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Mouvement laïque québécois v. Saguenay: Neutrality and Narrative

Victor M. Muñiz-Fraticelli*

*For every constitution there is an epic, for each decalogue a scripture.*¹

The controversy over the recitation of prayer at the sessions of the municipal council of the city of Saguenay laid bare the tensions between religious neutrality and historical identity that continue to play out in the constitutional politics of Quebec. At stake is control of the narrative of what Quebec was and is becoming, and thus control of the meaning of those symbols and norms that shape and direct its normative order.

*Mouvement laïque québécois v. Saguenay (City)*² is as much a case about constitutional doctrine as it is about the narrative of secularization in Canadian and (especially) Quebec society, and the ongoing displacement of a tacit Christian identity for a multicultural and civic ethos. In many ways, *MLQ v. Saguenay* is a distinctly Québécois controversy: It is the culmination of a long and often tumultuous struggle to define the place of Roman Catholicism in the civil and political life of the province after centuries of ecclesiastical hegemony and decades of reaction against this hegemony. The players in the drama were not new to the stage, but had been intervening in public life for years, most recently in the *Consultation Commission on Accommodation Practices Related to Cultural Differences* — the Bouchard-Taylor commission.³ The complaint that led to the actual case was originally brought before a forum charged with promoting the 1976 Quebec *Charter of Human Rights*

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¹ Robert M. Cover, “The Supreme Court, 1982 Term — Foreword: Nomos and Narrative” (1983) 97 *Harvard L. Rev.* 4, at 4 [hereinafter “Cover”].

² [2015] S.C.J. No. 16, 2015 SCC 16 (S.C.C.), revg [2013] J.Q. no 5220 (Que. C.A.) [hereinafter “*MLQ v. Saguenay*”].

³ Quebec, *Fonder l’Avenir : Le temps de la conciliation* (Québec : Commission de consultation sur les pratiques d’accommodement reliées aux différences culturelles, 2008) (Gérard Bouchard & Charles Taylor).

and Freedoms⁴ rather than the 1982 *Canadian Charter of Rights and Freedoms*.⁵ And it was, of course, Quebec justices who most directly weighed in on the debate, all the way to Gascon J. who wrote for the majority in the Supreme Court.

The Court's decision in *MLQ v. Saguenay* — which declared unconstitutional the practice of confessional (and perhaps all) prayer at city council meetings — is not especially surprising or controversial. Popular opinion in Quebec or Canada does not favour confessional prayer at council meetings, and a majority of Canadians would prefer that there were no invocation at all, even if a majority finds acceptable non-denominational prayers that reference “God” generically.⁶ And the little jurisprudence that existed on municipal prayers prior to *MLQ v. Saguenay*, while mixed, rejected the more overtly confessional orations and was suspicious even of the more generic. What is interesting about the *MLQ* decision is the reasoning of the Supreme Court, which consolidates a shift in the discussion of religion in civic life away from a focus on coercion of individual belief and towards a more general standard of state neutrality.

This shift is not new; scholars like Richard Moon and Benjamin Berger have been tracking it for years.⁷ But in *MLQ v. Saguenay* it is laid bare, which makes it easier to see some problems with the Court's underlying constitutional theory. I will only discuss two here. First, the standard of neutrality may well be the application of freedom of religion mandated by the *Canadian Charter of Rights and Freedoms* and other quasi-constitutional instruments — the section 15 guarantee of equal treatment would suggest this — but the Supreme Court seems uninterested in attaching it too firmly to the constitutional text, preferring to derive it from a broader political or sociological theory; this is a problem when interpreting a written constitution.⁸ Second, the Supreme

⁴ CQLR, c. C-12 [hereinafter “Quebec Charter”].

⁵ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁶ Interestingly, nine in 10 Canadians don't seem to mind the reference to God in the national anthem. See Angus Reid Institute, “Prayer in Canadian Public Life: A Nation Divided”, online: <<http://angusreid.org/public-prayer/>>.

⁷ Richard Moon, “Government Support for Religious Practice” in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: University of British Columbia Press, 2008), at 217; Benjamin Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015), at 84.

⁸ Even critics of entrenched constitutionalism understand that there is something different to a written document: “there are words *there* which may (or may not) actually *have* a plain meaning — whereas in the case of other sources of law, hermeneutical difficulties get going on a somewhat

Court insists on assimilating all provincial constitutional or quasi-constitutional rights instruments to the federal Charter, eliding important differences in historical experience and legislative intent; this is a problem for federalism. Attention to the interplay between rule and narrative in constituting the normative universe of constitutional law — a model famously proposed by Robert Cover over three decades ago — would do much to reground constitutional principles in the text of the Charter and to allow variation between different provincial rights instruments.

I. MUNICIPAL PRAYER IN SAGUENAY

The controversy in *MLQ v. Saguenay* can be told as a sequence of acts in an ongoing drama. In the cold open, we fade into scene at the opening of a municipal council session in the city of Saguenay. A statue of the Sacred Heart and a crucifix hang on the walls of the building. The mayor rises and leads the councillors in prayer. “Au nom du Père, du Fils et du Saint-Esprit”, he intones, while making the sign of the cross in the Roman Catholic fashion. Some brief words follow, commending the council to God and asking for guidance in deliberation, and the same formula — the appeal to the Christian Trinity and the sign of the cross — closes the invocation. The language of the prayer varies with time, but it is always transparently Catholic, if not in words at least in the ritual that surrounds it. The mayor who leads it, Jean Tremblay, is unapologetic about this, and the vast majority of the population of Saguenay seems to support him.

Jean Tremblay has been mayor of Saguenay since the city’s formal creation in 2002, following the municipal merger. For five years before then he had been mayor of Chicoutimi, now the major borough of Saguenay. By all electoral accounts, he has been a popular mayor, winning each election by comfortable margins, despite running on the federalist Liberal Party ticket in a largely nationalist region. He has been attentive to the strong current of cultural nationalism in his constituency, a current that has flowed from the days of *Union Nationale* to part of the coalition that sustains the present-day nationalist parties. This is the heart of Quebec’s cultural nationalism, rural and traditionalist, rooted in the

different basis.” J. Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), at 79. As I will mention later, it is also part of the *narrative* of a written constitution that certain words (and not others) were deliberately put down on a charter, and that this is an act of normative significance when interpreting constitutional principles.

agricultural and industrial heartlands of the province and proudly immersed in four centuries of Catholic hegemony.

