

The Evolution, Controversies and Implications of “the supremacy of God” in the Canadian Constitution

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June 20, 2017

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Abstract:

Within the field of religious studies, the definition of religion is constantly debated. While subjective definitions of this concept may be useful in day to day conversation, what happens when “religion” and other *religious* language is mentioned in constitutionally entrenched documents and policies? Drawing on critical theory, this thesis examines the biases associated with the the protection of freedom of religion and the preamble to Canada’s constitution which states that, “Canada is founded upon principles that recognize the supremacy of God and rule of law”.

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Introduction

An interesting characteristic of the academic or scientific study of religion is that scholars of this modern field disagree about its object of study. Some scholars do not actually think there is an *it*—an object to be studied—at all.¹ This is to say that scholars who study under departments of religious studies range broadly in the nature of their work that many of them do not share notions of what religious studies departments are about. As Timothy Fitzgerald puts it,

...[T]his has led [...] to a situation where many scholars working within religion departments have little in common with each other. Their theoretical and methodological allegiances are not to religious studies as such but to anthropology, sociology, psychology, philology, literary criticism, history, or whatever.²

Fitzgerald suggests that perhaps some scholars would be better off located in departments that correspond with their respective sub-fields, since “religion” is not a distinct phenomenon that requires special departments and methodologies for its study.³

¹ Victoria S. Harrison, "The Pragmatics of Defining Religion in a Multi-cultural World", *International Journal for Philosophy of Religion* 59, no. 3 (2006): 133.

² Timothy Fitzgerald, *The Ideology of Religious Studies*, (New York: Oxford UP, 2000), 13.

³ *Ibid.*, 3.

Fitzgerald’s radical opinion of the concept of “religion” as studied in departments of religious studies rests at one end of a spectrum of opinion of the concept of religion and the purpose of this type of department. Some scholars do not spend much time focusing on the vast issues that come with studying a loaded concept like religion and continue to teach and conduct research as if the concept were unproblematic. Still, others acknowledge the problematic nature of the concept of religion, but quickly move on as though this is a nonissue. Finally, some scholars give pause to the fact the category of religion is ambiguous, and work to deconstruct and demystify the concept.

The scholarly uncertainty surrounding the category of religion raises the following questions: Does it matter if “religion” is a problematic category? Should the the word be used in everyday language? Can religion be studied—as some scholars do—without careful consideration of past and present implications that come with using such a loaded term? The following section addresses these three questions.

Before I address these questions, I would like to point out that this document is largely a critique particular categories and their varied meanings. The focus of the critique will be on the categories of “religion” and “God”, but I will also make use of the term “secular”. For my purposes, I will not be thoroughly critiquing this concept, but rather using it in a very general manner. In this document, I use “secular” to refer to all things that are not religious. There is a certain irony in my use of the term secular, since I will argue that religion cannot be successfully objectively defined and thus nothing can truly be omitted from the religious nor the secular. In attempt to further clarify my use of the term “secular”, consider the secular to refer to instances where religion is not, and not meant to be present in an obvious manner.

The Category of Religion—Does it Matter?

1. *Does it matter if “religion” is a problematic category?*—In a word: yes. The problematic nature of the category of religion does matter, and especially so under certain circumstances, that are investigated in this thesis. Some argue that even though we cannot objectively define religion, we all know it when we see it. This thesis will suggest otherwise. A glance into just one of the various court cases regarding a violation of the right to freedom of religion will suggest that people do not in fact *know* religion at all. The argument that people know religion when they see it does not hold in discussions about policy and rights. Although some may find religion’s lack of objective definition thought-provoking, this problem is more than just an interesting fact. When people are given the fundamental right to freedom of religion, the inclusion and exclusion of practices included in this category are important, especially for non-Christian minorities, particularly poly-theists, non-theists, atheists, and agnostics.

2. *Can the word “religion” continue to be used in everyday language?*—This question is complicated. The idea of taking “religion” out of the average (by “average”, I mean non-academics or students outside of religious studies department) person’s vocabulary would likely prove impossible, so in a sense, no; we cannot discontinue the use of religion in everyday vocabulary. However, the consequences of using such a word in a variety of contexts outside of academia should be examined thoroughly. The casual use of the word religion helps to reinforce and reify the category. The more people that believe they know what religion is, the harder it is to determine how to allocate rights under statutes about freedom of religion. Because there is no objectively agreed upon definition of religion, and because the word gets tossed around regularly by the average person, there are essentially as many understandings of religion as there are people who claim to know what religion is. This creates a huge issue in courtrooms because

judges, lawyers, and appellants alike each have their own understanding of what religion is, and what freedom of religion laws ought to protect. As a result, there is no manner by which to weigh each understanding against another to determine which is most accurate. In a sense, there can be no accuracy when it comes to interpreting religion, because, for the most part, interpreting “religion”, is objectively impossible as the category proves to be entirely subjective. While individuals may each have a personal understanding of what religion means to them, this proves extremely problematic in the court room where rulings often depend on the objectivity of the judge. This idea will be further evaluated throughout this thesis.

3. Can “religion” be accurately studied—as some do—without careful consideration of past and present implications that come with using such a loaded term?

Anyone can study religion without considering its past and present implications; and I expect that many people do and will continue to study at religion without a critical thought. The key word in this question is “accurately”, which changes the answer to the question from yes to no. No—we cannot accurately study religion without critical thinking. To do so could lead to irresponsible scholarship that contributes to idea that it—religion—is something that can be defined and protected by law. The answers to these three questions provide the theoretical framework on which this thesis is based.

Overview of the Chapters

This thesis pertains to the use of religion in Canadian public policy and law, and in particular what the preamble to the Constitution Act, 1982 which states that, “Canada is founded

upon principles that recognize the supremacy of God”⁴, reveals about how Canadians interpret the notion of religion as a fundamental freedom. My research seeks to answer the following question: How does the understanding of “God” in the Canadian constitution, combined with the popular understanding of religion, contribute to the Christian bias, under which I argue Canadian society operates? There are four steps to answering this question, in the form of chapters. Each chapter is crucial to fully understanding my argument.

The first step in understanding my argument is to explore the peculiar circumstances that led to the inclusion of a preamble about God—that I refer to as “the God clause”—in the Canadian constitution. The purpose of chapter one, “A History of the God Clause” is twofold: First, the chapter provides details about the subject under scrutiny, and second, the chapter collects evidence that suggests that the God in the preamble refers to a Christian God.

The second chapter, entitled “Theoretical Perspectives” is an overview of the emerging field called “critical religion”, which I use to suggest that references to religion frequently hold a Christian bias. In this chapter, the focus switches from “God” to “religion”, which is necessary in order to understand my argument that “God” and “religion” work together to promote Christianity in Canada. By the end of the second chapter, evidence that there exists a Christian bias that is manifested by the use of “God” and the concept of “religion” will be established. The next two chapters will work in tandem to solidify my argument.

In chapter three, I turn to the few Canadian court cases that relate to both the God clause, and to freedom of religion, in order to strengthen my argument. Through an overview of court cases about freedom of religion, I point out that the God clause has most typically been used to

⁴ “Constitution Act, 1982” in *A Consolidation of the Constitution Acts, 1867 to 1982*. Ottawa: Dept. of Justice Canada, 2012, 53.

the benefit of Christians or adherents of Christian-like traditions, and that the courts inadvertently interpret freedom of religion from a Christian perspective. This chapter provides further evidence to support my argument that both the God clause and the category of religion are most easily interpreted to refer to Christian ideas.

In chapter four, I attempt to interpret the God clause and the concept of religion as they were intended to be interpreted. To do this, I perform a textual analysis of the House of Commons debates that led up to the establishment of *Constitution Act, 1982* in order to find out the *originalist* meaning of both concepts. In this chapter, I use Micah Schwartzman’s understanding of originalism as outlined in the article, “What if Religion Isn’t Special”⁵.

Finally, I conclude with a reiteration of all evidence that suggests that the God of the constitution is Christian. The God clause, combined with freedom of religion, works to secure the preferential treatment of Christianity above all other so-called religious institutions in Canada.

Methodology

Since religious studies is an interdisciplinary field, there is no one method that can be equated to “the religious studies method”. In an effort to distance religious studies from theology, scholars opt for more scientific approaches to the study of religion by borrowing the methods and theories from the social sciences and humanities.⁶ This thesis uses two main methods: discourse analysis, and document analysis.

⁵ Micah Schwartzman, "What If Religion Isn't Special?", (*University of Chicago Law Review* 79.4, 2013), 1351-427.

⁶ Frans Wijzen, "Editorial: Discourse Analysis in Religious Studies", *Religion* 43 no.1 (2012): 1.

Discourse Analysis

According to Titus Hjelm, who wrote the chapter entitled “Discourse Analysis” in *The Routledge Handbook of Research Methods in the Study of Religion*, “[d]iscourse analysis examines how actions are given meaning and how identities are produced in language use. Theoretically speaking, discourse analysts investigate processes of social structure.”⁷ The definition provided by Hjelm closely aligns with how I deconstruct the category of religion throughout this thesis. In chapters one and two, I investigate two social constructs: “God”, in chapter one; and “religion” in chapter two. In chapter two, I use discourse analysis in the way that Hjelm defines it: by investigating the process of the social construction of the category of religion.

Document Analysis

According to Grace Davie and David Wyatt, who co-wrote the chapter “Document Analysis” in *The Routledge Handbook of Research Methods in the Study of Religion*, documents can be a good source of attitudes and social values.⁸ They also say that, “[p]ublically available and official documents provide an insight into societal trends at specific points in time.”⁹ In

⁷ Titus Hjelm, "2.3 Discourse Analysis", *The Routledge Handbook of Research Methods in the Study of Religion*, By Michael Stausberg and Steven Engler, (London: Routledge, 201), 134.

⁸ Grace Davie, and David Wyatt, "2.4 Document Analysis", in *The Routledge Handbook of Research Methods in the Study of Religion*, ed. Michael Stausberg and Steven Engler, (London: Routledge, 2011), 151.

⁹ Ibid.

chapters three and four, I examine publically available documents—court cases in chapter three, and political debates in chapter four—to determine how society views the concept of religion at a given time. In chapter four specifically, I use document analysis to determine how policy makers and politicians were using the concept of religion specifically during the early 1980s when *the Charter of Rights and Freedoms* was being drafted. Davie and Wyatt suggest that although documents are rarely used primary sources¹⁰ in the scientific study of religion, they ought to be regarded as important material for scholars of religion.¹¹

Document analysts must consider the context of the documents they use, including their specific purpose and intended audience.¹² In my work, both the court cases and the political debates are used for the purpose of public record, and thus the intended audience is the general public. Interestingly, Davie and Wyatt point out that meeting minutes—which record the political debates that I analyze in this thesis—are more complicated and require special consideration upon use. Because minutes are drafted, edited, re-edited, amended, and finally approved, they are not necessarily as accurate a reflection of the specific meeting as per their claim.¹³ This fact is something I consider as a potential bias in the fourth chapter. In a sense, this thesis can be seen as one large document analysis—the analysis of the preamble to *the*

¹⁰ Of course scholars of religious studies use “religious” texts such as the Bible, the Quran, and more as primary sources; but when speaking about document analysis used for the scientific study of religion, Davie and Wyatt are referring to texts such as meeting minutes, newsletters, personal letters, etc...

¹¹ Davie, “2.4 Document Analysis”, 151.

¹² *Ibid.*, 152.

¹³ *Ibid.*

Charter of Rights and Freedoms which states that, “Canada was founded upon principles that recognize the supremacy of God and rule of law.”¹⁴

¹⁴ “Constitution Act, 1982”, 53.

Chapter One: A History of the God Clause

While it is not surprising that Canada offers the freedom of religion to all citizens, a little-known, and somewhat surprising fact about this country, is that the first line—the preamble—to *the Charter of Rights and Freedoms* which constitutes section one of *Constitution Act, 1982* states that, “Canada is founded upon principles that recognize the supremacy of God and rule of law.”¹⁵ Among the scholars, politicians, lawyers, and judges who have taken on the task of interpreting this vague clause, there is no consensus about what “the supremacy of God”¹⁶ means for Canada as a nation, and for freedom of religion in particular. The purpose of this chapter is to both investigate the history of the God clause and the reasons it was included into a modern constitution in 1982, when no such reference was made in the earlier version, *Constitution Act, 1867*.¹⁷ Throughout the chapter, I will point out an underlying popular understanding of the meaning of “God” which I will clarify at the end. There are three segments in this section of the thesis: Background and Attention in Politics, The Bill of Rights as an Analytical Tool, and Contrasting Interpretations of “God”.

¹⁵ “Constitution Act, 1982” in *A Consolidation of the Constitution Acts, 1867 to 1982*. Ottawa: Dept. of Justice Canada, 2012, 53.

¹⁶ Ibid.

¹⁷ “Constitution Act, 1867”.

Background and Attention in Politics

There is no consensus as to how the God clause came to be included in the Charter’s preamble. Some scholars have argued that it was added as an afterthought¹⁸, while others have suggested that many politicians supported it, including liberal Prime Minister Pierre Trudeau¹⁹. Although, “[p]rivately, Trudeau told the liberal caucus that he did not think ‘God gives a damn whether he was in the constitution or not’.”²⁰ Trudeau has also been quoted saying that it is “strange, so long after the Middle Ages that some politicians felt obliged to mention God in a constitution which is, after all, a secular and not a spiritual document.”²¹ Regardless of who did and did not support the God clause, its existence in the Charter is now permanent.

It is important to be aware of the Canadian historical context leading up to the implementation of the Charter, and thus the establishment of the God clause in 1982. One major value that has been claimed to distinguish Canada is multiculturalism, that has been officially established since 1971. The God clause, however, appears to be inconsistent with Canada’s 1971 multiculturalism policy.²² This policy reads: “Canada affirm[s] the value and dignity of all Canadian citizens regardless of their racial or ethnic origins, their language, or their religious

¹⁸ Dale Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986), 66.

¹⁹ Jonathon W. Penney and Robert J. Danay, “Embarrassing preamble? Understanding the ‘supremacy of God’ and the Charter”, *University of British Columbia Law Review* 39, no.2 (2006), 290-291.

²⁰ George Egerton, “5 Trudeau, God, and the Canadian Constitution: Religion, Human Rights, and Government”, *Rethinking Church, State, and Modernity: Canada between Europe and America*, eds. David Lyon and Marguerite Van Die, (Toronto: University of Toronto, 2000), 106.

²¹ Ibid.

