

**RE-EVALUATING THE PURPOSE OF CHURCH-  
STATE SEPARATION IN THE IRISH  
CONSTITUTION: THE ENDOWMENT CLAUSE  
AS A PROTECTION OF RELIGIOUS FREEDOM  
AND EQUALITY**

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**INTRODUCTION**

In hosting this reception, the Government is reflecting the honour which is due to the place of religion and of faith communities in our society. There are those who would argue that religious belief should be confined to the private domain, as a matter of purely personal choice and practice ... That is not my position, nor that of my Government. Neither is it one of privileging religion and religious organisations ... The proper stance of the State towards the Church and faith communities should be one of engagement and respectful dialogue. The State must acknowledge and recognise the spiritual dimension of its citizens. It must see as legitimate ... the importance of their religious faith for so many of our citizens.<sup>1</sup>

The guarantee contained in Article 44.2.2° of the Constitution – that “the State guarantees not to endow any religion” – may be regarded as one of the most under-exploited provisions of the Constitution. Given the contentious nature of the Church-State relationship,<sup>2</sup> and the historically close relationship

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<sup>1</sup> From an address delivered by the former Taoiseach, Bertie Ahern, at a civic reception in Dublin Castle held to honour the elevation to the status of Cardinal of a senior Roman Catholic cleric, Seán Brady, 4<sup>th</sup> February, 2008. The full text of the address is available at <http://www.taoiseach.gov.ie/eng/index.asp?locID=582&docID=3747>.

<sup>2</sup> Clarke, *Church and State: Essays in Political Philosophy* (1984).

of the Irish State to the Roman Catholic Church,<sup>3</sup> the extent to which the prohibition on religious endowment has essentially lain dormant is striking. However, this is perhaps unlikely to remain the case in light of changing social circumstances. In jurisdictions such as the United States, which has historically had a more religiously diverse population than Ireland, issues surrounding the Church-State relationship have generated a great deal of litigation. The increasing diversity of religions present in this jurisdiction may plausibly lead to greater State involvement with religious organisations in various contexts, giving rise to constitutional implications particularly where such instances of State involvement in religion may confer some benefit, whether selective or otherwise, on religious groups. A recent example of such Church-State entanglement in the United Kingdom, which would undoubtedly raise weighty constitutional questions, if transposed to Ireland, is the funding by the British State of a board of “moderate” Muslim theologians in order to combat religious extremism.<sup>4</sup> The above comments by the former Taoiseach, as well as recent examples, discussed below, of a willingness to financially support religious groups such as the Orange Order, suggest that such Church-State questions may plausibly arise in Irish Courts. As Casey notes, these issues “await authoritative resolution by the Supreme Court”.<sup>5</sup>

The sole Supreme Court ruling to have issued an authoritative interpretation of the endowment clause has significantly restricted its scope, at least in terms of its application to public education. The purpose of this article is to propose a purposive, more expansive interpretation of the endowment clause – in view of the underlying purpose of constitutional Church-State separation in upholding religious equality and liberty. Accordingly, it will focus on the potential of the endowment clause to protect individual constitutional rights by regulating the involvement of the State with religious bodies.

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<sup>3</sup> Whyte, *Church and State in Modern Ireland* (1980).

<sup>4</sup> See “New Board of Imams to Tackle Extremists”, *The Times*, 3 July 2008.

<sup>5</sup> Casey, *Constitutional Law in Ireland*, p. 693.

**I. THE HISTORY OF THE CHURCH-STATE RELATIONSHIP IN  
IRELAND: EXAMINING THE ORIGINS OF THE ENDOWMENT  
CLAUSE AS A GUARANTEE OF RELIGIOUS LIBERTY AND  
EQUALITY**

In *Campaign to Separate Church and State v. The Minister for Education*,<sup>6</sup> the Supreme Court rejected the claim that the State funding of Catholic and Church of Ireland chaplaincy services in community and comprehensive schools amounted to the endowment of religion within the meaning of Article 44.2.2°. The prohibition on endowment was qualified in view of the implicit constitutional legitimisation of the State funding of denominational education, despite the fact that it was conceded in evidence that the impugned payment resulted in indirect financial benefit to the relevant denominations. The archbishops stated in evidence that were the State to withhold the payments, they would feel obliged to pay the relevant costs themselves, and would thereby incur a loss.<sup>7</sup> The funding was therefore deemed valid, as its purpose was less to confer a benefit on particular religious denominations than to provide for religious education in accordance with principles “approved and recognised” by Article 42 of the Constitution.<sup>8</sup> According to Barrington J., parents who availed of such secondary schools enjoyed a “right to have religious education provided in the schools which their children attend”,<sup>9</sup> with this right extending to provide constitutional cover for the State payment of chaplains’ salaries. Thus, the prohibition on endowment was interpreted in view of what Hogan and Whyte term “the principle of State support for denominational education”.<sup>10</sup>

The only other noteworthy interpretation of the endowment clause is, if anything, more restrictive than that emerging from the *Campaign* ruling. In *Re Article 26 and the Employment Equality Bill 1996*,<sup>11</sup> the Supreme Court appeared to imply that Article 44.2.4° precluded only non-concurrent or discriminatory

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<sup>6</sup> [1998] 3 I.R. 321 (hereinafter referred to as the *Campaign* case).

<sup>7</sup> *Campaign* case [1998] 3 I.R. 321, at 357.

<sup>8</sup> *Campaign* case [1998] 3 I.R. 321, at 358.

<sup>9</sup> *Campaign* case [1998] 3 I.R. 321, at 358.

<sup>10</sup> Hogan and Whyte, *J.M. Kelly: The Irish Constitution* (2003), para. 7.8.69.

<sup>11</sup> [1997] 2 I.R. 321.

endowment of religion – such that the prohibition on endowment would not apply if all religions were concurrently benefited. Hamilton C.J stated: “[t]he endowment of religion implies the selection of a favoured State religion for which permanent provision is made out of taxation or otherwise”.<sup>12</sup>

Although the suggestion of the permissibility of concurrent “endowment” is not entirely explicit in this statement, Keane J. appears to be aware of the possibility of such an interpretation in the *Campaign* ruling. However, he rejected this construction, stating that “[i]t should not ... be treated as authority for the proposition that the concurrent endowment of various religions is constitutionally permissible ... [S]uch concurrent endowment was not sanctioned by the Constitution”.<sup>13</sup> Nonetheless, this statement seemed to suggest that the endowment clause could be invoked only in such an extreme scenario as the outright establishment of a particular favoured religion, for which permanent financial provision were made by the State. In this sense, the Supreme Court in both of its aforementioned rulings closely related the concepts of endowment and establishment of religion, while finding that Article 44 implicitly prohibits the establishment of a State religion. Interestingly, Keane J. found in the *Campaign* ruling that “it is obvious that any such law [establishing a religion] would be impossible to reconcile with the prohibition of religious discrimination”.<sup>14</sup> However, he also suggested that “there is no reason in principle why the State, through its different organs, should not confer benefits on religious denominations ... provided that in doing so it remains neutral and does not discriminate in favour of particular religions”.<sup>15</sup> Given that he referred to the *Oxford English Dictionary* definition of endowment as “to enrich with property; to provide (by bequest or gift) a *permanent* income for a person, society or institution”,<sup>16</sup> Hogan and Whyte suggest that Keane J. might be interpreted as implicitly suggesting that the endowment clause “does not

<sup>12</sup> *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 321, at 354.

