

# The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court

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## I. INTRODUCTION

Perhaps the most interesting issue in recent constitutional law jurisprudence is the movement toward enhancement of individual liberties by state courts' independent interpretation of state constitutional provisions.<sup>1</sup> This movement has developed because of the United States Supreme Court's recent retreat from the zealous concern for civil liberties exhibited by the Warren Court. In the narrower context of church-state relationships, the Court now evinces a more equivocal attitude than ever before.

The Washington State Supreme Court has reworked constitutional exegesis in several areas.<sup>2</sup> At least one such attempt has been severely criticized: "The majority's decision to embrace independent state grounds . . . is unfortunate . . . . This is the type of decision making that has quite justifiably 'resulted in charges that state courts are evading Supreme Court doctrine

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1. See, e.g., *Rebirth of Reliance on State Charters*, Nat'l L.J., Mar. 12, 1984, at 25-32. This series of articles, prepared and edited by Ronald K. L. Collins, contains a comprehensive survey of state appellate cases interpreting state constitutional provisions in 24 subject areas. *Id.* at 29-30. It also surveys the law review literature on the issue. *Id.* at 31-32.

2. See, e.g., *Southwest Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County*, 100 Wash. 2d 109, 126-27, 667 P.2d 1092, 1102 (1983) (equal protection); *State v. White*, 97 Wash. 2d 92, 104-05, 640 P.2d 1061, 1068 (1982) (application of exclusionary rule to illegally obtained confession); *MacLean v. First N.W. Indus. of America*, 96 Wash. 2d 338, 346-48, 635 P.2d 683, 687-88 (1981) (law against discrimination); *State v. Fain*, 94 Wash. 2d 387, 395-97, 617 P.2d 720, 725 (1980) (cruel and unusual punishment clause); *Lundgren v. Whitney's, Inc.*, 94 Wash. 2d 91, 96, 614 P.2d 1272, 1274 (1980) (equal protection clause).

and engaging in unprincipled, result-oriented use of their state constitutions.' ”<sup>3</sup>

Despite such criticism, the Washington court seems to relish using the state constitution to break ground on civil liberties issues. For example, the court has accorded significantly more protection to detained persons whose automobiles are searched than is offered by the fourth amendment.<sup>4</sup> In so doing, the court is creating a gap between the nationalizing influence of federal constitutional law and state treatment of similar issues. This gap may continue to grow, at least until the next election—or the one after that—limited only by judicial self-restraint and the spectre of a collision between enhanced state liberties of one group and recognized federal liberties of another. With regard to religious liberty and the prohibition of the state’s encouragement of religion, there is strong constitutional<sup>5</sup> and case law support<sup>6</sup> for enhanced protection of individual interests that pre-dates and presages this “new” state constitutional law.

Given recent signs of a relaxation in viewpoint by the United States Supreme Court towards the establishment clause,<sup>7</sup> interested groups in this state will likely exert pressure to bring assistance-to-religion issues into public law. Inevitably, the Washington court will be asked to re-examine the state constitution to determine whether the court’s adherence to an independent, strict “anti-establishment” position should be maintained or even strengthened.

This Article traces the independent development in the case law interpreting the Washington Constitution and in the drafting of the document itself. It is the position of the authors that the strict approach and consequent rigorous, independent analysis by the Washington court is not a necessary or appropriate

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3. *State v. Simpson*, 95 Wash. 2d 170, 201-02, 622 P.2d 1199, 1218 (1980) (Horowitz, J., dissenting) (application of exclusionary rule to warrantless search).

4. *See, e.g., State v. Ringer*, 100 Wash. 2d 686, 702, 674 P.2d 1240, 1249 (1983) (insufficient circumstances to permit a warrantless search of defendant’s car).

5. WASH. CONST. art. I, § 11 (1889, amended 1904, 1957) (religious freedom); art. IX, § 4 (sectarian control or influence prohibited). Article I, § 11 has been amended twice. Amendment 4 (1904) added a provision allowing for employment of chaplains at state prisons. Amendment 34 (1957) added custodial and mental institutions to the chaplain provision.

6. *See infra* notes 8-35 and accompanying text.

7. *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984) (city’s display of nativity scene held not violative of establishment clause); *Marsh v. Chambers*, 103 S. Ct. 3330 (1983) (state legislature’s practice of opening session with prayer by a chaplain paid by state held not violative of establishment clause of the first amendment).

method of deciding church-state issues, at least in many contexts. When examining establishment clause issues under the state constitution, the Washington State Supreme Court should therefore modify its previous position and adopt a more common-sense approach in lieu of the doctrinaire rigidity that has characterized prior opinions.