²² Citizenship and Immigration Canada, “Canadian Multiculturalism: An Inclusive Citizenship”, www.cic.gc.ca/english/multiculturalism/citizenship.asp

affiliation.”²³ Thus, in 1971, Canada affirmed the dignity of all citizens regardless of their *religious affiliation*, and then 11 years later the constitutional preamble was implemented making reference to a singular supreme God. In 1988, six years after the Charter and its preamble were implemented, Canada’s official multiculturalism *policy* was made into an Act.²⁴ In its lengthy preamble, the *Canadian Multiculturalism Act*, which further reinforces the idea of diversity in general and diversity of religion specifically in Canada, states:

AND WHEREAS the Government of Canada recognizes the diversity of Canadians as regards race, national or ethnic origin, colour and religion as a fundamental characteristic of Canadian society and is committed to a policy of multiculturalism designed to preserve and enhance the multicultural heritage of Canadians while working to achieve the equality of all Canadians in the economic, social, cultural and political life of Canada[.]²⁵

In 1988, diversity of religion in Canada is once again acknowledged, and stated as a fundamental characteristic of the nation. I point out both the multiculturalism policy and the act to highlight that Canadian values did not change between the time when multiculturalism was established in 1971 and 1982 when the God clause was introduced.

A total of seven versions of the *Charter of Rights and Freedoms* was drafted before it was finalized, and according to Robin Elliot, the Parliamentary Committee did not call for a preamble initially; but by the fifth draft, it was implemented.²⁶ The wording of the preamble, “[w]hereas Canada was founded upon principles that recognize the supremacy of God and rule of

²³ Ibid.

²⁴ “Canadian Multiculturalism Act”. Published by the Minister of Justice. 1988. <http://laws-lois.justice.gc.ca/eng/acts/c-18.7/>

²⁵ Ibid.

²⁶ Robin Elliot, "Interpreting the Charter - Use of the Earlier Versions as an Aid", *University of British Columbia Law Review* 16, (1982): 23.

law”²⁷, has not changed since its introduction in the fifth draft.²⁸ As noted in the introduction, there was no reference to divine supremacy in the 1867 constitution. Thus the sudden reference to God in a modern constitution might seem peculiar to many Canadians. This is perhaps why some people believe that the God clause was added at the last minute, and without careful consideration.²⁹ However, “Minister of Justice Jean Chrétien”, Elliot writes, “had by then received some 8,000 letters calling for the inclusion of some reference to God, and the federal Cabinet decided, after considerable debate, to comply.”³⁰

In January of 1981 during a drafting session of the Charter, a suggestion to recognize the supremacy of God was mentioned by conservative Members of Parliament David Crombie, and Jake Epp.³¹ Curiously, Crombie and Epp waited until the last five minutes of their time with Minister of Justice Robert Kaplan to bring up this point³²; a factor that might also contribute to the popular opinion that the God clause was added as an afterthought.

When it came time to vote on the addition of the preamble to the Charter, everyone except Svend Robinson, an MP for the New Democratic Party (NDP) supported the motion.³³

²⁷ “Constitution Act, 1982”, 53.

²⁸ Elliot, “Interpreting the Charter...”, 23.

²⁹ Ibid.

³⁰ Ibid.

³¹ Graeme Truelove, *Svend Robinson: A Life in Politics*, (Vancouver, BC: New Star Books, 2013), 73.

³² John Helis, “God and the Constitution: The Significance of the Supremacy of God in the Preamble of the Canadian Charter of Rights and Freedoms” (Masters Thesis, Carleton University, 2012), 18.

³³ Ibid.

Robinson felt this sort of recognition would contradict the freedom of religion outlined in section 2 a) of the Charter, and further, that it would be legally meaningless.³⁴ Leader of the NDP, Ed Broadbent did not commend Robinson for his opposition to the God clause. In fact, when it came to vote on the motion, Broadbent took Robinson off the committee for the day and replaced him with Catholic priest Bob Ogle.³⁵ “ ‘We’re not going to be on record voting Against God!!’ Robinson recalls Broadbent saying.”³⁶ Consequently, the motion passed and the God clause became the preamble.

In 1999, Robinson once again brought notice to the God clause when the Humanist Association of Canada brought him a petition signed by approximately 1,000 Canadians who wanted the God clause removed from the Constitution. Robinson agreed to present the petition to the House of Commons.³⁷ It is not surprising that Robinson raised the concerns of his constituents in the House since he frequently took it upon himself to represent the views of citizens regardless of his own opinion. For example, he also brought forth a petition to recriminalize abortion even though it was not something with which he agreed.³⁸ “It was part of the promise he often made during election campaigns: he would always present his constituents’ views to the house, but he would reserve the right to vote according to his conscience,” cites Graeme Truelove.³⁹ As it happened, in the case of the petition from the Humanist Association

³⁴ Ibid.

³⁵ Ibid., 74.

³⁶ Ibid.

³⁷ Ibid., 242.

³⁸ Ibid.

³⁹ Ibid.

of Canada, the matter was something that Robinson did support. Nevertheless his attempt failed, albeit not quietly. The petition caused a dramatic controversy in Canadian politics. “All hell broke loose...”⁴⁰ Robinson received hate-mail, and was misquoted to have said that, “God is offensive to millions of Canadians”.⁴¹ Most surprisingly was the negative feedback he received from his own party, the NDP. With comments suggesting what he did was “stupid”, “ill-advised”, “worse than poor judgment”, and “immensely controversial”. Many members of the NDP expressed anger.⁴² Like Broadbent in 1981, Party leader Alexa McDonough similarly denounced Robinson’s efforts to oppose “God” in the constitution: “Our party supported inclusion of that preamble in 1981 and our position remains firm. New Democrats stand together in supporting this clear statement of our most fundamental belief expressed across the country in a wonderful variety of faiths.”⁴³

From McDonough’s words, we can begin to see the discrepancies between different interpretations of the God clause. Robinson felt that the God referred to in the preamble was exclusory, while McDonough believed the clause referred to an all-inclusive God. An analysis of this issue using a critical religion perspective will reveal strong evidence to suggest that the God mentioned in the constitutional preamble was intended to refer to the God of the Christian faith—a fact that will be analyzed further throughout this chapter. Other interpretations of the

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid., 242-243.

⁴³ Canada. Parliament. House of Commons. *Debates*, 36th Parliament, 1st Session, June 9th, 1999, Ottawa: Canadian Government Publishing.

preamble are at risk of ignoring the crucial colonial underpinnings that have been shown to be attached to the category of religion and its attendant concepts.

Even more interesting than the lack of consistency from the NDP regarding the petition was theologian Bill Siksay’s opinion. He was upset that the constitution mentioned God at all because, “any implication that a human construct like the Constitution had divine endorsement was blasphemous, akin to taking the Lord’s name in vain.”⁴⁴ In response to the ordeal, Robinson said:

I was just outraged. I mean, that’s not why I joined the NDP. I’ve never seen that anywhere. I thought I’d joined the NDP because of something about economic justice, redistribution of income, that kind of stuff, not the supremacy of God. I cancelled my monthly donation to the party. I felt like I had to do something.⁴⁵

What is noteworthy about this ordeal is that this happened in 1999, not 1867, and not 1982. Seventeen years after the Charter was implemented the suggestion of removing the God clause remained taboo.

The Bill of Rights as an Analytical Tool

As I have suggested, many scholars, lawyers, and judges believe that because the God clause was added to the *Charter of Rights and Freedoms* at the very end of the drafting sessions, it did not receive careful consideration. While there is no way to be certain about how much thought was given to the God clause, it is imperative to acknowledge the similar—though by no means identical—reference to God in the 1960 *Bill of Rights*. Carleton University student John

⁴⁴ Truelove, *Svend Robinson*, 243.

⁴⁵ *Ibid.*

Helis, who wrote a Masters thesis in 2012 about “the supremacy of God” in the Charter, titled, “God and the Constitution: The Significance of the Supremacy of God in the Preamble of the Canadian Charter of Rights and Freedoms”. He stresses the connection to the *Bill of Rights*. He asserts that contrary to the popular belief that the God clause was implemented at the last minute and that it’s inclusion was the result of religious lobbyists, only

...three religious organizations... appeared before the Committee [and] only two were mainstream denominations - the United Church of Canada and the Ontario Conference of Catholic Bishops...[and] [n]either of these two denominations requested the inclusion of a reference to God in the Constitution.⁴⁶

Helis contends that it was after careful consideration that the God clause was adopted as the Charter’s preamble, and that although there was no mention of “the supremacy of God” in *Constitution Act, 1867*, its appearance in the 1982 version is far from random, pointing out that the 1960 Canadian Bill of Rights’ preamble reads as follows:

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada⁴⁷

Helis asserts:

Tracing the origins of the supremacy of God to the *Canadian Bill of Rights* displays that its inception stems not from a religious lobby active at the time of patriation, but rather a

⁴⁶ *Ibid.*, 15.

⁴⁷ *Canadian Bill of Rights*, SC 1960, c 44.

human rights instrument enacted two decades prior to the patriation process. Moreover, the process that resulted in its inclusion in the *Canadian Bill of Rights* begins to reveal some of its links to the foundation of rights and nationhood...⁴⁸

However, even if the preamble to the *Charter of Rights and Freedoms* was not influenced by religious lobbyist as Helis suggests, careful analysis of the implementation and drafting of the *Bill of Rights* reveals that Christian lobbyists heavily influenced the preamble to this bill, which in turn may have influenced the Charter’s preamble. In order to understand the Christian influence on the preamble to the Bill of Rights, a brief history outlined below.

History of the Bill of Rights

What became known as the *Canadian Bill of Rights (1960)*, was first introduced to parliament as Bill C-60, *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms* in September of 1958 by Prime Minister John Diefenbaker.⁴⁹ Diefenbaker had begun canvassing for the protection of human rights after the end of World War II in 1945 when he became a Member of Parliament. During this post-war era, concern for civil liberties was on the rise, “[...]in response to the atrocities and human suffering which had occurred during the Second World War.”⁵⁰ The bill was intended to be, “a statement of the rights and liberties of the individual which neither the government nor anybody else [would] be allowed to take away or infringe. More than that, it [would be] an attempt to state a fundamental

⁴⁸ Helis, “God and the Constitution”, 24.

⁴⁹ George Egerton, "Writing the Canadian Bill of Rights: Religion, Politics, and the Challenge of Pluralism 1957–1960", *Canadian Journal of Law and Society* 19, no. 02 (2004): 6.

⁵⁰ "Canadian Bill of Rights 1960." *50 Years of Human Rights Developments in Federal Corrections*. Correctional Services Canada. <<http://www.csc-scc.gc.ca/text/pblct/rht-drt/03-eng.shtml>>.

law, to grasp and express in effective form an essential principle of organized society.”⁵¹ Such principles would include the protection from discrimination by reason of race, national origin, colour, religion, or sex, although the bill would be statutory, and not entrenched by constitutional amendment, meaning it the bill would be limited to Parliament’s federal jurisdiction under the *British North America Act*.⁵² Because the bill would not be constitutionally entrenched, some writers, including libertarian academic Frank Scott, and University of Toronto Faculty of Law professor Bora Laskin, criticized the bill because it would result in little to no legal protection.⁵³

In May of 1959, Diefenbaker submitted the first draft of the *Bill of Rights*, but many criticized it its lack of inspirational language.⁵⁴ For example, Irving Himel, Secretary of the Toronto-based Association for Civil Liberties, writes, “[...]suggested that a Canadian bill of rights needed..., ‘clear, beautiful, and moving language,’ if the bill were to affect Canadians of all ages and backgrounds[...].”⁵⁵ As such, in the words of Anglican lawyer Stuart Ryan, a debate about finding “a good mouth-filling, heart-warming, preamble”⁵⁶ to the bill had begun.

The first to draft a preamble to the *Bill of Rights* was the Civil Liberties Association, that offered a preface that grounded the rights that were to be outlined in the bill in the inherent

⁵¹ Stuart Ryan, "Charting Our Liberties-The Proposed Canadian Bill of Rights", *Queen's Quarterly* 66, no. 1 (1959): 389-90.

⁵² Egerton, “Writing the Canadian Bill...”. 7.

⁵³ Ibid.

⁵⁴ Ibid., 8.

⁵⁵ Ibid.

⁵⁶ Ryan, “Charting our Liberties”, 403.

dignity and worth of all people.⁵⁷ Although, Christian groups opposed, insisting that an explicit reference to God be made in order to counter the threat of atheistic communism.⁵⁸ Lobbyists argued almost unanimously that rights needed to be grounded in a religious, and not secular foundation.⁵⁹ Remarkably, the only “religious” groups that gave voice in the drafting process were Christian groups. For example, Ronald Dehler, a Catholic legal specialist argued that,

Bill C-60 could serve a useful purpose, if a preamble were included, stating categorically that the Canadian people know and profess and proclaim the divine origin of these rights. Thus Bill C-60 would stand as a firm pillar of truth against the inroads of strict positivism, materialism, communism, a banner and a bastion, albeit abstract and elusive, against anything that tends to sap the spiritual energies, to dry up the religious springs of the people here and everywhere.⁶⁰

Diefenbaker, preferring to keep church and state separate, had not originally considered including a religious dimension in the bill.⁶¹ Still, more religious—or, more accurately Christian—people and groups voiced their opinions. The Canadian Conference of Catholic Bishops too, pressed for a religious reference in the bill⁶², as did Catholic Member of Parliament Paul Martineau, who, during a debate session in the House of Commons, insisted that civil rights come from the Christian God.⁶³ Further, another member of Parliament, Maurice Allard presented his opinion to the House of Commons. He said,

⁵⁷ Egerton, “Writing the Canadian Bill...”, 8.

⁵⁸ *Ibid.*, 10-13.

⁵⁹ *Ibid.*, 9.

⁶⁰ *Ibid.*, 10.

⁶¹ *Ibid.*, 12.

⁶² *Ibid.*, 10.

⁶³ *House of Commons Debates*, 24th Parl, 3rd Sess (4 July, 1960) at 5672 (Mr. Paul Martineau).