<sup>13</sup> *Campaign* case [1998] 3 I.R. 321, at 366.

<sup>14</sup> *Campaign* case [1998] 3 I.R. 321, at 361.

<sup>15</sup> *Campaign* case [1998] 3 I.R. 321, at 359.

<sup>16</sup> *Campaign* case [1998] 3 I.R. 321, at 361, emphasis added.

preclude the State from making occasional financial contributions in money or money's worth to religious bodies".<sup>17</sup>

Thus, the effect of these rulings is apparently to limit the application of the endowment clause to what would effectively amount to an outright *establishment* of a State religion, that involved the provision of funds or property on a permanent or quasi-permanent basis, while precluding its application to examples of mere Church-State *entanglement*, which entail some financial or other benefit flowing to religious denominations. While the Constitution does not, like the United States Constitution, explicitly forbid the establishment of religion, there is, as outlined, both judicial and academic authority to suggest that it implicitly precludes this.<sup>18</sup> Thus, if the Constitution forbids both the establishment and endowment of religion, how is it possible to explain the fact that it allows for a much stronger proximity of Church and State than its United States equivalent? This gives rise to (at least) two interesting questions: whether this restrictive interpretation accords with the historical purpose of the endowment clause, and secondly, what examples of Church-State entanglement might a more purposive (or even the current, more restrictive) interpretation of the endowment clause invalidate? This latter speculative exercise is rendered all the more interesting for the fact that all judicial considerations of the endowment clause to date have related to the State funding of religious education. As noted in the *Campaign* ruling, this support for religious education is mandated by Articles 42 and 44 of the Constitution<sup>19</sup> – thus, the particular constitutional position of education significantly restricts the scope of the endowment clause in this specific context. Crucially, however, it remains to be seen whether examples of Church-State entanglement in contexts other than public education will be subject to a more rigorous application of the endowment clause. If financial aid for religion, whether direct or otherwise, is stripped of the legitimacy afforded by the constitutional mandate for State support of

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<sup>17</sup> Hogan and Whyte, para. 7.8.72.

<sup>18</sup> *Campaign* case [1998] 3 I.R. 321, at 361, and Casey, *Constitutional Law in Ireland* (2000), p. 686.

<sup>19</sup> *Campaign* case [1998] 3 I.R. 321, at 358.

education, how might it withstand scrutiny under the endowment clause?

It will be argued in this article that a purposive interpretation is appropriate to the interpretation of the endowment clause, and in order to determine its purpose, it is necessary to look to its historical role. Undoubtedly, the endowment clause does not constitute a strongly secularist attempt to preclude all types of Church-State entanglement: this is not an Irish equivalent of the First Amendment to the United States Constitution, which has been applied to strike at virtually all forms of governmental involvement with religion.<sup>20</sup> This is immediately clear not only from Irish history, but from the fact that the Constitution clearly mandates the provision of public education through the funding of religious schools.<sup>21</sup>

However, the endowment clause makes it clear that the Irish Constitution does provide for a Church-State separation of sorts, albeit one which is significantly weaker than its United States counterpart, in view of the contrasting historical context of their respective enactments.<sup>22</sup> It can be demonstrated that the prohibition on the endowment of religion, although quite distinct in meaning from the American conception of establishment, fulfils a quite similar purpose, as it constitutes an important facet of the constitutional protections regulating the relationship between State and religion.

In broad historical terms, the rationale underpinning constitutional Church-State separation can be expressed as three distinct aims. First, it seeks to avoid the corrupting potential of State interference in religion. In the United States, early resistance to the establishment of religion was motivated, according to Keane J., by “the powerful *erastian* current of belief in some of the post-reformation churches which regarded any State aid to religion as repugnant to the nature of Christianity”.<sup>23</sup> This concern is reflected to some extent in Article 44.2.5° of the

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<sup>20</sup> See generally Tribe, *American Constitutional Law* (1988).

<sup>21</sup> Articles 42.4 and 44.2.4°.

<sup>22</sup> Hogan, “Law and Religion: Church-State Relations in Ireland from Independence to the Present Day” (1987) 35 *American Journal of Comparative Law* 47.

<sup>23</sup> *Campaign* case [1998] 3 I.R. 321, at 361 (emphasis in original).

Irish Constitution, which provides that “[e]very religious denomination shall have the right to manage its own affairs”. It is also reflected by the finding of Henchy J. in *McGrath and Ó Ruairc v. Trustees of Maynooth College*<sup>24</sup> that one of the “primary aim[s]” of Article 44 was “to give independence, vitality and freedom to religion”.<sup>25</sup>

Secondly, Church-State separation may be regarded as a product of Enlightenment thinking, in the sense that it is rooted in the belief that human progress is served by the separation of civil and religious concerns, and the ideal that effective government is secured by the exclusion of theological concerns from the governance of the polity. Reichley observes that the “Founding Fathers” of the United States Constitution were partially motivated by this concern: “[the] injection of religion into political controversies tends to hamper working out the pragmatic accommodations required by a functioning democracy, particularly in a socially pluralistic nation like the United States”.<sup>26</sup>

American Enlightenment figures, particularly Jefferson and Paine, followed European thinkers such as Locke in reasoning that State establishments of religion produced “ecclesiastical depredations and incursions”,<sup>27</sup> and that the separation of State and religion was therefore a precondition to liberal democracy. The Irish Constitution, with its recognition of fundamental liberal rights and individual equality, is at least partially grounded in this Enlightenment tradition, and this is particularly evident in the protections of religious liberty contained in Article 44.

Thirdly, and most importantly for the purposes of this article, constitutional Church-State separation seeks, at least indirectly, to uphold individual religious freedoms. On their face, both the endowment clause of the Irish Constitution and the establishment clause of the United States Constitution relate not to the relationship of the State with individuals, but with religious bodies. However, the Irish Constitution regulates the relationship

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<sup>24</sup> [1979] I.L.R.M. 166.

<sup>25</sup> *McGrath and Ó Ruairc v. Trustees of Maynooth College* [1979] I.L.R.M. 166, at 187.

<sup>26</sup> Reichley, “Democracy and Religion”, (1986) 19 *Political Science* 801.

