

9-1-2011

## Religion and Neutrality: Myth, Principle, and Meaning

Rafael Palomino

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>

 Part of the [Law and Politics Commons](#), [Religion Commons](#), and the [Religion Law Commons](#)

---

### Recommended Citation

Rafael Palomino, *Religion and Neutrality: Myth, Principle, and Meaning*, 2011 BYU L. Rev. 657 (2011).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2011/iss3/5>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

## Religion and Neutrality: Myth, Principle, and Meaning

*Rafael Palomino*\*

*Knowledge of speech, but not of silence;  
Knowledge of words, and ignorance of the Word.  
- T. S. Eliot*<sup>1</sup>

### I. INTRODUCTION

“[T]he fate of great words,” in their constant wandering, “appears to be their progressive dispersion in different directions, so that, in the end, neither detractors nor epigones know exactly what they are referring to in their diatribes or panegyrics.”<sup>2</sup>

In examining the changing dynamic of the religious phenomenon in postmodern societies, legal studies have invented or imported a considerable number of terms that offer only the illusion of scientific precision. Grand words that inspire immediate acceptance and a sense of security include the following: equality, nondiscrimination, liberty, and secularism. However, after this gratifying first impression, the jurist will take it upon himself to engage in a closer study to assess the scope, the ultimate implications, and the specific ramifications that such terms entail in reality. And in doing so, unsurprisingly, both “detractors [and] epigones” can lose sight of the underlying meaning, which is ultimately adapted to the claims and propositions being debated.

Neutrality faces this same danger of turning into an “empty” signifier, or, alternatively, a word too “full” of meanings. For this reason, embarking on an analysis of the concept in relation to religion is a worthwhile endeavor. To do so, this Article proposes two explorations—one in the world of political science and law and another in the world of law—of western legal texts from a wide range of traditions, combining

---

\* Professor of Law at Universidad Complutense de Madrid (Spain); researcher at The Human Rights Institute of Universidad Complutense de Madrid (Spain); member of the Advisory Council of the ODHIR Panel of Experts on Freedom of Religion or Belief (OSCE); associate member of the Spanish Royal Academy of Law.

1. T.S. ELIOT, *Choruses from the Rock*, in COLLECTED POEMS 1909-1962, at 147 (1963).

2. Rafael Navarro-Valls, *Volver a Pensar la Laicidad*, 0 ILU. REVISTA DE CIENCIAS DE LAS RELIGIONES 157, 157 (1995), available at <http://www.ucm.es/BUCM/revistas/ccr/11354712/articulos/ILUR9595110157A.PDF>.

an appraisal of case law and academic theory. At the same time, through these varied explorations, this Article will attempt to elucidate the specific function—if one exists—of neutrality in the complex system of state relations with religious beliefs. This will allow for a reflection on the scope of neutrality, a concept that, as will be shown, has something in it of myth as well as being a principle of state action in relation to the religious factor.

To this end, Part II analyzes the emerging role of the term “neutrality” in legal studies by taking a comparative approach to state law on religious affairs. Part III addresses the use of the term “neutrality” in the law, beginning with a general approach to the original meaning of the term in international law. Part IV briefly explains the influence of liberal ideology in crafting the meaning of legal neutrality in dealing with religion or beliefs. Part V tries to elucidate the meaning of neutrality as a principle in the law of several countries. Part VI will focus on the role of neutrality in academics. The Article concludes with remarks concerning the meaning of neutrality, its role as a legal principle, and its mythical character.

## II. NEUTRALITY AS AN EMERGING TERM IN RELATIONS BETWEEN THE STATE AND RELIGION

To introduce the topic, a very general definition of the concept of neutrality is needed. Neutrality designates the quality or attitude of one who maintains a distance from parties in a conflict. In the legal world, as will be shown, the concept of neutrality made its first appearance in international law.<sup>3</sup>

Neutrality appears in state law on religious affairs to the extent that the recognition of the fundamental right of religious freedom appears to entail an obligation on the state that may be specifically defined as “neutrality.”<sup>4</sup> The religious neutrality of the state is asserted in this sense in numerous geo-legal contexts. Merely by way of example, this religious neutrality appears in decisions by the Italian Constitutional Court,<sup>5</sup> the Spanish Constitutional Court,<sup>6</sup> the German Federal

---

3. See *infra* Part III.

4. “[Article] 9 of the Convention . . . guarantees freedom of thought, conscience and religion, including the freedom not to belong to a religion, and . . . imposes on Contracting States a ‘duty of neutrality and impartiality.’” *Lautsi v. Italy*, 2011 Eur. Ct. H.R. No. 30814/06, ¶ 60, available at [http://www.echr.coe.int/echr/resources/hudoc/lautsi\\_and\\_others\\_v\\_italy.pdf](http://www.echr.coe.int/echr/resources/hudoc/lautsi_and_others_v_italy.pdf).

5. See Corte Cost., 19 giugno 1997, n. 235, (It.), <http://www.cortecostituzionale.it/actionPronuncia.do> (search for case number 235 for year 1997).

Constitutional Court,<sup>7</sup> the U.S. Supreme Court,<sup>8</sup> and the European Court of Human Rights.<sup>9</sup> Moreover, its importance is asserted as an obligation upon state authorities and officials,<sup>10</sup> and it is stressed as a “basic value” in the minimum international criteria for religious freedom.<sup>11</sup>

Religious neutrality appears together with other terms such as impartiality, separation, independence, and autonomy. The question that arises is whether it is really necessary to introduce so many concepts, including the notion of religious neutrality, given that its implications are already stipulated in the principles of religious equality and secularism. Might it simply be a new way of referring to established categories, an old wine in new wineskins?<sup>12</sup> It certainly might seem this way at first glance; nevertheless, various reasons illustrate the value of making use of the concept of neutrality as an advantageous alternative. A few of these reasons are considered below.

The first is the justification that might be called the “language barrier.”<sup>13</sup> The Western legal worlds—basically the Anglo-American

6. See S.T.C., June 2, 2004 (No. 101) (Spain), <http://www.tribunalconstitucional.es/en/jurisprudencia/Pages/Sentencia.aspx?cod=8300> (“In its objective dimension, religious freedom entails a twofold demand, referred to in art. 16.3 CE: first, the neutrality of public authorities, inherent to the non-confessionalism of the State; second, the maintenance of relations of cooperation between public authorities and the various churches. In this regard, we previously stated in STC 46/2001, February 15, FJ 4, that ‘art. 16.3 of the Constitution, after setting forth a declaration of neutrality (STC 340/1993, November 16, and 177/1996, of November 11), considers the religious component perceptible in Spanish society and orders the public authorities to maintain “the consequent relations of cooperation with the Catholic Church and other denominations”, thereby introducing a notion of non-confessionalism or positive secularism that “prohibits any kind of confusion between religious and State functions” (STC 177/1996, November 11).”).

7. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 24, 2003, 2 BvR 1436/02 (Ger.), available at [http://www.bverfg.de/entscheidungen/rs20030924\\_2bvr143602en.html](http://www.bverfg.de/entscheidungen/rs20030924_2bvr143602en.html); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 26, 2002, 1 BvR 670/91 (Ger.), available at [http://www.bverfg.de/entscheidungen/rs20020626\\_1bvr067091en.html](http://www.bverfg.de/entscheidungen/rs20020626_1bvr067091en.html).

8. See *Van Orden v. Perry*, 545 U.S. 677 (2005); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

9. See *Hasan v. Bulgaria*, 34 Eur. Ct. H.R. 55 (2000); *Manoussakis v. Greece*, 23 Eur. Ct. H.R. 387 (1996); *Kokkinakis v. Greece*, 17 Eur. Ct. H.R. (ser. A) 397 (1993).

10. Eur. Consult. Ass., *Islam, Islamism and Islamophobia in Europe*, Res. 1743 ¶ 16 (2010), available at <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedTEXT/ta10/ERES1743.htm>.

11. See Organization for Security and Co-operation in Europe [OSCE] & The Office for Democratic Institutions and Human Rights [ODIHR] Advisory Panel of Experts on Freedom of Religion or Belief, *Guidelines for Review of Legislation Pertaining to Religion or Belief*, Sept. 28, 2004, at 11, available at <http://www.osce.org/odihr/13993>.

12. Robert E. Goodin & Andrew Reeve, *Liberalism and Neutrality*, in *LIBERAL NEUTRALITY* 1 (Robert E. Goodin & Andrew Reeve eds., 1989).

13. The “language barrier” is a common difficulty in dealing with comparative law that

tradition and the Continental European tradition—are moving ever closer together as a result of the constitutional demands imposed by human rights and the interdependence arising from globalization.<sup>14</sup> “[T]he techniques and mechanisms of law are often very different from one country to the next, but . . . the actual solutions, the responses to problems, and the legal sensibility are more or less the same.”<sup>15</sup> However, language can throw up barriers that prevent or hinder the analysis of common problems and solutions. An example of this issue is the word *laicidad*, a Spanish word that does not exist in the English language. Its near-equivalent would be the term “secularism,” but secularism does not relate exactly to the principle of *laicidad*, but to laicism as an ideological choice.<sup>16</sup> The French word *laïcité* has no exact translation, and when employed in English directly evokes the French system of relations between the state and religions.<sup>17</sup> On the other hand, the word “neutrality” is a term used by English speakers in a sense to identify the principle of *laicidad*.<sup>18</sup> If the same word existed in Romance and Germanic languages, this equivalence would offer clear advantages for a joint study of approaches to the religious factor in different legal traditions.