The dramatic tension rises as one resident of the city, Alain Simoneau, who feels uncomfortable with the religious invocation, challenges the mayor and demands an end to the practice. The mayor refuses, and Mr. Simoneau files a complaint with the Commission des droits de la personne et des droits de la jeunesse. He is assisted by the Mouvement laïque québécois (“MLQ”). The MLQ is the product of a reaction among urban intellectual elites against the Catholic hegemony that Mayor Tremblay wants to preserve.⁹ The group’s program represents another strain of Quebec nationalism — the urban intellectuals with republican sympathies who achieved the Quiet Revolution and broke with the moral authority of the Church and the colluding power of federalist politicians and financial elites. This strain looks to the history that might have been, had Quebec not been denied by a mere 30 years the Revolution that broke the First Estate and made France into *une république laïque*. The model of secularism that the MLQ wants to implement is a French republican model that took full form at the turn of the 20th century, when the Radical Republican party suppressed all religious orders, closed all religious schools, confiscated church property, and turned control of all religious associations to laypersons.¹⁰ The MLQ’s position also aligns it with the sovereigntist movement for a number of overlapping reasons: the force of Quebec’s rejection of the Church after the Quiet Revolution, versus Canada’s more gradual and less dramatic secularization; the republican opposition to the monarchy; the secularist rejection of the same Crown which, in the United Kingdom (though not in Canada), is at the head of a church.¹¹

In his complaint, Simoneau and the MLQ request the cessation of the prayer and a removal of all religious symbols from the municipal council chambers, on the grounds that they represent discriminatory interference with Mr. Simoneau’s rights under sections 3 and 10 of the Quebec *Charter of Human Rights and Freedoms*, respectively the guarantee of freedom of religion, and the “right to full and equal recognition and

⁹ M. Geoffroy, “Le Mouvement laïque Québécois et la laïcité au Canada” in P. Singaravélou, ed., *Laïcité: enjeux et pratiques* (Bordeaux: Presses Universitaires de Bordeaux, 2007), at 95.

¹⁰ *Loi du 1er juillet 1901 relative au contrat d’association*, JO, 2 July 1901, 4025 ; *Loi du 7 juillet 1904 relative à la suppression de l’enseignement congréganiste*, B.A.M.I.P. n° 1630, p. 143-146 ; *Loi du 9 décembre 1905 concernant la séparation des Églises et de l’État*, JO, 11 December 1905, 7205.

¹¹ Lost between these, of course, are non-Christian religious minorities, issued from recent migration and anathemized by both sides.

exercise of his human rights and freedoms, without distinction, exclusion or preference based on [...] religion".¹² The Commission finds sufficient evidence for a claim, and the MLQ takes the case before the Quebec Human Rights Tribunal for relief.

The Saguenay city council counters by unanimously approving a by-law that reaffirms its commitment to the municipal prayer, arguing that the recitation is a tradition in the city, and that the councillors wish to continue the practice in the exercise of their own individual rights to freedom of religion, conscience and expression. They also codify the language of the prayer in the by-law, and provide for a delay to the official start of the council session in order to accommodate councillors and members of the public who do not want to participate in the prayer.¹³ The mayor and the councillors, however, continue the practice of invoking the Christian Trinity and making the sign of the cross before and after the ceremony.

The Quebec Human Rights Tribunal receives the Commission's report and attempts to defuse the tension by calling the city's bluff. The Tribunal understandably finds the prayer — both the original practice and the one codified in the by-law — to be religious in content and in purpose, especially given the obviously Catholic gestures that surround it; in consequence, it violates the state's duty of neutrality. It orders the mayor and council to cease the recitation. It rules the by-law itself invalid and goes further by requiring all religious symbols be removed from the council chamber (which had been a request of the MLQ, but which the Commission had declined to investigate). It determines that the neutrality of the state requires complete abstention of religious expression in the public space, whether in prayer or in the portrayal of symbols.

The action then moves to the Quebec Court of Appeal, which reverses the Tribunal's decision. Its reasons are worth going over in detail, because they represent a contested but widespread position in the debate over religious expression in Quebec. Instead of the strict separationist view espoused by the Tribunal, the appellate court preferred a more flexible notion. The neutrality of the state requires the equal treatment of

¹² *Supra*, note 4.

¹³ The prayer enacted in the by-law, in translation, reads:

Almighty God, we thank You for the great blessings that You have given to Saguenay and its citizens, including freedom, opportunities for development and peace. Guide us in our deliberations as City Council members and help us to be aware of our duties and responsibilities. Grant us the wisdom, knowledge and understanding to allow us to preserve the benefits enjoyed by our City for all to enjoy and so that we may make wise decisions. Amen.

citizens, and the independence of governmental officials and public institutions from religious influence.¹⁴ But absolute neutrality, the Court claimed, was impossible given the religious history of the province,¹⁵ and not required by then-existent Supreme Court precedent.¹⁶ A better concept, the judges held, would be the notion of “neutralité bienveillante” (translated as “benevolent neutrality”),¹⁷ which allows for state support for religious institutions as long as all religions (and, presumably, at least some non-religious positions) are treated equally. The phrase, referenced to José Woehrling, contemplated the state’s financial support for religious institutions,¹⁸ most notably denominational schools, but the Court of Appeal appears to extend it to support for a historical religious heritage, and perhaps also to individual manifestations of religiosity by public officials — so long as all religions are equitably treated. The alternative, favoured by the MLQ, would demand the voiding of all religious signs from public space.¹⁹

The Court of Appeal ultimately tries to strike a balance between the only Canadian cases that are directly on point — two Ontarian judicial decisions on municipal prayer: *Freitag v. Penetanguishene (Town)*²⁰ and *Allen v. Renfrew (County)*²¹ (we will flash back to these later). For now, it is sufficient to know that the former decision, of the Ontario Court of Appeal, found that an overtly Christian prayer recited at a municipal meeting was impermissible under the Charter, but left open the possibility that a non-sectarian prayer might pass constitutional scrutiny. The later decision, from the Ontario Superior Court, took the Ontario

¹⁴ *Saguenay (Ville de) c. Mouvement laïque québécois*, [2013] J.Q. no 5220, 2013 QCCA 936 at para. 64 (Que. C.A.) [hereinafter “*Saguenay QCCA*”].

¹⁵ *Id.*, at para. 65.

¹⁶ *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine*, [2004] S.C.J. No. 48, 2004 SCC 48 (S.C.C.), revg [2002] J.Q. no 4728 (Que. C.A.) [hereinafter “*Lafontaine*”] and *L. (S.) v. Commission scolaire des Chênes*, [2012] S.C.J. No. 7, 2012 SCC 7 (S.C.C.), affg [2010] J.Q. no 1355, 1356, 1357 (Que. C.A.).

¹⁷ *Saguenay QCCA*, *supra*, note 14, at para. 77.

¹⁸ José Woehrling, “Quelle place pour la religion dans les institutions publiques ?” in Jean-François Gaudreault-DesBiens, ed., *Le droit, la religion, et le raisonnable* (Montreal : Éditions Thémis, 2009) 115, at 127.

¹⁹ This is consistent with the organization’s position in *Rosenberg v. Outremont (City)*, [2001] Q.J. No. 2858 (Que. S.C.), in which the MLQ supported the City of Outremont’s attempt to dismantle an *eruv* — which the Superior Court itself defines as “a notional concept by which an otherwise open area is closed by the attachment of barely visible wires or strings to freestanding structures” (at para. 7) — erected on private property and causing no one “any inconvenience or undue hardship” (at para. 44). I thank an anonymous commenter for pointing this out.

²⁰ [1999] O.J. No. 3524, 47 O.R. (3d) 301 (Ont. C.A.), revg [1998] O.J. No. 29 (Ont. Gen. Div.) [hereinafter “*Freitag*”].