## II. THE ANTI-ESTABLISHMENT CASES IN WASHINGTON

One particularly strong statement appears in the Washington cases regarding use of public funds that benefit schools under sectarian influence: “[a]ny use of public funds that benefits schools under sectarian control or influence—regardless of whether that benefit is characterized as ‘indirect’ or ‘incidental’—violates [article IX, section 11 of the Washington Constitution].”<sup>8</sup> With firm determination and vocal partisan support, the Washington State Supreme Court has turned away from the finely spun distinctions that have permeated the United States Supreme Court’s efforts in judging the merits of various state aid plans.<sup>9</sup>

*Weiss v. Bruno*<sup>10</sup> involved challenges to public funding of tuition for needy students in kindergarten through twelfth grade in public and private schools and to a tuition supplement program for students in private higher education. Reasoning that both programs supported the schools themselves and that the schools were under sectarian control, the Washington State Supreme Court invalidated the programs under article IX, section 4 of the state constitution, which provides: “[a]ll schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.”<sup>11</sup> The court’s view appears firm: the drafters of the state constitution intended an *absolute prohibition* against use of public funds in *support* of sectarian schools. This principle transcends related principles under the first amendment and continues to be recognized by the court.

Further support for this position is provided by the holdings of the court in *Mitchell v. Consolidated School District No.*

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8. *Weiss v. Bruno*, 82 Wash. 2d 199, 211, 509 P.2d 973, 981 (1973) (referring to WASH. CONST. art. IX, § 11).

9. See *infra* § III of this Article.

10. 82 Wash. 2d 199, 509 P.2d 973 (1973).

11. *Id.* at 205-32, 509 P.2d at 977-92.

201<sup>12</sup> and *Visser v. Nooksack Valley School District No. 506*.<sup>13</sup> In both cases the court voided legislation that would have provided publicly funded transportation for students attending any school in accordance with mandatory attendance laws, including private sectarian schools. Such assistance, the court held, violated both article IX, section 4 and article I, section 11: "no public money or property shall be appropriated or applied to any religious worship, exercise or instruction, or the support of any religious establishment."<sup>14</sup>

In *Visser*, the court was confronted by the claim that it should permit publicly funded transportation because the United States Supreme Court had recently interpreted the first amendment to allow public transportation for parochial school students.<sup>15</sup> In rejecting this assertion, the court said:

Although the decisions of the United States supreme court are entitled to the highest consideration as they bear on related questions before this court, we must, in light of the clear provisions of our state constitution and our decisions thereunder, respectfully disagree with those portions of the *Everson* majority opinion which might be construed, in the abstract, as stating that transportation, furnished at public expense, to children attending religious schools, is not *in support* of such schools.<sup>16</sup>

In partial summary, the *Mitchell*, *Visser*, and *Weiss* decisions, together with *State Higher Education Assistance Authority v. Graham*,<sup>17</sup> which struck down a state-sponsored college-student loan program as violative of article IX, section 4 and article I, section 11, severely restrict direct or indirect state financial support of sectarian schools.<sup>18</sup>

12. 17 Wash. 2d 61, 135 P.2d 79 (1943).

13. 33 Wash. 2d 699, 207 P.2d 198 (1949).

14. *Visser*, 33 Wash. 2d at 711-12, 207 P.2d at 205 (quoting WASH. CONST. art. I, § 11); *Mitchell*, 17 Wash. 2d at 65, 135 P.2d at 81 (quoting WASH. CONST. art. I, § 11).

15. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

16. 33 Wash. 2d at 711, 207 P.2d at 205 (emphasis in original).

17. 84 Wash. 2d 813, 817, 529 P.2d 1051, 1053-54 (1974).

18. In the recent case of *Witters v. Commission for the Blind*, 102 Wash. 2d 624, 689 P.2d 53 (1984), the Supreme Court of Washington held that it would be unconstitutional—under the United States Constitution, but in dictum also under the "stricter" language of the Washington Constitution—to provide state funds to a student who wished to attend the Inland Empire School of the Bible. This blind student was denied financial assistance because: "The provision of financial assistance by the State to enable someone to become a pastor, missionary or church youth director clearly has the primary effect of advancing religion." *Id.* at 629, 689 P.2d at 56. Concurring, the late Justice

In a similar manner, the court has been quite consistent in refusing to allow sectarian *influence* in the public schools. *State ex rel. Dearle v. Frazier*<sup>19</sup> and *State ex rel. Clithero v. Showalter*<sup>20</sup> prohibited the teaching of the Bible in public schools on the ground that such courses contravened article I, section 11 by using public funds for religious instruction. *Calvary Bible Presbyterian Church v. Board of Regents*,<sup>21</sup> a case in which the court refused to enjoin the teaching of a course on the Bible as literature at the University of Washington, is obviously inconsistent with this approach. The distinguishing rationale offered in *Calvary Bible* was that no religious "instruction" took place because the course consisted of a scholarly examination of the literature, rather than a manifestation of devotion to religious principles.<sup>22</sup> When the same course is taught in a church-related school, however, religious instruction obviously occurs because of *where* the course is taught.<sup>23</sup>

Finally, although the court intimated in *Perry v. School District No. 81*<sup>24</sup> that a release-time provision for religious instruction in public schools would be consistent with article I, section 11 and article IX, section 4,<sup>25</sup> the particular program was stricken because the schools participated by distributing registration cards and either making announcements about the program in the classroom or allowing representatives of the reli-

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Rosellini argued that state vocational funds paid to assist a student in this situation would violate the "plain language" of the stricter Washington State Constitution. *Id.* at 632, 689 P.2d at 58.

