doctrinal and Constitutional Perspectives on the ‘Reasonable Accommodation’ Debate” (2008) 43 S.C.L.R. (2d) 499, at 517-26.

<sup>93</sup> See Christopher L. Eisgruber & Mariah Zeisberg, “Religious Freedom in Canada and the United States” (2006) 4 Int’l J. Const. L. 262 [hereinafter “Eisgruber & Zeisberg”].

undue hardship analysis protects against arbitrary deprivation.<sup>94</sup> One conception of freedom, as explored in Part II, rationalizes such non-arbitrary deprivations, not in the form of exceptions or limits, but rather as a function of creating conditions of equality that enhance freedom. After all, accommodation is a form of redistribution: it usually involves taking from one to give to another. This is why basing an accommodation claim solely on a belief — creating entitlements *vis-à-vis* others — can be fraught in practice.

There is consequently tremendous pressure on courts and tribunals to present strong justifications for enforcing accommodation rights. The challenge is that, as Pettit tells us, freedom is a zero-sum game.<sup>95</sup> The promise of liberal constitutionalism of freedom for all can only be, in practice, an assurance of *relative* freedom. Accommodation begins from the assumption that absolute freedom is the goal, subject to limits that we encounter when one person's freedom (*e.g.*, A's preferred hours of work) bumps into another person's freedom (*e.g.*, B's scheduling needs). As suggested earlier, accommodation analysis often operates as a bargain between these "competing" freedoms. When negotiating accommodation fails to yield a result, courts and tribunals are called upon to adjudicate. This puts decision-makers in the position of weighing the value of the competing claims. Yet, current religious freedom doctrine does not permit substantive review of the content of claimants' religious beliefs. Decision-makers, then, must find ways to do it covertly, most likely under considerations of "harm" and in "proportionality" balancing exercises.<sup>96</sup>

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<sup>94</sup> In *Renaud*, *supra*, note 34, at 984, Sopinka J. made clear that there is no absolute protection: "The use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test."

<sup>95</sup> Pettit, *supra*, note 12, at 52.

<sup>96</sup> *Braker*, *supra*, note 71, at paras. 17-20. Facing the issue head-on, Abella J. explained: "... any harm to the husband's religious freedom in requiring him to pay damages for unilaterally breaching his commitment, is significantly outweighed by the harm caused by his unilateral decision not to honour it.

This is not, as implied by the dissent, an unwarranted secular trespass into religious fields, nor does it amount to judicial sanction of the vagaries of an individual's religion. In deciding cases involving freedom of religion, the courts cannot ignore religion. To determine whether a particular claim to freedom of religion is entitled to protection, a court must take into account the particular religion, the particular religious right, and the particular personal and public consequences, including the religious consequences, of enforcing that right.

See also *Reference re Section 293 of the Criminal Code of Canada*, [2011] B.C.J. No. 2211, 2011 BCSC 1588, at para. 5 (B.C.S.C.). Considering the criminal prohibition on polygamy: "I have concluded that this case is essentially about harm; more specifically, Parliament's reasoned apprehension of harm arising out of the practice of polygamy. This includes harm to women, to children, to society and to the institution of monogamous marriage."

For example, if a party were to make a claim based on an absolutist though sincere religious belief, the courts would have no choice but to either reject the belief itself as objectionable, necessarily requiring an objective evaluation of a subjective religious belief, or to concede the breach and build a justification at section 1. It is not fantastical to imagine any number of claims based on beliefs relating to interactions with others or others' ideas that could necessitate this sort of analysis. In *L. (S.)*, the Court avoided section 1; instead, it was able to frame the appellants' belief in a way which put it outside the definition of the freedom itself: a conceptual, rather than practical, limit. While, in this case, the Court was able to frame the appellants' belief in a way which allowed for a very fine carving of the sincere belief test, future cases will likely cause the *Amslem* test to crumble under the weight of these analytical challenges.

Accommodation derives from a theory in which freedom is, conceptually, limitless. Freedom only reaches its limit when it interferes with, or draws from, others. But what does it mean to draw from others? This is where the doctrine of undue hardship is designed to sort facts and, through the analytical mechanism of proportionality, weigh the competing interests. The analysis is designed with an expectation of conflict: infinite freedom will always collide with the finite world. While most Charter and human rights jurisprudence treats health, safety and cost considerations as "hardship", it is a general theory of *harm*, measured by effects on people, that underlies the undue hardship test.<sup>97</sup>

Cases involving claims of conscience and religion will often trigger concerns about *harmful values*. As Eisgruber and Zeisberg point out, "harm" as "conflict-with-values" has been a part of religious rights discourse since the seminal *Big M* case,<sup>98</sup> in which Dickson J. (as he then was) defined freedom in a way which simultaneously permits and restricts:

Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.<sup>99</sup>

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<sup>97</sup> See Bruce Ryder, "The Canadian Conception of Equal Religious Citizenship" in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008), at 1, 2.