²¹ [2004] O.J. No. 1231, 69 O.R. (3d) 742 (Ont. S.C.J.) [hereinafter “*Allen*”].

Court of Appeal at its word and allowed a town council to continue reciting a prayer that, while non-sectarian, still mentioned God.²² Among the reasons given by the Ontario Superior Court are the preamble to the Charter, which declares that “Canada is founded upon principles that recognize the supremacy of God and the rule of law”, and the persistence of prayer in the House of Commons.

The MLQ’s petition in *Saguenay*, however, was based on the Quebec Charter, which contains no reference to God. Nonetheless, the Quebec Court of Appeal pointed to numerous symbolic references that retain religious content (the flag of Quebec, the national anthem, the motto of Montreal, or the large illuminated cross on the summit of Mount-Royal) and to a resolution passed unanimously by the National Assembly of Quebec asserting its “attachment to our religious and historical patrimony represented notably by the crucifix in our blue hall and our armorial devices which adorn our institutions”.²³ These are historical evidence, the judges held, of the religious dimension of Québec’s history, but do not compromise the neutrality of the state. The appellate court also found support in European and American decisions — *Lautsi v. Italy*²⁴ and *Marsh v. Chambers*.²⁵ In the former, the European Court of Human Rights allowed crucifixes to remain posted on the walls of Italian public school classrooms, deeming them a passive symbol that did not have an indoctrinating effect, and represented mainly a historical recognition of the country’s majority religion. In the latter case, the United States Supreme Court refused to declare unconstitutional the practice of opening the Nebraska state legislative session with a prayer led by a chaplain. The “unbroken practice for two centuries in the National Congress and for more than a century in Nebraska and in many other states”²⁶ was reason to continue the practice despite the constitutional proscription to “make no law respecting an establishment of religion”. In the end, the Court of Appeal was able to rely on ambiguities in the case law, in the historical practice of the federal and provincial governments, and even in comparative law to alter the narrative of religious neutrality.

²² As the Quebec Court of Appeal observes, this prayer is more or less identical in wording to the Saguenay prayer, as both were based on the prayer recited at the House of Commons.

²³ *Saguenay QCCA*, *supra*, note 14, at para. 102, citing Québec, Assemblée nationale, *Procès-verbaux*, 38e lég, 1re sess, No. 87 (22 mai 2008), at 840.

²⁴ [GC], No. 30814/06 (March 18, 2011).

²⁵ 463 U.S. 783 (1983).

²⁶ *Id.*, at 795.

II. THE CONSTITUTIONALITY OF MUNICIPAL PRAYER BEFORE *MLQ*

Before reaching the last scene in the drama, we should briefly flash back to the state of the law at the time the controversy started. Prior to the Supreme Court decision in *MLQ v. Saguenay*, there was little precedent to guide Canadian municipalities on the constitutionality of reciting prayers at town and city meetings. Only two recent Ontario cases stood out — *Freitag v. Penetanguishene*²⁷ and *Allen v. Renfrew*²⁸ — which, although they appealed to a common norm, nonetheless reached contrary conclusions.

In *Freitag*, a non-Christian resident of the Town of Penetanguishene challenged an apparently long-standing practice of having the mayor open the municipal council meetings with the Lord's Prayer.²⁹ The practice was not mandated by any municipal ordinance or by-law, but was done at the mayor's discretion in order to bring a "moral tone" to the deliberation of the council.³⁰ Nonetheless, this discretion was exercised in light of the mayor's statutory authority to open and conduct town meetings, and therefore constituted a governmental act. It was not — and even the mayor did not intend it to be — a merely personal invitation of like-minded private persons to jointly exercise their religious convictions.

The Court of Appeal clearly saw in the prayer an attempt "to impose a Christian moral tone on the deliberations of council" and deemed it impermissible in light of the Charter's guarantee of freedom of religion.³¹ It was guided by the Supreme Court's expansive framing of religious freedom in *R. v. Big M Drug Mart Ltd.*,³² and the more specific discussion of public prayer in *Zylberberg v. Sudbury Board of Education*.³³ The latter case concerned an Ontario regulation that allowed the recitation of Bible readings and the Lord's Prayer in public schools, but offered an exemption to any student who did not wish to attend the ceremony. The *Zylberberg* Court found the exemption insufficient to redeem the regulation, especially given the sensitive content of the school environment, since both participating in the prayer and seeking an exemption compelled students

²⁷ *Supra*, note 20.

²⁸ *Supra*, note 21.

²⁹ *Freitag*, *supra*, note 20, at para. 4.

³⁰ *Id.*, at para. 6.

³¹ *Id.*, at paras. 18, 20.

³² [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 (S.C.C.), affg [1983] A.J. No. 766 (Alta. C.A.) [hereinafter "*Big M*"].

³³ [1988] O.J. No. 1488, 65 O.R. (2d) 641 (Ont. C.A.), revg [1986] O.J. No. 720 (Ont. Div. Ct.).

and parents to make a religious statement — a profession or rejection of ritual and belief — which they should not have to make.

Now, there were differences between the prayer in *Zylberberg* and the Penetanguishene prayer, which the *Freitag* Court felt the need to explain. The first difference is that, in *Zylberberg* (as in *Big M*), the religious practice was prescribed by law, while in *Freitag* it was not a mandated practice but an act of mayoral discretion. The *Freitag* Court did not dwell much on this point, but it will become a relevant distinction in *MLQ v. Saguenay*. It will suffice, for now, to say that the fact that the Christian prayer was a discretionary practice as opposed to an explicit mandate required the court to look more closely at the context and content of the prayer, where an explicitly Christian statute or regulation would have been dismissed out of hand.

The second difference is that *Zylberberg* involved children in a school environment while *Freitag* concerned adults in a civic context. The pressure felt by children in the school setting can be understood more easily than that of the citizen attending a council meeting, which is why the *Freitag* Court emphasized the concrete exclusionary effect of the Christian prayer, the tangible ways in which Freitag was coerced. The *Freitag* Court relied only on section 2(a) of the Charter to determine that Freitag's constitutional rights had been infringed.³⁴ It does not invoke section 15, the right of every individual to "the equal protection and equal benefit of the law without discrimination" which is the complementary premise to the guarantee of religious freedom in any argument favouring the religious neutrality of the state. But the argument in *Freitag* is simply not about religious neutrality, but about religious coercion. The Court concluded that an overtly Christian prayer at the opening of a municipal council meeting restricted the liberty of the town's non-Christian citizens by creating a climate in which full civic participation was implicitly conditional on acquiescence to a sectarian religious act. The Court, therefore, did not have to entertain the question of whether impermissible coercion was neutrally applied. Neutrality, as a concept, does not enter into it.

³⁴ The Court also cited s. 27 of the Charter against the argument that a long-standing practice should be allowed to stand merely on account of its historicity, suggesting that the Charter recognized in positive law what was sociologically evident: that religious and cultural diversity had increased in Canada over time, and that customs that presumed a homogeneously Christian nation could not survive this change unquestioned. The multicultural argument, however, was intended to cancel the Town of Penetanguishene's historical argument, and not to ground Freitag's right to a non-confessional town meeting. *Freitag, supra*, note 20, at para. 46.