The second justification, more complex than the first, relates to the semantic deflation suffered by the term *laicidad*. A balanced approach to the concept of *laicidad* requires a certain degree of caution. Friedrich von Hayek pointed out the perversion of language in what he referred to as

---

academics often reference. See H.C. GUTTERIDGE, *COMPARATIVE LAW: AN INTRODUCTION TO THE COMPARATIVE METHOD OF LEGAL STUDY AND RESEARCH* 142 (1971); MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 4 (2009); W. Cole Durham, Jr., *Foreword: Comparative Law in the Late Twentieth Century*, 1987 *BYU L. REV.* 325, 327.

14. Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 *IND. L.J.* 819 (1999).

15. JEAN CARBONNIER, *DERECHO FLEXIBLE* 197 (1974).

16. See Iain T. Benson, *Considering Secularism*, in *RECOGNIZING RELIGION IN A SECULAR SOCIETY* 83–98 (Douglas Farrow ed., 2004).

17. See, e.g., OLIVIER ROY, *SECULARISM CONFRONTS ISLAM* xii (George Holloch trans., 2007); Lorenzo Zucca, *The Crisis of the Secular State—A reply to Professor Sajó*, 7 *INT’L J. CONST. L.* 494 (2009).

18. “Governmental religious neutrality is attained when government does not influence its citizens’ choices for or against certain religious or secular systems of belief, either by imposing burdens on them or by granting advantages to them. Instead, government is neutral when it is evenhanded toward people of all faiths and of none.” John T.S. Madeley, *European Liberal Democracy and the Principle of State Religious Neutrality*, in *CHURCH AND STATE IN CONTEMPORARY EUROPE: THE CHIMERA OF NEUTRALITY* 7 (John T.S. Madeley & Zsolt Enyedi eds., 2003) (quoting STEPHEN V. MONSMA & J. CHRISTOPHER SOPER, *THE CHALLENGE OF PLURALISM* 10 (1997)) (internal quotation marks omitted).

“weasel words,”<sup>19</sup> a phrase inspired by an old Norse myth that attributes to the weasel an ability to suck out the contents of an egg without breaking its shell. Hayek noted the possibility of emptying words of their content, or of stripping them of their meaning, so that only the signifier remains.<sup>20</sup> This is similar to what has happened to the word *laicidad*.<sup>21</sup> The reasons for this perversion are explained below.

In France, for example, there have been attempts to clarify the terminology, resulting in the use of *laïcité du combat*<sup>22</sup> to designate the outdated, intolerant French secularism,<sup>23</sup> as opposed to *laïcité ouverte*,<sup>24</sup> which is what is sought in France today,<sup>25</sup> and on which the Canadian system is predicated.<sup>26</sup> Turkey, meanwhile, would define a form of *laicidad* that acts as a breakwater against the rise of Islamic fundamentalism.<sup>27</sup> In Italy, faced with the difficulty of applying an old-fashioned French-style *laicidad*, in academic circles it has been deemed necessary to undertake the task of *ripensare la laicità*.<sup>28</sup> In short, in light of this polysemy and its concomitant political confusion, it has been suggested that *laicidad* might simply end up becoming a “useless legal concept.”<sup>29</sup>

19. THE CAMBRIDGE COMPANION TO HAYEK 221 (Edward Feser ed., 2006).

20. *Id.*

21. Luis Prieto Sanchís, *Religión y Política (A Propósito del Estado Laico)*, 53 PERSONA Y DERECHO 113, 115 (2005).

22. *Laïcité du combat* means an aggressive or hostile detachment of the State from religion or beliefs, particularly from institutional religion and more specifically from the Catholic Church.

23. Martin Rhonheimer, *Democrazia Moderna, Stato Laico e Missione Spirituale della Chiesa: Spunti per una Concezione Politica “Sana della Laicità”*, in LAICITÀ: LA RICERCA DELL’UNIVERSALE NELLE DIFFERENZE 101 (Pierpaolo Donati ed., 2008).

24. Fernando Rey, *La Laicidad ‘A la Francesa’, ¿Modelo o Excepción?*, 53 PERSONA Y DERECHO 385, 395 (2005). *Laïcité ouverte* means a separation between church and state which admits some kind of relation between institutional religion or belief and the state, or recognizes a role of religion in public life, in the daily life of a given country, in its traditions, etc.

25. Miguel Angel Jurdado, *El Sentido Moderno del Laicismo Francés*, 104 NUEVA REVISTA DE POLÍTICA, CULTURA Y ARTE 66 (Marzo–Abril 2006).

26. Gérard Bouchard & Charles Taylor, Commission de Consultation sur les Pratiques d’Accommodement Reliées aux Différences Culturelles, BUILDING THE FUTURE : FINAL REPORT OF THE COMMISSION, 2008, available at <http://www.accommodements.qc.ca/index-en.html>; María Elósegui Itxaso, *El Concepto De Laicidad Abierta En El Informe Bouchard-Taylor Para Québec*, 23 REVISTA GENERAL DE DERECHO CANÓNICO Y DERECHO ECLESIASTICO DEL ESTADO (2010).

27. Rey, *supra* note 24, at 403.

28. See RAFAEL NAVARRO-VALLS, *Los Estados Frente a la Iglesia*, 9 ANUARIO DE DERECHO ECLESIASTICO DEL ESTADO 17, 29–34 (1993). *Ripensare la laicità* might mean a proposal of an academic legal debate for revisiting the real meaning and practical effect of laicism in our welfare states and in our postmodern, pluralistic societies.

29. Giuseppe Dalla Torre, *Laicità: Un Concetto Giuridicamente Inutile*, 53 PERSONA Y

Turning to another very different perspective, represented in the concept referred to as *laicidad positiva*, the matter is no clearer. The concept of *laicidad positiva* was employed by Pope Benedict XVI, when he asserted in a letter to Senator Marcello Pera (taking up, in part, the terminology of Pius XII) that “a healthy laical State should also logically leave room in its legislation for this fundamental dimension of the human soul. This is, in fact, a ‘*laicidad positiva*,’ guaranteeing each citizen the right to live his own religious faith with genuine freedom, including in the public sphere.”<sup>30</sup> This same notion of *laicidad positiva* was also employed by the former Spanish congressman Victorino Mayoral in a newspaper article<sup>31</sup> and in the *Manifiesto en Defensa de una Sociedad Laica* of the Fundación Cives (a Spanish secularist organization), which asserted: “The *laicidad positiva* of the State, recognized in Article 16.3, is presented in this context as the guarantee of freedom of conscience for all, of the equality of all before the law, of non-discrimination for religious reasons and of the neutrality of the State in relation to the religious and moral beliefs of its citizens.”<sup>32</sup> It is highly probable that neither Benedict XVI nor Mayoral and the Fundación Cives meant exactly the same thing when employing this term.

Following Dalla Torre, it is apparent that there are various ways of approaching the concept of *laicidad*, some of which are even mutually incompatible.<sup>33</sup> In some cases, *laicidad* is equivalent to secularism, a position that is not so much legal as it is ideological. Secularism is conceived of as a confrontation between religion (a kind of fable, myth, or superstition) and reason (as represented by empirical science and technology with its unyielding advancements and benefits to humanity); between dogma (whose formulations are indisputable and unchangeable) and relativism; or even between traditionalism and innovation. Another means of approaching *laicidad* is to view it as an equivalent of non-confessionalism, in the sense that it refers to the state having no official religion under its protection. Equally easy to assimilate into the concept

---

DERECHO 139 (2005).

30. Letter from Pope Benedict XVI to Senator Marcello Pera, Presidente Honorario de la Fundación Magna Carta on the Norcia Conference “Libertad y Laicidad,” (Oct. 15, 2005), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/letters/2005/documents/hf\\_ben-xvi\\_let\\_20051015\\_senatore-pera\\_it.html](http://www.vatican.va/holy_father/benedict_xvi/letters/2005/documents/hf_ben-xvi_let_20051015_senatore-pera_it.html).

31. Vitorino Mayoral, *Religión o Política*, EL PERIÓDICO (EXTREMADURA), Mar. 21, 2007, available at <http://www.elperiodicoextremadura.com/noticias/noticia.asp?pkid=292556>.

32. *Manifiesto en defensa de una sociedad laica*, FUNDACION CIVES, <http://www.fundacioncives.org/index.php?id=121> (last visited Aug. 27, 2011).

33. Dalla Torre, *supra* note 29, at 142–45.

of *laicidad* is that of a state rejecting submission to laws foreign to it, such as human rights, or spurning laws above it, such as natural law. Under this formulation, a kind of ethical positivism gives rise to the ethical state—more or less totalitarian, a producer of social values that must be shared.

In light of so many possible definitions, it is reasonable to conclude that “*laicidad* as such, as a valid universal concept, does not exist, and its meaning and, therefore, its consequences will be different depending even on the political party holding government power at any given moment.”<sup>34</sup>

Considering the factors discussed above, would it not be an appealing alternative to adopt the concept of religious neutrality? There are reasons for responding to this question in both the affirmative and the negative. Before answering either way, a few preliminary reflections are needed.

### III. NEUTRALITY AND LAW

As mentioned above, neutrality generally designates the quality or attitude of one who maintains a distance from parties in a conflict. A closer examination reveals two modes of expressing neutrality, under which practically all others can be classified. The first of these relates to the attitude or intellectual position of political authorities; a distinction is made here between *negative* or indifferent neutrality and *positive* or active neutrality. The second mode of expression relates, in a sense, to equality of treatment: here, there is a distinction between neutrality of *purpose*, which is impartiality with regard to specific factors or qualities in decision making, and neutrality of *outcome*, which is guaranteeing that neutral decision making does not produce unequal results because of those factors or qualities.<sup>35</sup>

As noted earlier, in legal terms neutrality first emerged as a concept in international law. Legal dictionaries and encyclopedias usually restrict the concept of neutrality to the field of conflicts between states. Thus,

---

34. Isidoro Martín Sánchez & Gloria Moreno Botella, *Laicidad y Enseñanza: Problemas Actuales*, in SECULARIZACIÓN Y LAICIDAD EN LA EXPERIENCIA DEMOCRÁTICA MODERNA: JORNADAS DE ESTUDIO, OÑATI 239 (Juan Goti Ordeñana, San Sebastián, & Librería Carmelo eds., 1996).