<sup>27</sup> Tribe, *American Constitutional Law* (1988), p. 1158-1159.

between the State and religious bodies under the heading of “Fundamental Rights”. It does so, in the same article that guarantees individual religious liberties, both in order to prevent excessively close (Article 44.2.2°) or excessively hostile (Article 44.2.5°) State measures with respect to religious groups. The most credible explanation for this lies in the secularist idea that securing individual religious freedoms requires the prevention of too close, or too hostile, a relationship between the State and particular religion(s). Witte notes that the First Amendment to the United States Constitution did not merely end the establishment of religion in the traditional sense of maintaining a favoured sect, but also embodied a number of related concerns: he states that “‘non-’ or ‘disestablishment’ was broadly defined as a general guarantee of religious equality, liberty of conscience, and separation of church and state”.<sup>28</sup> In this sense, constitutional Church-State separation may coherently be regarded as ancillary to individual religious freedom, or a means of indirectly upholding individual religious freedom, by providing a bulwark against instances of Church-State entanglement which “skew the choice of conscience, encumber the exercise of religion and upset the natural plurality of faiths”.<sup>29</sup> Alternatively, as will be considered below, it is possible to argue that even the symbolic significance of State support for sectarian religious ends itself amounts to a direct violation of the freedom of religious conscience of individuals.

This is obviously not an absolute truism. Many European jurisdictions, including Denmark and the United Kingdom, have established religions – yet it could hardly be claimed that this adversely affects the religious freedoms of their citizens.<sup>30</sup> Nonetheless, it is evident that Church-State proximity in such jurisdictions is reduced to such an extent that it is no longer a threat to individual liberties, except, perhaps – as was alluded to by Keane J. in the *Campaign* ruling<sup>31</sup> – in the rather abstract terms of the discrimination against non-coreligionists which flows

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<sup>28</sup> Witte, *Religion and the American Constitutional Experiment* (2000), p. 74.

<sup>29</sup> Witte, p. 46.

<sup>30</sup> Robbers (ed.), *State and Church in the European Union* (1996).

<sup>31</sup> *Campaign* case [1998] 3 I.R. 321, at 361.

from State recognition of a particular religion. Therefore, it is possible to endorse as a general rule the observation by Tribe, in the context of American constitutional law, that “forbidding the excessive identification of church and state ... remains, in part, a means of assuring that the government does not excessively intrude upon religious liberty”.<sup>32</sup>

While the idea that Church-State collaboration is harmful to Church as well as State is not entirely alien to Catholic thought,<sup>33</sup> it is this third purpose of upholding religious freedom which apparently most strongly underpins the endowment clause of the Irish Constitution. While Article 44.2.5° *indirectly* protects individual religious liberty by preventing the State from interfering with the right of religious denominations to manage their own affairs, the endowment clause serves the same purpose in a similarly indirect fashion, by preventing too close a relationship between the State and any particular religious denomination(s). This interpretation is lent considerable strength by the fact that the Supreme Court in *Quinn’s Supermarket v. Attorney General*<sup>34</sup> has ruled that the “overall purpose” of Article 44 is “freedom of practice of religion”, and has applied the anti-discrimination clause in Article 44.2.3° in view of this underlying purpose.<sup>35</sup> This observation does not necessarily derive from a particular political understanding of the Church-State relationship, but may also be considered implicit in the historical understanding of the provisions of Article 44. Despite clerical pressure from both within Ireland and the Vatican, De Valera consciously abandoned the first draft of Article 44 which recognised the Catholic Church as the “Church of Christ”, and “the true religion ... established by our Divine Lord, Jesus Christ Himself”.<sup>36</sup> Certain figures expressed disappointment at the fact

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<sup>32</sup> Tribe, *American Constitutional Law* (1988), p. 1157.

<sup>33</sup> In 1982, the Bishop of Down and Connor, Cahal Daly, stated “we believe that the alliance of Church and State is *harmful for the Church* and harmful for the state ... The Catholic Church in Ireland has no power and seeks no power except the power of the Gospel it preaches” (emphasis added), from Keogh, “The Irish Constitutional Revolution: An Analysis of the Making of the Constitution” in Litton, *The Constitution of Ireland 1937-1987* (1988), p. 74.

<sup>34</sup> [1972] I.R. 1, at 11.

<sup>35</sup> *Quinn’s Supermarket v. Attorney General* [1972] I.R. 1, at 11.

<sup>36</sup> *Quinn’s Supermarket* case [1972] I.R. 1, at 24-25.

that the “special position” clause seemed to confer no privileged position in law on the Church, while the final version did not correspond to the “Catholic ideal” as regards the Church-State relationship.<sup>37</sup> De Valera sought the approval of minority Churches for Article 44, and facing potential opposition on grounds of secular republicanism from some colleagues, was mandated by the Executive Council to formulate a solution which did not constitutionally establish the Catholic Church.<sup>38</sup>

Additionally, the endowment provision itself appears to have a very particular historical origin. In the *Campaign* ruling, Barrington J. noted the particular historical connection between the establishment of religion by European States, and the placing under civil disabilities of those who opposed the State religion.<sup>39</sup> The attack on religious equality stemming from the privileging of a religious denomination may itself constitute the imposition of a civil disability against those who do not belong to the privileged denomination. This relationship between Church-State entanglement and individual freedom and equality is expounded by Witte, who notes that while these rights evidently precluded the direct penalising of the religious choices of individuals, liberty of conscience was also considered to preclude “more subtle forms of discrimination, prejudice and cajolery by [the] state”.<sup>40</sup> In a similar vein, Laycock argues that religious freedom may be undermined “either by coercion or persuasion”.<sup>41</sup>

This relationship between the State financing of religion and the consequent undermining of individual religious liberty is reflected in the construction of Article 15 of the Anglo-Irish Treaty of 1921, in many respects the historical forerunner of the endowment clause, and cited in the *Campaign* ruling.<sup>42</sup> It provided that the new Irish legislature could not “give any preference or impose any disability on account of religious belief or religious status”. This relationship between religious liberty

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<sup>37</sup> *Quinn’s Supermarket* case [1972] I.R. 1, at 24-25.

<sup>38</sup> *Quinn’s Supermarket* case [1972] I.R. 1, at 24-25.

<sup>39</sup> *Campaign* case [1998] 3 I.R. 321, at 348-349.

<sup>40</sup> Witte, p. 40.

<sup>41</sup> Laycock, “Formal, Substantive, and Dissaggregated Neutrality Towards Religion”, (1990) 39 *DePaul Law Review* 993, 1001-1002.