19. 102 Wash. 369, 173 P. 35 (1918).

20. 159 Wash. 519, 293 P. 1000 (1930).

21. 72 Wash. 2d 912, 436 P.2d 189 (1967).

22. 72 Wash. 2d at 919, 436 P.2d at 193. The case does, however, seem to restrict the value of the rather broad language of the earlier cases in their sweeping indictment of the use of the Bible in public school teaching. In that sense, the case is a narrow reading of WASH. CONST. art. I, § 11. This decision could effectively serve as a precedent should the court desire to depart from its more restrictive approach.

Justice Utter, dissenting in *Witters v. Commission for the Blind*, 102 Wash. 2d 624, 689 P.2d 53 (1984), re-examines the historical basis for a commitment to a strict anti-establishment position based on the state constitution and concludes, much as the authors do on somewhat different grounds, that the strict position is unwarranted, at least in the context of aid to students in higher education. *Id.* at 643-49, 689 P.2d at 64-67 (Utter, J., dissenting).

23. *Calvary Bible* is not mentioned in *Witters v. Commission for the Blind*, 102 Wash. 2d 624, 689 P.2d 53 (1984), but the thrust of the majority seems to be not what is being taught but where it is being taught.

24. 54 Wash. 2d 886, 344 P.2d 1036 (1959).

25. *Id.* at 892, 344 P.2d at 1040.

gious groups to do so.<sup>26</sup> In this case, the court seemed to construe the Washington provisions on establishment identically with the United States Supreme Court's then current perception of release time.<sup>27</sup> The Washington court's view of the scope of the prohibitions, however, remained unchanged, especially since the court went through great pains to establish that a school district could satisfy the constitutional limits only through total noninvolvement<sup>28</sup> (that is, nonsectarian-influenced: no public expenditure). The practical consequence of these separationist rules would seem to fatally discourage release-time programs.

In the area of education, the Washington courts have virtually isolated religion from government, although total separation of church and state may not be their intention. In *Weiss*, the court noted that total "separation" at some point might violate the free exercise of religion guaranteed by the first amendment.<sup>29</sup> Total separation might also violate the free-belief provisions of article I, section 11 of the Washington Constitution.<sup>30</sup>

Thus, aside from the dictum in *Perry* suggesting how a release-time provision could survive state constitutional scrutiny,<sup>31</sup> the court has on several occasions also recognized that many indirect relationships that assist the functioning of sectarian activities are permitted, if not mandated, by equal protection or religious freedom requirements.<sup>32</sup> Representative of these

26. *Id.* at 896-98, 344 P.2d at 1043. One may infer from the precision of the holding that the program would have been sustained had the elements of involvement by the school been absent.

27. *Id.* at 894-97, 344 P.2d at 1041-43.

28. *Id.* at 896-98, 344 P.2d at 1043-44.

29. 82 Wash. 2d at 206 n.2, 509 P.2d at 978 n.2.

30. WASH. CONST. art. I, § 11. A related issue, that a strict anti-establishment position based on state constitutional grounds would violate federal equal protection, was argued and rejected in *Witters v. Commission for the Blind*, 102 Wash. 2d 624, 689 P.2d 53 (1984).

31. 54 Wash. 2d at 892-93, 344 P.2d at 1040.

32. *City of Sumner v. First Baptist Church*, 97 Wash. 2d 1, 639 P.2d 1358 (1982). The court stated that regulations concerning fire, health, and safety will be enforced against parochial schools when the state proves:

That the specific concerns addressed by the regulations are of sufficient magnitude to outweigh the free exercise claim, that the non-application of the regulations will threaten the public's health or other vital interests and that the state's interest could not otherwise be satisfied in a way which would not infringe on religious liberty.

*Id.* at 9, 639 P.2d at 1363. A similar position was taken in the earlier case of *State ex rel. Holcomb v. Armstrong*, 39 Wash. 2d 860, 864, 239 P.2d 545, 548 (1952), in which the court held that restrictions on religious freedom to act are permissible only to prevent grave and immediate dangers that the state lawfully may protect. See also *Larken v.*

partially developed doctrines is *City of Sumner v. First Baptist Church*.<sup>33</sup> In this recent case, the court recognized the fundamental nature of free exercise of religion, using an enhanced scope of review to remand for further findings the application of certain zoning requirements adverse to church schools.<sup>34</sup>

The Washington court's basic approach to establishment of religion issues under the state constitution is clear: any perceptible state support that rises above provision of noncontroversial government services is forbidden. That is, as long as the restriction of state involvement would not violate equal protection principles by singling out sectarian organizations for *less than* similar treatment, the state can refuse to give any support to religious or sectarian bodies and can refuse to recognize religious beliefs or practices in any way connected to or intertwined with state institutions, except those practices explicitly recognized in the state constitution.<sup>35</sup>

The critical, and as yet not carefully examined, problem with this approach is that it will inevitably lead to antagonism between a dedication to not supporting religion and a restraint on inhibiting its practice.<sup>36</sup> The Washington court, perhaps because of the narrow range of cases that it has considered, and perhaps also as a result of the emphasis in article I, section 11 of the state constitution on protecting beliefs rather than action, has not been forced to contemplate the spectacle of the snake of anti-establishment doctrine eating its tail of free exercise of religion. There is little doubt that, as the United States Supreme Court adopts a more pragmatic approach and changes religious activity in public life, citizens in Washington may demand a rethinking of the boundaries between nonsupport of religion and the restriction of its practice.