<sup>98</sup> Eisgruber & Zeisberg, *supra*, note 93, at 262.

<sup>99</sup> *Big M*, *supra*, note 35, at para. 95.



Accommodation claims invariably, therefore, bring up balancing, pitting harms against claims or benefits. Balancing as an adjudicative exercise is challenging: it aspires to achieve compromise by identifying and organizing all of the relevant interests at stake. In so doing, the courts must translate a religious obligation from a faith-based commitment into a form of legally protected expressive activity. In so doing, the courts must necessarily explain and rationalize the particularities of the religious commitment.<sup>100</sup>

Berger argues that, under the jurisprudence of the Supreme Court over the past decade, the Canadian constitutional law's image of religion is best understood as being essentially individual, serving autonomy and choice, and concerned with private interests.<sup>101</sup> With the adoption of the Charter, the conception of freedom of religion within an individual rights paradigm tore people out of their communities and social groups, and individualized their interests. At the same time, it created an artificial bifurcation of religious people's identities, split between private and public/collective expressions.<sup>102</sup> Berger notes that the contemporary "rendering" of religion included a descriptive account that is *not* value-neutral. Rather, courts have decided, apparently on their own accord, that what counts as "religious" (and therefore deserving of protection) is only "that which is meaningful to the individual; institutions and collective traditions are only of derivative importance to the law."<sup>103</sup>

Another feature of religion that the Court has rendered is the way religions ought to interact, which naturally requires interrogating the place of outsiders from within the religious perspective (such as being "apostates", "sinners" or "heathens"). The Court simply washes over these perspectives and substitutes a presumed, or imputed, view based on mutual respect and tolerance. While many religions — perhaps any religion, by definition — may contain core exclusionary doctrines, may lend itself to absolutist positions, and may not be open to compromise on fundamental tenets, the Court has woven religious freedom tightly with the protection of diversity in its interpretive *dicta*. It appears the Court is signalling that there can be no basis for a religious freedom claim if it is grounded in a view (even, dare we say, a "sincerely held belief") that

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<sup>100</sup> Berger, "Law's Religion", *supra*, note 8.

<sup>101</sup> *Id.*, at 283.

<sup>102</sup> Donn Short & Bruce MacDougall, "Religion-Based Claims for Impinging on Queer Citizenship" (2010) 33 Dal. L.J. 133, at 146.

<sup>103</sup> Berger, "Law's Religion", *supra*, note 8, at 288.

significantly opposes or threatens the values of diversity and cultural pluralism.

### VIII. REFINING THE CONCEPT OF FREEDOM

The Supreme Court's decision in *L. (S.)* suggests that nearly 30 years after *O'Malley*, the Court is grappling with the implications of applying the accommodation approach to the adjudication of religious freedom claims, whether under the Charter or anti-discrimination statutes. Nearly 60 years after *Saumur*, the Court is again compelled to revisit the concept of freedom in the context of the relationship between religion, the state and society.

*L. (S.)* certainly constrains the individual rights approach to freedom of religion. The Court did not call upon the government to justify a "limit"; rather, the Court tailored the scope of the freedom in such a way that there was no restriction at all. A robust accommodation analysis would have difficulty sustaining the Court's conclusion: while the restriction complained about may not have been arbitrary — given that the program applied equally to everybody and contained "neutral" (*i.e.*, agnostic) content — it clearly had some adverse effect on the appellant. The dissent was less cagey about this fact, but found that the risk of adverse impact was speculative.

Looking at *L. (S.)* in the bigger picture, the facts were relatively easy. The claimant was not a member of a vulnerable minority, but rather of the former dominant majority:<sup>104</sup> white, French-speaking Catholics in Quebec. Even more relevant is the institutional history of the Roman Catholic church and Quebec's education system and entire social structure. The Court acknowledged this history, and emphasized Quebec's deliberate move to secular public education in the 1960s. The curricular program at issue was part of a distinctive, Québécois relationship between religion and society, and the Court seemed eager to dovetail its analysis with its rendition of Quebec's history.