<sup>42</sup> *Campaign* case [1998] 3 I.R. 321, at, 352.

and establishment of religion is further expounded by the observations of Black J. in the landmark United States case of *Everson v. Board of Education*<sup>43</sup> (discussed in more detail below). He noted that the prohibition in the First Amendment of “law respecting an establishment of religion” reflects a conception “in the minds of early Americans of a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity”.<sup>44</sup> In a further reference to the purpose of separationism in securing religious liberty, he noted that “[t]he centuries immediately before and contemporaneous with the colonization of America had been filled with ... persecutions, generated ... by established sects determined to maintain their absolute political and religious supremacy”.<sup>45</sup>

## II. A CRITIQUE OF THE *CAMPAIGN* RULING AND THE RESTRICTIVE INTERPRETATION OF THE ENDOWMENT PROVISION: A COMPARISON WITH UNITED STATES JURISPRUDENCE

In contrast to the *Campaign* jurisprudence, the prohibition in the United States Constitution on the establishment of religion has been interpreted explicitly in terms of its role in protecting individual religious liberty. Both Costello J. and Keane J. argued in the *Campaign* ruling that United States jurisprudence is of limited assistance in this context, with the latter going so far as to state that “[t]he provisions of our Constitution are ... so markedly different that ... [rulings under the First Amendment] are not of assistance in the construction of Article 44.2.2<sup>o</sup>”.<sup>46</sup> Undisputedly, the fact that the Irish Constitution explicitly foresees the granting of State aid to religious schools precludes the application of the strict separationist jurisprudence of the United States Supreme Court, which has unequivocally held that such aid to religious

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<sup>43</sup> 330 U.S. 1 (1947).

<sup>44</sup> *Everson* case 330 U.S. 1, at 8.

<sup>45</sup> *Everson* case 330 U.S. 1, at 9.

<sup>46</sup> *Campaign* case [1998] 3 I.R. 321, at 338 and 362.

schooling violates the establishment clause.<sup>47</sup> However, beyond the particular context of public education, this United States jurisprudence is nonetheless useful as it elucidates the purpose of the constitutional regulation of the Church-State relationship in upholding religious liberty and equality. While the observed differences between the concepts are indeed relevant, the fact that a similar *purpose* underpins the endowment and establishment clauses, which are both instruments of constitutional Church-State separation, should not mean that the different *form* in which they implement this purpose renders judicial interpretations of one form of Church-State separation alien and irrelevant to another. In this sense, United States jurisprudence on the establishment clause is useful at least insofar as it illuminates the relationship of constitutional Church-State relationship to individual religious freedom, the latter which is affirmed by the Irish as well as the United States Constitution.

#### *A. Criticisms of the Campaign Ruling*

The sole authoritative interpretation of the endowment clause markedly overlooks the historical purpose of the endowment clause in protecting individuals from the imposition of civil disability on religious grounds. In the *Campaign* ruling, as outlined above, it was held by Barrington J. – notwithstanding the benefit which flowed to the relevant Churches – that “the Constitution contemplates children receiving religious education in schools recognised by the State”, and that, in light of the provisions of Article 42, the framers of the Constitution envisaged the provision of funds for denominational education.<sup>48</sup> Accordingly, the payment by the State of the salaries of chaplains in Community and Comprehensive schools was held to be “a manifestation, under modern conditions, of principles which are recognised and approved by Articles 44 and 42 of the Constitution”.<sup>49</sup>

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<sup>47</sup> *McCullum v. Board of Education* 333 U.S. 203 (1948) and *Abington School District v. Schempp* 374 U.S. 203 (1963).

<sup>48</sup> *Campaign* case [1998] 3 I.R. 321, at 356-357.

<sup>49</sup> *Campaign* case [1998] 3 I.R. 321, at 358.

The *ratio* of the decision can be distilled to the following principle. The State is not constitutionally permitted to endow a religion by conferring it with an income or property “on a perpetual or quasi-perpetual basis”. However, for the purposes of State provision for public education, the conferring of such benefit does not run afoul of the endowment clause if its purpose is to provide religious education in publicly-funded schools in accordance with parental wishes. Thus, two important qualifications were attached to the ruling by Barrington J.: that funding for such purposes should be issued on a non-discriminatory basis where required by schools of any denomination, and pastoral services not dispensed without the knowledge and consent of pupils’ parents.<sup>50</sup> Thus, while some acknowledgment is made of the need to account for fundamental rights in the interpretation of the endowment clause, the reasoning used in the application of this is deficient in a number of respects.

Firstly, Barrington J. fails to distinguish between the constitutional position of primary and secondary education. The contention that the parents who happen to find themselves in a religious majority in a State-established secondary school enjoy a right to have the State fund the unfettered religious “education” of their children – rather than mere religious “instruction” – appears, *inter alia*, to erroneously equate the constitutional position of secondary education with that of primary education. Under Article 42.4, the State is obliged to “provide for” free primary education in accordance with the wishes of parents,<sup>51</sup> and it is reasonable to suggest that the prohibition on the endowment of religion must be read in light of this. However, the State is not obliged to provide for free secondary education. Under Article 42.4, it “shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation”. This hardly creates a justiciable right for parents to demand that the State fund the religious education of their children in secondary schools. In any

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<sup>50</sup> *Campaign* case [1998] 3 I.R. 321, at 358.

<sup>51</sup> *O’Sheil v. Minister for Education* [1999] I.L.R.M. 241.

case, only those belonging to the coreligionist majority within such schools are in practice able to extract such a privilege from the State. This “right” presupposes for its exercise the adherence of its beneficiaries to a religious group which is sufficiently well-established in a particular area to merit the recognition and funding of a secondary school. It is certainly questionable whether such a justiciable right to State-sponsored religious education exists even in relation to primary education, as there is no authority to indicate that the right to free primary education which flows from Article 42.4 encompasses the right to have appropriate religious instruction provided at the expense of the State. The emphasis in Articles 42 and 44 is clearly on State restraint, rather than State intervention, in the domain of religious education, while Article 44.2.4° explicitly envisages non-coreligionist children attending schools where they receive no religious instruction. The Constitution clearly does not confer a right to State-funded religious education on such children or their parents – how, therefore, can it coherently be claimed that it confers such a right on children who belong to the religious majority?

With this established, it becomes clear that the prohibition on the endowment of religion cannot be qualified in terms of a “right” of parents to receive State-funded religious education for their children. As Hogan and Whyte argue, the explicit, unqualified prohibition on religious endowment – an unqualified, negative injunction – cannot be restricted with reference to a rather weak mandate, more permissive than injunctive, with respect to secondary education, in the second clause of Article 42.4 – particularly since the words “with due regard ... for the rights of parents” are more coherently interpreted as a restricting rather than empowering the State in terms of educational provision.<sup>52</sup> The theory of religious education as a “positive” constitutional right, which would require the State to positively assist parents in religious instruction, suffers from a fatal lack of clarity as to the broader constitutional philosophy of parental rights and religious freedom. It is hardly necessary to point out that the constitutional text, underpinned primarily by a liberal

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<sup>52</sup> Hogan and Whyte, *J.M. Kelly: The Irish Constitution* (2003), para. 7.8.69.

emphasis on “negative” rights of non-interference, abounds with injunctions against State interference in parental rights, particularly in terms of religious education, while heavily qualifying aspirations to State assistance in this context with reference to these more fundamental freedoms. As O’Connell notes, “the ‘positive rights’ argument runs the great risk of denuding the non-endowment clause of any sense”.<sup>53</sup>

Thus, McCrea observes that “[a] positive obligation to provide religious education in schools has been created with no textual basis”.<sup>54</sup> O’Mahony writes that “Barrington J. failed to specify which provisions of the Constitution this supposed right of parents is based on, and did not offer any justification at all for its existence”.<sup>55</sup> Glendenning suggests that since parents of all religions must be entitled to have their children educated in this way, this would result in “a huge drain on public finances”.<sup>56</sup>

Even if “positive rights” with respect to religious education – whether in primary or secondary schools – are created by the Constitution, they should evidently yield to the more concrete restraints which are imposed by the protections of Article 44 of freedom of conscience and free religious practice. Barrington J. suggests that the religious ethos of a school may legitimately influence a non-coreligionist child because the parents of the majority religion enjoy a right to have this religion education provided.<sup>57</sup> This assertion overlooks both the fact that the right to a religious education at secondary level has no constitutional basis, and the fact that were the State not to finance religious education in secondary schools, parents are still free to impart their chosen religion to their children without interference – their religious freedom would remain intact. By contrast, the restriction of free religious practice is far greater in the case of those parents whose child is involuntarily exposed to alien religious beliefs and practices in a State-funded school.