After a brief excursion into the Byzantine complexities of the United States Supreme Court's treatment of free exercise and establishment cases, we will turn again to the textual gene-

Grendel's Den, Inc., 103 S. Ct. 505 (1983) (a comparable position on federal establishment grounds in which a veto of liquor license granted to a church violated establishment clause).

33. 97 Wash. 2d 1, 639 P.2d 1358 (1982).

34. *Id.* at 13, 639 P.2d at 1365.

35. WASH. CONST. amend. 34. See *infra* text accompanying note 128.

36. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 19 IA, at 1029 (2d ed. 1983) (use of the term "tension" to describe this problem); see also L. TRIBE, CONSTITUTIONAL LAW § 19-2, at 815 (1978). Both texts form the basis for the broad overview that follows.

sis of the Washington anti-establishment bias.

### III. TENSION ON THE SACRED BATTLEMENTS: THE UNITED STATES SUPREME COURT AND RELIGION IN AMERICA

The United States Supreme Court has followed a tortuous and different path than the fairly straight one blazed by the Washington Supreme Court in analysis of aid to religious bodies.

#### A. Kindergarten Through Twelfth Grade

In the seminal case of *Everson v. Board of Education*,<sup>37</sup> decided in 1947, the Court upheld the payment of state funds for transportation of sectarian school students. Since that time, the Court has considered challenges to publicly funded programs that:

(a) provided textbooks to students in sectarian and public schools;<sup>38</sup>

(b) subsidized the salaries of teachers of secular subjects in private schools;<sup>39</sup>

(c) provided unrestricted grant payments for reimbursement of the costs of mandated state services and testing provided by private schools;<sup>40</sup>

(d) allowed tuition reimbursement and tax credits for parents of children in private schools;<sup>41</sup>

(e) provided for secular and instructional materials as well as public-employee directed educational testing of students in private schools;<sup>42</sup> and

(f) provided for subsidies for private school use of standardized tests and for field trips.<sup>43</sup>

37. 330 U.S. 1 (1947).

38. *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

39. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

40. *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973).

41. *Mueller v. Allen*, 103 S. Ct. 3062 (1983); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

42. *Meek v. Pittenger*, 421 U.S. 349, 371 n.21 (1975) (Court indicated that the state could probably send public employees into the schools to diagnose and treat illness or educational disabilities). See *Wolman v. Walter*, 433 U.S. 229 (1977), *infra* note 43 and accompanying text, in which programs of this type were upheld.

43. *Wolman v. Walter*, 433 U.S. 229 (1977). The validity of public subsidies for private school use of standardized tests, as well as such subsidies for collection and reporting of attendance and other data about students and teachers, was also recognized in *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 654 (1980).

Throughout its analysis of these thorny questions, the Court has had difficulty articulating the appropriate constitutional doctrine for measurement of these efforts at state aid. What emerges from the cases is a sense of a two-front war: the Court jousting with itself and also with various state legislatures as the latter attempted to find weaknesses in the Court's opinions in order to fund some private education. Thus, the Court has moved through at least two phases since *Everson*. In the first, the Court used a two-part test: the "purpose and effect" test developed in the school prayer cases, whereby a state aid program must be secular in purpose and not have the effect of advancing or inhibiting religious practices.<sup>44</sup> Later, the Court borrowed a three-part test from a decision upholding property tax exemptions for religious schools.<sup>45</sup> Under this test, a state aid program must: (1) have a secular purpose; (2) not advance or inhibit religion; and (3) provide only incidental aid to religion.<sup>46</sup> As might be expected, this searching examination tended to invalidate programs that probably could have withstood the earlier test.<sup>47</sup>

In recent cases, the Justices' diverging analyses reveal an extremely fragmented Court. Although facially still committed to the three-part test, the Court seems to be divided on how to apply it.<sup>48</sup> The most that can be said about the current Court is that the majority is less rigid in analyzing aid to private schools and more likely to uphold facially neutral aid given equally to public and to private schools than was its counterpart a mere ten years ago.<sup>49</sup> Some of these decisions suggest that the "entan-

44. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (challenge to state law requiring Bible reading each day in the public schools); *Engle v. Vitale*, 370 U.S. 421 (1962) (challenge to a prayer composed by state officials and ordered to be read aloud by each class).