Nonetheless, the *L. (S.)* decision does offer some further development to religious freedom jurisprudence generally. Secular diversity appears to have replaced the "equality of religions" as the governing

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<sup>104</sup> It must be noted that this "majoritarian" dominance was not enjoyed equally. The privileged status of Catholicism in Quebec was held firmly by religious institutions who were cozy with government until the Duplessis era ended in 1959. In terms of economic power, French-speaking Catholics in Quebec were, for most of their history under English rule, a *disadvantaged* majority.

norm of religious freedom. This is a shift away from respect for differences in religious doctrine, belief and practice, and towards an identity-based discourse rooted in the recognition of “culture”. As a sociological statement, it reflects the secularization of the general public, the de-privileging of religion in public life, and a reconstruction of principles of social cohesion. The jurisprudence of diversity and multiculturalism could very well be the contemporary expression of communitarian and constitutional goals, filling the normative gaps left by the demise of majoritarian faith communities. This could be the dawn of a new republicanism.

There is something to be gained by having constitutional law and democratic theory interacting in judicial decision-making. It is useful for courts and adjudicators to explain in their reasons what values underlie their interpretations of the law. Through such reasoned decisions, decision-makers give meaning and content not only to rights, but also to civic identity. While the state aspires to neutrality in mediating between competing private interests, the law need not be (and is never, in fact) neutral in every instance. We already recognize this with the concept of the “public interest”, which in adjudication becomes the doctrine used to promote what is generally held to be the “common good”. The courts impliedly tell us what the common good is, and sometimes they outright say it. More detailed attention to explaining and theorizing these doctrines will provide greater stability in the law.

There is, however, also reason to be skeptical about universalizing concepts like the “common good” or the “public interest”. We approach such concepts with caution because we are aware of the risk of interest domination and usurpation by a strong few to the detriment of the rest. Extreme examples of fascist and socialist states immediately come to mind, illustrating how tyranny (*i.e.*, the concentration of political power with little popular legitimacy) has been justified on the basis of “public” or “common” interests. In fact, justifications based on common interests have been the hallmark of most if not all of the regimes that we view as totalitarian.

The risk of sliding into totalitarianism is not an immediate or necessary concern for Canada, at present. Rather, the risk in a democracy committed to equality is that public interests come to be defined with inadequate attention to the interests at the margins, those who arguably need the protection of law the most. When accepted applications of the common good fail to deliver, substantively, more egalitarian outcomes over the span of time, if not in each and every case, there is reason to

worry about breakdown in the system of legitimate democratic governance. The legitimacy of the democratic system and the rule of law thus hinges on the pursuit of democratic egalitarianism against the threats of elite domination and unchecked majoritarianism,<sup>105</sup> which together leave society's weakest in peril.

The courts are the guardians of the constitutional aspiration: judges find and give meaning to the statements of goals and principles that are embodied in constitutional law. Similarly, human rights legislation is not self-executing: statutory tribunals must hear and decide, giving meaning to the words of the statute in respect of the matters brought to adjudication. Rights and freedoms are therefore defined *in practice*, on the facts of particular cases. For this reason, decision-makers must explain how their conclusions respect and uphold the democratic egalitarian principle of non-domination, in particular when considering the "public interest" or other doctrines grounded in the "common good".

## IX. CONCLUSION

This paper endeavoured to expose a theoretical gap in the jurisprudence of the Supreme Court of Canada in relation to freedom of religion claims. The Court engages in decision-making about contested values, but has tended to avoid substantive consideration of normative questions. Instead, it has preferred formalistic doctrinal applications coupled with covert content review, whereby normative assessments are made in the name of a stretched and contrived neutrality. I have suggested that a shift in the theoretical paradigm could find some justification within a neo-republican democratic model. This model would conceptualize religious freedom as involving group and relational interests, and recognizing social encumbrances. Such a conception of freedom would dismiss the impulse to emphasize individual non-interference as the defining or only characteristic of freedom. Instead, it would view freedom as a fixed resource that must be distributed fairly and equitably throughout the society. Rejection of hyper-individualism suggests that responsibility and social commitments ought to be understood as a constituent part of freedom, rather than as a threat or toll. Freedom, in this light, would be viewed as a shared commodity that both gives and takes.

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<sup>105</sup> This sort of "soft" domination is best theorized in the work of Marxist political philosopher Antonio Gramsci. See Antonio Gramsci, *Selections from the Prison Notebooks*, translated by Quintin Hoare & Geoffrey Nowell Smith (New York: International Publishers, 1991), at 12-22.