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<sup>53</sup> O’Connell, “Theories of Religious Education in Ireland” (1999) 14 *Journal of Law and Religion* 492.

<sup>54</sup> McCrea, “The Supreme Court and the School Chaplains Case” [1999] 2 T.C.L.R. 19, 22-3.

<sup>55</sup> O’Mahony, *Educational Rights in Irish Law* (2006), p. 121.

<sup>56</sup> Glendenning, *Education and the Law* (1999), p. 68.

<sup>57</sup> *Campaign* case [1998] 3 I.R. 321, at 357.

Secondly, the ruling largely ignores the underlying purpose of the endowment clause in protecting individuals from the imposition of disabilities and discriminations on account of religious affiliation. There is a stark tension in the judgment between its recognition of the historical effect of Church-State establishment on religious liberty, and its suggestion that the State is not prevented from directing financial benefit to religious denominations. While Barrington J. held that the State could indirectly benefit religious denominations for the purpose of funding religious education within State-funded schools,<sup>58</sup> Keane J., as already noted, went so far as to suggest that the State could legitimately “confer benefits” on religious bodies, albeit in a non-discriminatory fashion.<sup>59</sup> Hogan and Whyte speculate that this interpretation may permit the State to make “occasional financial contributions in money or money’s worth to religious bodies”<sup>60</sup> – an interpretation which is also perhaps implicit in the suggestion in *Re Article 26 and the Employment Equality Bill 1996*<sup>61</sup> that Article 44.2.2° strikes only at the *discriminatory* endowment of religious bodies, leaving the State free to endow denominations on a concurrent or non-discriminatory basis.<sup>62</sup>

All of the above interpretations of the endowment clause share a common faith in the viability, within a liberal democratic constitutional scheme, of the conferring by the State of financial benefits on religious bodies, on the condition that such financial advantage is dispensed by the State on a non-discriminatory basis. This implicitly suggests that the State financing of religious denominations will not result in the imposition of disabilities or discriminations on individuals, if this is administered between religious groups on a non-discriminatory basis.

However, this faith in the remediating virtue of formal non-discrimination in the regulation of the Church-State relationship cannot withstand critical scrutiny – primarily because a guarantee of non-discrimination in the State funding of religious

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<sup>58</sup> *Campaign case* [1998] 3 I.R. 321, at 357.

<sup>59</sup> *Campaign case* [1998] 3 I.R. 321, at 359.

<sup>60</sup> Hogan and Whyte, para. 7.8.72.

<sup>61</sup> [1997] 2 I.R. 321.

<sup>62</sup> *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 321, at 354.

denominations does not guarantee that the beliefs of all persons will be equally privileged or favoured. As Hogan and Whyte point out, only Catholic and Church of Ireland schools received the benefit conferred by the State in the context of the *Campaign* ruling.<sup>63</sup> When Barrington J. stated that the relevant funding should be “available to all community schools of whatever denomination on an equal basis in accordance with their needs”,<sup>64</sup> he evidently meant that such funding must be non-discriminatory in the sense that the State must treat schools equally in terms of religious affiliation. This cannot mean, however, that the State will treat individuals equally in terms of their religious affiliation, because what the Supreme Court in this ruling required was not that the State treat individuals within a school equally in terms of their religious beliefs – in fact, this was specifically precluded – but that it treat religious *groups* who happen to operate schools equally. In this sense, it is a guarantee of equality between groups rather than individuals. It is a guarantee of equality between religions that have a sufficient number of adherents to establish and operate secondary schools, and in this sense is difficult to reconcile with a conception of individual equality.

As Ravitch argues, conceptions of neutrality, as between religions and between religion and irreligion, ignore the substantive inequality which may arise in such situations.<sup>65</sup> Where government engages with religions on a formally non-discriminatory basis in the public education context, it may favour large religious groups which have sufficient numbers and support to attract public funding, at the expense of individuals who belong to minority groups which cannot attract such funding even within a framework of formal equality. Thus, within a liberal-democratic constitutional order, requirements of equality and non-discrimination must evidently be constructed in terms of individuals rather than groups. This guarantee of non-discrimination does not protect those persons who are irreligious, or who belong to religions who do not operate secondary schools. This doctrine is therefore strikingly majoritarian in prioritising the

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<sup>63</sup> Hogan and Whyte, *J.M. Kelly: The Irish Constitution* (2003), para. 7.8.70.

<sup>64</sup> *Campaign* case [1998] 3 I.R. 321, at 358.

<sup>65</sup> Ravitch, *Masters of Illusion: The Supreme Court and the Religion Clauses* (2007), p. 21.

rights of those parents who find themselves in the coreligionist majority in a particular area or within a particular school.

Thus it remains, notwithstanding the guarantee of formal non-discrimination, that in the *Campaign* scenario, funds are directed from general, religiously-neutral taxation to the religious education projects of just two religious denominations. Therefore, this particular example of the State financing of religious purposes results in the imposition of a disability and discrimination on those who do not benefit from it. Those who belong to other religions or none must undertake the religious education of their children at their own expense, while those belonging to the privileged denominations can rely on a “right” to have the State fund this education. The refusal of the Supreme Court to strike down such State funding of religion constitutes a failure to uphold the purpose of the prohibition on religious endowment in preventing such discrimination. Through such a narrow interpretation of the endowment clause, the Supreme Court has arguably permitted the State to treat persons of non-dominant religious affiliations less favourably, not only in the sense that such individuals cannot avail of the same financial advantages for religious education, but also by virtue of the finding of the Court that such individuals, who attend Catholic and Church of Ireland schools, cannot be protected from being influenced by the ethos of such schools.