45. *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). The test was first applied to aid-to-school cases in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

46. *Walz v. Tax Comm'n*, 397 U.S. 664, 702-05 (1970).

47. *Compare Board of Educ. v. Allen*, 392 U.S. 236 (1968) (textbook aid approved under two-part test) with *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (aid for instructional materials stricken under three-part test).

48. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 36, at 1037-38 (authors divide the Court into three camps: Chief Justice Burger and Justices White, Rehnquist, and O'Connor favoring financial assistance as long as it does not *clearly* aid religion; Justices Blackmun and Powell adhering essentially to the three-part test; and Justices Brennan, Marshall, and Stevens prohibiting aid).

49. *Mueller v. Allen*, 103 S. Ct. 3062 (1983), is a signal of this new majority. In *Mueller*, the Court distinguished *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), and upheld a statute that allowed parents to deduct school

glement" prong, the third prong of the three-part test, also includes an independent analysis of the potential for political divisiveness arising from aid programs.<sup>50</sup>

This fragmented pattern also emerges in three other areas in which the establishment clause has recently been examined or discussed.

### B. Higher Education

In the context of aid to higher education, three major cases,<sup>51</sup> supported by summary affirmances in several others,<sup>52</sup> suggest that a clear majority of the United States Supreme Court is willing to uphold some state programs involving government aid to students at private institutions or to the institutions themselves, including sectarian ones. The Court approved programs authorizing federal grants<sup>53</sup> or the issuance of state revenue bonds<sup>54</sup> for the construction of facilities, a program of state grants for full-time students other than those attending "pervasively sectarian" institutions,<sup>55</sup> and various programs providing financial assistance for college students, including students in attendance at sectarian schools.<sup>56</sup> While the Court applies the same test for analyzing programs aiding higher education that it uses for primary and secondary education, the Court is less inclined to strike aid programs at the college level for two reasons: (1) there is a more easily identifiable secular purpose at the college level;<sup>57</sup> and (2) typically a less compelling need exists to

expenses from state income tax liability.

50. *Sée, e.g.,* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 795-98 (1973) (discussing the natural tendency of modest support programs to become entrenched and to expand over time, increasing commitment and involvement and therefore heightening the potential for church-state strife).

51. *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971).

52. *Smith v. Board of Governors*, 434 U.S. 803 (1977); *Americans United for Separation of Church & State v. Blanton*, 434 U.S. 803 (1977).

53. *Tilton v. Richardson*, 403 U.S. 672 (1971).

54. *Hunt v. McNair*, 413 U.S. 734 (1973). *Cf. State Higher Educ. Assistance Auth. v. Graham*, 84 Wash. 2d 813, 529 P.2d 1051 (1974). *See also supra* notes 21-22 and accompanying text.

55. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 755 (1976). *Cf. Weiss v. Bruno*, 82 Wash. 2d 199, 509 P.2d 973 (1973) (Washington law providing public funds for financial assistance to children attending private, religiously influenced schools was violative of WASH. CONST. art. IX, § 4).

56. *Smith v. Board of Governors*, 434 U.S. 803 (1977); *Americans United for Separation of Church & State v. Blanton*, 434 U.S. 803 (1977).

57. *See, e.g.,* *Roemer v. Board of Pub. Works*, 426 U.S. 736, 750-51 (1976) (Black-

police the institution to separate religious and secular uses,<sup>58</sup> and, consequently, establishment pressures resulting from the entwinement of government and religion are reduced.

### C. *School Prayer*

Purpose, effect, and entanglement are also now the bywords in another type of establishment case: the school prayer case. In *Stone v. Graham*,<sup>59</sup> the Court prohibited the posting of the ten commandments in public school classrooms. The Court imposed the three-part test on all school prayer issues, thereby modifying the approach, although not the result, in the earlier prayer cases.<sup>60</sup>

### D. *Release Time*

Should the Court again be faced with a challenge to a state program allowing release time for public school students to attend religious instruction classes, it likely would uphold such a program, provided that the three-part test could be met. In the cases applying the two-part test, one invalidating<sup>61</sup> and the other sustaining such a program,<sup>62</sup> the factors distinguishing the latter were the absence of religious instructors at the school and the lack of involvement by school officials in the coercion of students.<sup>63</sup> Under the three-part test, the lack of excessive entanglement would apparently salvage a carefully drafted release-time program.

### E. *Is the Three-Part Test Collapsing?*

There are some signs that the United States Supreme Court is moving away from the three-part test toward a more relaxed attitude in the evaluation of the church-state intersection. In *Marsh v. Chambers*,<sup>64</sup> the Court sustained a Nebraska Legisla-

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mun, J., plurality opinion).

58. See, e.g., *Tilton v. Richardson*, 403 U.S. 672, 687 (1971).

59. 449 U.S. 39 (1980).

60. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (challenge to a statute requiring Bible reading each day in the public schools); *Engel v. Vitale*, 370 U.S. 421 (1962) (challenge to a prayer composed by state officials ordered to be read aloud by each class).

61. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

62. *Zorach v. Clauson*, 343 U.S. 306 (1952).