One of the primary functions of law is to set the permissions and restrictions that regulate access to, and use of, any shared commodity, including freedom. Political philosophers have grappled with the fact that the realization of freedom needs more than mere permission:<sup>106</sup> the promotion of religious freedom requires some degree of state or institutional action to create the conditions that will allow full freedom to flourish in an egalitarian fashion. This means that freedom is as much about managing the kinds of interactions people have with each other, with the state and with other social institutions, as it is about offering a vehicle to individual autonomy. Rights and freedoms, understood within the relational context of this system of permissions and restrictions, incorporate both the respect for personal autonomy and the requirement that personal autonomy be exercised reasonably, fairly and responsibly.

Democratic legitimacy demands at least serious efforts to promote egalitarianism. Coercion or restriction in the promotion of legitimate Charter goals cannot, on their own, breach the Charter. The Charter cannot breach itself. This is a matter of fact, not interpretation. One right cannot extinguish another. From this view, the normative content of freedom is shaped concurrently by individual interests in autonomy and self-realization, and collective goals, to ensure equality and social harmony. These two threads are equally necessary to promote freedom, though all too often they are pitted against one another, especially when subject to adjudication. Conceptually, the social permission of freedom should, in each case, be evaluated against a generally held (though not necessarily universal) notion of the common good. While there is not, in any realistic sense, a neutral standard (“neutrality does not exist”<sup>107</sup>), democratic processes help to ensure that the values underlying the law and institutional behaviour will bear the imprimatur of wide popular consent, and have the widest and deepest benefit to society.

This is the basic framework for a *relational* conception of freedom — one in which permissions and restrictions flow in all directions between the state, the individual and the collective. The task for the Supreme Court, then, is to develop a legal understanding of religious freedom that is shaped in relation to expressions of the common good. The sources for ascertaining the common good include instruments of law and policy, but will also inevitably contain moral judgment. Courts

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<sup>106</sup> See generally, Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999).

<sup>107</sup> *L. (S.)*, *supra*, note 9, at para. 31.

should ensure that principles of democratic egalitarianism and non-arbitrariness are respected in order to maintain democratic legitimacy. In other words, the role of the Court is to be the protector of these values as part of its function of interpreting the law.

In *Bruker*, the Supreme Court of Canada described the pride of Canada's growing appreciation for, and protection of, difference. Respect for difference appears to be an ethical principle, as opposed to a "right" or a "law". Yet, it underlies Canada's constitutional structure and defines Canadian identity. Justice Abella explained that:

Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism. This journey has included a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected. Endorsed in legal instruments ranging from the statutory protections found in human rights codes to their constitutional enshrinement in the *Canadian Charter of Rights and Freedoms*, the right to integrate into Canada's mainstream based on and notwithstanding these differences has become a defining part of our national character.<sup>108</sup>

The ethical principle of respecting difference apparently gives rise to a "right" to integrate, though the precise source of this right is unclear. This "defining part of our national character" may have foretold the story of *L. (S.)*. While we may assume a generalized right to integrate *vis-à-vis* the state implied in the equality guarantee, this "right" suggests obligations on the part of others stemming from mutual respect for difference among citizens. What this speaks to is a value of diversity tolerance that defines the social space in which rights and freedoms exist. In other words, the respect for difference speaks not only to government, but to everyone. It sets the context in which rights and freedoms are defined.

Justice Abella explained respect for difference not as a limiting principle based on governmental needs and objectives, but rather as a nuanced rights definition based on specific facts and context:

The right to have differences protected, however, does not mean that those differences are always hegemonic. Not all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity for

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<sup>108</sup> *Bruker, supra*, note 71, at para. 1 (emphasis added).

protecting the evolutionary integrity of both multiculturalism and public confidence in its importance.<sup>109</sup>

Here is a conceptual limit on freedom: not all differences are compatible with Canada's values. It seems, then, that the Court is saying that the "right" to integrate is paired with an unconditional principle — an obligation — of belonging, or at least an obligation of conforming to certain core values. If so, this creates boundless possibility for how the Court may identify and apply such core values. Based on recent religious freedom doctrine, including the cases surveyed in this paper, it appears that the Court is developing a theory of religious freedom that is defined and shaped by the normative priority of respecting difference in a multicultural society, coupled with a concomitant duty of belonging to an integrated society. If, indeed, this is the course, then further illumination can be expected from the Court's judgments in *S. (N.)* and *Whatcott*,<sup>110</sup> which are both due imminently. Until then, it is worth thinking about what a relational theory of freedom might mean for the other section 2 rights, as well as to what extent this analysis might enhance our understanding of the theory of equality reflected in the Supreme Court's section 15 jurisprudence.

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<sup>109</sup> *Id.*, at para. 2.

<sup>110</sup> *Supra*, note 39.