Since the beginning of this discussion, we have been speaking about freedoms and human rights. Is it not proper to try and find the sources of those human rights and freedoms? In short, we can say that the enjoyment of those prerogatives man owes to God, to his own nature and to the state. Having created man, God gave him rules which, if observed, guarantee his security and the respect of his own aspirations.⁶⁴

One Member of Parliament, L.J. Pigeon, went so far as to suggest that Canada is in fact a country which believes in God⁶⁵, and another, J.J. Martel, states the following as a reason for supporting Diefenbaker’s bill of rights:

History irrefutably proves that whenever man has risen against God, or against divine or natural law, he has, inevitably in the end, betrayed the basic freedoms, individual and general. The struggle between good and evil did not start yesterday; it began in Paradise after the first fall of man. And since then, one generation after another had to fight and exercise a restless vigilance to safeguard the respect of human rights. The lot of humanity has improved since the coming of the Saviour, the Lord’s son who made himself man but, unfortunately, there are still various areas on earth where the basic freedoms and rights of many are in practice completely denied, even if sometimes, taking a hypocritical attitude, some countries pretend to set up a bill of rights, which, anyhow, is in no way observed.⁶⁶

Martel also states that “no true Christian could question the usefulness nor the need for a collective manifestation of our faith in democracy and in the integral respect for human rights.”⁶⁷

Considering all of the statements made by various religious groups and members of Parliament, it is clear that during the time the *Bill of Rights* was being drafted, religion meant Christianity, and God referred to the Christian deity. I will return to this point in a subsequent section of this chapter.

⁶⁴ *House of Commons Debates*, 24th Parl, 3rd Sess (4 July, 1960) at 5712 (Mr. Maurice Allard).

⁶⁵ *House of Commons Debates*, 24th Parl, 3rd Sess (5 July, 1960) at 5771 (Mr. L.J. Pigeon).

⁶⁶ *House of Commons Debates*, 24th Parl, 3rd Sess (7 July, 1960) at 5922 (Mr. J.J. Martel).

⁶⁷ *Ibid.*

Proposed Preambles

In realizing that including an inspiring preamble to the *Bill of Rights* would please the many politicians and citizens alike, Diefenbaker eventually abandoned his desire to keep church and state separate and invited suggestions for a preamble that would profess that these rights come from God. As such, in July of 1960, the bill’s drafting committee held hearings over a two week period in order to determine the best wording for the preamble.⁶⁸ Among the dozens of preambles that were suggested, I will discuss three below:

One of the first preambles to be proposed was by Mac Cohen, a specialist in constitutional law at the McGill Faculty of Law. Cohen offered a secular preamble that began with, “Whereas the people of Canada believe in the dignity of man and assert that every human being deserves respect;” and concluded with, “Whereas Canada is a federal state, uniting within a single nation many ethnic and religious groups while yet encouraging the preservation and respect for all heritages.”⁶⁹ However, many of the witnesses and members of parliament were not willing to accept a secular preamble, and demanded that a explicit reference to God appear.⁷⁰ Thus, the following preamble (among many others) was subsequently proposed.

Paul Martin suggested the following preamble, which I have condensed to highlight the religious language and references to God:

Before God the Canadian people, united for the common pursuit of their well-being, composed of persons of various races and religions from many nations; intent on preserving (the heritage of the past), especially that of the dignity of the individual in his

⁶⁸ Egerton, “Writing the Canadian Bill...”, 13.

⁶⁹ Quoted in: *Ibid.*, 14.

⁷⁰ *Ibid.*, 16.

rights and freedoms which have been secured through the institution of parliament and the law, desire to affirm their faith in these human rights and fundamental freedoms. [...]

The Canadian people, therefore, believe that it is meet and proper that, for the better understanding of all, the parliament of Canada declare before man and God, on behalf of the nation, those human rights, fundamental freedoms, and objects of national purpose that are within its competence to so to do.⁷¹

The third example is a preamble proposed by the Department of Justice as an amalgamated version of previously suggested preambles. This version, which scarcely differs from the final one, states that:

The parliament of Canada recognizing that the Canadian nation is founded upon principles that acknowledge the dignity and worth of the human person and the position of the family within a society of free men and free institutions,

Recognizing also that men and institutions remain truly free only when freedom itself is anchored upon dual foundations of respect for moral and spiritual values and the rule of law,

And being desirous therefore of enshrining these principles and the basic rights and freedoms derived from them in a bill of rights which shall reflect the respect of parliament itself for the provisions of its own constitutional authority and shall ensure the protection of the basic rights and freedom of all individuals in Canada.⁷²

This draft of the preamble was an attempt to recognize Christian beliefs without offending any non-Christian groups. However, this was not enough for some, and an explicit reference to God was added.⁷³ The final version of the preamble to the 1960 *Bill of Rights* is worded almost exactly the same as version quoted above except for the addition of “the supremacy of God” in the first line.

⁷¹ Ibid., 15.

⁷² Ibid., 15-16.

⁷³ Ibid., 16.

Opposition to the Preamble to the Bill of Rights (1960)

Although many politicians and citizens were satisfied with a preamble to the Bill of Rights that referenced a supreme God, there were several individuals who opposed the inclusion. Among those opposed was Frank Scott from the Association of Civil Liberties, the group who proposed the first, and secular preamble quoted in the above section. After the implementation of the preamble, Scott admitted that he found the preamble’s reference to the “supremacy of God”, to be offensive.⁷⁴ Justice Minister Davie Fulton also expressed feeling uneasy regarding the preamble’s reference to God, especially since the document was intended for all of the people of Canada, and not just Christians.⁷⁵ It was not only secularists who criticized the inclusion of God in the preamble: Anabaptist Member of Parliament Erhart Regier warned, “against the consequences to religious freedom generated by the state’s temptation to abuse divine or church authority in order to buttress its own policies, and to confuse the ‘supremacy of God’ with ‘the rule of law’.”⁷⁶ Finally, during the final stages of the passage of the *Bill of Rights*, one citizen urgently messaged the Governor General, George Vanier in a letter demanding that the reference to God be omitted on the grounds that conflicted with freedom of religion, and the right to believe in the absence of God.⁷⁷

Contrasting Interpretations of “God”

⁷⁴ Ibid., 18.

⁷⁵ Ibid.

⁷⁶ Ibid., 19.

⁷⁷ Ibid., 20.

Some have suggested that what I have termed “the God clause” benefits Canada because it supports freedom of religion. The argument that this freedom should be formulated as an endorsement of Christianity will be presented in Chapter Two. The group of people, whom I will refer to as “Group A”, interpret “God” as enshrined in the Charter’s preamble as all-inclusive of the multiple cultures that make up the Canadian nation. “Group B” thinkers, by contrast tend to view the God clause as oppressive to non-Christians. Scholars and other key proponents of this line of thought tend to believe that the mention of “God” (especially with a capital “G”) is necessarily a reference to Christian deity and therefore conflicts with citizens’ fundamental freedom of religion, which will be analyzed further in chapter two. In this section I will analyze both lines of thinking, and ultimately conclude that the God of the Charter is in fact a Christian God.

Group A—God is Multicultural

Regardless of how, or why the God clause became the Charter’s preamble, there is disagreement about how the clause should be interpreted and whether or not it works with or against the fundamental freedom of religion. This section is an analysis of scholarly support for the God clause. There are not many examples of scholars who outright approve of the God clause. Of those who embrace it the best-argued example comes from Jonathon Penney and Robert Danay who wrote in their article, “The Embarrassing Preamble? Understanding the ‘supremacy of God’ and the Charter” that, “Courts and scholars should muster the ‘constitutional courage’ to acknowledge the existence of the supremacy of God clause and make a good faith attempt to determine its meaning and role in Canadian constitutionalism.”⁷⁸ They also suggest

⁷⁸ Penney and Danay, “Embarrassing preamble?”, 289.

that although many scholars and judges alike wish there were no reference to God in the Charter; we ought to interpret the clause as it is written and not as we wish it were written.⁷⁹ This thought—that we should interpret the God clause as it was written—acts as the inspiration for my fourth chapter in which I provide an understanding of God and religion that corresponds with the particular historical and political period of the constitution. Penney and Danay maintain that, “[t]he meaning of the supremacy of God clause is straightforward. Contrary to the title of [the] paper, the Charter’s Preamble is nothing to be embarrassed about.”⁸⁰ They are strong advocates for using the God clause as an interpretive lens in the courts. The fact that the Canadian courts have largely ignored the God clause is a cause for complaint for some, and for praise by others. Jonathon Penney and Robert Danay are dissatisfied with, “the way in which the supremacy of God clause has received the silent treatment both from academics and courts—in particular, the Supreme Court of Canada.”⁸¹ They contend that this dismissive approach is not justified, and that the God clause should be given equal weight, and taken as seriously as “the rule of law”.⁸²

Another supporter of the God clause is John Helis, whose work I have cited above. Helis argues that, “the supremacy of God ...[is] an important provision that reveals something significant about the Canadian Constitution, the theory of rights embodied by the Constitution,

⁷⁹ *Ibid.*, 289.

⁸⁰ *Ibid.*

⁸¹ Penney and Danay, “Embarrassing preamble?”, 290.

⁸² *Ibid.*

Canadian nationhood and the theory of the state more generally.”⁸³ He disapproves of those who jump to the conclusion that the God clause was included as the Charter’s preamble without considerable debate, and claims that the link between the supremacy of God and religion is “one which points to higher spiritual values and transcendence without religious exclusion and which is linked to the foundation of rights and nationhood.”⁸⁴

To add to the list of those who approve of the God clause, it is worth mentioning Alexa McDonough, who as I have already stated, feels that “the supremacy of God” in Canada is expressed in a “wonderful variety of faiths.”⁸⁵ McDonough is not wrong in her pronouncement that there are people from many faiths that may enjoy a reference to the supremacy of God in the preamble. It is not difficult to imagine that some Hindus or Wiccans, who believe in multiple Gods and Goddesses, or adherents of a variety of non-monotheistic traditions, could make use of the God clause. However, I point out in Chapter 2 that many of the “Word Religions” were discovered through a colonial process, and as such I argue that in order for traditions that differ vastly from Christianity to make use of the God clause, there must be a significant re-imagining of either the tradition itself or of the God clause. I certainly expect that many non-Christians accept the preamble, but it is important to draw attention to the difficulties of inclusiveness posed by the strict monotheistic wording of the God clause. Moreover, David Crombie, and Jake Epp undoubtedly support the clause, since it was they who first made the suggestion of adding a reference to God to the Constitution.

⁸³ Helis, “God in the Constitution”, 2.

⁸⁴ *Ibid.*, 3.

⁸⁵ Canada. Parliament. House of Commons. *Debates*, 36th Parliament, 1st Session, June 9th, 1999.

Among those who are undecided about the benefits of the God clause are Peter Hogg and Dale Gibson. Hogg admits that since the God clause is in the *preamble* it does not hold legal force. However, in theory he suggests it could be used as an interpretive lens (though he stated that still, the preamble is of little assistance even with interpretation).⁸⁶ Dale Gibson has similarly suggested that the preamble’s “value [is to be] ... seriously doubted”.⁸⁷

Group B—God is Christian

Group B thinkers are those who for various reasons oppose the inclusion of the God clause in a constitutional document. Legal scholar Liav Orgad is among those who question the relevance of the God clause in the preamble. He says that preambles serve a multitude of functions. Some present a nation’s core values and principles and express the history of the constitution’s enactment; while others serve as an interpretive lens for other clauses. There are short preambles and long preambles, and preambles that identify a nation’s goals. Some are given legal authority while others are granted none.⁸⁸ Although the God clause is part of a Canadian legal document, it does not actually hold any legal authority.⁸⁹ Orgad insists that although some preambles do have a legal role, the Canadian Charter contains a, “non-legally

⁸⁶ Lorne Sossin. “The ‘supremacy of God’, Human Dignity and the Charter of Rights and Freedoms.” *University of New Brunswick Law Journal* 52, (2003). 232.

⁸⁷ Gibson, *Law of the Charter*, 65.

⁸⁸ Liav Orgad, “The Preamble in Constitutional Interpretation”, *International Journal of Constitutional Law* 8, no. 4 (2010).

⁸⁹ Sossin, “The ‘supremacy of God’ ”, 232.

binding preamble, which has no persuasive power”⁹⁰—a position that this thesis opposes. Orgad summarizes the reputation of the God clause in the legal realm as follows:

Courts refer to the preamble as a dead letter; others, describe it as perfunctory, restricting the liberties embodied in the Charter and not intended for use even as an interpretative tool. Canada, thus is an example of a state in which the judiciary dissociates itself from the preamble. One reason might be that the preamble is short and lacks significant usable details. Another reason might be that...the preamble to the Canadian Charter has no persuasive value. In particular, it does not offer a persuasive explanation for the unusual reference to the "supremacy of God". Interestingly, when the legal status of the preamble to the Constitution Act of 1867 was discussed, the Canadian Supreme Court reached a different conclusion. In order to determine whether the secession of Quebec was constitutionally valid, the Court analyzed that preamble's content to determine the fundamental values underlying the Canadian Constitution.⁹¹

Thus, according to Orgad, the fact that “Canada is founded upon principles that recognize the supremacy of God and rule of law”⁹², cannot technically be used to justify actions in a court of law. Yet, as we shall see in the following sections, courts do at times use the God clause to justify ‘religious’ actions in the public sphere.

In *McBurney v. the Queen*, Justice Muldoon comments on the God clause. He says:

[I]t is not stretching matters to say that even in the modern, secular age the advancement of religion is rooted in our law and in our Constitution. That policy is readily discernable in the declaratory preambles to the Canadian Bill of Rights, and the Canadian Charter of Rights and Freedoms which both affirm that Canada "is founded upon principles that" acknowledge and recognize "the supremacy of God", and the "rule of law"... So it is that while Canada may aptly be characterized as a secular State, yet, being declared by both Parliament and the Constitution to be founded upon principles which recognize "the supremacy of God", it cannot be said that our public policy is entirely neutral in terms of "the advancement of religion".⁹³

⁹⁰ Orgad, “The Preamble in Constitutional Interpretation”, 722.

⁹¹ *Ibid.*, 723.

⁹² “Constitution Act, 1982”, 53.

⁹³ *Zylberberg v. Sudbury Board of Education (Director)* (Ont. C.A.) 65 O.R. (2d) 641[1988] O.J. No. 1488. N.p.

Additionally, legal scholar Lorne Sossin posits that, “[p]erhaps in part because of its inglorious origins, the ‘supremacy of God’ reference in the Charter’s preamble has been all but ignored by the Supreme Court, and by most constitutional observers as well.”⁹⁴

As I have thus far pointed out, scholars and judges in Canada have varying conceptions of what the God clause means, and what it implies for freedom of religion, and religion in general. Some feel that it should be used more often in the courtroom while others feel it is useless. This difference in opinion about meaning is consistent with the difference in opinion about the origin of the clause. However, if the wording, “the supremacy of God”, in the Charter’s preamble truly came from the 1960 *Bill of Rights*’ preamble, then the fact that all preamble suggestions that were discussed during the bill’s drafting sessions were from Christian groups, some of whom out rightly stated that Canada believes in a Christian God, ought to be considered and given weight when determining whether or not the God in the preamble is Christian.