Five years after *Freitag*, the Ontario Superior Court of Justice had the opportunity to clarify the standard of acceptable religious ceremonies in municipal councils. The County of Renfrew had been opening council meetings with a recitation of the Lord's Prayer but, when faced with a challenge by Allen — a self-identified Secular Humanist —, it changed the oration to a non-denominational one that was based on the prayer recited at the House of Commons.³⁵ The *Allen* Court's discussion was focused, as in *Freitag*, on the presence of coercion, but the adopted prayer was deemed so abstract that it was “not in substance a religious observance, coercive or otherwise”.³⁶ Mere mention of God may have caused Allen discomfort but, in the Court's assessment, did not make his full civic participation conditional on a show of religious profession.

The limited judicial doctrine that emerges from the Ontario cases is that the constitutional objection to municipal prayer is grounded on the impermissibility of religious *coercion*, particularly the coercion of citizens who might feel compelled to acquiesce in ceremonies and declarations to which they object in order to avoid being excluded from full participation in civic affairs. The clearer the exclusion, the stronger the objection. Thus, a prayer or religious ceremony that is held behind closed doors, without public participation — as is the prayer in the House of Commons — and does not therefore force citizens to declare their adherence or rejection of the professed faith is less vulnerable to constitutional challenge than a public prayer at an open meeting, where the citizen is subject to the judgment of peers and legislators.³⁷ Likewise, a prayer or religious ceremony identified with a specific religious tradition — as is the Lord's Prayer with the Christian religion — is more

³⁵ The *Allen* prayer was unsurprisingly similar to the one approved by the Saguenay city council:

Almighty God, we give thanks for the great blessings which have been bestowed on Canada and its citizens, including the gifts of freedom, opportunity, and peace that we enjoy. Guide us in our deliberations as [County Councillors], and strengthen us in our awareness of our duties and responsibilities. Grant us wisdom, knowledge, and understanding to preserve the blessings of this country for the benefit of all and to make good laws and wise decisions. Amen.

³⁶ *Allen*, *supra*, note 21, at para. 27.

³⁷ The prayer in the House of Commons may also be outside the purview of judicial review under the doctrine of parliamentary privilege, as the Court points out in *MLQ v. Saguenay*, *supra*, note 2, at para. 142, citing *Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)*, [2001] O.J. No. 2180, 54 O.R. (3d) 595 (Ont. C.A.), affg [2000] O.J. No. 3416 (Ont. Div. Ct.). (Interestingly, the same Mr. Freitag of *Penetanguishene* was an intervener in this 2001 case.) Municipal councils are not protected by this doctrine, although the grounds for this are sometimes contested. For a general discussion, see, Ron Levi & Mariana Valverde, “Freedom of the City: Canadian Cities and the Quest for Governmental Status” (2006) 44:3 Osgoode Hall L.J. 409.

objectionable (and perhaps always impermissible) than a non-sectarian prayer. The latter is less exclusive or, if it does exclude, it does so trivially and insubstantially.

III. THE SUPREME COURT DECISION

Back in the main storyline, we reach the final act, played out before the Supreme Court.³⁸ On all matters but one, the Supreme Court sided with Simoneau, and against Mayor Tremblay and the City of Saguenay. The exception was the constitutionality of the statue of the Sacred Heart and the crucifix in the council halls. The Commission that heard the original complaint decided to investigate the prayer, but not the religious symbols. Because of this, the Court decided that the Quebec human rights tribunal, which received the Commission's recommendation, lacked jurisdiction to decide on the religious symbols.³⁹ Nonetheless, although the question of the permissibility of the statue and the crucifix could not be resolved, their presence could be taken into account in the evaluation of the constitutionality of the municipal prayer, and indeed provided crucial context to prove that, despite the non-sectarian words of the invocation, the prayer was Roman Catholic in both perception and intent.⁴⁰

The essence of the Supreme Court's decision follows. "Sponsorship of one religious tradition by the state" Gascon J. writes, "in breach of its duty of neutrality amounts to discrimination against all other such traditions."⁴¹ Rather than follow the approach of the two previous municipal prayer cases, *Freitag* and *Allen*, and hold that a legislative act or municipal practice was unconstitutional if it amounted to religious coercion of a

³⁸ There is an interesting disagreement among the justices about the applicable standard of review, with Abella J. restating the deference to administrative tribunals that she articulated in *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12, 2012 SCC 12, [2012] 1 S.C.R. 395 (S.C.C.), against the majority. Some commentators have pointed out that the majority's position on the standard of review is confusing. See Paul Daly, "I Don't Know: Mouvement laïque québécois v. Saguenay (City), 2015 SCC 16" (April 15, 2015), *Paul Daly — Administrative Law Matters* (blog), online: <<http://www.administrativelawmatters.com/blog/2015/04/16/i-dont-know-mouvement-laïque-quebécois-v-saguenay-city-2015-scc-16>>. I would speculate that the majority's confusion may come from the more rigorous scrutiny of an administrative determination that Abella J. herself — grounded on *Doré* — applied in *Loyola High School v. Québec (Attorney General)*, [2015] S.C.J. No. 12, 2015 SCC 12, [2015] 1 S.C.R. 613 (S.C.C.), revg [2012] J.Q. no 15094 (Que. C.A.).

³⁹ *MLQ v. Saguenay*, *supra*, note 2, at para. 60.

⁴⁰ *Id.*, at para. 62.

⁴¹ *Id.*, at para. 64.

segment of the population, the majority in *MLQ v. Saguenay* opts for the broader principle: that the state has a duty not only not to coerce, but also to remain neutral between different religious confessions, and between religious belief and non-belief. The Court formulates a test to evaluate the neutrality of legislation and practices, which I discuss below; but first I want to understand the principle of neutrality itself.

This position had been advanced in a dissent by LeBel J. in *Témoins de Jéhovah v. Lafontaine*, extensively quoted by Gascon J.,⁴² and in legal scholarship by Richard Moon.⁴³ The language of neutrality shifts attention away from the individual practitioner who may experience undue pressure to conform in a specified context, to the state as creator and sustainer of a public space that all citizens should feel welcome to enter. Moon has previously written that the *Freitag* and *Allen* opinions improperly and confusingly emphasized *coercion* as the outcome to avoid, when it was in fact *exclusion* from the public realm.⁴⁴

I agree with Moon that the normatively proper framework for understanding religious freedom in a liberal democracy is some kind of religious neutrality (although the content of that term is quite contested, and several interpretations are probably acceptable to various degrees). I don't think, however, that the *Freitag* and *Allen* courts were confused in their application of a standard of coercion. (If anything, as I explain below, it is the Supreme Court that hasn't clearly settled on a constitutional principle.) The coercion standard was the more reasonable interpretation of section 2(a) of the Canadian Charter when read alone.⁴⁵ And reading section 2(a) alone, without reference to section 15 — the right to equality — had been the norm in Canadian constitutionalism since *Big M*.⁴⁶

The difference might be explained by analogy to the American constitutional framework on religious freedom. That framework

⁴² *Lafontaine*, *supra*, note 16, at paras. 66-67, LeBel J. dissenting, cited in *MLQ v. Saguenay*, *supra*, note 2, at para. 71.