63. *Id.* at 308-09, 311-12.

64. 103 S. Ct. 3330, 3333-37 (1983).

ture's use of a chaplain, paid for with state funds,<sup>65</sup> and in *Lynch v. Donnelly*,<sup>66</sup> the Court upheld a city's erection of a nativity scene as part of a Christmas display in a park owned by a nonprofit organization. Such decisions instructively combine free exercise and establishment clause issues and thus present more clearly the dilemma that the Washington court may soon be required to resolve.

In both *Marsh* and *Lynch*, the Court applied the three-part test, but added another dimension by taking notice of historical incidents in which some accommodation of religion in public life was allowed in order to avoid "callous indifference"<sup>67</sup> in the interpretation of the establishment clause. The Court also placed less emphasis on the possibility of political divisiveness resulting from the entanglement of church and state.<sup>68</sup> Chief Justice Burger's opinion for the Court in *Lynch* clearly de-emphasized the rigorous application of the three-part test in favor of a careful case-by-case analysis of establishment clause issues and rejected stilted "over-reactions" and "crabbed reading of the Clause."<sup>69</sup> When read together with Justice O'Connor's concurrence rejecting the independent constitutional significance of the political divisiveness issue<sup>70</sup> and her proposal that establishment issues be analyzed under what amounts to a two-part test—(1) excessive entanglement of church and state; or (2) government endorsement (or disapproval) of religion<sup>71</sup>—these new cases suggest that the Court would sanction a newly broadened accommodation of religion.<sup>72</sup>

Whether the Court will actually reformulate the three-part test is not yet clear, and the Court has not explicitly abandoned its tortuous path. Stitching together the Court's refusal to overrule the *Everson* case, however, plus its continued accommodation of neutral public aid to sectarian schools and its recent tilt

65. The Washington Constitution was amended in 1904 specifically to accommodate chaplains in state institutions. WASH. CONST. art. I, § 11 (1889, amended 1904, 1957).

66. 104 S. Ct. 1355, 1366 (1984).

67. *Lynch*, 104 S. Ct. at 1360-61; *Marsh*, 103 S. Ct. at 3333-37. See *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

68. See, e.g., *Lynch v. Donnelly*, 104 S. Ct. 1355, 1364-65 (1984) (the Court's discussion pointed out the lack of evidence of political friction or divisiveness over the crèche).

69. *Id.* at 1365-66.

70. *Id.* at 1367 (O'Connor, J., concurring).

71. *Id.* at 1366.

72. It is interesting to note that the dissenters in *Lynch* accuse the Court of abandoning the prior rigorous approach to the establishment clause. *Id.* at 1370 (Brennan, J., dissenting).

toward accommodation of some religious practices in public life, one recognizes that the United States Supreme Court's refusal to espouse a doctrinaire ideology is a more flexible approach than the Washington Supreme Court has adopted.<sup>73</sup>

The rigid position taken by the Washington court is a compound of strict separationist personal beliefs<sup>74</sup> and of the correlative, unwavering insistence that such an approach is mandated by the special language of the various separationist clauses in the state constitution.<sup>75</sup> A court, of course, always invokes the "plain language" approach when articulating a dogmatic statement that must be accepted on faith. Anything that is "too clear for argument" is an article of faith that must be accepted as a divine spark.

One rationale for this dogma must be respected because it expresses the sincere theological beliefs espoused by some of the founders of the republic.<sup>76</sup> As the majority pointed out in *Lynch v. Donnelly*, however, equally compelling historical evidence demonstrates that many others of that same era did not subscribe to these beliefs and embraced a more pragmatic and accommodating set of values.<sup>77</sup>

The dogmatic hostility to church-related schools that has permeated the opinions of the Washington Supreme Court has broad historical roots in the valiant effort to save the West from the twin evils of polygamy and popery. Perhaps the Washington court could be persuaded to rise to a higher plane of judicial statesmanship and rethink the rigid doctrinal commitments of the past in the light of present economic realities.

73. Notice should be taken of the Court's balancing, in *Widmar v. Vincent*, 454 U.S. 263 (1981), of a state's strict anti-establishment clause against the free exercise and free speech clauses of the first amendment. In *Widmar*, the Court struck a state policy limiting use of university facilities for religious worship and teaching. In this "public forum" case, the Court concluded that the federal establishment clause was not violated and that the state's interest in separation of church and state was limited by the first amendment. Further, the modern view of state court involvement in ecclesiastical disputes, which seems to be less deferential to hierarchical religious authority, suggests a more permeable barrier between church and state than previously existed. See *Jones v. Wolf*, 443 U.S. 595 (1979).

74. See, e.g., *Weiss v. Bruno*, 82 Wash. 2d 199, 205-09 (1973).

75. See *infra* text accompanying note 128.

76. See *Walz v. Tax Comm'n*, 397 U.S. 664, 719-27 (1970) (Douglas, J., dissenting) (reprint of Madison's "Memorial and Remonstrance").

77. 104 S. Ct. 1355, 1366 (1984).