Concluding Thoughts

I mentioned in the introduction that there were four steps to my argument. The first step, was to understand that there is strong evidence to suggest that the God in the preamble to the *Canadian Charter of Rights and Freedoms* refers to a Christian deity, and that it would require significant reimagining of the God clause or of one’s tradition, to suggest that the God of the Charter was a multi-faith God. Through an analysis of the important points that I have pointed out in this chapter, I will demonstrate why this is true. In the introduction to this chapter, I said that the purpose of this chapter is to both understand the history of the God clause and the reasons it was included into a modern constitution in 1982, when no such reference was made in the earlier version, Constitution Act, 1867. Below is a summary of both findings.

⁹⁴ Sossin, “The ‘supremacy of God’”, 232.

At the time of partition in 1867, the Canadian constitution made no reference to any God or to religion at all. In 1982, between the time when the multiculturalism policy was announced, and the multiculturalism act was established, *Constitution Act, 1867* was amended and replaced with *Constitution Act, 1982* which contains the *Charter of Rights and Freedoms*, and states that, “Canada is founded upon principles that recognize the supremacy of God and rule of law.”⁹⁵ This reference to God was particularly strange considering Prime Minister Pierre Trudeau believed in a separation of Church and state, and scholars, lawyers, politicians and judges are uncertain about why the reference was included into what is an otherwise secular and modern document. It is likely that God clause’s wording came directly from the 1960 *Bill of Rights* that was established under Prime Minister John Diefenbaker, because the line “supremacy of God” appears in its preamble. Many do not feel that a reference to a supreme deity is necessary in a modern constitution, and thus a debate about whether or not the God in the constitution is a Christian exclusory God, or an all-encompassing multi-faith God has arisen. I argue that the reference to God is most accurately interpreted as Christian and not an all encompassing God for several reasons.

(1) God—regardless of what or whose God the preamble has established as supreme—can never be all-encompassing, because not every individual, nor every group adheres to a deity. Canada has a growing number of atheists each year, though it is not just atheists that are excluded in the preamble. Even the argument that people from all religions can relate to having a supreme deity in the constitution is fallacious, because Buddhism, which is widely recognized a world religion, is not a tradition in which practitioners generally adhere to any deity. There are

⁹⁵ “Constitution Act, 1982”, 53.

more examples of non-theistic traditions that are recognized as religions, but just one example shows that the existence of a deity is not a universally held opinion.

(2) Of the many traditions whose adherents acknowledge a deity, not all of them adhere to only one as supreme. Many pre-Christian pagan traditions adhere to many deities, none of which are referred to with capital a “G”, meaning that not one is given a higher ranking than another. Additionally, the God in the preamble is male. I have already quoted Prime Minister P. Trudeau who said that he didn’t think that God gave a damn whether or not *he* was in the constitution⁹⁶, and God is continually referred to with the male pronoun throughout house of commons debates in the 1960s during the drafting of the *Bill of Rights*. The notion of a singular male supreme deity is Christian, although many—but not all—Muslims and Jews share this view. The fact that three of the hundreds of religions that are represented in Canada potentially share the notion of God as singular, supreme, and male, is not enough to claim that the God in the preamble to the Canadian *Charter of Rights and Freedoms* is all-inclusive or multicultural.

(3) The supreme God referenced in the *Bill of Rights* and the *Charter of Rights and Freedoms* was never intended to be interpreted as all-inclusive. In this chapter I have discussed the fact that the only groups and individuals who were part of the drafting of the preamble to the Bill of Rights were Christian groups who frequently cited the importance of Christianity in Canada. There should be no question: the God of the Constitution is Christian, and although the reference can be extended to include some traditions, it is not a reference to a multi-faith God.

⁹⁶ Egerton, “5 Trudeau, God, and the Canadian Constitution...”, 106.

Chapter Two: Theoretical Perspectives

In Chapter One, I argued that the God in the *Charter of Rights and Freedoms* best refers to a Christian God. In order to understand how the God of the Charter works in tandem with the notion of religion employed in the document, it is necessary to do a critical analysis of the category of religion. To do this, I interrogate the category of religion using what is termed “critical religion” discourse. This chapter analyzes the word “religion” and inquires about the construction of the concept of freedom of religion.

Freedom of religion is consistently viewed as a fundamental characteristic of any modern democratic nation. Thus Canada’s protection of this freedom is largely uncontroversial to most Canadians. The word “religion” brings to mind institutions called “Christianity”, “Islam”, “Judaism”, and “Buddhism”, and citizens are expected to identify with only one, (or none) of “the religions”. In this discourse, sometimes referred to as “the world religions perspective”, religion is seen as generally good, and deserving of protection. In contrast, “critical religion” is a developing discourse within religious studies that critically examines and interrogates the category of religion. It challenges a world religions perspective. The following is an application of critical theory to Canadian public policy as stated in the *Charter of Rights and Freedoms*. This chapter outlines the field of critical religion with regard to three key components: definitions, colonialism, and law.

Problems with Popular Definitions of Religion

Naomi Goldenberg has said that, “critical religion argue[s] for the necessity of scrutinizing the historical origin and political motivation behind all religious vocabulary[.]”⁹⁷ A good place to start is by analyzing some of the most commonly used definitions of religion. Scholars of critical religion criticize the category of “religion” as meaning nothing in particular, and just about everything in general. Consider these four popular definitions of the term:

(1) [A] unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden -- beliefs and practices which unite into one single moral community called a Church all those who adhere to them.⁹⁸

(2) Religion is what an individual does with his solitariness.⁹⁹

(3) Religion is (1) a system of symbols which acts to (2) establish powerful, persuasive, and long-lasting moods and motivations in men by (3) formulating conceptions of a general order of existence and (4) clothing these conceptions with such an aura of factuality that the moods and motivations seem uniquely realistic.¹⁰⁰

(4) Belief in Spiritual Beings.¹⁰¹

Based on these four definitions, which are frequently cited in religious studies classrooms to outline the problem of definitions, one would be hard-pressed to name any phenomenon,

⁹⁷ Naomi Goldenberg, “Queer Theory Meets Critical Religion: Are We Starting to Think Yet?” – (forthcoming) in “Theory/Religion/Critique: Classic and Contemporary Views”, ed. Richard King, (NY:Columbia University Press, 2016), n.p.

⁹⁸ Émile Durkheim, and Karen E. Fields, *The Elementary Forms of Religious Life*, (New York: Free, 1995), n.p.

⁹⁹ Alfred North Whitehead, *Religion in the Making, Lowell Lectures 1926*, (New York: Fordham UP, 1996), 15-16.

¹⁰⁰ Clifford Geertz, *The Interpretation of Cultures: Selected Essays*, (New York: Basic, 1973), 90.

¹⁰¹ Edward Burnett Tylor, *Primitive Culture: Researches into the Development of Mythology, Philosophy, Religion, Art, and Custom*, (London: Murray, 1903), 383.

practice, occurrence, or event that cannot be considered religio(n/ous). Under these and other popular definitions of religion, an argument can be made to include anything at all from Christianity and atheism, to hockey, capitalism, attending class, or maybe even daily acts of personal hygiene such as brushing one’s teeth.

Acknowledging that there is a problem with determining a central definition of religion is not unique to critical religion. Many scholars begin articles and lectures with a few sentences about the fact that either religion cannot be defined, or that it has so many definitions that no single one can be agreed upon, but are then quick to move past this point and continue to discuss “religion” as if it were a stable, unchallenged, and obvious concept. However, what *is* unique to critical religion is that scholars and theorists of this emerging field emphasize the fact that there is no agreed-upon meaning for religion. These scholars work to deconstruct the concept and analyze some of the conflicts that come with attempts to define the category. The third section of this chapter will illustrate some of the major issues that are the result of citing religion as an undefined concept in public policies, after some more discussion about problems with definitions.

Another definitional issue within critical religion discourse concerns the history of the word religion. In *Before Religion: A History of a Modern Concept*, Brent Nongbri traces the origins of the word religion, and concludes, as is expressed in its title, that religion is a *modern* concept. Thus he renders fallacious any references to ancient traditions such as those found within early Greek or Roman civilization as “religions”, noting that the “formation of ‘ancient religions’ as objects of study coincided with the formation of religion itself as a concept in the

sixteenth and seventeenth centuries.”¹⁰² He says that , “[r]eligion is a modern category: it may be able to shed light on some aspects of the ancient world when applied in certain strategic ways, but we have to be honest about the category’s origins and not pretend that it somehow organically and magically arises from our sources.”¹⁰³ Nongbri’s argument challenges the idea that religion is timeless and universal as is commonly suggested, by locating the origin of the concept in a specific time and place.¹⁰⁴ He suggests that if scholars are more careful about when and how they employ the term “religion”, there would be a much more specific understanding of which phenomenon is being presented. Instead of books on *Religions of Rome*, and *Ancient Greek Religion* we would get books on Athenian appeals to ancestral tradition, and Mesopotamian scribal praxis.¹⁰⁵ Applying the word “religion” to traditions and phenomena that predate the concept itself only blurs and mystifies the content of the text.

Similarly, in her article entitled, “There is No Religion in the Bible.”, Goldenberg argues that it is false to suggest that details about “religion” can be found in the Bible. She writes:

The crux of my argument is that religion as a category and type of institution has evolved as an instrument of statecraft, as a management tool of dominant governments. In the ancient, social worlds spoken of in the Bible, religion has not yet been invented. Instead of narratives about groups and individuals interacting in arenas of life that we now differentiate as religious or secular, governmental or ecclesial, political or clerical, we are presented with stories and reports in which these distinctions have no meaning.¹⁰⁶

¹⁰² Brent Nongbri, *Before Religion: A History of a Modern Concept*, (New Haven: Yale UP, 2013), 152.

¹⁰³ *Ibid.*, 153.

¹⁰⁴ *Ibid.*, 150.

¹⁰⁵ *Ibid.*, 159.

¹⁰⁶ Goldenberg, “There is No Religion in the Bible,” Unpublished Manuscript.

Instead, Goldenberg opts for reading the Bible as a political document, and like Nongbri, she observes the benefits of careful articulation concerning the description of what went on in biblical and/or pre-religion societies¹⁰⁷. Since there was no religion, there was also no concept of the secular; no dichotomous divide. The act of applying religion to places where religion does not exist leads to another important component of critical religion discourse: colonialism.

Colonial Roots of the Category of Religion

Many scholars of critical religion have pointed out that categorizing the world’s societies, in terms of “religions” is a colonial process. That is, Westerners have applied the term “religion” to non-Western traditions or societies as a way of understanding and comparing what *they* (non-Westerners) do, against the *western norm*, which is often depicted as protestant Christianity. The concept of having so-called world religions that are clearly defined and distinguishable from one another is heavily scrutinized by scholars of critical religion. According to Tomoko Masuzawa,

“world religions” as a category and as a conceptual framework initially developed in the European academy, which quickly became an effective means of differentiating, variegating, consolidating, and totalizing a large portion of the social, cultural, and political practices observable among the inhabitants of regions elsewhere in the world.¹⁰⁸

Masuzawa, and other critics of world religions discourse¹⁰⁹ have traced the process of how some behaviours, ideas, traditions, and cultural practices have become named as “world religions”.

¹⁰⁷ Ibid.

¹⁰⁸ Tomoko Masuzawa, *The Invention of World Religions, Or, How European Universalism Was Preserved in the Language of Pluralism*, (Chicago: U of Chicago, 2005), 20.

¹⁰⁹ I have previously referred to “world religions discourse” as the “world religions perspective” on page 34. They can be used interchangeably in this thesis.

In *The Invention of World Religions, Or, How European Universalism Was Preserved in the Language of Pluralism*, Masuzawa outlines the history of the invention of Buddhism.¹¹⁰ She writes that in the late nineteenth century there was much disagreement as to what Buddhism was all about and whether or not it was one of the so-called world religions. However, as Christian European scholars began to recognize the resemblances and links between cultural practices in a range of territories from Ceylon, Burma, Siam, Japan, and China, Buddhism eventually came to be seen as a unified whole.¹¹¹ Instead of the history of Buddhism being identified and shared by practitioners of a specific tradition itself, European scholars essentially created Buddhism the moment they determined that *it* (whatever that means) was a world religion.

The discovery of Buddhism was therefore from the beginning, in a somewhat literal and nontrivial sense, a textual construction; it was a project that put a premium on the supposed thoughts and deeds of the reputed founder and on a certain body of writing that was perceived to authorize, and in turn was authorized by, the founder figure.¹¹²

It is important to be aware that so-called “Buddhists” did not identify as such until after Christian European scholars named and created the tradition in the late nineteenth century.

Similarly, in “Capabilities, Religionizing Effects and Contemporary Jewishness”, Jeffery Israel argues that the modern invention of Judaism as a religion occurred in the late 18th century.¹¹³ He says that, “[i]n Western Europe at that time, some Jews attempted to format the marker “Jewish” so that it would match the modern category of ‘religion,’ which they hoped

¹¹⁰ Masuzawa, *The Invention of World Religions*, 121-146.

¹¹¹ *Ibid.*, 125.

¹¹² *Ibid.*, 126.

¹¹³ Jeffery Israel, "Capabilities, Religionizing Effects and Contemporary Jewishness", *Religion as a Category of Governance and Sovereignty*, Ed. Trevor Stack, Naomi R. Goldenberg, and Timothy Fitzgerald, (Brill: 2015),197.

would emerge as a tolerably variable feature of citizenship”.¹¹⁴ Jews began to organize themselves to look more like the tolerable religion of Protestant Christianity. They began to build synagogues that looked like churches, and train rabbis to accord with Protestant clerical norms.¹¹⁵ Being part of a “religion” benefits Jews because, “those who rally under the category of ‘religion’ continue to exploit official accommodations and other privileges in states where sovereignty is organized around special deference for “the religious.’ ”¹¹⁶ The pattern of groups marketing themselves as religions will be one of the central components of the third chapter in this thesis.

In “Hinduism and the ‘World Religion’ Fallacy”, Timothy Fitzgerald argues that the category of Hinduism as a world religion is artificial, and that it was created for theological purposes.¹¹⁷ He identifies the necessary conditions that must be met in order for a world religion to be created. Essentially, if these conditions have been met, then Europeans will have dubbed the grouping “a religion”. The conditions of a world religion appear to be,

that it must develop a universal message, a doctrine of salvation that is sufficiently transparent to be potentially available to adherents in a variety of cultural contexts... that it [be] literate, ha[ve] scriptures that can be translated into different languages, ha[ve] a class of special interpreters who can act as missionaries, appeal to large numbers of people, appear to transcend cultural boundaries, and [be] studied by hordes of westerners.¹¹⁸

¹¹⁴ Ibid., 197.