⁴³ Richard Moon, "Freedom of Religion Under the Charter of Rights: The Limits of State Neutrality" (2012) 45 U.B.C. L. Rev. 497, cited in *MLQ v. Saguenay*, *supra*, note 2, at para. 73; see also Moon, "Government Support for Religious Practice", *supra*, note 7.

⁴⁴ Moon, "Government Support for Religious Practice", *id.*, at 229.

⁴⁵ Mary Anne Waldron makes this point in her critique of Moon's appeal to equality and inclusion: "There appears to be no reason", she writes, "why government support for the expression of belief, provided such support does not actually coerce the acceptance by others of those beliefs or impose non-trivial burdens on the practice of others of their own beliefs, should be struck down by the courts." M.A. Waldron, *Free to Believe: Rethinking Freedom of Conscience and Religion in Canada* (Toronto: University of Toronto Press, 2013), at 52.

⁴⁶ *Supra*, note 32.

famously consists of two clauses: the free-exercise clause and the non-establishment clause. The First Amendment to the United States Constitution prohibits Congress (and — through the Fourteenth Amendment — the federated states) from making a “law respecting an establishment of religion, or prohibiting the free exercise thereof”.⁴⁷ A focus on religious coercion fits the “free exercise” aspect of religious freedom, as forced compliance with ritual or practice directly interferes with the individual’s profession of belief. But a focus on neutrality better fits the “non-establishment” aspect of religious freedom, since it is a categorical prohibition aimed at the state itself, which operated prior to and independent of any specific act of religious coercion.

The problem, of course, is that Canada is not supposed to have a non-establishment clause. The Preamble to the *Constitution Act, 1982* invokes the supremacy of God,⁴⁸ and there is extensive aid to religious schools, both constitutionally mandated and discretionary.⁴⁹ In the pre-eminent treatise of Canadian constitutional law, for instance, Peter Hogg finds that “[t]he establishment clause, which was intended to prohibit the establishment of an official church or religion in the United States, has no counterpart in s. 2(a).”⁵⁰ But in practice, Canadian courts have assumed what Jeremy Patrick calls a “hidden establishment clause” which emerges out of the functional operation of the Charter’s different sections.⁵¹ The Court has achieved this result though relaxed rules of standing and a very broad interpretation of coercion.⁵²

⁴⁷ United States Constitution, Amdnt 1.

⁴⁸ Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. The extent to which the Preamble is a theistic statement is contested, with many scholars arguing that it is a symbolic gesture or an allusion to inalienable rights. See Jonathon W. Penney & Robert J. Danay, “The Embarrassing Preamble? Understanding the Supremacy of God and the *Charter*” (2006) 39 U.B.C. L. Rev. 287; Lorne Sossin, “The ‘Supremacy of God’, Human Dignity and the Charter of Rights and Freedoms” (2003) 52 U.N.B.L.J. 227; and George Egerton, “Trudeau, God, and the Canadian Constitution: Religion, Human Rights, and Government Authority in the Making of the 1982 Constitution” in David Lyon & Marguerite Van Die, eds, *Rethinking Church, State and Modernity: Canada Between Europe and America* (Toronto: University of Toronto Press, 2001), at 90.

⁴⁹ On differences between Canada and the United States in this regard, see, e.g., Christopher L. Eisgruber & Mariah Zeisberg, “Religious Freedom in Canada and the United States” (2006) 4:2 Int’l J. Const. L. 244.

⁵⁰ Peter Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) § 39-2, at 979.

⁵¹ Jeremy Patrick, “Church, State, and Charter: Canada’s Hidden Establishment Clause” (2006) 14 Tulsa J. Comp. & Int’l L. 25 [hereinafter “Patrick, ‘Church, State, and Charter’”]. See also Donald L. Beschle, “Does the Establishment Clause Matter? Non-Establishment Principles in the United States and Canada” (2002) 4:3 J. Const. L. 451.

⁵² Patrick, “Church, State, and Charter”, *id.*, at 27, 46-47.

Now, an explicit non-establishment clause is no guarantee of religious neutrality. The same year that *MLQ v. Saguenay* was decided, the Supreme Court of the United States heard a case precisely on the issue of prayer at town council meetings and reached, by a narrow majority, an opposite conclusion to the Supreme Court of Canada in *MLQ*. In *Town of Greece v. Galloway*,⁵³ a narrow majority of the American court upheld the practice of opening the meetings of a town board with a confessional prayer. The prayer was not offered by town officials, however, but rather by an invited member of the clergy, and the invited minister would rotate among different congregations in the town. Citing history and tradition, the United States Supreme Court concluded that even sectarian prayer was allowed provided that sufficient efforts were made to identify and invite different congregations within town borders.⁵⁴

But it is noticeable that the case was roundly criticized both within the Court and in the legal academy.⁵⁵ Justice Elena Kagan, writing for four dissenting justices, insisted that the Establishment Clause of the United States Constitution prohibits official preference of a single faith, which is precisely what had happened in Greece. In an argument that mirrors the Canadian case for neutrality and inclusion, Kagan protests that, when a citizen comes before an assembly with a petition or request and is confronted with officially sanctioned religious practices, she is forced to either conform to the practice in order to gain official favour, or make their dissent apparent and risk exclusion and differentiation. In other words “when a citizen stands before her government, whether to perform a service or request a benefit, her religious beliefs do not enter into the picture”.⁵⁶ In choosing not to participate in prayer “she thus stands at a remove, based solely on religion, from her fellow citizens and her elected representatives.”⁵⁷ The relevance of this is highlighted (though I don’t think it is determined) in the composition of the majority and the minority of the Court in *Town of Greece*. All members of the majority are Roman Catholic, a group that just a few decades before was more likely to oppose denominational prayers on the grounds that they were

⁵³ 134 S. Ct. 1811 (2014) [hereinafter “*Town of Greece*”].

⁵⁴ Justice Breyer’s dissent points out, however, that the list of congregations identified was drawn from a Christian phone guide. Only when the lawsuit was filed did the town make more aggressive efforts to contact non-Christian ministers of religion. *Id.*, at 1839, Breyer J. dissenting.

⁵⁵ Academic reaction to the decision was mixed, but mostly critical. See, e.g., “Legislative Prayer Symposium” SCOTUSBlog (Blog), online: <<http://www.scotusblog.com/category/special-features/town-of-greece-symposium/>>.

⁵⁶ *Town of Greece*, *supra*, note 53, at 1843-44, Kagan J. dissenting.

⁵⁷ *Id.*, at 1850, Kagan J. dissenting.

excessively Protestant, or else dilute them of meaning and render them as “civil religion”.⁵⁸ Roman Catholics are now welcome in the American Christian mainstream, but Kagan J. reminds the Court that some remain outside that narrative and face continued symbolic exclusion.