35. Alfonso Ruiz Miguel, *Para una Interpretación Laica de la Constitución*, in ESTADO Y RELIGIÓN, IN LA EUROPA DEL SIGLO XXI: ACTAS DE LAS XIII JORNADAS DE LA ASOCIACIÓN DE LETRADOS DEL TRIBUNAL CONSTITUCIONAL 147, 167 (Centro de Estudios Políticos y Constitucionales & Tribunal Constitucional eds., 2008).

neutrality is “[t]he state of a nation which takes no part between two or more other nations at war,”<sup>36</sup> which implies at least some degree of “abstention” and “impartiality,”<sup>37</sup> referring mainly to a series of rules governing relations between belligerent states and neutral states (those not involved in the conflict). These rules belong to that particular sort of international law that is traditionally called “law of war.” But it is noteworthy that in times closer to the present the term “neutrality” has been used in different and more blurred contexts, where it is less connected, or at least diminished in its characteristic connection, with the international law of war. In this sense we speak of “permanent neutrality” of states, territories, or areas, although the concept is more often designated by the term “neutralization.” In this sense, the condition of neutrality does not arise merely as certain conflicts arise, but covers any possible future conflict. In addition, permanent neutrality and the legal status of its effects may be spoken of even in times of peace.<sup>38</sup>

In principle, neutrality refers to a position that a state voluntarily decides to adopt in response to a conflict arising between other sovereign entities that are its equals.<sup>39</sup> In the neutrality of international law, significant consequences can be identified for relations between the state and religion. First of all, neutrality in international law implies the existence of a conflict. But relations between religious groups in a country do not necessarily need to be conflictive unless we intentionally consider them as such.

[T]here is no confrontation or conflict here; there are only people engaged in the task of their own realization as such. And on that task the State is not called upon to make pronouncements, but to make it possible . . . by removing obstacles, eliminating coercion and guaranteeing its achievement within the scope of its powers.<sup>40</sup>

Nor is there any reason that relations between religions and the state should be conflicting. In this respect, a position which holds that religious movements—the “strong religions”<sup>41</sup>—are seeking to *seize*

---

36. BLACK'S LAW DICTIONARY WITH PRONUNCIATIONS (Henry C. Black et al. eds., 6th ed. 1991).

37. Alejandro Herrero Rubio, *Neutralidad*, in NUEVA ENCICLOPEDIA JURÍDICA 330 (Francisco Seix ed., 1982).

38. Luigi Sico, *Neutralità*, in 28 ENCICLOPEDIA DEL DIRITTO 164, 164–65 (1978).

39. Manuel Ossorio et al., *Neutralidad*, in DICCIONARIO DE CIENCIAS JURÍDICAS POLÍTICAS Y SOCIALES 644 (28th ed. 2001).

40. Ángel Marzoa, *No Confesionalidad e Indiferentismo en Materia Religiosa (Dos Términos no Implicados)*, 5 ANUARIO DE DERECHO ECLESIASTICO DEL ESTADO 103, 106 (1989).

41. Andrés Sajó, *Constitutionalism and Secularism: The Need for Public Reason*, 30

*power* cannot be said to be entirely neutral. In these cases, the state is not a third neutral party but is merely another party to the conflict and must defend itself.

Secondly, the concept of neutrality in this area appears to be broader than what can be inferred from mere abstention. In principle, the neutrality of a state in a military conflict between two other states means that it will keep out of the conflict, neither providing assistance to nor impeding the action of either side. More specifically, it is understood that a primary duty of the neutral state consists of not providing the adversaries with any material that could be used to pursue their hostilities.<sup>42</sup> However, total inaction—neutrality of impact<sup>43</sup>—is not the only form of neutrality.<sup>44</sup> A state could be equally neutral by doing all possible to assist or impede both sides in the conflict to an equal degree.<sup>45</sup> At this point, the classical considerations related to the principle of equality come into play with all their intensity. Does neutrality require that trade relations with the parties to the conflict be quantitatively equal? If one of the adversaries is a country with a population of one million, while the other is a country of fifteen million, would neutrality be understood to mean providing each country with one ton of food, regardless of their differing demographics? A real example of neutrality in war may serve to illustrate the point: can a consistently neutral state, such as Switzerland, provide medicine to the injured and/or sick of a country at war? If it does, should it provide the same aid to the country on the other side of the conflict? If it fails to do so, does it abandon its neutrality?<sup>46</sup>

Now let us turn to the legal relations of the state with religion. In this context, it is virtually impossible to sustain “first generation” neutrality—*hands-off neutrality*<sup>47</sup> or negative neutrality<sup>48</sup>—and much

---

CARDOZO L. REV. 2401, 2402 (2009).

42. James Upcher, *Neutrality*, in THE NEW OXFORD COMPANION TO LAW 832 (Peter Cane & Joanne Conaghan eds., 2008), available at <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t287.e1527> (subscription required).

43. Alexa Zellentin, *Neutrality as a Twofold Concept*, 4 LES ATELIERS DE L'ETHIQUE 159, 162–166 (2009), available at [http://www.creum.umontreal.ca/IMG/pdf\\_13\\_Zellentin.pdf](http://www.creum.umontreal.ca/IMG/pdf_13_Zellentin.pdf).

44. Peter Jones, *The Ideal of the Neutral State*, in LIBERAL NEUTRALITY 9, 18 (Robert E. Goodin & Andrew Reeve eds., 1989).

45. See Alan Montefiore, *Preliminaries*, in NEUTRALITY AND IMPARTIALITY: THE UNIVERSITY AND POLITICAL COMMITMENT 5 (Alan Montefiore ed., 1975).

46. See RONALD F. THIEMANN, RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY 63 (1996).

47. Zellentin, *supra* note 43, at 160.

48. See Jones, *supra* note 44, at 18.

less a neutrality of total indifference or distance, given the involvement of and active role played by the interventionist state.<sup>49</sup>

“Negative” neutrality is far from being the only form in which the phenomenon presents itself. A clear and unadulterated “take” on the delimitation of the principle of neutrality would perhaps be just as desirable as it is difficult to apply.<sup>50</sup> This is because neutrality of inaction has been overtaken by other forms of neutrality that are just as prevalent. To illustrate the “advance” or reformulation of neutrality, reference is often made to the role of the referee in a sports match or the judge in a criminal proceeding.<sup>51</sup> A neutral referee is not exactly a person who remains completely out of the game; the referee fulfills a specific role within it, the role of interpreting and applying the rules of the game. The neutral referee applies the rules impartially, without applying greater severity to one team over the other, helping or hindering both sides equally. However, the rules that the referee makes use of have not been created to prevent any kind of inequality, but only certain practices that are deemed contrary to *fair play*. On this point, there is a certain parallel with the activity of the state, which intervenes as a referee in the specific legal terrain occupied by religious bodies in the different European nations.<sup>52</sup> Nevertheless, the neutral referee does not create the rules or set the limits; he simply applies the rules created by others.

Apart from the figure of the referee, the image of the neutral judge in a criminal proceeding has also been employed. This analogy is applied in order to emphasize that the chances of the accused being convicted or

---

49. See THIEMANN, *supra* note 46, at 63–64.

50. “Neutrality (or non-confessionalism, or secularism, or whatever you wish to call it) is either strictly applied or is not true neutrality, but favoring of one, another or several religious options, always to the detriment of others, especially those at odds with the positive or widely accepted religions. The alternative between neutrality and confusion is thus just as unbalanced as its correlate between conflict and collaboration.” Alfonso Ruiz Miguel, *La Neutralidad, por Activa y por Pasiva*, in LAICISMO Y CONSTITUCIÓN 161–62 (María Isabel de la Iglesia ed., 2009).

51. Jones, *supra* note 44, at 19–20; Marzoa, *supra* note 40, at 106.

52. For instance, Silvio Ferrari has remarked:

This common European model appears to be defined by the following coordinates: a) The state is neutral (impartial) towards the various individual religious subjects. b) A religious sub-sector is singled out within the public sector. This may be understood as a “playing field” or “protected area.” Inside it the various collective religious subjects (churches, denominations and religious communities) are free to act in conditions of substantial advantage compared to those collective subjects that are not religious. c) The state has the right to intervene in this area only to see that the players respect the rules of the game and the boundaries of the playing field.

Silvio Ferrari, *The New Wine and the Old Cask. Tolerance, Religion and the Law in Contemporary Europe*, 10 *RATIO JURIS* 75, 77–78 (1997) (citations omitted).

absolved do not depend—must not depend—on factors such as race, creed, sex, or ideology. Here, once again, neutrality is not a matter of indifference. It requires the positive intervention of the judge to purge the process of any prejudice, thereby “neutralizing” any influence in the result that might otherwise be imposed by a range of external factors, which are closely related to the *suspect classes* that we refer to in constitutional law.

Both the referee of the match and the judge of the criminal proceeding reveal once again that the neutrality of indifference, of total abstention, is not viable because of the very features that frame the dynamic of the religious factor in a social and democratic state of law. In other words, alongside negative neutrality exists a positive neutrality that requires a certain degree of involvement of the state in the hypothetical social confrontation.