#### IV. THE WEST IS SAVED FROM POLYGAMY AND POKERY

Two great policy issues regarding the role of religion in public life preoccupied the politicians who guided the United States during the waning years of the Grant administration and for more than a decade thereafter. The Mormon question shaped the meaning and interpretation of the free exercise clause of the United States Constitution in a series of decisions that are, in many ways, still "the law" today. The Catholic question, which revolved around public funds for parochial schools, opened the White House to the first Democratic candidate since the secession and left behind an ambiguous, sometimes acrimonious heritage.

##### A. *The Mormon Question*

On July 12, 1843, Joseph Smith announced the revelation that patriarchal marriage was the mandate of heaven. This revelation set in motion a chain of events culminating in a sweeping series of decisions that fleshed out the skeletal outlines of the free exercise clause of the first amendment.<sup>78</sup> The Mormons were driven west, settled in the territory of Utah, and in 1851 sought admission to the Union as the state of Deseret.<sup>79</sup>

The southern delegations to Congress and their constituents were appalled by the practice of polygamy, and the prospect of Deseret's admission was never seriously entertained. The craft of politics, however, made the slave states unwilling allies of the Mormons and prevented Congress from enacting an anti-polygamy law. If Congress could outlaw polygamy in the territories of the United States, it could also outlaw the peculiar institution upon which the economy of the South rested. It was therefore unthinkable to permit Congress to address the Mormon question directly.

Mr. Lincoln at one point suggested that the Mormon question be treated like an immovable log: simply plow around it until time resolves the problem.<sup>80</sup> But with the guns at Fort Sumter and Bull Run the Mormons lost their cardinal protectors, and Congress moved swiftly in 1862 to resolve the Mormon

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78. An excellent and thorough treatment of the Mormon cases may be found in Linford, *The Mormons and the Law: The Polygamy Cases* (pts. 1-2), 9 UTAH L. REV. 308, 543 (1964-1965).

79. See Morgan, *The State of Deseret*, 8 UTAH HIST. Q. § 7 (1940).

80. See Linford, *supra* note 78, (pt. 1), at 317.

question.<sup>81</sup>

Section 1 of this anti-Mormon act sought to outlaw polygamy by prohibiting bigamy.

Section 2 voided the territorial legislature's incorporation of the Church of Jesus Christ of Latter-Day Saints.

Section 3 was the first mortmain statute enacted by Congress and provided that no religious or charitable association could acquire or hold real property worth more than fifty thousand dollars in any territory of the United States.<sup>82</sup>

Having "solved" the Mormon question, Congress turned to the more pressing problems, such as the vitalization of Mr. Lincoln's army. Meanwhile, in Utah, the Mormons ignored the new law and continued to prosper and multiply. In time they grew confident and sought to have the 1862 anti-Mormon act<sup>83</sup> invalidated by the courts because they devoutly believed that it violated the freedom of religion guaranteed by the United States Constitution.

The sacrificial lamb selected for a friendly test case was George Reynolds, Brigham Young's secretary. He was tried and found guilty of having violated the 1862 law because he had two wives.<sup>84</sup> Reynolds' name became a household word in constitutional history when the United States Supreme Court, in *Reynolds v. United States*,<sup>85</sup> upheld his conviction in the terse syntax of Mr. Justice Waite: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."<sup>86</sup> Government could exist only in name under such circumstances. Probably no other case in the Court's history better illustrates the dynamic power of the Court to generate a consensus in the body politic,

81. Act of July 1, 1862, ch. 126, 12 Stat. 501 (1862).

82. *Id.* §§ 1-3. The mortmain statute survived for many years, codified at 48 U.S.C. § 1480 (1890):

No corporation or association for religious or charitable purposes shall acquire or hold real estate in any Territory during the existence of the Territorial government of a greater value than \$50,000; and all real estate acquired or held by such corporation or association contrary hereto shall be forfeited and escheat to the United States; but existing vested rights in real estate shall not be impaired by the provisions of this section.

The mortmain statute was repealed in 1978 by Pub. L. 95-584, § 1, 92 Stat. 2483 (1978).

83. Act of July 1, 1862, ch. 126, 12 Stat. 501 (1862).

84. *Reynolds v. United States*, 98 U.S. 145, 147 (1878).

85. 98 U.S. 145 (1878).

86. *Id.* at 166.

or to coalesce a nascent consensus. Both President Hayes<sup>87</sup> and new President Arthur<sup>88</sup> denounced polygamy (and Mormonism), triggering Congress to enact the Edmunds Act.<sup>89</sup>

The Edmunds Act was a comprehensive review of the Mormon question and sought to leave no stone unturned in the effort to resolve the issue once and for all. Section 1 of the Act outlawed polygamy, but defined it in substantially the same manner as bigamy had been defined under previous law. Section 3 went beyond the polygamy issue and outlawed cohabitation with more than one woman. The significance of this provision was that, in order to prove bigamy or polygamy, it was necessary to prove "marriages," and in Utah no records were kept except by the church. Subsequent sections of the Act permitted a person to be challenged for cause as a juror if that person lived in polygamy, bigamy, or unlawful cohabitation; and prohibited any bigamist or polygamist from holding office or voting. Section 9 declared all voter registration and election offices in Utah to be vacant and created a new commission to register all persons in Utah.