IV. TOO MUCH NARRATIVE: CONSTITUTIONAL INTERPRETATION AS SOCIOLOGY

I suggested above that, even if the *Freitag* and *Allen* Courts were ultimately wrong about the principle that should have governed the analysis of municipal prayers, it is the Supreme Court of Canada who is unclear, perhaps even confused, about the issue. This suspicion is explained in Richard Moon’s recent analysis of *MLQ v. Saguenay*, regarding the Court’s test for evaluating the religious neutrality of state legislation and practices.⁵⁹ The test is oddly bifurcated. On one hand, “[a] provision of a statute, of regulations or of a by-law will be inoperative if its purpose is religious and therefore cannot be reconciled with the state’s duty of neutrality.”⁶⁰ On the other hand, where “a complaint of discrimination based on religion concerns a state practice, the alleged breach of the duty of neutrality must be established by proving that the state is professing, adopting or favouring one belief to the exclusion of all others *and* that the exclusion has resulted in interference with the complainant’s freedom of conscience and religion.”⁶¹ It seems, given the comparative analysis in the last section, that legislation is strictly governed by a principle of non-establishment, while practices are governed both by non-establishment and free exercise principles. Why the difference?

Moon suggests that the second element of the test — interference with a person’s freedom of religion or conscience — is redundant.⁶² This may

⁵⁸ Consider, for instance, William Brennan’s dissent in *Marsh v. Chambers*, in which he stunningly reversed his own position in *Abington School Dist. v. Schempp*, 374 U.S. 203, 213 (1963). “[A]ny practice of legislative prayer”, Brennan J. writes in *Marsh*, “even if it might look ‘nonsectarian’ to nine Justices of the Supreme Court, will inevitably and continuously involve the State in one or another religious debate. Prayer is serious business — serious theological business — and it is not a mere ‘acknowledgment of beliefs widely held among the people of this country’ for the State to immerse itself in that business.” *Marsh v. Chambers*, *supra*, note 25, at 819.

⁵⁹ Richard Moon, “Neutrality and Prayers: *Mouvement laïque v. Saguenay*” (2015) 4 Oxford J. L. & Religion 512.

⁶⁰ *MLQ v. Saguenay*, *supra*, note 2, at para. 81.

⁶¹ *Id.*, at para. 83.

⁶² Moon, “Neutrality and Prayers”, *supra*, note 59, at 518.

indicate, he speculates, the Court's unwillingness to fully embrace the neutrality principle, or it may indicate the Court's anticipation of other controversies, most likely those threatened by the ill-fated *Quebec Charter of Values*, which would have prohibited civil servants from wearing conspicuous religious symbols while performing their duties on the view that this amounted to religious expression by the state. I agree with Moon that such religious garb "is an act of personal religious expression, rather than a state act of religious favouritism"⁶³ and that the courts should not interfere with civil servants' sartorial choices. But I take the speculative worry as another reason to pay closer attention to the context of religious practice in Quebec and its implications for constitutional interpretation. In particular, the Court may be willing to allow some forms of religious expression (especially historical or generic symbols or practices) if it deems their infringement on religious freedom trivial and insubstantial. The degree of triviality may be a function of the intensity of religious conflict, and this may in turn depend on historical factors not present at all times or across all areas of the country.

What is more worrying about the Canadian "hidden" non-establishment principle is that it seems to emerge from the Supreme Court's understanding of what religious freedom in the Charter *ought* to mean, regardless of what it *says*. The Court seems to admit as much in *MLQ v. Saguenay*, where Gascon J. writes that "[n]either the *Quebec Charter* nor the *Canadian Charter* expressly imposes a duty of religious neutrality on the state. This duty results from an evolving interpretation of freedom of conscience and religion."⁶⁴

This is sociological narrative substituting for constitutional doctrine. But in the context of the complete text of the Charter, it is completely unnecessary. It would hardly be a stretch of the legal imagination — and would, instead, be an extension of sound statutory interpretation — to read the protection of religious freedom in section 2(a) of the Canadian Charter together with the guarantee of equality in section 15. But the Supreme Court in *MLQ v. Saguenay* does not do this, and neither did the *Freitag* and *Allen* Courts. This is especially remarkable in *MLQ v. Saguenay* since the legislation that was actually invoked in the case was not section 2(a) of the Canadian Charter but rather sections 3 *and* 10 of the Quebec Charter, that is, both the religious freedom and the guarantee of "equal recognition and exercise of ... human rights and freedoms".

⁶³ *Id.*

⁶⁴ *MLQ v. Saguenay*, *supra*, note 2, at para. 71.

The assumption — which is not without problems, and which I take up below — that “[b]ecause of the similarity between s. 3 of the *Quebec Charter* and s. 2 of the *Canadian Charter*, it is well established that s. 3 should be interpreted in light of the principles that have been developed in relation to the application of the *Canadian Charter*”⁶⁵ is not extended to section 10 of the Quebec Charter which, by this reasoning, should find its parallel in section 15 of its Canadian counterpart.

It is perhaps uncharitable to conclude that Canadian constitutional *jurisprudence* has become unmoored from the constitutional *text* to such an extent that the Supreme Court prefers to appeal to “the evolution of Canadian society” when grounding the principle of religious neutrality of the state, rather than return to the document *even when the text would yield the same desired result*. This may reflect a kind of common-law constitutionalism where the content of rights evolves through courts’ interpretation of general principles rather than statutory construction.⁶⁶ The text of the Charter fades from view — relegated to the status of principle or value, and not norm — and instead Dickson J.’s interpretation of religious freedom under section 2(a) of the Canadian Charter becomes the effective source of law. A certain confirmation of this attitude comes from knowing that, when the *Big M* case was litigated, section 15 of the Charter had not yet come into effect. That chapter of Canadian constitutionalism, as it were, was still listed as “forthcoming”. The spirit of state neutrality in Canadian religious liberty, which is so tied to Dickson J.’s discussion, forcibly developed from the guarantee of freedom of religion because the more obvious source was not available at its origin. But now that section 15 is in effect, it is only the reluctance to *go back to the text* to determine constitutional norms that allows this strange situation to continue uncorrected.

⁶⁵ *Id.*, at para. 68.

⁶⁶ But consider Robert Leckey’s caution, in a comparative analysis of bills of rights in common-law countries, that

... attention to country-specific text need not attract charges of formalism or evoke arid versions of originalism. It does not presume that constitutional text has a fixed, uncontroversial meaning. What it assumes is that a bill of rights’ text and the set of plausible meanings that it generates within its community of readers claim a weight in practical reasoning that is distinct from liberal political theorists’ conception of the optimal relationship between branches of government. To return to Allan’s term, the text of a bill of rights is not “inessential”. Regarding it as such betrays practices and commitments that, if not conceptually linked to ordering by law, run nevertheless through Western legal practice.

Robert Leckey, *Bills of Rights in the Common Law* (Cambridge : Cambridge University Press, 2015), at 25.

A more textualist interpretive methodology would, perhaps, limit the Court's discretion in other cases where the constitutional text was not so accommodating. But that is, of course, the point of a written constitution: to constrain the deliberation and action of government, including the judicial branch.

V. NOT ENOUGH NARRATIVE: PROVINCIAL CONSTITUTIONALISM

Finally, I want to consider the Court's cursory and largely unexamined reference to statutory interpretation of provincial rights instruments. As I mentioned above, the Court has preferred to interpret the clauses of provincial human rights charters in light of the principles that guide interpretation of their federal counterparts.⁶⁷ This methodology is based on assumptions about the identity of purpose and similarity of language in the respective statutes. In some (perhaps most) cases, similar interpretation may be sound. But as a general principle of interpretation, the assumption is unwarranted.