¹¹⁵ Ibid., 198.

¹¹⁶ Ibid.

¹¹⁷ Timothy Fitzgerald, "Hinduism and the ‘World Religion’ Fallacy", *Religion* 20.2 (1990), 101.

¹¹⁸ Ibid., 104.

I want to highlight two important points in Fitzgerald’s article. The first is that Hinduism does not fit into the world religions model, which is discussed further in his 2000 book, *The Ideology of Religious Studies*.¹¹⁹ The second is that the world religions model is altogether problematic. His issue with the world religions model as a whole is that it is “a theological concept which has been uncritically employed as though it was a scientific category that describes a class of real objects in the world.”¹²⁰ Fitzgerald’s criticism of the world religions discourse is a good representation of the general view that scholars of critical religion have regarding the concept of world religions.

Finally, I wish to point out the success of the colonization of what many now know as “the World Religions”. Evidence of the success of the colonial process of creating the World Religions is manifested when adherents no longer question their inclusion into the category of religion. During the colonial process of these traditions, certain aspects of each tradition were reinforced and solidified, while other traits slipped through the cracks. Once established as “a religion”, adherents of these traditions developed the ability to self-identify as religious, an identity that would have been impossible to hold should these traditions not have been named and defined as religions. Although it is useful to name a concept, or a pattern of thinking, since once named, the concept can be analyzed and discussed, it is also important to be aware of what gets lost in the process. A certain amount of re-imagining must be established before a tradition can be named a religion. The same is true in order for adherents of non and poly-theistic traditions to accept the God clause.

¹¹⁹ Fitzgerald, Timothy, *The Ideology of Religious Studies*, (New York: Oxford UP, 2000), 134-155.

¹²⁰ Fitzgerald, “Hinduism and the ‘World...’”, 115.

Legal Challenges and Vestigial State Theory

To continue the theme of the previous section about religion and colonialism, the difficulties of non-Christian groups’ attempt to gain legal recognition as “a religion” will be discussed. In her Master’s thesis entitled “Religion Drag: The relevance of ‘Critical Religion’ and Queer Theory to Canada Law and Religious Freedom”, Gabrielle Desmarais examines the language used to describe religion in Canadian courts and through several case studies determines that religion in Canada is consistently recognized if the organization presents itself as similar to Protestant Christianity.¹²¹ She notes that, “[...]no matter how benign its intentions, [the court] relies on a concept of religion that is entrenched with centuries of historical baggage; specifically Protestant Christian baggage that is evidenced by language that continues to structure any legal discussion about religion.”¹²²

One of the examples that Desmarais uses to outline the struggles of a non-Christian group to gain legal recognition as a religion is that of Wiccan Churches. She refers to a case in which groups of Wiccans sought the tax exemption granted to charitable organizations, as groups that foster “the advancement of religion”. In order to qualify for the exemption, the Wiccan groups had to prove their religiosity. Some of the issues that Wiccans faced during this challenge were that their clerical structure differed vastly from that of Protestant Christianity. In addition, they did not have stable places of worship that were similar enough to churches. In Canada, Wiccans

¹²¹ Gabrielle Desmarais, “Religion Drag: The Relevance of “Critical Religion” and Queer Theory to Canadian Law and Religious Freedom” (Masters Thesis, University of Ottawa, 2014), n.p.

¹²² *Ibid.*, 84.

were denied categorization as a religion. However in the US, after a long struggle, Wiccans were officially established as "Wiccan Churches"¹²³, though only after they molded their tradition to resemble Christianity.

"Mainstream Christianity sets the tone for the limits of normal religion..."¹²⁴, writes Suzanne Owen and Teemu Taira in their work about The Druid Network's struggle to gain status as a religion for charitable tax purpose in the United Kingdom.¹²⁵ In 2010, the Druid Network was successful in presenting itself as a coherent "religion" in order to register as a charity, even though it is generally accepted that Druidry does not have an authoritative set of scriptures or even a single concept of a deity.¹²⁶ The Charity Commission for England and Wales defines religion as having four main requirements: a belief in a supreme being, worship and practices that relate to the supreme being, theological cohesion, and an ethical framework. Thus the Druid Network was required to fill out an application in a manner that fits this structure, which is in fact modeled after Protestant Christianity.¹²⁷ The concern here is not *how* the Druid Network manipulated themselves to fit the Protestant Christian mold, but rather the fact that they, and any other group wishing to attain recognition as a religion, *must* present themselves in this way.

¹²³ Ibid., 96-101.

¹²⁴ Lori G Beaman, "Religion and Rights: The Illusion of Freedom and the Reality of Control", *Culture and Religion* 6.1 (2005), 26.

¹²⁵ Suzanne Owen and Teemu Taira, "The Category of 'Religion' in Public Classification: Charity Registration of The Druid Network in England and Wales", in *Religion as a Category of Governance and Sovereignty*, ed. Trevor Stack, Naomi R. Goldenberg, and Timothy Fitzgerald, (Brill, 2015) n.p.

¹²⁶ Ibid., 90.

¹²⁷ Ibid., 94.

Although it is true that in theory there is no one agreed upon way to define religion, it seems that in practice, the validity of a religion is always held to a Christian standard.

Although the validity of religion is regularly held to a *Christian* standard within the law, Jewish and Muslim “religions” are typically easily recognizable in the court because of the monotheistic traits shared with Christianity. However, this does not mean that Muslims, Christians, and Jews are exempt from proving themselves to be religious, at least when it comes to legal violations of freedom of religion. In *The Impossibility of Religious Freedom*, Winnifred Sullivan discusses the challenges faced by the Christian and Jewish plaintiffs in the case, *Warner v. Boca Raton*.¹²⁸ The case is about the Boca Raton Cemetery in Boca Raton, Florida, and the people who have buried their deceased loved ones within its territory. The section of the cemetery in question was designed as a memorial garden that only allowed flat grave markers instead of vertical monuments.¹²⁹ The plaintiffs, some of whom were Christians and Catholics, others who were Jews, placed vertical monuments on the graves of their loved ones. The Catholic plaintiffs decorated their monuments with statues of Jesus, the Virgin Mary, upright crosses, and other Christian themed decor, while the Jewish plaintiffs decorated the graves of their loved ones with upright tombstones that depicted the Star of David. When they were asked to take down all of the non-flat decor from the gravesites in accordance with the regulations, the plaintiffs claimed it was an infringement on their religious freedom.¹³⁰ The case turned into a messy debate *not* about whether or not the plaintiffs were in fact religious adherents, but rather

¹²⁸ Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom*, (Princeton, NJ: Princeton UP, 2005), N.p.

¹²⁹ *Ibid.*, 15.

¹³⁰ *Ibid.*, 32-53.

about whether their religion *required* vertical monuments at gravesites. That such a requirement cannot be objectively proved or disproved, reflects back to the problem of definitions discussed earlier. Although freedom of religion laws have the tendency to protect Christian, and Christian-like institutions, when the courts are pressed for a definition, the ambiguity surrounding the concept of religion arises once again. Court decisions are not always consistent, and as a result not even the courts can agree on which traditions are protected under freedom of religion clauses, and which are not.

Another issue brought up by critical religion scholars is that of the special legal privileges that are afforded to those who identify as religious. In “Demythologizing Gender and Religion within Nation-States”, Goldenberg discusses section 319 of the Criminal Code of Canada which makes hate-speech targeted at any identifiable group of people distinguishable by colour, race, religion, ethnic origin or sexual orientation a crime.¹³¹ She asks, “What would happen if a religious person, perhaps even a member of the clergy, felt moved to express hatred toward gay people in a sermon from the pulpit? Would such behaviour...warrant prosecution?”¹³² In short, the answer is no. Speech “on a religious subject” is excused from penalties pertaining to other forms of speech including hate speech, and thus, “two people could, in theory at least, spout the same hate-filled screed, with the result that one would be jailed and the other would go free depending on the classifications of such screeds as ‘religious’ or ‘secular’.”¹³³

¹³¹ Naomi Goldenberg, "Demythologizing Gender and Religion within Nation-States", in *Religion, Gender, and the Public Sphere*. By Niamh Reilly and Stacey Scriver, 248.

¹³² *Ibid.*, 248.

¹³³ *Ibid.*, 249.

Goldenberg identifies this kind of “religious hate-speech”, or any commentary presented by a recognized religious institution as depoliticized speech. By depoliticized speech, she means that within the law, religion is treated as innocent and thus exempt from prosecution; it is afforded extra privileges, which essentially mystifies any speech that is uttered in the name of a religion.¹³⁴ Goldenberg suggests that the process of demystification of the category of religion can begin by understanding religions as vestigial states. This is one of the central tenets of what is evolving as vestigial state theory. In “The Category of Religion in the Technology of Governance: An Argument for Understanding Religions as Vestigial States”, Goldenberg defines vestigial states, “as the institutional and cultural remainders of former sovereignties surviving within the jurisdictions of contemporary governments”.¹³⁵ When we begin to see religions as vestigial states, we stop seeing religion and the state as separable spheres of human activity. In “Theorizing Religions as Vestigial States in Relation to Gender and Law: Three Cases”, Goldenberg suggests that, “contemporary debates about issues regarding law and public policy would be helped if religions were demystified and understood as forms of government that are basically akin to those that are often called ‘secular’.”¹³⁶

To summarize, vestigial state theory posits that religions are the remnants of former systems of government that hold a particularly special, or mystical place in law and public policy and that citizens would be better served if the category were to be demystified and religions

¹³⁴ *Ibid.*, 250.

¹³⁵ Naomi Goldenberg, “The Category of Religion in the Technology of Governance: An Argument for Understanding Religions as Vestigial States”, *Religion as a Category of Governance and Sovereignty*, Ed. Trevor Stack, Naomi R. Goldenberg, and Timothy Fitzgerald, (Brill, 2015), 280.

¹³⁶ Naomi Goldenberg, “Theorizing Religions as Vestigial States in Relation to Gender and Law: Three Cases”, *Journal of Feminist Studies in Religion* 29, no. 1 (2013): 39-51.

would instead be understood as systems analogous to secular institutions. Critical religion works to unpack the history and modern conceptions about religion by locating its presence in particular historical contexts, and acknowledging the colonial implications of the everyday usage of the term.

Concluding Thoughts

In this chapter, I have argued that although there is no agreed upon definition of religion that can objectively distinguish the religious and the secular, the concept of religion can be traced back to reveal its Christian roots. Part of the reason that there is no objectively suitable definition for religion is that the concept was not originally meant to be applicable to traditions outside of Christianity. The history of every “religion” essentially begins the moment that it is claimed by the category of religion. Once deemed a religion, the culture or tradition is essentially treated as frozen in time, according to how it was perceived by European Christians at time of its induction into the category, instead of being seen as a fluid, changing way of living. As a result, people who practice traditions that have long been deemed acceptable religions, do not necessarily understand their “religion” in the same way as judges, lawyers, politicians, and the general public, which is essentially the controversy in *Warner v. Boca Raton*.

The category of religion has never been a universal category that has existed across a variety of cultures. Its main purpose has been to act as a framework through which European Christians understand other peoples. Thus, the fact that religion has become a mystified concept that many deem an important value in a democratic nation is hugely problematic. Hidden under the guise of multiculturalism and diversity, the category of religion as a fundamental freedom, often acts to reinforce Christianity and Christian-like values and institutions. Combined with,

“the supremacy of God” at the beginning of the Canadian constitution, the protection of freedom of religion reinforces the Christian bias under which Canada operates. The following chapter will continue this argument through an analysis of Canadian court decisions involving freedom of religion.

Chapter Three: Religion and the Law in Canada

In chapters one and two, I highlighted the Christian underpinnings of the use of God in the Charter of Rights and Freedoms, and the concept of religion in general. Although in theory, both “religion” and “God” have Christian roots, it is important to see how both concepts are used in practice. In this chapter I turn to a variety of Canadian court cases. The first section analyzes court cases that deal with the God clause, and the second section analyzes cases that deal with the interpretation of the category of religion. Here I argue that both theory and practice are essential to determine the meaning and influence of “God” and “religion”, on the allocation of Canadian rights. Thus far, I have argued that the God clause, and the concept of religion originate in Christianity. In this section I will show how this Christian origin operates in particular circumstances.

The God Clause in the Courtroom

In this section, I analyze five Canadian court cases involving the freedom of religion, in which the God clause has been a factor. Each case reveals an aspect of the Christian biases of both freedom of religion, and the God clause that I have argued in the first two chapters of this thesis. This section supports my theory that the Christian roots of both freedom of religion, and the God clause affect how Canadian court officials, and citizens understand the concept of religion, and that this understanding supports the Christian bias that is evident in Canadian society.

R. v. Morgentaler

R v. Morgentaler is a Supreme Court case that was being appealed from Court of Appeal for Ontario in 1988. The case deals with women’s right to have an abortion; the concern being whether or not the abortion provision in the criminal code was constitutional. The court found that denying a woman an abortion infringed on her right to security of person, and since that time, Canada has not had any criminal laws regulating abortion.¹³⁷

Throughout the case, discussion turned into one of a potential conflict between section 7 of the Charter which gives citizens the right to life, liberty, and security, and section 2 a), freedom of conscious and religion.¹³⁸ Questions arose surrounding *which* person is protected by these clauses (the mother or the baby), and whether or not denying an abortion to a woman would infringe on her conscientiously held beliefs. This discussion led to the following statement by Justice Bertha Wilson:

The Chief Justice sees religious belief and practice as the paradigmatic example of conscientiously-held beliefs and manifestations and as such protected by the *Charter*. But I do not think he is saying that a personal morality which is not founded in religion is outside the protection of s. 2 (a). Certainly, it would be my view that conscientious beliefs which are not religiously motivated are equally protected by freedom of conscience in s. 2 (a). In so saying I am not unmindful of the fact that the *Charter* opens with an affirmation that “Canada is founded upon principles that recognize the supremacy of God” But I am also mindful that the values entrenched in the *Charter* are those which characterize a free and democratic society.¹³⁹

This statement reveals a glimpse of the some of the discussion surrounding the interpretation of the Charter’s section 2 a), which guarantees citizens freedom of conscience *and*

¹³⁷ R v. Morgentaler, [1988] 1 S.C.R. 30, 1988 SCC

¹³⁸ “Constitution Act, 1982”, 55, 53.