*B. United States Jurisprudence on the Establishment Clause:  
Illuminating the Purpose of Constitutional Church-State  
Separation*

By contrast, the application of the establishment clause of the First Amendment of the United States Constitution has been rigorously interpreted in terms of its underlying purpose of protecting individual citizens from the disabilities or discriminations which might otherwise arise from the privileging by the State of particular religions. In contrast to the suggestion by Keane J. in *Campaign* that the Irish Constitution permits the State to confer financial benefit on religious denominations,<sup>66</sup> the United States jurisprudence on the First Amendment has

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<sup>66</sup> *Campaign* case [1998] 3 I.R. 321, at 359.

emphasised the requirement of neutrality – that legislation neither inhibits nor advances religions, and avoids an excessive governmental entanglement with religion. *Lemon v. Kurtzman*<sup>67</sup> synthesized this analysis in the three-part *Lemon* test. To withstand *Lemon* scrutiny, the legislation or government conduct must have a secular purpose, must have a principal or primary effect that does not advance or inhibit religion, and cannot foster an excessive government entanglement with religion. This has precluded all forms of public assistance to religious education, and even the use of public school buildings for private religious education.<sup>68</sup>

The rationale behind this strict interpretation of the establishment clause is clear – to prevent excessive Church-State entanglement from undermining both the equality and religious liberty of persons belonging to all religious sects and none. Thus, it was stated in *Zorach v. Clauson*<sup>69</sup> that the establishment clause required that “the government must be neutral when it comes to competition between sects”. It was held in *Lynch v. Donnelly*<sup>70</sup> that legislative measures must avoid governmental “endorsement” of religion: “[t]he Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community ... Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community”.<sup>71</sup>

Again, this rationale invokes the underlying purpose of the neutrality principle: the belief that governmental endorsement of, or assistance to religion – whether of religion in general or of particular sects – entails the imposition of discrimination and disability on non-believers. The link between individual religious freedom and Church-State entanglement is further expounded in *Tilton v. Richardson*:<sup>72</sup> in testing the constitutionality under the

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<sup>67</sup> 403 U.S. 602 (1971).

<sup>68</sup> *McCollum v. Board of Education* 33 U.S. 203 (1948).

<sup>69</sup> 343 U.S. 306, 314 (1952).

<sup>70</sup> 465 U.S. 668 (1984).

<sup>71</sup> *Lynch v. Donnelly* 465 U.S. 668 (1984).

<sup>72</sup> 403 U.S. 672 (1971).

establishment clause of legislation which provided federal aid to church-related colleges, Burger C.J. states that in applying the establishment clause the Court must ask “[d]oes the implementation of the Act inhibit the free exercise of religion?”<sup>73</sup> The rationale of the establishment clause in securing religious liberty for all citizens is also in evidence in the seminal, strongly separationist ruling in *Everson v. Board of Education*.<sup>74</sup> In a reminder of the historical origins of the establishment clause, Black J. notes that “a large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches”.<sup>75</sup> His exploration of this history also expresses the potentially oppressive nature of Church-State entanglement in terms of the levying of tax on citizens to fund sectarian purposes:

And all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters ... The imposition of taxes to pay ministers’ salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment ... The people reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.<sup>76</sup>

Black J. noted<sup>77</sup> that this longstanding view of the levying of tax for religious purposes as a threat to religious liberty was also reflected in the preamble to the Virginia Bill for Religious Liberty, which stated that “to compel a man to furnish contributions of money for the propagation of opinions which he

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<sup>73</sup> 403 U.S. 672, at 678.

<sup>74</sup> *Everson v. Board of Education* 330 U.S. 1 (1947).

<sup>75</sup> 330 U.S. 1, at 8-9.

<sup>76</sup> 330 U.S. 1, at 10-11.

<sup>77</sup> 330 U.S. 1, at 13.

disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern ...”.

Thus, Black J. ruled in *Everson* that the First Amendment meant that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion”.<sup>78</sup> He stated that the purpose of this principle, which he described as the prevention of “governmental intrusion on religious liberty”,<sup>79</sup> has informed the interpretation by the Supreme Court of the establishment clause. This stands in stark contrast to the almost total absence of any consideration given by the Irish Supreme Court in its *Campaign* ruling to the question of how concepts of religious equality and liberty should inform the interpretation of the endowment clause. What is interesting in cases such as *Everson* is the nexus which they outline between the undermining of equality that arises from Church-State entanglement, and the resulting impact on religious liberty. The ruling of Black J. in *Everson* is just one expression of the view that the primary historical purpose of the establishment clause is to uphold the freedom of religious conscience of individuals by not forcing them to contribute, through taxation, to the support of sectarian religious institutions which propagate beliefs which they do not share, or may be hostile towards them.

### III. HOW SHOULD THE ENDOWMENT CLAUSE REGULATE THE CONTEMPORARY CHURCH-STATE RELATIONSHIP IN IRELAND?

If it is accepted that the endowment clause – as an instrument of constitutional Church-State separation – should be interpreted in light of its purpose in protecting individuals from discrimination and disability on grounds of religion, how might this apply to contemporary manifestations of the Church-State relationship? Despite the recent secularisation of Irish society, the

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<sup>78</sup> 330 U.S. 1, at 16.

<sup>79</sup> 330 U.S. 1, at 13.

comments by the former Taoiseach, cited in the introduction, reflect a somewhat prevalent view that the State must maintain a close relationship with “faith communities” – echoing, perhaps, the observation made by Keane J. in the *Campaign* case that “religion plays an important part in Irish life and has done so for many centuries ... courts could not disregard, at least in a context where it becomes relevant, the fact that religious beliefs and practices are interwoven throughout the fabric of Irish society”.<sup>80</sup> This prevailing view is also perhaps in evidence in recent examples of Church-State entanglement which benefit or advance religion in pecuniary terms. Examples of entanglement in religion which may be constitutionally suspect include the recent grant of €250,000 made by the State to the Orange Order,<sup>81</sup> the State indemnity for clerical child sex abuse claims against the Catholic Church,<sup>82</sup> and the longstanding observance of the Angelus prayer on State radio and television. The first and second of these measures are examples of Church-State association which result in pecuniary gain for the relevant religions or religious organisations, while the third may reasonably be described as indirectly benefiting a particular religious group by using the airwaves as a means of cost-free evangelisation.<sup>83</sup>

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<sup>80</sup> *Campaign* case [1998] 3 I.R. 321, at 358-359

<sup>81</sup> See “Ó Cuív grants €250,000 to promote Orange Order”, *Irish Times*, 5 February 2008. The grant was made through the Department for Community, Rural and Gaeltacht affairs for the purposes of developing “Orange Lodges” in areas of the State bordering Northern Ireland.

<sup>82</sup> “Money trail key to abuse inquiries”, *Sunday Business Post*, 27 October 2002. Under the indemnity agreement by the Fianna Fáil/Progressive Democrats government and the Conference of the Religious in Ireland in June 2002, the liability of the Roman Catholic Church was limited to €128m. It was recently estimated by organisations representing victims of child sex abuse and members of the Dáil that the total compensation would amount to €1.3 billion – leaving the Catholic Church with approximately 10% of costs and the State with the remainder: see “Dáil and church agree €1.3bn payout to child abuse victims”, *The Observer*, 1 January 2006.