Now, this proposition may seem strange at first glance, given the constitutional hierarchy between provincial human rights instruments and the Canadian Charter. It is true, as the Court has clearly stated, that "human rights legislation must conform to constitutional norms, including those set out in the *Canadian Charter*." But in the same breath, it acknowledges that "there is no requirement that the provisions of the [Quebec] *Charter* mirror those of the *Canadian Charter*". The provincial charter must be interpreted "in light of" the Canadian Charter in the sense that "when a statutory provision is open to more than one interpretation, it must be interpreted in a manner consistent with the provisions of the *Canadian Charter*."⁶⁸ What does consistency with the Canadian Charter mean in this context? It cannot mean identity of meaning, given the immediately preceding acknowledgment; this would effectively render most provisions of all provincial human rights instruments redundant. It must mean, rather, a presumption of constitutionality, that is, the conscientious rejection of any possible

⁶⁷ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, [2000] S.C.J. No. 24, 2000 SCC 27, [2000] 1 S.C.R. 665, at para. 42 (S.C.C.), affg [1998] J.Q. no 369 (Que. C.A.), cited as "*Boisbriand*" in *MLQ v. Saguenay*, *supra*, note 2, at para. 68.

⁶⁸ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, *id.*, at para. 42. The decision is cited approvingly in *MLQ v. Saguenay*, *supra*, note 2, at paras. 63, 68, 83, and 152.

interpretation of the provincial instrument that would put it at odds with the federal Charter. But this presumption may still leave several interpretations available to the courts. The initial stem in such an inquiry, then, should be to discern the various possible interpretations of the provincial human rights instrument on its own terms,⁶⁹ and select the most plausible one that passes the Canadian Charter's constitutional threshold.⁷⁰ So a provincial human rights instrument could recognize rights on which the Canadian Charter is silent, or require certain actions of the government which the Canadian Charter merely permits, or place a higher threshold on "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".⁷¹

Another reason why the proposition may seem strange is because of jurists' natural (and reasonable) propensity to interpret similar words in similar ways. But excessive attention to semantics and grammar can obscure as much as illuminate the meaning of a text. To show this I draw on Robert Cover's celebrated article, "Nomos and Narrative", which makes a compelling case for going beyond "[t]he rules and principles of justice, the formal institutions of the law, and the conventions of a social order"⁷² when trying to understand the normative orders in which legal actors operate. Positive instruments of law such as the constitutional and quasi-constitutional legislation at play here are inscribed in a cultural and

⁶⁹ The terms on which the provincial charter should be understood may include, of course, the provincial legislators' knowledge of the Canadian Charter and their intent, perhaps explicit in legislative records, to make the provincial instrument convergent or divergent from its federal counterpart. This would likely not be the case in Quebec, however, as the Quebec Charter precedes the Canadian one by six years.

⁷⁰ This strategy resembles the "margin of appreciation" doctrine in European Court of Human Rights ("ECHR") jurisprudence, which allows the ECHR to defer to states in the implementation of certain provisions of the European Convention of Human Rights. I will not delve into the analogy here, however, because the precise scope and application of such a doctrine may be decidedly shaped by constitutional differences (*e.g.*, between a Europe of sovereign states and a Canada of federated provinces). I do note, however, that the doctrine was invoked by the EHCR to allow the continued presence of crucifixes in Italian public schools in *Lautsi v. Italy*, *supra*, note 24.

⁷¹ James Gardner gives several illuminating examples from the American context. Several states have express constitutional protections against warrantless searches and seizures that are literally or substantially identical to the language of the Fourth Amendment of the United States Constitution. In some states (like New York) the state courts have interpreted the state constitutional protection to be identical to the federal protection, so that state police officers are subject to the same rules regarding, for example, exclusion of evidence. In other states (like Massachusetts) the state courts have interpreted the state constitution to provide broader protection in some areas and narrower protection in others. James Gardner, *Interpreting State Constitutions: A Jurisprudence of Function in a Federal System* (Chicago: University of Chicago Press, 2005), at 2-11 and 166. This interpretive pluralism may be facilitated by the non-unitary court system of the American federation but, as I will suggest below, it is hardly impossible even in a unitary system.

⁷² Cover, *supra*, note 1, at 4.

symbolic context, and apart from this context, legal norms are often unintelligible or woefully misunderstood.

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.

In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse — to be supplied with history and destiny, beginning and end, explanation and purpose.⁷³

The work of legal interpretation, from the narrowest statutory rule to the broadest constitutional principle, is never a purely abstract and autonomous practice. It is always dependent on the “interpretive commitments” shared by judges and attorneys, officials and clients. Absent these shared commitments, the law will seem to some parties to be an alien imposition or an arbitrary act of mere coercion, even as it remains intelligible and presumptively legitimate to the other party. It is not enough that there be a set of positive norms to which all parties make reference; the meaning of these norms, which goes beyond the letter, must be shared as well, lest the reasons that ground the legitimacy of law for some undermine that legitimacy for others. Cover explains:

If there existed two legal orders with identical legal precepts and identical, predictable patterns of public force, they would nonetheless differ essentially in meaning if, in one of the orders, the precepts were universally venerated while in the other they were regarded by many as fundamentally unjust.⁷⁴

It is wrong to assume, then, that a legal formula — a phrase in a contract, an article in a statute, a constitutional principle — will carry the same meaning in different narrative contexts. The letter of the law is not a complete *nomos*; it carries with it assumptions about historical experience and social reality. That is not to say that any interpretation goes, that there is no correct interpretation of legal phenomena, that the law is radically indeterminate. It is to say that the correct interpretation of a legal norm (if there is one) must take account of social meaning, and

⁷³ *Id.*, at 4-5 (internal citations omitted).

⁷⁴ *Id.*, at 7.

therefore that interpretation of a similar legal norm may be different in different contexts.

But the relationship between norm and narrative goes both ways. Norms are unintelligible — or have their meaning distorted — if they are not understood in the context of the historical, political, economic and social narratives from which they emerge and in which they remain inscribed. But legal narratives in particular make no sense without reference to norms. Part of the meaning of legal regulation is that it references posited norms as opposed to prudential “rules of thumb” or inchoate dispositions of character.⁷⁵ What it means for a community to be governed by law is that its members communicate their expectations and obligations to each other by reference to these norms and expect these to count as reasons for action in their discourse.

The interplay of norm and narrative in the construction of the *nomos* demands a balance between the narrative and the norm. This is especially true in a “chartered” community, one which has deliberately and expressly given itself a fundamental law. The charter serves a dual purpose in such a community: it is a norm, or a set of norms, to which legal actors are expected to make reference in their reasoning; but it is also a historically situated event, or combination of events, which constitute a chapter in the story of the community. This notion of a chartered community suggests the greater attention to the constitutional text discussed above. But it also demands that we take seriously the difference between *different* charters emerging from different narratives, even if their languages are similar. The narrative of the Charter asks that we take charters seriously, and ties the problem of interpreting a written constitution to the problem of federalism.