#### IV. NEUTRALITY AND IDEOLOGICAL LIBERALISM

The emergence of the principle of neutrality as a requirement of state action was a product of ideological liberalism. Defining liberalism proves to be an almost impossible task as this movement has developed over a long period of time in the West and has many variants. Some of its more consistent features are the defense of individualism and democracy, the insistence on limitations on the power of the state, the social contract theory, capitalism as an economic system, and freedom understood as individual autonomy.<sup>53</sup>

From the outset, liberal philosophers themselves have been aware of the controversial and difficult nature of the term neutrality: “[T]he term *neutrality* is unfortunate; some of its connotations are highly misleading, others suggest altogether impracticable principles.”<sup>54</sup> Neutrality as a liberal category is found in the work of the so-called neoliberals of the twentieth century<sup>55</sup> and, more specifically, of thinkers such as John Rawls, Robert Nozick, Ronald Dworkin, and Bruce Ackerman.<sup>56</sup>

---

53. Nicola Matteucci, *Liberalismo*, in 2 DICCIONARIO DE POLÍTICA 875, 875–897 (Norberto Bobbio, Nicola Matteucci, & Gianfranco Pasquino eds., 1991).

54. JOHN RAWLS, *POLITICAL LIBERALISM* 191 (2005).

55. MARIANO FAZIO, *HISTORIA DE LAS IDEAS CONTEMPORÁNEAS: UNA LECTURA DEL PROCESO DE SECULARIZACIÓN 183–188* (2006).

56. “[A] state or government . . . must be *neutral* between its citizens.” ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 33 (1974). “No reason is a good reason if it requires the power holder to assert: (a) that his conception of the good is better than that asserted by his fellow citizens, or (b) that, regardless of his conception of the good, he is intrinsically superior to one or more of his fellow citizens.” BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 11 (1981).

Although there are certain observable differences in the thinking of these authors,<sup>57</sup> the common feature is the description of the liberal and neutral state as one that does not impose a conception of good or of the good life upon its citizens, but that allows them to follow their own conception of good in their own way.<sup>58</sup> The state, then, is neutral insofar as it does not interfere in the individual conceptions of the good life, however lofty or modest they may be. This attitude of noninterference is generally described as Dworkin explains it: each person follows a more or less complex conception of what gives life meaning. The academic researcher who values the contemplative life has a conception of life meaning, just as the citizen who watches a lot of television, drinks a lot of beer, and says, “This is the life!” as he sits back in his armchair, even if he fails to defend his thinking in the sophisticated manner of the academic researcher.<sup>59</sup> In any case, the state maintains its hands-off approach with regard to the different methods of configuring the good life, including the religious method. Dworkin goes so far as to argue that these are areas of human life that are duly protected by the rights to freedom. What is curious is that contemporary states—perhaps with the occasional exception—are more inclined to subsidize and support research, literature, or music than beer-drinking contests or world records for the longest time spent in front of a television. This type of contemporary state would not be neutral. Indeed, from this same perspective, the Spanish state itself is not neutral, as its constitution recognizes culture, research, the environment, and national heritage as constitutional values (Spanish Constitution articles 44 to 46) but states authoritatively that it does not grant this status to religion or beliefs.<sup>60</sup>

It would certainly be easy from any point of view—including a liberal perspective—to confuse noninterference in individuals’ conceptions of ethics or the good life with ethical neutrality on the part

---

57. Jones, *supra* note 44, at 10.

58. *Id.* at 11.

59. RONALD DWORKIN, A MATTER OF PRINCIPLE 191 (1985).

60. Dionisio Llamazares Fernández, *Libertad de Conciencia y Laicidad en la Constitución Española de 1978*, in JORNADAS JURÍDICAS SOBRE LIBERTAD RELIGIOSA EN ESPAÑA 119–22 (Juan Ferreiro Galguera ed., 2008). However, it is rather odd that article 16.3 of the Constitution should include the sentence: “The public authorities shall take into account the religious beliefs of Spanish society . . .” wherein the direct complement is “the religious beliefs” and not “the freedom of religion.” LA CONSTITUCIÓN ESPAÑOLA Dec. 6, 1978, art. 16. And it is more surprising still to find that when the Spanish Constitution mentions culture and research, it does so with a sentence in which both constitutional values also appear in the same syntactic position of direct complement, with just one tiny and significant difference: the state cannot “promote” religion as such (confessionalism, multi-confessionalism, pluri-confessionalism) but merely “take [it] into account.”

of the state. But it is undeniable that the state is not ethically neutral from the moment that, for example, it establishes a criminal code. It is claimed that the state declares and condemns criminal behavior, but that it cannot—and must not—declare that there is behavior that is sinful. Curiously, crimes and sins coincide in more than a few instances. It is also claimed that the strength of the ethics of the state, admitting not only the possibility but also the inevitable existence thereof,<sup>61</sup> consists of the fact that they lack any transcendent association and are held by free, autonomous men, as opposed to the heteronomy and slavery of religious morality.<sup>62</sup> This is nothing less than reductionism because secular morality can be followed with the same degree of closed-mindedness as religious morality, while religious morality can be experienced with the same sense of liberation as secular morality. The question, in my view, is not one of patterns of behavior, but of the personality of specific individuals.

The general categorization of liberal neutrality can, in turn, be divided into four more specific notions<sup>63</sup>: rights neutrality, epistemological neutrality, political neutrality, and legal neutrality. *Rights* neutrality refers to the demarcation of those areas of human experience and activity that fall outside the scope of the state. Such areas are not subject to the processes of deliberation or debate, compromise or negotiation that make up the political life of a liberal state.<sup>64</sup> Meanwhile, *epistemological* neutrality, which is closely related to rights neutrality, refers to the acceptable arguments for demarcating the limitations of admissible policy. Epistemological neutrality represents the idea that liberal theory must be neutral not only in relation to the rights it recognizes and protects, or with respect to the structures that it recommends for political life, but also in relation to the intellectual foundations that underlie those structures and rights. On the other hand, *political* neutrality is concerned with institutional agreements and arrangements. It means that the legislative procedures that establish public policies must guarantee that political power is sufficiently spread out, even, and shared so as to prevent any group from dominating the

---

61. Llamazares Fernández, *supra* note 60, at 134.

62. PIERPAOLO DONATI, LAICITÀ: LA RICERCA DELL'UNIVERSALE NELLE DIFFERENZE 11–12 (2008).

63. ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE 72–77 (1993). Other distinctions related to neutrality include positive and negative neutrality (as discussed earlier), but also neutrality of impact, neutrality as “equality of opportunity” and neutrality of justification, or neutrality in the reasons justifying certain political choices. Zellentin, *supra* note 43, at 165–66.

64. Jones, *supra* note 44, at 18.

political scene and imposing its moral view on society as a whole. Finally, *legal* neutrality refers to judicial processes. In this case, liberal political thought would argue that judges cannot reconsider what the political process has already resolved. If legislators have promulgated a particular law, it must be interpreted and applied neutrally, i.e., independently of the influence of any new evaluation of conflicting points of view.

Nevertheless, liberal neutrality is not—nor can it be—a perspective that defends the neutrality of, or the absence of values in, legislation in relation to all moral values, whatever they may be. Rather, it must be acknowledged that neutrality is itself a value, an ethical option, a normative position, a perspective on what legislators and officials should and should not do, a philosophical-political movement that sustains that it is wrong for certain ideas to enter the political sphere,<sup>65</sup> and that it is right for them to be kept out. “[T]he propositions of authors such as Rawls, Dworkin or Kymlicka respond, point for point, to the approach of liberal ideologies which . . . are no less comprehensive than the metaphysical or religious conceptions they exclude.”<sup>66</sup> Liberal neutrality does not achieve epistemological neutrality because it cannot subject its own suppositions to that same rule of neutrality. In other words, it cannot neutrally consider the so-called “primary goods” of health, physical integrity, wealth, personal dignity, etc. The notion or conception of the liberal good life presupposes an individualist narrative regarding the way in which people generate or adopt lifestyles. The emphasis is placed on an abstract individual who plans his own life and who chooses what is best for him, overlooking at least two issues: first, that the individual shapes his worldview and his lifestyle through contact with society, which inevitably places spatial-temporal limitations on his abstract liberty as true autonomy does not exist; and second, that the structure of liberal neutrality itself generates inequality of results, as it makes certain lifestyle choices more advantageous than others. Why? There are several reasons, the most prominent of which are discussed below.

First of all, in the system of liberal neutrality individual options that are consistent with liberal principles have better chances of thriving than lifestyle options opposed to those principles. In other words, in the same liberal social and state space, morally non-liberal options coexist (“I

---

65. See Jeremy Waldron, *Legislation and Moral Neutrality*, in LIBERAL NEUTRALITY 72 (Robert E. Goodwin & Andrew Reeve eds., 1989).