<sup>83</sup> It was held in *Coughlan v. Broadcasting Complaints Commission* [2000] I.E.S.C. 44 that the unequal time allocated to the “Yes” and “No” campaigns in the 1995 divorce referendum campaign violated the requirement of s. 13(b) of the Broadcasting Authority (Amendment) Act, 1976, that RTÉ must “uphold the democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression”. Although the case is perhaps of limited

*A. Contemporary Understandings of the Church-State Relationship: A Departure from the Original Understanding?*

Certainly, the Supreme Court in its *Campaign* ruling failed to develop a jurisprudence which might have utilised the endowment clause to regulate the purposes of religious liberty and equality which undisputedly define Article 44 of the Constitution. Given the dicta of Keane J. in particular, it is questionable whether the Supreme Court would strike down State assistance to religion which was not, as in the *Campaign* ruling, legitimised by educational purpose. However, is there any precedent for the use of the Constitution in this way – specifically, as a means of preventing the levying of taxes for sectarian ends?

It might be questioned whether, as a matter of historical constitutional interpretation, the framers of the Constitution in fact intended that it would strike in this way at such examples of Church-State association or entanglement. It is arguable whether the term “endowment” must be interpreted in terms of its original or historical understanding, or whether it is amenable to evolving interpretation in light of changing social norms and values, under the doctrine set out by Walsh J. in *McGee v. Attorney General*.<sup>84</sup> Recent jurisprudence has determined that “marriage” should be given such a contemporary interpretation,<sup>85</sup> while “unborn” should not.<sup>86</sup> Should the interpretation of the endowment clause apply the historical or contemporary method? Members of the current Supreme Court have referred to a test set out by the late Professor Kelly.<sup>87</sup> He reasoned that where some law-based

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assistance since it relates to statutory rather than constitutional interpretation (the relevant statute nonetheless invokes constitutional principles), its relevance may lie in this context in its extension of the principle formulated in *McKenna v. An Taoiseach (No.2)* [1995] 2 I.R. 10, which is discussed at a later point in this article, to State broadcasting. If the unequal spending of State funds on political broadcasting violates “liberty of expression” as suggested in this case, it is arguable that this should equally apply to religious broadcasting.

<sup>84</sup> [1974] I.R. 284, at 317 and 319.

<sup>85</sup> *Zappone v. Revenue Commissioners* [2006] I.E.H.C. 404.

<sup>86</sup> *M.R. v. T.R.* [2006] I.E.H.C. 359.

<sup>87</sup> See in particular *Sinnott v. The Minister for Education* [2001] 2 I.R. 545, at 681.

system was at issue, such as jury trial, the historical approach was appropriate, but that the “present tense” or contemporary approach was appropriate to matters concerning “standards and values”.<sup>88</sup>

It is clear that the Church-State relationship falls in the latter category, and that the constitutional regulation of this cannot be hidebound in the understanding of Church-State relationship of 1937. This does not mean, of course, that Article 44 may be vested with a meaning which it clearly does not bear on its face. However, it is perfectly plausible that the prevalent contemporary understanding of the Church-State relationship accounts for the potentially negative impact on individual freedoms of excessive Church-State entanglement, and that, additionally, this understanding can quite easily be accommodated within the current version of Article 44, with its extensive protections of individual religious freedom. Furthermore, the very fact that a 1972 referendum deleted reference to the “special position” of the Roman Catholic Church demonstrates that a historicist understanding of Article 44 which relied on the understanding of the constitutional drafters of 1937 would be largely unsuitable for the interpretation of constitutional provisions relating to religion.

In any case, since the meaning of the provision is illuminated neither by a great deal of case law nor by a definition within the text itself, it would seem appropriate to apply a purposive interpretation – that is, to apply the provision in light of its historical purpose in protecting individual religious liberty, and in terms of the overall purpose of Article 44, which was considered in *Quinn’s Supermarket v. Attorney General*<sup>89</sup> to be “freedom of practice of religion”. As O’Connell states, the literal approach is unsuitable for provisions such as this – “it is when the text is ambiguous that we most need a theory of interpretation rather than a dictionary”.<sup>90</sup> In relation to the interpretation of

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<sup>88</sup> A contribution on constitutional interpretation by Kelly in Litton (ed.), *The Constitution of Ireland, 1937-1987* (1988), p. 215.

<sup>89</sup> [1972] I.R. 1.

<sup>90</sup> O’Connell, “Theories of Religious Education in Ireland”, (1999) 14 *Journal of Law and Religion* 463.

Article 44, he also supports the position that “the fundamental rights protected by the Irish Constitution must not be confined to an unnecessarily literalist perspective”.<sup>91</sup> In the *Paperlink* case<sup>92</sup>, Costello J. held that the nature of the Constitution as “a political instrument as well as a legal document” means that a “purposive” rather than a literal approach is appropriate to its interpretation.<sup>93</sup> This contrasts with the rather literal interpretation of the endowment clause applied in the Supreme Court *Campaign* ruling by Keane J. in particular. He cited the *Oxford English Dictionary* definition of the word “endow” as “to enrich with property; to provide (by bequest or gift) a permanent income for (a person, society or institution)” in giving Article 44.2.2° a narrow construction,<sup>94</sup> thus apparently implying that the endowment of religion signifies only “direct subvention by the State to [a] religious denomination”.<sup>95</sup>

Leaving aside the rather theoretical question of whether a literal interpretation, through the use of a dictionary, is appropriate to this type of constitutional provision, it is unclear that, even on the literal terms of the *Oxford English Dictionary*, the meaning of the term “endowment” is limited, in the manner suggested, in terms of the permanence and direct form of the subvention. While both the *Employment Equality Bill* ruling and Keane J. in the *Campaign* ruling suggest, as outlined, that Article 44.2.2° is directed at *permanent* and *direct* financial assistance to religions, neither of these two elements is necessarily required by the outlined dictionary definition. Although the second clause of this definition indeed includes the term “permanent”, the first, *alternative* clause simply states “to enrich with property”. Under the terms of the *Oxford English Dictionary*, an arrangement does not have to match the terms of the second clause in order to qualify as an “endowment” – it merely has to “enrich with property”. It is certainly possible to enrich a body with property on neither a permanent nor direct basis. In any case, the application of these criteria would clearly lead to absurdities

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<sup>91</sup> 14 *Journal of Law and Religion* 463, 466.

<sup>92</sup> *Attorney General v. Paperlink Ltd.* [1984] I.L.R.M. 373.

<sup>93</sup> [1984] I.L.R.M. 373, at 385.

<sup>94</sup> *Campaign* case [1998] 3 I.R. 321, at 361.

<sup>95</sup> *Campaign* case [1998] 3 I.R. 321, at 360.

which the framers of the Constitution clearly could not have intended. It is clearly possible to significantly enrich a religion through occasional or irregular payments, as well as through a permanent arrangement; such a criterion would otherwise allow the State to defeat the purpose of the provision merely by supplying the same benefit to favoured religion(s) as would accrue under a permanent, direct arrangement through irregular, indirect means.