¹³⁹ R v. Morgentaler, 178.

religion. There are two sides to the argument: one side being that conscience and religion are to be interpreted together, and that the two essentially equate to religious beliefs, and the second side being that conscience and religion are two isolated freedoms to be understood separately. Additionally, there is a casual reference to the supremacy of God in this quotation. The God clause is acknowledged, and then pushed aside for what may be a *better* interpretation: that the Charter is first and foremost about protecting a free and democratic society.

The most important factor in *R v. Morgentaler*, is in regard to the words of Justice Wilson. Justice Wilson, in the above quotation, has pointed out an important problem: either section 2 a), which protects the freedom of conscience and religion, is intended to protect conscientiously held *religious* beliefs, or it is intended to protect secular conscientiously held beliefs, as well as religious beliefs. Although the answer to this problem is hugely important for secularists and those who belong to groups that are not officially recognized as religions, *R v. Morgentaler* does not settle this dilemma. Justice Bertha Wilson admits that she believes that conscientiously held non-religious beliefs should be equally protected, but she also admits that the Chief Justice sees religious belief and practice as the paradigmatic example of conscientiously-held beliefs. Thus her opinion does not reflect the dominant discourse surrounding this issue. What she says next is particularly important for my purposes. She brings up the Constitution’s reference to God in the Charter’s preamble, at the same time that she questions whether or not conscience and religion are to be interpreted together or separately. In acknowledging the God clause in such a way, Justice Bertha Wilson has inadvertently pointed to the Christian connection between religion and God, the existence of which I have argued extensively in the first two chapters of this thesis. When she uses the fact that a reference to God exists in the Charter as a reason why the freedom of conscience and religion should be

interpreted together, Bertha Wilson is using a Christian theistic model to define religion, which as I argued in chapter two, is incompatible with a more inclusive, multicultural understanding of freedom of religion. In this case religion is understood using the Christian framework that I have previously described.

Zylberberg v. Sudbury Board of Education

In the same year as *R v. Morgentaler*, the Ontario Court of Appeal issued another decision that commented on the God clause in *Zylberberg v. Sudbury Board of Education*. This case concerned Section 10(1) of Education Act, which at the time, gave ministers the power to set regulations for religious practices in the schools, while providing exemptions for anyone not wanting to participate. At one particular school in Sudbury, three parents—one Muslim, one Jew, and one non-religious person—did not wish for their children to take part in the school’s morning ritual which consisted of reciting the Lord’s Prayer, and sometimes reading scripture. The regulation allowed for the exemption of certain students on the request of their parents, but these three particular parents did not want to have their child singled out every morning by leaving the room while the rest of the children prayed. It was after all, a public school.¹⁴⁰ Although it was decided that religious prayers in public schools did in fact infringe on the appellants’ freedom of religion, the God clause was used in defense of the Education Act.

In the Divisional Court, O’Leary J. held that the religious exercises prescribed by s. 28(1) did not infringe the guarantee of freedom of conscience and religion provided by s. 2(a) of the Charter. Alternatively, he held that, if the Charter freedom was infringed, the infringement was justifiable under s. 1 of the Charter which provides:

¹⁴⁰ *Zylberberg v. Sudbury Board of Education (Director)* (Ont. C.A.) 65 O.R. (2d) 641[1988] O.J. No. 1488.

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

He was of the view that the inculcation of morality was a proper educational object and that morality and religion were intertwined. If this resulted in any infringement on minority religious beliefs, it was not substantial. He pointed out that the religious exercises did not have to be Christian and, except in the case of non-believers, could be consistent with the Charter which, in its preamble, recognizes "the supremacy of God and the rule of law".¹⁴¹

Here, the God clause is used to support the recitation of a prayer directed toward God, in public places. The argument assumes that since we have a reference to the supremacy of God in our *Charter of Rights and Freedoms*, then it must be all right to recite a prayer that recognizes this God in an otherwise secular space. According to this logic, the only people that prayer can offend are atheists and agnostics. However, as I have argued in chapter two, it is not just atheists and the non-religious who are excluded by the God clause. We shall see the same argument manifested in the two Saguenay cases below.

Zylberberg v. Sudbury Board of Education goes on to refer to the God clause a total of seven times, mostly to argue that in allowing prayer at public schools, the *Education Act* remains consistent with the Charter's preamble.¹⁴² To refute this argument, the court claims that,

Whatever meaning may be ascribed to the reference in the preamble to the “supremacy of God”, it cannot detract from the freedom of conscience and religion guaranteed by s. 2(a) which is, it should be noted, a “rule of law” also recognized by the preamble.¹⁴³

This is another example of the courts' difficulty interpreting the God clause, and how it often gets swept to the side and ignored. Courts are not interested in taking on the challenge of

¹⁴¹ *Ibid.*, n.p.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

actually interpreting the clause, and instead tend to ignore it and move on. However, as I argue, ignoring the God clause does not mean that it has no influence.

What is noteworthy about *Zylberberg vs. Sudbury Board of Education* is the fact that only Christian prayers and rituals were cited as examples of religious morality, even though Judge O'Leary suggested that morality and religion were intertwined, and that the Education Act allowed for religious rituals in general, and said nothing about Christianity in particular. Essentially, the "religious practices", that the Education Act protected, were used interchangeably with the idea of "Christian practices", because no practices from non-Christian religions were ever exercised. Once again, it is clear that religion was been interpreted to mean Christianity, as per my argument in chapter two. Further, the God clause was used to serve the advancement of Christianity only, instead of a more general multicultural theism that some suggest is what the God clause is meant to support.

Allen v. Renfrew

The case, *Allen v. Renfrew* was decided in 2004 by the Ontario Superior Court of Justice.

Like in *Zylberberg*, the issue in this case surrounded public prayer:

The respondent council commenced its monthly meetings with a "non-denominational" prayer, similar to that recited in the Ontario Legislature and the House of Commons, invoking "Almighty God" as a source of blessings, knowledge, understanding and wisdom. The applicant, a resident who occasionally attended council meetings, did not believe in God. He brought an application for a declaration that the practice of opening county council meetings with a "non-sectarian" prayer violated his freedom of conscience and religion contrary to s. 2(a) of the Canadian Charter of Rights and Freedoms and for damages.¹⁴⁴

¹⁴⁴ *Allen v. Renfrew (County)* 69 O.R. (3d) 742 [2004] O.J. No. 1231 Court File No. 00/1269. N.p.

The difference between this case, and that of *Zylberberg*, is that the court ruled against the appellant, finding that public prayer did not infringe on anyone’s freedom of religion. The God clause was used as a defense:

It would be incongruous and contrary to the intent of the Charter to hold that the practice of offering a prayer to God per se is a violation of the religious freedom of non-believers. The preamble to the Charter itself specifically refers to the supremacy of God. The purpose of the prayer was not to impose a Christian or other denominational stamp on the proceedings of the county council.¹⁴⁵

Again, the argument that the supremacy of God should be used to justify theistic prayers in the public sphere is presented. Despite the fact that the purpose of the prayer was not to impose a Christian stamp on the council meetings, a “Christian stamp” is exactly what gets imposed by praying to a supreme deity in an otherwise secular environment. Little effort needs to be made for Christianity to be imposed on non-Christian Canadians. The existence of a freedom of religion that is defined by Christian standards, and the reference to the supremacy of God in the preamble ensure that this bias exists regardless of intentions.

Saguenay (Ville de) v. Mouvement laïque québécois

In 2013, the Quebec Court of Appeal came out with a decision about a freedom of religion case involving the Mayor of the city of Saguenay, Quebec and atheist resident Alain Simoneau. The case, *Saguenay (Ville de) v. Mouvement laïque québécois (Saguenay v. MLQ)* was on appeal from the Human Rights Tribunal which,

ruled that the respondent Alain Simoneau (“Simoneau”) was discriminated against in regard to his freedom of conscience and his freedom of religion as a result of a prayer recited by the Mayor at the beginning of every public meeting of City Council and also

¹⁴⁵ Ibid.

due to the presence of a Sacred Heart statue and a crucifix on display in certain rooms in which these meetings are held.¹⁴⁶

The Quebec Court of Appeal overturned the Tribunal’s decision, claiming that Mr. Simoneau’s freedom had not been infringed since the prayer recited at city council meetings was a general, non-denominational prayer, and the supposed religious statues were actually works of art depicting Quebec’s cultural heritage. Paragraph 100 of the case brings up the God clause:

[100] There is also the preamble of the Canadian Charter, which states that “... Canada is founded upon principles that recognize the supremacy of God and the rule of law”. The purpose of mentioning this statement is not to suggest that these words constitute an implicit limit on freedom of conscience, quite the contrary. Just like the preamble to the Canadian Charter, however, the prayer at issue refers to a monotheistic deity. From this point of view, it is difficult to argue that the recitation of a prayer inspired by one of the fundamental principles of the Constitution could nevertheless violate Simoneau’s rights.¹⁴⁷

This quotation is self-explanatory. As in *Zylberberg v. Sudbury Board of Education*, the argument suggests that since the Charter’s preamble names a deity as supreme, there can be no harm in praying to said deity in public spaces. It is noteworthy that the Human Rights Tribunal decided that since the prayer was non-denominational, it did not infringe on Mr. Simoneau’s freedom of religion. One has to question what is meant by “non-denominational”—the prayer was not from a denomination of what? A “denomination” is not normally a category that is used to differentiate different religious traditions. However, it is the commonly used word to distinguish between types of Christianities. Thus the logic pertaining to why the prayer was acceptable in an otherwise secular meeting space, is that the prayer is all-encompassing of all

¹⁴⁶ *Saguenay (Ville de) v. Mouvement laïque québécois*, [2013] QCCA 936, para. 11.

¹⁴⁷ *Ibid.*, para. 100.

versions of Christianity when it—whatever is said at the beginning of meetings—ought to have been inclusive of all peoples and religions. Once again, “religion” is interpreted as meaning Christian. We shall see this argument once again in *Mouvement laïque québécois v. Saguenay*—the Supreme Court ruling on this same case that came out on April 15th, 2015.

Mouvement laïque québécois v. Saguenay

In *Mouvement laïque québécois v. Saguenay* (*MLQ v. Saguenay*), the Supreme Court of Canada overturned the Quebec Court of Appeals decision, ruling in favour of Mr. Simoneau, deciding that his freedom had been infringed upon by the recitation religious (Christian) prayer in the public sphere.¹⁴⁸ The case makes references to paragraph 100 of the Court of Appeal case, as I have quoted above¹⁴⁹, and delves further into the issue of the preamble.

[147] The reference to the supremacy of God in the preamble to the *Canadian Charter* cannot lead to an interpretation of freedom of conscience and religion that authorizes the state to consciously profess a theistic faith. The preamble, including its reference to God, articulates the “political theory” on which the *Charter’s* protections are based ... It must nevertheless be borne in mind that the express provisions of the *Canadian Charter*, such as those regarding freedom of conscience and religion, must be given a generous and expansive interpretation. This approach is necessary to ensure that those to whom the *Canadian Charter* applies enjoy the full benefit of the rights and freedoms and, thereby, that the purpose of that charter is attained. The same is equally true of the *Quebec Charter*.¹⁵⁰

And paragraph 149:

This leads me to conclude that the reference to the supremacy of God does not limit the scope of freedom of conscience and religion and does not have the effect of granting a

¹⁴⁸ *Mouvement laïque québécois v. Saguenay* (City), 2015 SCC 16.

¹⁴⁹ *Ibid.*, para. 144.

¹⁵⁰ *Ibid.*, para. 147.

privileged status to theistic religious practices. Contrary to what the respondents suggest, I do not believe that the preamble can be used to interpret this freedom in this way.¹⁵¹

In this most recent Supreme Court decision regarding freedom of religion, we get the most commentary on the God clause of any other case to date. In this decision we are provided with an answer to some of the questions that some scholars have been asking for years, such as how are freedom of religion and the supremacy of God in the Charter’s preamble to be interpreted? According to the judgment in *Mouvement laïque québécois v. Saguenay*, the God clause cannot be used to advance the agendas of theistic religions. However, I argue that very fact that the God clause exists, along with freedom of religion, necessarily protect and promote not just “theistic” religions, but Christianity is particular.

From these five cases outlined above, several trends emerge. The God clause is routinely used for the advancement of Christianity and the most Christian-like traditions, and rarely for the advancement of other religions, traditions, and organizations, especially non-theistic traditions as they differ most vastly from Christianity. By “Christian-like”, I mean traditions that best represent the framework of the category of religion as outlined in Chapter 2. This “framework”, I argued, developed from the colonial roots of the category of religion, and tends to recognize “religions” by their similarities to Protestant Christianity. In *MLQ v. Saguenay*, the dissenting opinion is that the God clause cannot be used to grant a privileged status to “theistic religious practices”, but this statement blurs the fact that no theistic religion has ever claimed in court that the God clause can be used to support it except for Christianity. Additionally, in many of these cases, “religion” is being used somewhat synonymously with “Christian practices”, which reflects my argument that the category of religion is established using Christian standards.

¹⁵¹ Ibid., para 149.

The Meaning of Religion According to the Courts

It took only six weeks after the *Charter of Rights and Freedoms* was officially implemented for the first freedom of religion case to be filed.¹⁵² Since then, there have been dozens of cases pertaining to the clause. Furthermore, it has been left up to the courts to determine what “religion” is, and what it is not. I have already explained that the courts tend to view religion in terms of Christianity implicitly—that is, without realizing that they are making a value judgment as such—and this section serves to provide an overview of how “religion” gets explicitly defined in cases involving freedom of religion. I turn to two specific cases to highlight some of the ways in which Canadian courts envision the concept of religion: *R. v. Big M Drug Mart Ltd* and *Syndicat Northcrest v. Amselem*. An analysis of the Christian implications of both definitions will follow.

In *R. v. Big M Drug Mart Ltd.* the Supreme Court of Canada held that the Lord’s Day Act, which stated that stores must be closed on Sundays, was unconstitutional because it infringed on the freedom of religion of non-Christian Canadians. Throughout this case, an attempt is made to clarify the meaning of the freedom of religion clause in the Charter. On page 336 of the case, a loose idea of what is allegedly meant by freedom of religion is outlined:

A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms...Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and

¹⁵² *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295

without fear or hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching dissemination.¹⁵³

In this description of freedom of religion, the term “religious beliefs” is used three times. From these references very little about religion and religious freedom can be extracted. According to the courts: (1) religion encompasses beliefs; (2) freedom of religion protects religious beliefs; and (3) beliefs are manifested through worship, practice, and teaching. These three pieces of information about religion are only slightly insightful. The court has defined freedom, defined a truly free society, and outlined the meaning of freedom of religion, although it has neglected to define religion itself. I will use these three qualifications to compare the courts’ conception of religious freedom with the originalist meaning of the concept in chapter four.