66. ALEJANDRO LLANO, EL CARÁCTER RELACIONAL DE LOS VALORES CÍVICOS 38 (2004) (translation of quote).

believe that there is only one good life and it would be best if everyone lived that type of life”) with morally liberal options (“I believe that there is no good life that is valid for everyone, and it is best for everyone to live the kind of life they consider good”). The second of these options has an advantage over the first in the sense that—by pure coincidence—it happens to be the official view of the state. Consider this comparison: it is well known that a confessional state may recognize religious freedom on a level playing field, but it is also true that significant state confessionalism generates inequalities that may go as far as being discriminatory. Similarly, a neutral state generates a supposition that favors certain ways of life—those that are liberal. Liberal neutrality is more inclined to favor secular or laical world views over religious ones.<sup>67</sup>

Secondly, it is worth reflecting on some of the implications of neutrality from an economic perspective of the “market of ideas and beliefs.”<sup>68</sup> If a large number of individuals or citizens end up at least nominally coinciding in the type of good life they choose, it is more than likely that certain disruptions will occur. The effect of an economy of scale could make this popular choice “cheaper” or more accessible, and this easier access might make it more appealing to the masses. Conversely, a less popular form of good life would prove less accessible, more “expensive” to pursue. On the other hand, the “suppliers” of more popular good life options may “raise” the cost of achieving the goal of consumer satisfaction. As a result, in either case, the pursuit of certain good life options would be more difficult than the pursuit of others. And then there is the question of whether certain good life options produce a greater level of satisfaction than others in the citizen or individual, which require a greater “investment” to achieve the same degree of satisfaction. By way of example: the good life of the contemplative monk is cheaper in economic terms than the good life of the collector of the works of Diego Velázquez. This may even be true not only for the question of choice in general, but to the actual specific enjoyment of fundamental rights. Thus, for example, freedom of education may be satisfied more cheaply in the case of parents who choose state-run schools than those who choose alternative private schools. However, curiously, for the Spanish Constitutional Court there is no appreciable difference: freedom of education consists basically in the freedom of choice, regardless of

---

67. See Madeley, *supra* note 18, at 8.

68. See Jones, *supra* note 44, at 14–18.

what the financial cost of that choice might be.<sup>69</sup> If in response to this inequality of costs, satisfactions, or results the state were to intervene to ensure the equal promotion of the different conceptions of good by means of positive action, would it be abandoning its position of neutrality? For some liberals the answer is yes, because the spheres of freedom—immunity from coercion—mark the limits of action for a neutral state. This is known as neutrality of purpose. But for others, such intervention is not only possible but also forms part of the notion of neutrality itself in order to ensure that all conceptions of good are equal. This is known as neutrality of outcome. In any case, returning to the previous example, it would seem undeniable that if the state finances private schools, the lack of neutrality would consist of financing only secular private schools and not religious schools.<sup>70</sup>

Thirdly, liberal neutrality does not guarantee equal treatment of citizens. It does so only when those covered by the principle have accepted liberal standards of the good life. But in such cases, neutrality is only apparent. In this regard, it is worth recalling that many of the most significant religious persecutions of the last two centuries were carried out under the pretext of laws that were formally general and neutral.<sup>71</sup>

Liberalism has almost imperceptibly introduced the illusion of neutral judgment and decisions, i.e., political solutions that are the product of a rational process unhindered by any particular world view. According to liberalism, we can and must separate religious judgments and conclusions from secular ones. And, therefore, secular world views are elevated to the level of political and legal regulation simply because it is believed that they are of a different nature. Nevertheless,

---

69. Constitutional Court Decision 5/1981, February 13: “Also arising from the principle of freedom of education is the right of parents to choose whatever religious and moral instruction that they may desire for their children (art. 27.3).” (Court Consideration no. 7). “The ideological neutrality of teaching in public education institutions regulated under the L.O.E.C.E. imposes an obligation upon teachers employed in those institutions to refrain from any form of ideological indoctrination, which is the only attitude compatible with the respect for the freedom of the families who, by free decision *or forced by circumstances*, have not chosen education institutions with a specific, explicit ideological orientation.” (Court Consideration no. 9) (emphasis added).

70. See STEPHEN CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 200 (1993).

71. W. Cole Durham, *Perspectives On Religious Liberty: A Comparative Framework*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES* 1, 33 (J.D. van der Vyver & John Witte eds., 1996). This may well be the case of article 26 of the 1931 Spanish Republican Constitution (“Quedan disueltas aquellas Ordenes religiosas que estatutariamente impongan, además de los tres votos canónicos, otro especial de obediencia a autoridad distinta de la legítima del Estado”) or even the case of the regulation contested in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*. See 508 U.S. 520 (1993).

[n]either the need to make religious decisions, nor the extreme difficulty in doing so, can be avoided. And these decisions, in one fashion or another, will have to be enforced, making perfectly clear that what we are dealing with is not apples and oranges (secular judgments and religious judgments) but apples and apples (secular judgments that are at the same time religious).<sup>72</sup>

It is not for nothing that when, for example, the principle of neutrality is established in German law, it is understood that generic and abstract neutrality does not prevent or prohibit the possible coincidence of specific moral values in the German body of law with those sustained by religious groups.<sup>73</sup> This has ultimately led to the postulation of an *overlapping consensus*,<sup>74</sup> which may benefit epistemologically<sup>75</sup> from contributions by citizens with religious beliefs.<sup>76</sup>

#### V. NEUTRALITY AS A PRINCIPLE AND STATE-RELIGION RELATIONS

Based on the reflections above, it would be reasonable to conclude that there is simply no such thing as a neutral state. Neutrality cannot be the essence of the state, but rather a requirement for its action in certain especially sensitive spheres of societal life. In general, it could be said that in relation to religious beliefs

[t]he neutrality of the secular State applies rules of political justice to religion or the religions practiced by the citizens of a given society. These rules are based on criteria of freedom, equality and procedural fairness. From this political perspective, religion is accepted as part of the reality and the cultural heritage of a society or nation and so, logically, religious praxis and its facilitation come to form part of the

---

72. Douglas Farrow, *Three Meanings of Secular*, FIRST THINGS, May 2003, at 22.

73. GERHARD ROBBERS, RELIGION AND LAW IN GERMANY 87 (2010).

74. “[A] consensus in which it is affirmed by the opposing religious, philosophical and moral doctrines likely to thrive over generations in a more or less just constitutional democracy, where the criterion of justice is that political conception itself.” John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 1 (1987).

75. “The ultimate solution, however, lies in another direction. What is needed is not a requirement that the religiously devout choose a form of dialogue that liberalism accepts, but that liberalism develop a politics that accepts whatever form of dialogue a member of the public offers. Epistemic diversity, like diversity of other kinds, should be cherished, not ignored, and certainly not abolished. What is needed, then, is a willingness to listen, not because the speaker has the right voice but because the speaker has the right to speak.” CARTER, *supra* note 70, at 230.

76. MARTIN RHONHEIMER, CRISTIANISMO Y LAICIDAD: HISTORIA Y ACTUALIDAD DE UNA RELACIÓN COMPLEJA 187 (2009).

common good.<sup>77</sup>

The remainder of this section briefly examines the application of neutrality in legal relations between the state and religion in certain legal frameworks in the West.

In the United States, the principle of neutrality as a guideline in state-religion relations was formulated prior to or simultaneous with the generation of the principle in liberal political theory.<sup>78</sup> Perhaps the first application of the idea of religious neutrality was the case law on intra-church disputes regarding the assets of a church or the cases involving disputes between factions in a religious community. In these cases, rather than resolving the conflict based on church doctrine (which would require the state somehow to become an “arbitrator of theological interpretation”), the principles of the law of the state are asserted—the norms of common law—as “neutral” elements for the resolution of the conflict.<sup>79</sup>

The definition of religious neutrality in U.S. law was formally established by Phillip B. Kurland in 1961.<sup>80</sup> According to Kurland, the religious clauses of the First Amendment in the Bill of Rights<sup>81</sup> should be interpreted on the basis of a single precept: the state cannot use religion as a criterion for action or omission because these clauses, read as a whole, forbid both the classification of individuals on the basis of their religion and the concession of benefices or offices.<sup>82</sup> This *formal* neutrality is appealing for its simplicity and impartiality and is totally plausible until, as Douglas Laycock points out, we stop to ponder its consequences—some of which produce disconcerting results that are firmly counterintuitive.<sup>83</sup> Thus, for example, from the “neutral”

---

77. *Id.* at 134.

78. A general account of the neutrality principle in state-religion relations may be found in W. COLE DURHAM & ROBERT SMITH, *RELIGIOUS ORGANIZATIONS AND THE LAW* §§ 2:6, 2:17, 2:93 (2011).

79. See MICHAEL S. ARIENS & ROBERT A. DESTRO, *RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY* 500–17 (1996); JOSE IGNACIO RUBIO LOPEZ, *LA PRIMERA DE LAS LIBERTADES: LA LIBERTAD RELIGIOSA EN LOS ESTADOS UNIDOS DURANTE LA CORTE REHNQUIST* (1986–2005), at 166–68 (2006); see also *Jones v. Wolf*, 443 U.S. 595 (1979); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440 (1969).

80. See Phillip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961).

81. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I.

82. See Kurland, *supra* note 80.

83. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999–1000 (1990).

application of the *National Prohibition Act* of 1919 (also known as the *Volstead Act* or the “dry law”)<sup>84</sup> would follow the impossibility of celebrating a sacrament of the Catholic Church, of certain Protestant ceremonies, and of the Jewish Seder. And there are other situations where a law fully justified from a secular perspective—and coinciding only accidentally with a precept of a specific religion—leads to the prohibition of the exercise of some practice of a religious nature.<sup>85</sup>

Based on this potential for unwanted results, Laycock himself proposes a different form of neutrality, which he calls *substantive neutrality*, according to which the constitutional mandate requires the state to act in a way that neither promotes nor dissuades religious or nonreligious belief, practice, or observance.<sup>86</sup> When neutrality is defined this way, some degree of consideration can be given to situations where an apparently neutral piece of legislation may harm or benefit a particular religion or belief.

From the distinction between formal and substantial neutrality a conclusion may be drawn (recently addressed by a Spanish scholar<sup>87</sup>) which presents a paradox: not every violation of strict neutrality is an assault on religious freedom; but, at the same time, not every violation of religious freedom is simultaneously an assault on neutrality. But if we focus on the *actual* practice of neutrality, Laycock notes a third classification, which he calls *disaggregated neutrality*, where the importance of a particular factor at play takes on a preponderant value in decisions that are *far from neutral*.<sup>88</sup> As an example, Laycock refers to the ruling of the U.S. Supreme Court in *Aguilar v. Felton*.<sup>89</sup> This ruling invalidates a federal school support program for children with few economic resources in religious schools. In itself, the program is neutral, as it provides assistance to disadvantaged children (neutrality of

84. See 41 Stat. 305–23 (1919).

85. Waldron, *supra* note 65, at 40. Similarly, the acknowledgment of Sunday as a day of rest conforms to neutral criteria. S.T.C. Feb. 13, 1985, No. 19 (Spain) (Court Consideration 4).