*B. Assessing Church-State Entanglement in light of  
McKenna (No.2): Understanding the Endowment Clause  
in terms of Equality and Public Expenditure*

In this light, may a purposive interpretation of the endowment clause, considered in harmony with constitutional principles of equality and religious freedom protected in Articles 40 and 44, extend to prevent the State from favouring or financially assisting “faith communities?” In light of the narrow interpretation of the endowment clause arising from the *Campaign* ruling, this possibility might seem remote. However, two considerations may increase the plausibility of such an approach. First, given that the *Campaign* ruling validated the funding of school chaplains primarily on the basis that its purpose was to provide education in accordance with Articles 42 and 44, it is not entirely inconceivable that the endowment clause could be used in this more expansive way in other contexts. Additionally, there is some authority in existing constitutional jurisprudence for such an approach. In *McKenna v. An Taoiseach (No.2)*,<sup>96</sup> the Supreme Court used the equality guarantee of Article 40.1 to invalidate the exclusive State funding of the “Yes” side in the 1995 divorce referendum campaign. The use of public funds to support the political views of one category of citizens was held to be incompatible with constitutional equality. Denham J. found that the use of State funds in this manner breached not only the constitutional principle of equality, but the right to freedom of expression.<sup>97</sup>

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<sup>96</sup> [1995] 2 I.R. 10.

<sup>97</sup> [1995] 2 I.R. 10, at 53.

Of course, Doyle notes that the use of the equality guarantee in this manner is “unusual”,<sup>98</sup> and the link between unequal spending and the equality guarantee is not entirely explicit. It is arguable that the significance of *McKenna (No.2)* is largely confined to the specific context of referenda, which, apart from issues of constitutional equality, invoke a particular notion of constitutional justice<sup>99</sup> which may not be neatly applied to the present question. However, it is quite arguable that the rationale used to strike at the State funding of partisan political ends in *McKenna (No.2)* may be applied to the use of State funding to promote sectarian or exclusive religious ends. Hamilton C.J. stated that the politically exclusive use of public funds in 1995 “infringes the concept of equality which is fundamental to the democratic nature of the State”,<sup>100</sup> while O’Flaherty J. held:

To spend money in this way breaches the equality rights of the citizen enshrined in the Constitution as well as having the effect of putting the voting rights of one class of citizen (those in favour of the change) above those of another class of citizen (those against). *The public purse must not be expended to espouse a point of view which may be anathema to certain citizens who, of necessity, have contributed to it.*<sup>101</sup>

Evidently, the spending of funds in favour of particular religious sects does not concern voting rights. However, it nonetheless uses public funds which are raised through religiously neutral taxation to fund purposes which are religiously exclusive, and it therefore has the effect of prioritising the right to religious expression and practice of a particular category of citizens over those rights as exercised by citizens whose beliefs and practices attract no such support from the public purse. Thus, the italicised last sentence in the above observation by O’Flaherty J. might equally apply to the spending of State funds on selective religious ends as well as political ones. Feldman argues in the United States context that liberty of conscience is

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<sup>98</sup> Doyle, *Constitutional Equality Law* (2004) p. 90.

<sup>99</sup> [1995] 2 I.R. 10, at 49, per Blayney J.

<sup>100</sup> *McKenna v. An Taoiseach (No.2)* [1995] 2 I.R. 10, at 42.

<sup>101</sup> *McKenna v. An Taoiseach (No.2)* [1995] 2 I.R. 10, at 43, emphasis added.

violated if a person is forced to pay taxes to support even non-discriminatory aid to religion, as this interferes with a person's ability to support only those religious institutions which he chooses, and burdens his preference for institutions and beliefs which are not privileged by equivalent governmental support.<sup>102</sup>

It is also useful to recall the observations of O'Connor J. in *Lynch v. Donnelly*,<sup>103</sup> that such State funding directed to religious ends has the effect of creating a distinction between "favored" citizens whose beliefs and practices attracted State support, and those for whom the absence of such support amounted to exclusion from this favoured category.

It might be objected that such funding does not undermine equality if it is neutral between sects, but for reasons already outlined, the purported validation of the "concurrent" financing of religions on the basis of formal non-discrimination should be met with considerable scepticism. The concurrent funding of "Yes" and "No" sides in a referendum campaign is infinitely less problematic than the question of how, or even whether, it is possible to uphold equality between individuals in the funding of religious activities or purposes. Even if a viable formula to ensure equality in the funding of religious groups were possible, it could not possibly account for the infinite variety of religious belief both within such groups and on their margins; it would penalise those whose beliefs were peripheral, or did not fall within recognised categories; it would also necessitate a system of recognition of religious sects which itself is highly problematic in terms of religious freedom and the Church-State relationship. More obviously, equality in terms of religious funding does not account for sceptics, agnostics, atheists, humanists or rationalists, for whom "concurrent" religious endowment would mean the levying of tax to support a variety of hostile or exclusive beliefs. Thus, while it might be possible to conceive of concurrent and equal funding between Catholicism and Anglicanism, it is impossible to conceive how constitutional equality might be upheld through the concurrent funding of Catholicism,

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<sup>102</sup> Feldman, *Divided by God – America's Church-State Problem – And What We Should Do About It* (2005), pp. 224-251.

<sup>103</sup> *Lynch v. Donnelly* 465 U.S. 668 (1984).

Anglicanism, Adventism, Seventh Day Adventism, Scepticism and Humanism, not least because it is difficult to conceive of what form the “endowment of scepticism” might take. This is merely one of the absurdities which inevitably emerge from any attempt to mediate a principle of equality through the recognition of groups.

### CONCLUSION

This discussion relates directly to the question of whether principles of religious equality and liberty can be reconciled with Church-State entanglement which has the effect of favouring or financially benefiting religious groups. In the *Campaign* ruling, the Supreme Court indicated that the establishment of a State religion would violate the Constitution, offending in particular the prohibition on religious discrimination in Article 44.2.3°. <sup>104</sup> The reasoning underpinning this is somewhat unclear. If the establishment of religion violates the prohibition on religious discrimination in a rather abstract sense, presumably this is because it amounts to an endorsement of the beliefs of a particular category of citizens to the exclusion of others. However, why is this reasoning not applied to the endowment question, even though the endowment rather than the establishment of religion is explicitly prohibited by the Constitution? It would appear self-evident that if the establishment of a national Church would violate the right to religious equality of non-coreligionists, the same reasoning applies to measures which enrich certain religious denominations at the expense of the public at large – measures which, for reasons already outlined, cannot possibly be equal with respect to all citizens. These and other outlined considerations demonstrate that the conception of equality in the State funding of religious projects and activities is largely illusory, as it is impossible to mediate equally between recognised religious groups while upholding individual equality. This consideration ultimately militates in favour of a more expansive application of the endowment clause to the Church-State relationship, one which takes account of the underlying

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<sup>104</sup> *Campaign* case [1998] 3 I.R. 321, at 361.

purpose of the provision in upholding freedom and equality in terms of religious beliefs.