In the second case that I will discuss, *Syndicat Northcrest v. Amselem*, issues relating to freedom of religion in Quebec (and Canada more generally) are brought to the forefront when the orthodox Jewish co-owners of a luxury Montreal building set up *succahs* on their balcony, apparently interfering with the building’s balcony by-laws. Throughout this case, the courts essentially create a meaning of religion by providing an explicit definition. The definition reads:

Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual’s spiritual faith and integrally linked to his or her self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.¹⁵⁴

¹⁵³ *Ibid.*, 336.

¹⁵⁴ *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551. 553.

This definition becomes important in the case because it acts the basis for interpreting the Charter’s freedom of religion. However, it is problematic for several reasons. To begin, the word “typically” in the first sentence of the provided definition implies that there are some valid expressions of religion that do not follow the guidelines provided in the remaining five lines of the definition. However, there is no hint of what those exceptions might be. Next, this definition is complicated by the word, “spirituality”. Without including a definition of spirituality in addition to the definition provided for “religion”, it is impossible to objectively distinguish religion from non-religion. One cannot prove whether or not deeply held convictions connect to spirituality. Finally, according to this definition religion relates to practices that allow people to connect with the divine, OR object of their spiritual faith. This section of the definition is particularly vague because the divine cannot be defined objectively, and no guidelines are provided for further interpretation. Questions such as, “whose version of the divine must one connect with to have a practice protected by freedom of religion?”, and, “what qualifies as the subject or object of one’s spiritual faith?”, arise, resulting in more questions than the given definition answers.

The description and definitions of religion and attendant vocabulary from both cases are essentially ambiguous. The attempt by the courts to objectively define religion for legal purposes has failed, because they have merely introduced a number of new concepts such as “spirituality”, “divine”, and “object of faith”, which are equally ambiguous. Further, both definitions are essentially a vague reference to several components of Christianity such as a connection with divinity, a system of faith and worship, a practical component, and a belief. The above can be seen as a simplified list of the components of Christianity, and constitutes support for my argument in chapter two that suggests religion is always defined according to a Christian standard.

Concluding Thoughts

In this chapter, I have demonstrated various ways in which my argument, that the category of religion and God clause work together reinforce the idea that Canadian society operates under a Christian bias, is supported in practice through Canadian court decisions about freedom of religion cases. First, the God clause is most frequently cited to favour of Christianity and Christian-like traditions. This fact pertains to my argument that it is less accurate to suggest that the God clause can refer to an all-encompassing God that is expressed across a “wonderful variety of faiths”, as Alexa McDonough is quoted as saying¹⁵⁵. Even though some adherents of non-theistic, or poly-theistic traditions can enjoy the inclusivity of the God clause upon a re-imagining of their tradition or the clause itself, in practice, only Christians, or those traditions nearest to Christianity, have ever pointed to this clause to defend themselves.

Second, the courts have both implicitly and explicitly expressed the meaning the category of religion through a Christian lens. For example, religion is often used as a descriptor for a variety of Christian practices. The fact that the term is used in this way, demonstrates the way in which a Christian undertone leaks into the category of religion as it is widely understood. Explicitly, through their definitions of religion, the courts have also used a Christian model to express the meaning of this confused concept. Thus, both in theory and in practice, the God clause and appeals to freedom of religion are working together to solidify a Christian undertone in Canadian society.

¹⁵⁵ Canada. Parliament. House of Commons. *Debates*, 36th Parliament, 1st Session, June 9th, 1999, Ottawa: Canadian Government Publishing.

Chapter Four: An Originalist Interpretation

In chapters one and two, I argued that the God clause, and the category of religion have a theoretical bias toward Christianity, and in chapter three I showed that this bias manifests in practice as well. Now, I will frame an argument that involves determining whether the politicians, policy makers, and key players of the drafting of the Charter operated under a Christian framework while discussing religion and religious language in the early 1980s. To do this I cite Micah Schwartzman’s understanding of originalism as a form of constitutional interpretation, and apply it to the God clause and the category of religion as understood at the time of the Charter’s establishment.

Purpose of an Originalist Interpretation

In his article, “What if Religion Isn’t Special?”, Micah Schwartzman distinguishes between originalist, and nonoriginalist theories of constitutional interpretation as part of his analysis of constitutional freedom of religion clauses.¹⁵⁶ Essentially, an originalist is one who believes that constitutional debates and arguments should be settled by determining what the framers intended at the time of the constitution’s enactment.¹⁵⁷ A nonoriginalist, by contrast, is one who believes that other means should be used to settle constitutional debates.

¹⁵⁶ Schwartzman, “What If Religion Isn’t Special?”, n.p.

¹⁵⁷ Robert W. Bennett, and Lawrence Solum, *Constitutional Originalism: A Debate*, (Ithaca, NY: Cornell UP, 2011), 2.

Nonoriginalism comes in many forms, including the belief that constitutional clauses should be interpreted broadly to accommodate an ever-changing society.

About religion and originalism specifically, Schwartzman says,

[I]n addition to focusing on religion rather than some broader category of belief or practice, originalist accounts of the Religion Clauses commonly define the concept of “religion” in terms of theistic belief. There is little, if any, evidence that the Framers, ratifiers, or ordinary members of the public understood the meaning of religion to encompass nontheistic views. And even if they did, it is highly unlikely that the concept extended to agnosticism or atheism.¹⁵⁸

It is my contention that Schwartzman is correct. I have argued that because of the Christian underpinnings of both the concept of freedom of religion, and the God clause, these concepts are connected, and that they work together to maintain a Christianized status-quo in Canadian society. Freedom of religion reinforces Christianity and Christian-like practices, and the God clause reinforces the idea of the need for a supreme (Christian-like) deity in all legitimate religions. Although this thesis does not concern the establishment of the freedom of religion clause, I can maintain that the freedom of religion in Canada was not meant to include atheism because of the fact that God was added into the Bill of Rights, largely to counter the threat of “atheistic communism”.¹⁵⁹ Thus Schwartzman is correct in his assumption that constitutional religion clauses were never meant to protect non-belief.

Just as Schwartzman uses originalism to determine the intention of freedom of religion clauses in the United States, this section uses this same theory to determine what was originally meant by the God clause and how it relates to the category of religion. Through a careful reading of the House of Commons debates from 1981, when the Charter and its preamble were

¹⁵⁸ Ibid., 1405.

¹⁵⁹ Egerton. “Writing the Canadian Bill...”, 10-13.

the subject of debate, I have extracted several important sections of dialogue. An examination of comments made members of parliament during these debates reveals the originalist assumptions about religion, under which the God clause was drafted.

The words in which I have taken particular interest are closely associated with “religion”. Below, I provide ten quotations in chronological order taken from the House of Commons Debates in 1981, the year before the enactment of the Charter. These passages, which are in some cases lengthy, are followed by an analysis that aids in determining the originalist intention about God and religion in the Charter. In bold, are the most relevant words for this analysis. They include all words that may have a strong connection to religion including but not limited to: religion, religions, religious, spiritual, secular, God, multicultural, morals, atheist, and supreme.

Textual Analysis

The following is a textual analysis of House of Commons dialogue in 1981. Each of these quotations is taken from the debates surrounding a potential preamble to the upcoming *Charter of Rights and Freedoms*.

(1) Hon. John Roberts (Minister of State for Science and Technology and Minister of the Environment):

The hon. member for Provencher misrepresented our views even more fundamentally yesterday. He argued passionately for inalienable rights. I agree; we agree. He argued that rights are not created by governments. I agree; we agree. What we are saying is that rights are inalienable. They are the essential condition, the context, for the fulfilment of the human personality and the human potential, including the **moral** and **religious** capacities of men and women. They flow from the nature of man. We argue that rights

are inalienable, and we also argue that the time has come to have the Constitution recognize that inalienability and to make that recognition legally enforceable.¹⁶⁰

In this passage the key word is “religious”. In using religion as an adjective, Hon. John Roberts reveals what government officials thought about religion at this time. What he is describing as religious is, “the capacities of men and women”, which he says “are part of the fulfillment of the human personality”. Although this quotation is about inalienable rights, it reveals that “religion” was thought of as having something to do with the fulfilment of the human personality and the human potential. Thus I can infer that part of the originalist understanding of religion in reference to religious freedom in the Charter is that it is essentially *human*; it is part of the human personality. This passage can also be taken as an inference that religion is universal—if it is part of the human personality then it must exist universally in all humans. Also noteworthy is the pairing of the adjectives “moral” and “religious”, which are portrayed as equal in value.

(2) Hon. David Crombie (Rosedale):

Rights also always rested on the basis of some **spiritual** entity, a **supreme being**. This was not merely because it was a nice thing, which it was, but primarily because it had a very practical advantage. When law rests on **religion**, when legal orders relate to **spiritual** principles, it allows for diversity and dissent. The roots of democratic dissent have always begun with **religious** dissent; laws imposed by governments were always fought on the basis of an appeal to **God**. This is why we insisted in the committee that not only should there be a preamble respecting the supreme authority because it was in our hearts that it should be related to **spiritual** principles, but it had a practical democratic value as well.¹⁶¹

¹⁶⁰ *House of Commons Debates*, 32nd Parl, 1st Sess (18 Feb 1981) at 7438 (Hon. John Roberts)

¹⁶¹ *House of Commons Debates*, 32nd Parl, 1st Sess (18 Feb 1981) at 7441 (Hon. David Crombie)

This quotation is rife with language that often pertains to the category of religion. The key words include: spiritual, religion, religious, God, and supreme being, a term that is often used synonymously with God. In this passage, David Crombie makes a grand pronouncement: that rights have always rested on the basis of a spiritual entity, which he equates with “supreme being”. He also notes that laws imposed by governments were always fought on the basis of an appeal to God, which implies that there is a traditional aspect to the concept of religion. From Crombie’s statement, it can be inferred that from the originalist perspective, religion has something, or perhaps much to do with God, and that this God is in fact supreme. Crombie also implies that religion is something that has always existed, when he suggests that laws have *always* been fought on the basis of an appeal to God.

(3) Mr. Leonard Hopkins (Renfrew-Nipissing-Pembroke):

In these days of great world upheaval, uncertainty and turmoil we are a very privileged Parliament and nation to be able to debate in strong, but hopefully rational and constructive terms, the constitutional future of this great country of ours with which **God** has blessed us so richly. I think it also presents us with the opportunity to use the various personal talents which **He** has given to us. I am sure most of us, as we take this Canadian Constitution debate seriously, are fully aware of the great importance of this measure. As we discuss the Constitution we realize what we are as Canadians is really **God's** gift to us and what we become, or how we use our talents of understanding, breadth of mind, and spirit of brotherhood, is our gift to **Him**.¹⁶²

In this passage, member of parliament Leonard Hopkins’ words reveal some important facts about “God”. Accordingly, God is male; both times Hopkins references God by using a male pronoun. This language is not in any way surprising, and pertains to my argument that the God in the constitution is a reference to Christianity. Further, if God is male and supreme, the

¹⁶² *House of Commons Debates*, 32nd Parl, 1st Sess (19 Feb 1981) at 7487 (Hon. Leonard Hopkins).

all-encompassing-multicultural-God theory of interpretation is incorrect because not all adherents of deities understand their god(s) as gendered, singular, or supreme.

(4) Mr. Walter McLean (Waterloo):

As the record will show, this motion in committee was opposed by the hon. member for Burnaby (Mr. Robinson). The argument was that many people do not believe in **God**; therefore, the reference should not be included, that any such inclusion would diminish their rights as a consequence. There was some discussion that this ought to be in the preamble instead of Clause 1 of the charter, and if so, it could be approved by the provinces. We should remind ourselves that our **Judeo-Christian** roots have had a reference to **God** as part of the building process of this nation and its values. Immigrants coming to Canada came for the freedom to express their concepts of **God** as they saw fit, so the **Mennonites**, the **Hutterites** and the **Soviet Jews** came. **God** and the motivation of that **belief** has played an important part in the building of our nation. Take, for example, hospitals, agricultural development and transport. These roots come from the premise that **God** gives life and gives rights, and governments perform under **God**. **God** grants rights, not governments. Governments are there to see that rights are maintained. The charter we agree upon is to serve that function. It seems to me very arrogant to leave out a reference to **God**.¹⁶³

In this quotation, Member of Parliament Walter McLean is arguing for the addition of a reference to God in the Charter of Rights and Freedoms. Interestingly he refers to Canada’s “Judeo-Christian” roots, and mentions Soviet Jewish immigrants. Canada’s Christian heritage was not normally referred to as “Judeo-Christian” at this time, thus it is peculiar that McLean should use this phrase. What can be inferred from this unusual reference to Judaism is that by this time (1981), Judaism was established as a religion that is similar enough to Christianity that both religions can be acknowledged together. More interesting, is the fact that he suggests that immigrants to Canada have the freedom to express their concepts of God, which is an allusion to freedom of religion. Essentially, McLean equates religion with belief in God, and states that God is the giver of rights and life.

¹⁶³ *House of Commons Debates*, 32nd Parl, 1st Sess (20 Feb 1981) at 7523 (Mr. Walter McLean)

(5) Mr. Walter McLean (Waterloo):

For those who say our society is changing, let us look at our **multicultural** mosaic today. Let us be reminded that those who come from the **Islamic, Buddhist, Confucian** or other **religious** backgrounds bring with them a concept of **God** which is not strange to their **culture**.¹⁶⁴

Walter McLean discusses multiculturalism and culture in the same line of thought that he discusses religion, thus revealing a perceived connection between religion and culture. McLean also names Islam, Buddhism, and Confucianism as religions when he refers to them and “other religious backgrounds”, and he indicates that they each have a concept of God. Thus, “religion” in 1981 was certainly perceived to have a connection to some sort of God. It is generally understood that several forms of Buddhism do not have a concept of God, and that Confucianism is a Western invention. This quotation reflects an originalist view of religion in the world religions perspective, which as I mentioned tends to express a Western bias by attempting to make all traditions look like Christianity, the dominant tradition in the West. This is why statements like Buddhism and Confucianism have a concept of God appear in common discourse.