86. Laycock, *supra* note 83, at 1001.

87. Zoila Combalía Solís, *Relación entre laicidad del Estado y libertad religiosa en la jurisprudencia reciente del Tribunal Europeo de Derechos Humanos*, 24 REVISTA GENERAL DE DERECHO CANÓNICO Y DERECHO ECLESIASTICO DEL ESTADO 1 (2010).

88. For instance, Laycock writes:

I call this disaggregated neutrality, because it looks only at one side of the balance of advancing or inhibiting. Because absolute zero is not achievable, it is always possible to find some effect of advancing or inhibiting religion. Thus, if you look only at one side of the balance, you can always find a constitutional violation.

Laycock, *supra* note 83, at 1007.

89. 473 U.S. 402 (1985).

outcome) regardless of their beliefs (neutrality of purpose). However, the Supreme Court viewed the program as contrary to the neutrality of the state (formal neutrality prevailing in the case) as it implied a penetrating and permanent state presence in the religious school receiving the assistance.<sup>90</sup>

Incidentally, this argument of “disaggregated neutrality” might also be identified in the decision of the European Court of Human Rights in the case of *Leyla Sahin v. Turkey*, where neutral treatment of the dress of university students gave way to a partial view of the problem based on the demands arising from the principle of secularism in the Turkish legal and social context.<sup>91</sup> Thus we have disaggregated neutrality to the extent that one of the factors at play, either the *promotion* of a belief or the *dissuasion* or undermining of a belief, assumes decisive force. These are cases where, given that any action or omission of the state necessarily has short- or long-term consequences, it appears impossible to achieve absolute zero. If the state acts, it is providing support and therefore not neutral; but if it does not act, its silence is not neutral either because it is interpreted as hostility toward religion.

We can find this same perception of disaggregated neutrality in the case *Lautsi v. Italy*.<sup>92</sup> As Joseph Weiler pointed out in his speech before the court on the appeal against the decision of the lower chamber, if the crucifix remains, the immediate message sent will be one of state support

---

90. The Court stated:

The critical elements of the entanglement proscribed in *Lemon* and *Meek* are thus present in this case. First, as noted above, the aid is provided in a pervasively sectarian environment. Second, because assistance is provided in the form of teachers, ongoing inspection is required to ensure the absence of a religious message. In short, the scope and duration of New York City’s Title I program would require a permanent and pervasive state presence in the sectarian schools receiving aid.

*Id.* at 412–13 (citations omitted).

91. In *Sahin*, the European Court of Human Rights remarked:

Having regard to the above background, it is the principle of secularism, as elucidated by the Constitutional Court . . . which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.

*Sahin v. Turkey*, Eur. Ct. H.R., No. 44774/98 (2005).

92. *Lautsi v. Italy*, Eur. Ct. H.R. No. 30814/06 (2009). The case was appealed and decided by the Grand Chamber in *Lautsi v. Italy*, 2011 Eur. Ct. H.R. No. 30814/06. According to this latter decision displaying crucifixes in Italian public schools classrooms is not contrary to the European Convention of Human Rights.

for a religion, of not being neutral, but ultimately, “[e]ven more alarming would be the situation if the crucifixes, always there, suddenly were removed.”<sup>93</sup> “Make no mistake,” adds the U.S. constitutionalist, “a State-mandated naked wall, as in France, may suggest to pupils that the State is taking an anti-religious attitude. . . . Likewise, a crucifix on the wall may be perceived as coercive. Again, it depends on the curriculum to contextualize and teach the children in the Italian class tolerance and pluralism.”<sup>94</sup>

It is, therefore, no surprise that, with a healthy dose of skepticism, the concept of neutrality in U.S. law may be classified as a “protean concept,” capable of changing form or content.<sup>95</sup> Thus we may speak of *strict* neutrality (neutrality of indifference), which is especially reflected in the prohibition of state aid to religion, or of *nondiscriminatory* neutrality (close to substantial neutrality), which hints at a degree of permeability of the public sphere in relation to religious beliefs, provided that the symbols and practices symbolically supported by the state are not sectarian or discriminatory. But there is also an argument for the possibility of *benevolent neutrality*.<sup>96</sup> This concept aims to broaden the framework within which religion might be relevant to include the adaptation of the public sphere to religious beliefs.<sup>97</sup> This position

93. Joseph Weiler, *Oral Intervention by Professor Weiler on Behalf of Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, Russia, and San Marino—States Who Intervene as Third Parties in the Lautsi Case Before the Grand Chamber of the European Court of Human Rights*, ILSUSSIDIARIO.NET (June 30, 2010), <http://www.ilsussidiario.net/News/Politics-Society/2010/7/1/EXCLUSIVE-Joseph-Weiler-How-I-defended-the-Crucifix-Before-the-European-Court-of-Human-Rights/96909/>.

94. *Id.*

95. THIEMANN, *supra* note 46, at 60.

96. The term is based on the case law of the U.S. Supreme Court, where it has been employed in decisions related to the application of the clause prohibiting the establishment of an official religion. *Walz v. Tax Comm’n of New York*, 397 U.S. 664 (1970). The Court, commenting on tax exemptions for places of worship said:

The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

*Id.* at 669; *see also* *Bd. of Educ. v. Grumet*, 512 U.S. 687, 743–44 (1994) (citing *Walz*, 397 U.S. at 669); *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987) (citing *Walz*, 397 U.S. at 669). On benevolent neutrality, strict separation and the legal restriction, see W. COLE DURHAM & ROBERT SMITH, *RELIGIOUS ORGANIZATIONS AND THE LAW* § 2:6 (2011).

97. *See* DURHAM & SMITH, *supra* note 96, § 2:6.

interprets strict neutrality and the “no aid to religion” policy as hostility toward religious beliefs, a policy contrary to the cultural history of the United States.<sup>98</sup> Benevolent neutrality proscribes only official confessionalism or state interference in religion.<sup>99</sup> According to this position, neutrality means impartiality of the state with regard to *all* religions, but not a distancing from religion.<sup>100</sup>

It is worth noting here that the term *benevolent neutrality* is also employed in German law as a concept associated with cooperation.<sup>101</sup> The structure of the German system of relations between the state and religion cites neutrality as one of its most important features.<sup>102</sup> Neutrality fulfills some specific roles in the system: guaranteeing religious peace, ensuring the free practice of the beliefs of the citizens and of religions, and making it possible for each citizen to identify with the state as a home for all.<sup>103</sup> Neutrality means that the German state cannot identify with any church and prohibits the state from any special inclination toward a particular religious community by applauding the intrinsic value of its ideas or qualities.<sup>104</sup> Ideological organizations are placed on an equal footing with religious institutions. But at the same time, religious organizations cannot be placed by the state in a disadvantageous position in relation to other social groups: an antireligious policy or state atheism would be contrary to the neutrality that characterizes the system. Moreover, neutrality means nonintervention, and is intimately associated with the principle of autonomy of religious organizations. Finally, it is important to note that neutrality in German law also means *positive* neutrality: the state is required to actively promote religion by ensuring the moral “space” that religion needs to develop.<sup>105</sup> This positive neutrality makes possible—and at the same time requires—the inclusion of religious needs in urban

---

98. *See id.*

99. *Id.*

100. *Id.*

101. María Roca, *Consideraciones Acerca de la Eventual Personificación Jurídica de la Comisión Asesora de Libertad Religiosa*, in COMISIÓN ASESORA DE LIBERTAD RELIGIOSA: REALIDAD Y FUTURO 154 (2010).

102. ROBBERS, *supra* note 73, at 86–87.

103. This is according to German federal constitutional case law. *See* María Roca, *La Neutralidad del Estado: Fundamento Doctrinal y Actual Delimitación en la Jurisprudencia*, 48 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 251, 253–54 (1996).

104. ROBBERS, *supra* note 73, at 86.

105. *Id.* at 87.

development law, for example.<sup>106</sup>

Turning our attention back from German law to North America, this time to Canada, it bears noting that

[i]nsofar as the requirement of State neutrality is concerned, it is necessary because intervention by the State in favor of a given religion places an incompatible pressure on the freedom of those who profess a less favored religion. Therefore, it is understandable that, in a way, the obligation of neutrality arises from the right to free exercise [of religion].<sup>107</sup>

Furthermore, in cases where there is no explicit establishment of neutrality as an *objective or structural*<sup>108</sup> principle—as in the Canadian case—the full recognition of freedom of religion requires an attitude of the state that, nevertheless, “is not as strict as one founded on an autonomous principle of neutrality.”<sup>109</sup> In other words, the adaptation or accommodation of the religious needs of citizens is more flexible when neutrality is a consequence of religious freedom rather than in cases where neutrality is established primarily as an objective or structural principle. In a way, this assertion is corroborated in the French and Turkish cases (although not only in

these cases), as it is shown in a somewhat inadequate regional European jurisprudence.<sup>110</sup>

Nor has Italian church-state law remained immune from the provocative developments regarding state neutrality in relation to the religious phenomenon. Indeed, the concept of neutrality appears as a requirement imposed on the political sphere because of the principle of the secular state; thus, the political sphere must be neutral in the face of possible conflicts between religious values and in the performance of certain activities (i.e., the broadcasting system or public education

---

106. *Id.* at 82.

107. José Woehrling, *La Libertad de Religión, el Derecho al Acomodamiento Razonable y la Obligación de Neutralidad Religiosa del Estado en el Derecho Canadiense*, 33 REVISTA CATALANA DE DRET PÚBLIC 1, 3 (2006).

108. José María Rodríguez de Santiago, *El Estado Aconfesional o Neutro Como Sujeto. un modelo Explicativo del Artículo 16.3 CE*, in ESTADO Y RELIGIÓN EN LA EUROPA DEL SIGLO XXI: ACTAS DE LAS XIII JORNADAS DE LA ASOCIACIÓN DE LETRADOS DEL TRIBUNAL CONSTITUCIONAL 123 (Centro de Estudios Políticos y Constitucionales & Tribunal Constitucional eds., 2008).