The similarity that the Supreme Court of Canada finds between the Canadian Charter and the Quebec Charter (and similar provincial legislation), of course, is at the level of the text (and even that claim is questionable, as is evident in the mention of God in the Canadian document and its absence in the Quebec one). It ignores the entire context in which the two instruments are inscribed, and has the effect of

⁷⁵ *Id.*, at 7-8. Of course, through a rule or standard, law may attempt to establish a baseline for prudence or formalize a disposition of character, as is the case with the reasonable person or the *bon père de famille*. Legal reasoning, however, mediates prudence or character through the rule rather than referencing it directly. If this reading of Cover is objectionable because it reconciles him with legal positivism, I reply by suggesting that Cover’s objections to positivism are misguided. See V.M. Muñoz-Fraticelli, *The Structure of Pluralism: on the authority of associations* (Oxford: Oxford University Press, 2014), Chapter 6 and 137-38.

distorting the meaning and the application of both the Canadian and the Quebec Charters, especially on matters of freedom of religion.

The narrative of secularism in Quebec recommends against reading the provisions of the Quebec Charter related to freedom of religion as necessarily consonant with those in the Canadian Charter. I suggested above, when discussing Richard Moon's worries about the bifurcated test for state religious neutrality in *MLQ v. Saguenay*, that some manifestations of religion could be considered trivial in some contexts and not others, and that retaining a "free exercise" element in the analysis of offending practices could help distinguish between degrees of exclusion. The facts in the Saguenay controversy suggest this may have been one such case.

The three and a half decades since the adoption of the Canadian Charter have witnessed a secular change — in all senses of the term — in Canadian religiosity, from an overwhelmingly Christian nation to one marked, on the one hand, by increasing religious diversity and, on the other, by disaffiliation from established churches and marked reduction in professed religious belief.⁷⁶ At the same time, the Charter itself has emerged as a paramount source of Canadian identity (eclipsing even hockey, the national sport).⁷⁷ The courts have closely followed this trend, developing a doctrine of state neutrality towards religious practice and belief out of the constitutional guarantees of freedom of conscience and religion. Yet the precise structure of neutrality has never been clear, and courts — from the provincial human rights tribunals to the Supreme Court — have oscillated between two poles: prohibition of coercive public endorsement of religious expression, and equitable support for religious activities.

The same oscillation is evident in the judicial interpretation of the Quebec Charter, but here the fluctuations are markedly more intense. The Quebec Charter precedes its Canadian equivalent by six years. It was not the first provincial human rights charter, but it "stands out from the crowd of provincial statutes on this matter, because it protects a more comprehensive range of fundamental rights, including certain rights that

⁷⁶ Pew Research Center, "Canada's Changing Religious Landscape", online: <<http://www.pewforum.org/2013/06/27/canadas-changing-religious-landscape/>>.

⁷⁷ Statistics Canada, "Canadian Identity, 2013", online: <<http://www.statcan.gc.ca/pub/89-652-x/89-652-x2015005-eng.pdf>>. As an anonymous reviewer rightly points out, hockey is only the national *winter* sport of Canada, and lacrosse the national *summer* sport: *National Sports of Canada Act*, S.C. 1994, c. 16, s. 2. I would argue, however, that of these only hockey has attained religious status.

are unique to Quebec”.⁷⁸ The Quebec Charter is also an important marker of collective identity, a unique (if unofficial) constitution that sets the province apart and provides a distinctive point of normative reference for its residents.⁷⁹ It is one of the institutional achievements of the Quiet Revolution, a period of economic and cultural change that, among other things, saw the rapid secularization of Quebec society and the drastic reduction of influence of the Roman Catholic Church in the province. But for many Quebecers, especially in the areas outside of Montreal, the abandonment of religious *practice* (or even *belief*) did not mean an abandonment of religious *identity*, as this is closely bound with the history of the province and identified with its Francophone heritage. The two aspects of the Quiet Revolution — secularization and affirmation of identity — reveal themselves in constant tensions between secularists who wish to import from France the *laïcité* and conservatives who would retain the symbols of the Church as protection against cultural dilution. The political synthesis of both positions leads to absurd pronouncements: thus an avid secularist party leader could defend the permanence of a crucifix on the wall of the National Assembly because “c’est pas la religion, c’est le patrimoine”.⁸⁰

Against Jean Tremblay’s confessional narrative and the MLQ’s radical secularist one, we may add a conciliatory vision of a pluralist Quebec society, best expressed in the report of the Commission de consultation sur les pratiques d’accommodement reliées aux différences culturelles⁸¹ — the famous Bouchard-Taylor Commission — and in Charles Taylor and Jocelyn Maclure’s later reformulation of the philosophical principles that animated the conclusions of that inquiry. The authors emphasize the distinct history of church-state relations in the province, with its internal tensions and its complex relations to the broader Canadian context. The tentative conclusion, reached by the Commission, is that “open secularism best allowed respect both for

⁷⁸ Maxime St-Hilaire, “The codification of human rights in Canada” (2012) 42 R.D.U.S. 505, at 551.

⁷⁹ See Lawrence David, “Subnational Constitutionalism and The Concurrent Protection of Religious Freedom: The Canada-Quebec Experience”, at 18ff. (on file with author). Jean-Francois Gaudreault-Desbiens & Charles-Maxime Panaccio, “The Asymmetrical Distinctness of the *Charter of Human Rights and Freedoms* in the Post-Chaoulli Era” (2006) R. du B. 217.

⁸⁰ “It is not religion; it is patrimony.” Pauline Marois, then leader of the Parti Québécois, argued this against Charles Taylor in the television show *Tout le Monde en Parle* (February 21, 2010), in reference to the crucifix hanging on the wall of the National Assembly, the Quebec provincial legislature.

⁸¹ *Supra*, note 3.

the equality of citizens and for their freedom of conscience and of religion.’⁸² That conclusion is certainly contested in the province — though it seems most acceptable to me — but what is important about it is the careful consideration of historical context which creates a distinct narrative of constitutional principles in Quebec, one not necessarily shared by the rest of the country.⁸³

In the context in which the prayer controversy originates (both the general historical context and the specific confrontation between the crusading mayor and the radical secularist movement) no concession to either side could be deemed trivial or insubstantial. Attention should turn to the specifics of a case — the symbols and ceremonies surrounding a prayer, the declarations of government officials to the press. Essentially the same prayer could be recited in the Town of Renfrew without much concern, but in Saguenay, with the accompanying ritual and mayoral bravado, it was fighting words. It may be useful to have a constitutional test that could distinguish between the two contexts while holding on to the principle of neutrality. But this can only be done if neutrality is seen not only as a norm but also as a developing narrative in a chartered federation.

⁸² Jocelyn Maclure & Charles Taylor, *Secularism and Freedom of Conscience* (Cambridge: Harvard University Press, 2011), at 60.

⁸³ For the corresponding Canadian narratives, see Benjamin L. Berger, “Religious Diversity, Education, and the Crisis’ in State Neutrality” (2014) 29 C.J.L.S. 103.