(6) Mr. S. J. Korchinski (Mackenzie):

A large section of our society is now apparently being disregarded. Many people are inspired by the **religious** training they received when they were growing up. Many still turn to **religion** in order to instil in their families the **belief and moral fibre** they feel necessary. I cannot help but think that the Prime Minister (Mr. Trudeau) receives his inspiration while travelling to **atheist** countries like China and Russia. Therefore, future

¹⁶⁴ Ibid., 7524.

generations will not have the same recognition of the **values** we have held in the past. I am sure that many members opposite believe there should be a reference to the supremacy of God but are prepared to go ahead with this Constitution in order to satisfy one man's ego.¹⁶⁵

Mr. Korchinski uses a number of the key words in this quotation; the typical terms, such as religion and religious, and also one that I have not yet discussed: atheism. The supporting terms are: belief and moral fibre, and values. When Korchinski mentions religious training, he mentions that it happens as people grow up— it is something people undergo as children. It can be inferred, then, that religion is something humans are *trained* in, or taught; we are brought up religious. Next he mentions belief, and more interestingly, he makes a link between religion and morality. Finally, Korchinski refers negatively to atheist. I argue that the tone is negative because of the way Korchinski speaks of future generations as not having the same recognition of values should a reference to God be absent from the constitution. By placing religion and atheism next to one another and comparing them, we can infer that religion and atheism are opposites: religion = good, while atheism = bad. Since religion is often equated to a belief in God, and is also often associated with goodness and morality, and atheism is its opposite, then atheism is that which is bad, immoral, and godless.

(7) Mr. Bill Vankoughnet (Hastings-Frontenac-Lennox and Addington):

When looking at Canada's constitutional patriation, one finds it is necessary to cut through attitudes and prejudices which have built up for generations, and to look at the facts as they are and then to join others to fix what is faulty and to expand what is good. This approach brings together people of all races, languages, political parties and even **religions** in the realization of their ability to change this large and diverse land.¹⁶⁶

¹⁶⁵ *House of Commons Debates*, 32nd Parl, 1st Sess (2 Mar 1981) at 7775 (Mr. S. J. Korchinski)

¹⁶⁶ *House of Commons Debates*, 32nd Parl, 1st Sess (3 Mar 1981) at 7865 (Mr. Bill Vankoughnet)

This statement is fairly straightforward. We see here another reinforcement of the world religions perspective perspective as outlined in chapter two, in the use of religion in the plural. By speaking of religion in terms of a breaking down of prejudices, we gain that religion is about difference, but that it is also about acceptance. Through this passage we see the notion of the world religions cookie-cutter approach to the concept fortified.

(8) Mr. Bill Vankoughnet (Hastings-Frontenac-Lennox and Addington):

We in Canada are fortunate to have freedom of **religion** and **worship** and freedom of assembly in order to **practise** our **different religions**. The Fathers of Confederation founded Canada recognizing the supremacy of **God**, the importance of the family and private property, and the respect for moral and **spiritual values**. Just like property rights, people have fought and died over **religious beliefs** for centuries because of the strong feeling they instil. The Diefenbaker Bill of Rights recognized the importance of this quality of Canadian life in its wording.¹⁶⁷

Here is another quotation with several key terms and several supporting terms. Each of religion, religions, religious, God, and spiritual, along with practice, worship, different, values, and beliefs, are cited in this section of speech by Member of parliament Bill Vankoughnet. Vankoughnet states that Canadians are fortunate to have freedom of religion—an assumption that reinforces the theme that religion is good. He also mentions more common components of religion: worship, and practice, and moral and spiritual values. Although spirituality too, is an ambiguous category, we recognize that it has a connection with religion, and is often mentioned with alongside the category. In this passage, the importance of religion is reinforced when Vankoughnet states that people have fought and died over religious beliefs for centuries. In this

¹⁶⁷ *House of Commons Debates*, 32nd Parl, 1st Sess (3 Mar 1981) at 7867 (Mr. Bill Vankoughnet)

same sentence, he alludes to the pseudo-fact that religion has been around for a long time. Such a line of thought is consistent with the mystification of the category of religion that is omnipresent from within the world religions perspective about understanding the category of religion. It is interesting that Vankoughnet states that the Fathers of Confederation founded Canada by recognizing the supremacy of God, because in fact there was no such reference in Constitution Act, 1867.

(9) Mr. Laverne Lewycky (Dauphin):

Similarly, when my born-again brothers and sisters in **Christ** quote **John 3:16** and tell me how they have a personal **faith in Christ**, I can say to them, "We are not setting up any barriers in the Constitution; we are entrenching this bill of rights in the Constitution." I can even say to some of the **Mennonites** in my constituency who do not vote or will not vote because of their belief and conscience, "You, too, have freedom of conscience; you, too, have **freedom of religion**." I think it is important that this be recognized regardless of what has been said in the House to date.¹⁶⁸

Member of Parliament Laverne Lewycky mentions two Christian groups: Born Again Christians, and Mennonites. He also refers to a Biblical passage, and a faith in Christ, the Christian prophet. In doing so, Lewycky only speaks about freedom of religion in terms of the freedom to be any kind of Christian one chooses. He does not explicitly say this, but there are numerous examples of freedom of religion being spoken about in terms of freedom of Christianity. There are only a few examples of freedom of religion being spoken about in terms of other-than-Christian religions and in most of these cases, assumptions about the beliefs of practitioners are misguided and incorrect.

¹⁶⁸ House of Commons Debates, 32nd Parl, 1st Sess (10 Mar 1981) at 8090 (Mr. Laverne Lewycky)

(10) Mr. Bill Yurko (Edmonton East):

I would like to have included in the preamble a reference to **God** and family and the worth of the individual. However, I am distressed over accusations in the debate in regard to the inclusion of a reference to **God** in the Constitution. My **belief** in **God** is secure; it does not need to be enshrined in **secular** documents. It is now enshrined in the greatest of all constitutions—the Good Book. I wholeheartedly accept its inclusion in the Diefenbaker Bill of Rights and I would be delighted to see **God** enshrined in the preamble to the Constitution. What distresses me is the postulate that somehow we on this side are somehow more **godly** than members on the other side of the House, or that they are more **godly** than we, or that one person here in his or her judgment is somehow more **godly** than someone else in this House. Time will bring forth a constitutional preamble and **God** will be in it, if **He** so wills it to be.¹⁶⁹

Finally, in Bill Yurko’s quotation we have mention of the secular—the constitution as a secular document. Secular usually means the opposite of religion (whatever that means), and typically when the term is used, it is used to dichotomize the world into the religions and secular realms. Additionally, God is asserted as a masculine figure.

Concluding Thoughts

From an analysis of the ten quotations above, the originalist perspective about God and religion in the Canadian Charter of Rights and Freedoms can be extracted. Though the sample is small, inferences can still be made about what religion may have meant to those who were part of the process of deliberation for the Charter and its preamble. According to the way the terms “religion”, “God”, and the various associated words were used in 1981 in the House of Commons, I argue that the originalist definition of religion is as follows: Religion is a universal human phenomenon; it is the fulfilment of the human personality and human potential. It is a tradition that is taught to a person as a child and spread through the generations, and it requires

¹⁶⁹ *House of Commons Debates*, 32nd Pari, 1st Sess (10 Mar 1981) at 8107 (Mr. Bill Yurko)

worship and practice. There are many religions, some of them are called Islam, Buddhism, and Confucianism, and they each encompass a belief in a spiritual being or a God. This God is supreme, and male. Religion has a connection with morality and values; it is good, and it is in opposition to atheism and secularism.

It is important to draw attention to the fact that these quotations were taken from the debates about whether or not a reference to God should be included in the Constitution. The fact that religion was mentioned so prominently (in seven of ten passages) is a testament to the close connection between God and the concept of religion. In the 1980s, “religion” really implied belief in a singular supreme being, which, as a Christian concept, helps to secure the Christian undertone of Canadian society, then and now.

The definition that I have extracted from an analysis of the House of Commons debates does in fact fit the mold of the world religions perspective about the concept of religion. My purpose here was to offer an alternative and consistent interpretation of the freedom of religion clause based on an originalist understanding of the term religion. After this analysis of freedom of religion and the God clause from an originalist perspective, the question arises about whether the originalist or the nonoriginalist mode of constitutional interpretation should be used, and whether one is better than the other. I argue that neither method is a *good* interpretive lens. From the originalist perspective, freedom of religion and the God clause are named to selectively provide rights to those who adhere to a Christian-like God. In Chapter two I argued that the nonoriginalist perspective—the perspective that religion and God are all-inclusive and multicultural—does not work either due to the inherent Christian underpinnings of Canadian society that are secured through freedom of religion and the God clause. Because neither the originalist, nor the nonoriginalist modes of constitutional interpretation work to ensure the

inclusivity of religion as a protected freedom in Canada, defining religion in Canada will likely change on a case-to-basis.

Conclusion

It seems as though everyone has an opinion about religion. Some say that it is the cause of all war, others believe that it—whatever it is—is peaceful. Everyday, people talk about religion as if they know what it means, but when pressed for a definition, no one can give a comprehensive answer. They are quick to include some things, and exclude others, and the category of religion is often written off as a phenomenon that one knows when one sees.

Religion is not the only concept with this problem. There are many words and concepts that are thrown around loosely by the general public, and for the most part, it does not really matter what these words *actually* mean. However, the word *religion* and its associated concepts—including God—come with a particular power. Through the mystification of the category of religion, religion has come to hold a privileged status among institutions, particularly in the Western world. Because *religion* is named as a fundamental freedom in the Canadian constitution, and God is named as a supreme authority, these categories influence law, policy, and human rights. Throughout this thesis I have argued that when these concepts are investigated, it becomes clear that what is actually being protected under the rubric of freedom of religion in Canada, is the freedom to be Christian, or Christian-like. The fact that the constitution states that, “Canada is founded upon principles that recognize the supremacy of God”, reinforces the Christian ideology which dominates Canadian society. I will conclude this thesis with an overview of the arguments that I have made in each chapter, followed by a summary of why this work matters.

Summary of Chapters

The purpose of this thesis was to analyze the use of “religion” in Canadian public policy and law, and to point out that the preamble to the Constitution Act, 1982 which states that, “Canada is founded upon principles that recognize the supremacy of God”¹⁷⁰, affects how Canadians interpret the notion of religion as a fundamental freedom. Through each of the four chapters, I have solidified my argument that through the God clause, and freedom of religion, Canadian society continues to ensure that the nation’s Christian roots dominate as an ideology well into the 21st century. I argued first that the God clause could only be accurately described as referring to a Christian God, and then that freedom of religion truly only protects Christian and Christian-like institutions. After arguing that both of the concepts that I interrogated—God and religion—were theoretically Christian based, I turned to court cases that revealed that in practice too, both concepts are most often to the benefit of Christianity and Christian-like traditions. Finally, after I argued that both in theory and in practice, God and religion are concepts heavily rooted in Christianity, I turned to House of Commons debates to argue that these concepts promote Christianity.

In the first chapter, I provided a history of the God clause in the preamble to the *Canadian Charter of Rights and Freedoms*. Although there was no reference to God in the 1867 constitution, I argued that the wording of the 1982 preamble came from Prime Minister Diefenbaker’s 1960 Bill of Rights which also made reference to divine supremacy in its

¹⁷⁰ “Constitution Act, 1982” in *A Consolidation of the Constitution Acts, 1867 to 1982*. Ottawa: Dept. of Justice Canada, 2012, 53.

preamble. The 1960 preamble was intended to protect against atheistic communism¹⁷¹, and during its drafting sessions, only Christian groups were consulted about the preamble. There is no doubt that the preamble to the *Bill of Rights* was intended to secure the esteemed Christian values in Canadian society. Although I did not introduce the concept of originalism until chapter four, I made an argument against non-originalism in chapter one. I argued that it would be very difficult to accurately reinterpret the God clause to reflect multicultural Canadian values, because not all *religions* adhere to one deity, and some adhere to no deity at all, not to mention non-believers.

In the second chapter, I provided an overview of the emerging field of “critical religion”, which I used to suggest that all references to religion in the Charter carry a Christian bias. In this chapter, the focus switched from “God” to “religion”, which was necessary in order to advance the argument that “God” and “religion” work together to promote Christianity in Canada. I argued that religion can have no objective meaning because it is either too inclusive or entirely exclusive. I provided a short history of the concept to show that although religion is often depicted as an ancient concept, the use of the term is modern. It was Christian Europeans who first developed the term as it gets used today, and through a process of colonialism, Christian Western Europeans essentially invented the non-Christian religions by naming them as such. As such, when rights are to be allocated under freedom of religion clauses, the standard of measure is always Christian—a situation that leads to the advancement and protection of Christianity and Christian-like traditions.

In chapter three, I provided an overview of Canadian court cases that involved the God clause, as well as some that involved defining the category of religion. I argued that the God

¹⁷¹ Egerton, “Writing the Canadian Bill...”, 10-13.

clause is most often used to the benefit of Christians and those traditions most like Christianity, and that even the courts inadvertently interpret freedom of religion from a Christian perspective. I argued that it is not just in theory that Canadian society operates under a Christian framework, because in practice, non-Christian groups always struggle more than Christian groups in order to gain access to rights under the freedom of religion clause.

By chapter four, I had argued that both in theory and in practice, Canadian society operates with a Christian bias. The fourth chapter solidified my argument that both “God” and “religion” in the constitution were originally intended to protect and promote Christianity in Canada. To make this point, I performed a textual analysis of the House of Commons debates that led up to the establishment of *Constitution Act, 1982* in order to find out the originalist meaning of both of these concepts. I established that the way in which the 1982 preamble drafters of the preamble understood religion, left little to no room for non-Christian traditions to establish themselves as such.

My central question is: How does the understanding of “God” in the Canadian constitution, combined with the understanding of religion in the constitution and in legislation, work to reinforce the bias under which Canadian society operates? The answer is as follows: Simply put, “religion” is an inherently Christian concept. When the category of religion is applied to other traditions, a re-imagined version reflecting of the most Christian-like traits of said tradition is pushed forth as the foundations of the new tradition. As a result, Christian and Christian-like phenomena have the easiest access to rights under freedom of religion clauses, which are typically regarded as fundamental aspects of a modern-democracy. All states that promote freedom of religion are subject to this Christian bias, but with the addition of, “the supremacy of God” in the Canadian constitutional preamble, the Christian bias is intensified. If

religion could have been interpreted as an inclusive right with a loose definition, the supremacy of God renders this task much more difficult. Instead of the freedom to believe and practice a “religion” at will, Canadians have the freedom to define and practice their own Christianity. This freedom, or lack thereof is disguised as a fundament of multiculturalism, ultimately contradicting this widely enforced Canadian value.

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