109. Woehrling, *supra* note 107, at 6.

110. Javier Martínez-Torrón, *La Cuestión del Velo Islámico en la Jurisprudencia de Estrasburgo*, 4 DERECHO Y RELIGIÓN 87 (2009).

system).<sup>111</sup> The neutrality and, associated with it, the impartiality of the state toward the religious factor, religious institutions, and symbols, would be the “test” —the patent manifestation—of the secularism that characterizes its legal system.<sup>112</sup> There is also recognition of the link existing between the way of interpreting the principle of secularism and the ideologically liberal culture, according to which the distinction between politics and religion results in two lines of behavior: the neutrality of the state toward the various positive expressions of religious values, and the application of the principle of equality of treatment and nondiscrimination.<sup>113</sup> In turn, neutrality is explained or specified in two directions: on the one hand, indifference as a reflection of the basic principle of the lack of jurisdiction of the contemporary state in religious affairs, which prevents it from expressing judgments in religious matters; and on the other, nonidentification, based on the idea that the institutions through which the state acts must have a character of “generality,” so that all citizens—regardless of their beliefs—are able to “recognize themselves” in state institutions.<sup>114</sup> At the same time, it is argued that current circumstances promote an understanding of secularism that is more associated with nonidentification than indifference.<sup>115</sup>

Where does Spanish academic opinion situate the notion of neutrality within the dynamic framework of the so-called “guiding principles” of church-state law? As a sample, and with no intention of being exhaustive, the following will refer to a few contributions that may prove significant.

For one sector of expert opinion, neutrality in religious affairs constitutes a *terminological quest to replace* terms such as secularism or non-confessionalism, which allows a more dynamic connectivity between the attitude of the state in relation to the religious factor and nonreligious world views.<sup>116</sup> The result is the adoption of a concept of *religious and ideological neutrality*.<sup>117</sup>

---

111. ENRICO VITALI & ANTONIO G. CHIZZONITI, DIRITTO ECCLESIASTICO: MANUALE BREVE: TUTTO IL PROGRAMMA DE'ESAME CON DOMANDE E RISPOSTE COMMENTATE 60 (2009).

112. MARIA CRISTINA FOLLIERO, DIRITTO ECCLESIASTICO: ELEMENTI: PRINCIPI NON SCRITTI, PRINCIPI SCRITTI, REGOLE 159 (2007).

113. VITALI & CHIZZONITI, *supra* note 111.

114. FOLLIERO, *supra* note 112.

115. VITALI & CHIZZONITI, *supra* note 111.

116. JAVIER MARTÍNEZ-TORRÓN, RELIGIÓN, DERECHO Y SOCIEDAD: ANTIGUOS Y NUEVOS PLANTEAMIENTOS EN EL DERECHO ECLESIASTICO DEL ESTADO 178 (1999).

117. *Id.* at 178–79.

At the same time, neutrality establishes an operative bridge between non-confessionalism and nondiscrimination: “The neutrality of the State, from a functional perspective, has significant consequences for the understanding of the principle of equality. In its *negative* sense, equality is equivalent to non-discrimination and, although conceptually diverse, it is in a certain sense subsumed in the concept of neutrality.”<sup>118</sup>

Other sectors of opinion posit the existence of an implicit *obligation of ideological neutrality*,<sup>119</sup> with two dimensions: impartiality of public authorities (giving the same treatment to all ideas and beliefs) and state abstention from participation in any debate on politics, philosophy, morality, aesthetics, etc.<sup>120</sup> Neutrality prohibits indoctrination in any aspect of society on the part of the state.<sup>121</sup> And this extends to various aspects of administrative action, from public intervention of the police to the provision of services or the granting of subsidies.<sup>122</sup>

For another sector, neutrality is a *specific mandate derived from secularism* for the purposes of avoiding discrimination.<sup>123</sup> Public institutions should be neutral, as should public officials in the performance of public duties; it is not for nothing, for example, that the Spanish Constitution of 1978 sets forth in its article 103.3 the regulation by law of “the guarantees regarding impartiality in the discharge of their duties.”<sup>124</sup> As a result, religious considerations would not form part of the decisive factors that representatives of the state can employ. A variant of this same view interprets neutrality as a “component” of secularism in evolution, which unites separation and neutrality as necessary consequences.<sup>125</sup> Again, neutrality requires “the State, the public institutions and the holders of public office, regardless of their

---

118. *Id.* at 184.

119. This obligation parallels the principle of non-confessionalism in relation to the religious factor.

120. LUIS MARÍA DíEZ-PICAZO, SISTEMA DE DERECHOS FUNDAMENTALES 247 (2d ed. 2005).

121. *Id.*

122. *Id.*

123. Isidoro Martín Sánchez, *El Modelo Actual de Relación Entre el Estado y el Factor Religioso en España*, in JORNADAS JURÍDICAS SOBRE LIBERTAD RELIGIOSA EN ESPAÑA 53, 89 (Juan Ferreiro Galguera ed., 2008).

124. C.E., B.O.E. n. 103, Dec. 6, 1978 (Spain).

125. Llamazares Fernández, *supra* note 60, at 117, 129.

own beliefs and convictions, to carry out their duties without any hint of discrimination, either positive or negative, toward the citizens as a consequence of their beliefs or convictions.”<sup>126</sup> In short, neutrality is a fundamental element, the *functional* dimension of secularism, a criterion for action of the public authorities, supported by separation as an instrumental guarantee.<sup>127</sup>

Recalling the connections of the term with international law, another sector of Spanish academic opinion associates neutrality, on the one hand, with equality, whereby the state must intervene actively in order to ensure the exercise of religious freedom.<sup>128</sup> Religious assistance in prisons or in the army must be provided to all, regardless of creed or conviction; if the state acts on this basis, it acts neutrally.<sup>129</sup> But on the other hand, neutrality is a specific *ideological characteristic* of public educational institutions (as explained by the Spanish Constitutional Court<sup>130</sup>), although this is not so much a consequence of the ideological neutrality of the state as such but rather a requirement derived from the lack of freedom in education.<sup>131</sup> This last point would really require further exploration, given its importance. For the moment, this Article will contend that neutrality and education are incompatible concepts. Education means the transmission of values; wherever values are transmitted, neutrality is absent. When a constitutional court applies the term “neutrality” to education,<sup>132</sup> it does so with the intention of

---

126. *Id.* at 117, 132.

127. Gustavo Suárez Pertierra, *La Laicidad en la Constitución Española*, 53 PERSONA Y DERECHO 157, 163 (2005).

128. JOSÉ MARÍA GONZÁLEZ DEL VALLE, DERECHO ECLESIAÍSTICO ESPAÑOL 124–25 (4th ed. 1997).

129. *Id.* at 125.

130. As the Spanish Constitutional Court has explained,

[i]n a political legal system based on pluralism, ideological and religious freedom of individuals and non-confessionalism of the State, all public institutions and very especially educational institutions must be, in effect, ideologically neutral. This neutrality, which does not prevent the organization in public schools of optional classes to facilitate the right of parents to choose for their children a religious and moral education in accordance with their own convictions (art. 27.3 of the Constitution), is a necessary feature of each of the teaching positions offered at the school, and not the hypothetical result of casual coincidence in the institution and in relation to the students of teachers of different ideological orientations whose teachings mutually neutralize one another.

S.T.C., Feb. 13, 1981 (No. 5) (Spain), [http://www.boe.es/aeboe/consultas/bases\\_datos/doc.php?coleccion=tc&id=SENTENCIA-1981-0005](http://www.boe.es/aeboe/consultas/bases_datos/doc.php?coleccion=tc&id=SENTENCIA-1981-0005).

131. GONZÁLEZ DEL VALLE, *supra* note 128, at 399–402.

132. For more on the positive (optional classes to facilitate the right of parents to an education in accordance with their own beliefs) and negative aspects (prohibition of indoctrination), see

specifying with a “positive” term what is “negatively” expressed with the concept of “indoctrination.” That is, the aim is to not indoctrinate.<sup>133</sup>

In any case, there are also sectors of constitutional academic opinion that, considering a global analysis of the question—not focusing on a specific country, but covering in their reflections a wide range of European countries—view the terms neutrality, secularism, and *laïcité* as more or less equivalent expressions, also compatible in some cases with cooperation.<sup>134</sup> At the same level of analysis, other sectors posit the establishment of *secularist constitutionalism (laïcité)*, enforcing secularism as an objective or structural principle, as opposed to incomplete “conceptual representations” or metaphors such as “separation,” “convention or adaptation,” and, of course, “neutrality,”<sup>135</sup> which is criticized in terms of its actual operability. Indeed, for neutrality to conserve its appeal as “strict impartiality” on the part of the state, the state must determine the limits of public space and, once these are determined, religious activities falling outside this neutral sphere must be protected. The problem is the anachronistic nature of this operation, as the welfare state expands enormously the area of public space, making it extremely complex—or even unviable—to require strict neutrality in activities in which, both historically and today, religious groups act not as supporters of state welfare initiatives, but as agents of what they view as part of their specific mission. In this sense, it is illustrative to recall here the problems associated with implementation by the state of nondiscrimination in the provision of services (particularly at present in the United Kingdom),<sup>136</sup> which ends up reducing the social presence of some religions in charity activities to a minimum. It seems, then, that the constitutional balance between religious autonomy and other values of ideologically liberal constitutionalism cannot be achieved simply by appealing to the neutrality of the state. “A neutrality mantle is ill-suited

---

TOMÁS PRIETO ÁLVAREZ, LIBERTAD RELIGIOSA Y ESPACIOS PÚBLICOS: LAICIDAD, PLURALISMO, SÍMBOLOS, 190–91 (2010).

133. Ana Llano Torres, *Unas Reflexiones Sobre la Jurisprudencia del Tribunal Supremo en Relación con “Educación para la Ciudadanía,” en diálogo con Adela Cortina*, 11 ANUARIO DE DERECHOS HUMANOS 253, 258 (2010); Ana Llano Torres, *El cansancio de Occidente, el nihilismo y el debate constitucional sobre el derecho a la educación: ¿de qué se trata?, ¿qué hace posible hoy una auténtica experiencia educativa?*, 5 ANUARIO DE DERECHOS HUMANOS 435, 489 (2004).

134. RENÁTA UITZ, FREEDOM OF RELIGION IN EUROPEAN CONSTITUTIONAL AND INTERNATIONAL CASE LAW 16–18 (2007).

135. Sajó, *supra* note 41, at 2403–14.

136. See Neil Addison, *Catholic Care an Attack on the Idea of Charity Itself*, RELIGION LAW BLOG (Aug. 23, 2010, 3:18 PM), <http://religionlaw.blogspot.com/2010/08/catholic-care-no-freedom-for-charities.html>.

to the task of balancing the relevant interests because *both* sides can—and do—seize the mantle with equal force.”<sup>137</sup>

It is more than likely that the sector of opinion referred to in the previous paragraph is advocating a strict, first-generation neutrality, a neutrality that jealously defends the state against the different versions of the good life of social actors, both religious and nonreligious. Nevertheless, this neutrality, over time, has ceased to be the unequivocal posture of the state.<sup>138</sup> We are now clearly in another phase, which belongs, once again, to the “market of ideas and beliefs,” and which was analyzed by Joseph Weiler in his statement before the European Court of Human Rights. Weiler notes:

If the social pallet of society were only composed of blue yellow and red groups, then black—the absence of color—would be a neutral color. But once one of the social forces in society has appropriated black as its color, then that choice is no longer neutral. Secularism does not favor a wall deprived of all State symbols. It is religious symbols which are anathema.<sup>139</sup>

#### VI. NEUTRALITY AS A PRINCIPLE IN SPANISH LAW

In view of the foregoing facts and reflections, it would be logical now to summarize the important points, identify the more outstanding critical elements, and propose some ideas about the possible role that the term “neutrality” may play in church-state law.

As noted above, neutrality was originally used to refer to the activity or omission through which an individual refrains from intervening in or influencing a conflict between two or more other individuals.<sup>140</sup> From the outset, this view does not fit easily with any situation involving religious activity in a society. Only in those cases where there is a religious conflict between two factions in the same country or the same society, as might have been the case in Germany, has the state—for historical reasons—kept its distance and declared itself neutral toward the conflicts between Christian churches. Of course, this was not the case in Spain, or in Italy, where the historical conflicts have been different, involving no more than the state and the Catholic Church (e.g., the

---

137. Toni M. Massaro, *Religious Freedom and “Accommodationist Neutrality”*: A Non-Neutral Critique, 84 OR. L. REV. 935, 944 (2005).

138. ANDRÉS OLLERO, ESPAÑA ¿UN ESTADO LAICO?: LA LIBERTAD RELIGIOSA EN PERSPECTIVA CONSTITUCIONAL 41–47 (2005).

139. Weiler, *supra* note 93.

140. *See supra* Parts II and III.

Italian State unification process, Spanish regalism, and the right of the Ecclesiastical Royal Patronage or *Patronato regio*, the anti-Catholic policy of the Second Spanish Republic, etc.).

Neutrality in Spanish law is indifference or absence of judgment (either approval or reproach) only with regard to the dogmatic content of religious groups. But this type of neutrality is not precisely negative with regard to religion as a social phenomenon; it is more akin to indifference or nonrelation. In Spain, part of the multidimensional mandate of Article 16 of the Constitution establishes that the public authorities must take into account the religious beliefs of Spanish society, within the scope of a fundamental right (although that fundamental right may not necessarily entail abstract consideration of religious beliefs in themselves<sup>141</sup>). It therefore might be appropriate to speak of positive neutrality as an expression of this principle or attitude in its application to the religious sphere. In this case, it is not indifference toward religions but the establishment of a certain type of relation and of political dialogue by virtue of a fundamental right. Neutrality thus understood justifies and supports the necessary adaptations of the law of the apparently neutral state in order to prevent unexpected infringements upon the free exercise of beliefs.

The use of the qualifying terms “principle” or “attitude” with reference to state neutrality is intentional. In light of the foregoing reflections, it might be suggested that we are perhaps witnessing an emerging principle invoked to overcome, in part, the problems associated with the principle of *laicidad* discussed at the beginning of this paper. The response to this suggestion is not simple. On the one hand, neutrality as a principle is not entirely immune from the same confusion provoked by the principle of *laicidad*. Indeed, the preceding pages list multiple definitions for neutrality.<sup>142</sup> On the other hand, if the focus of attention on academic opinion and case law is turned on beliefs in general, *laicidad* could turn into a refuge and an excuse that implicitly authorizes the State to remain neutral toward religions but with a certain myopia that prevents the detection, prevention, and condemnation of the assumption of power by nonreligious world views, a risk which is quite real and may already be happening.

Along with negative and positive neutrality, this Article has also made reference above to neutrality of purpose (impartiality) and

---

141. MARTÍNEZ-TORRÓN, *supra* note 116, at 190.

142. *See supra* Part V.

neutrality of outcome.<sup>143</sup> These two dimensions or definitions of neutrality direct our attention to the facet of equality intrinsic to the idea of neutrality. Are both definitions applicable to religious neutrality? Of course, it is clear that neutrality of purpose lies at the heart of neutrality in its closest dimension to *laicidad*. And with regard to neutrality of outcome, as applied to the religious factor, it is necessary to make a distinction. Neutrality of outcome does apply in this context provided that its objective is the establishment of the conditions to ensure real enjoyment of religious freedom, removing the structural barriers of the apparently neutral legal system. Neutrality of outcome, however, would not be applicable to those actions that have the purpose of altering in any way the internal structure of religions, communities, or churches in a given society through measures of compensation that would directly affect demography, social profile, or societal acceptance, or that would constitute direct or indirect incentives of persuasion or dissuasion with regard to given beliefs.

In this day and age, it would be difficult to argue that neutrality might come to constitute a guiding principle of Spanish church-law law—a kind of synthesis of the principles of equality and *laicidad*. Nevertheless, neutrality could ultimately prevail when considering the terminological evolution of the Spanish Constitutional Court. In effect, the court began by applying the category of non-confessionalism (*aconfesionalidad*) before moving to the use of *laicidad* and subsequently to *laicidad positiva*.<sup>144</sup> Although neutrality appeared as a concept during these periods, it was still in incipient form, restricted to neutrality in public schools.<sup>145</sup> However, in 1996 the Constitutional Court began to employ the specific term “religious neutrality,”<sup>146</sup>

---

143. See *supra* note 36 and accompanying text.

144. GUSTAVO SUÁREZ PERTIERRA, LAICIDAD Y COOPERACIÓN COMO BASES DEL MODELO ESPAÑOL: UN INTENTO DE INTERPRETACIÓN INTEGRAL (Y UNA NUEVA PLATAFORMA DE CONSENSO) 26–28 (2010).

145. See ROBBERS, *supra* note 73, at 117–19.

146. The Court has explained this concept as follows:

[A]rt. 16.3 CE, in stipulating that “no denomination shall have official status”, establishes a principle of neutrality of the public authorities in terms which, as stated in the S.T.C. 24/1982 and 340/1993, “prohibits any kind of confusion between religious and State functions.” A direct consequence of this constitutional mandate is that citizens, in the exercise of their right to religious freedom, have as right “to act in this sphere with full immunity from action by the State” (S.T.C. 24/1982, Legal Grounds 1), the neutrality of which in religious affairs thus becomes a premise for peaceful coexistence between the different religious convictions existing in a plural and democratic society (art. 1.1 CE).

S.T.C., Nov. 11, 1996 (No. 177) (Spain) <http://www.boe.es/aeboe/consultas/>

replacing the concept of *laicidad*, which nevertheless continues to coexist with it.

## VII. CONCLUSION

This Article began this study with reference to the term neutrality in three senses: myth, principle, and meaning. In reviewing the above reflections in light of the title of this work, in one sense, neutrality is a *myth*, because it proves impossible on various levels (a truly neutral state does not exist), or because it is significantly nuanced in order to adapt its appealing objective to the complexities of reality. Indeed, it is important that models constructed as castles in the air, grandiloquent and convincing in abstraction, do not jar with reality to the point that they produce results contrary to justice. Neutrality is at the same time a *principle* insofar as it expresses not only a guideline or a constant related to the legislation that regulates the fundamental freedoms (including religious freedom), but also because it expresses a directive and mandate consistent with the requirements of state action in managing legal contexts in which the religious factor is present. Finally, neutrality also points to a complex *meaning*, synthesizing elements related to nondiscrimination, the impartiality of public authorities, the separation between the state and religious beliefs, and even secularism or non-confessionalism.

Words wander and, like stones on the road, they also suffer the wear and erosion of use and time. On other occasions, the wear and tear is simply the result of manipulation. But we cannot renounce them—neither words nor the meanings they carry—because the word is a divine gift. As the Spanish poet Blas de Otero reminds us, in the end, the word is all we have left: “If I lost my voice in the bush/ . . . If I have suffered thirst, hunger, all that was mine and proved to be nothing . . . / if I opened my lips until they were rent, I still have the word.”<sup>147</sup>

---

bases\_datos/doc.php?coleccion=tc&id=SENTENCIA-1996-0177

147. BLAS DE OTERO, *En el Principio*, in *MEDIOS BIOGRAFÍA: SELECCIÓN DE POEMAS BIOGRÁFICOS* 71 (1997).