Armed with section 3 of the Act, Judge Zane headed to Utah in 1884 and, with the support of a motley assortment of bounty hunters, began to crack down on Mormonism.<sup>90</sup> Among the cases tried under the new law, *Cannon v. United States*<sup>91</sup> stood for the proposition that the government need not show any acts of sexual contact in order to convict a defendant of unlawful cohabitation. The government needed only to show that the defendant lived in the same house with two women and ate at their respective tables one-third of his time, or thereabouts.<sup>92</sup>

Meanwhile, the territorial legislature of Idaho, which was much closer to the spectre of Mormonism than was the United States Congress, adopted an ironclad anti-polygamy oath for all

87. 7 J. RICHARDSON, *MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897*, at 606 (1897).

88. 8 J. RICHARDSON, *supra* note 87, at 57.

89. Act of Mar. 22, 1882, ch. 47, 22 Stat. 30 (1882).

90. See 3 O. WHITNEY, *HISTORY OF UTAH* 341-43 (1898).

91. 116 U.S. 55 (1885).

92. *Id.* at 74-80. A more enduring statement of civil liberties was made by the Court in *In re Snow*, 120 U.S. 274 (1887). Snow had been charged with three counts of unlawful cohabitation: count 1 for the year 1885; count 2 for 1884; count 3 for 1883. The Court held that when a person is charged with a continuous offense, the charge cannot be artificially divided into time periods. *Id.* at 284. *Snow* continues to be good law.

prospective voters and candidates:

I do further swear that I am not a bigamist or polygamist; that I am not a member of any order, organization or association which teaches, advises, counsels or encourages its members, devotees or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization or association, or which practises bigamy, polygamy or plural or celestial marriage as a doctrinal rite of such organization; that I do not and will not, publicly or privately, or in any manner whatever teach, advise, counsel or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a religious duty or otherwise.<sup>93</sup>

In *Murphy v. Ramsey*,<sup>94</sup> the Court upheld section 8 of the Edmunds Act, which stated that a “polygamist, bigamist or any person cohabiting with more than one woman” could not vote or hold office. In *Murphy*, the Court did not discuss the constitutional problems of free exercise of religion, saving that discussion for *Davis v. Beason*,<sup>95</sup> wherein Samuel D. Davis and others had been indicted for a “conspiracy to unlawfully pervert and obstruct the due administration of the law” after taking the oath when they were not entitled to do so.

The curious thing about the Court’s opinion in *Davis* is the summary manner in which it dismissed all constitutional objections with the simple statement that the ironclad oath was not open to “any valid legal objection to which our attention has been called.”<sup>96</sup> Significantly, the Court in *Davis* goes far beyond the mere outlawing of criminal acts such as polygamy or bigamy and extends civil disabilities to mere membership in an organization that teaches or practices such ideas. In plain English, *Davis* stands for the proposition that it is constitutional to enact a statute that makes it a crime to be a Mormon.<sup>97</sup>

The voracious appetite for justice for the Mormons was

93. Idaho Rev. Stat. 1887, ch. 4, § 504.

94. 114 U.S. 15 (1885). In *Murphy*, the Court read the ex post facto clause as a restriction on criminal punishment only. Thus, even though it was not a crime to have been a polygamist or bigamist in the past, a person could still be prohibited from voting or holding office because these are not criminal penalties. *Id.* at 40-44.

95. 133 U.S. 333, 334 (1890) (defendants convicted for unlawfully taking oath adopted by the Territorial Legislature of Idaho, which required prospective voters and candidates to swear that they did not practice or encourage bigamy or polygamy).

96. *Id.* at 334-35.

97. *Id.* at 347.

merely whetted, not assuaged, by the plethora of prosecutions under the Edmunds Act. Congress reacted to the continuous pressure by enacting the Edmunds-Tucker Act<sup>98</sup> as an ultimate solution to the Mormon question.

To facilitate prosecutions of polygamists, the Edmunds-Tucker Act provided *inter alia* that adultery could be punished by three years in prison. In addition, someone other than the offended spouse could raise the charge of adultery. Another provision of the Act required that every marriage be certified and all records filed with the probate court as a matter of permanent record. Section 13 ordered the Attorney General of the United States to institute proceedings to forfeit and escheat to the United States all property held in violation of the 1862 anti-Mormon act, which had voided the incorporation of the church.

On July 30, 1877, legal action commenced in Utah that culminated in *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*.<sup>99</sup> In this case, the Supreme Court upheld the revocation of the incorporation of the church and ordered that all personal property of the church be escheated to the United States together with all real property except the congressionally exempted burial grounds and houses of worship.<sup>100</sup>

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98. Act of Mar. 3, 1887, ch. 397, 24 Stat. 635 (1887).

99. 136 U.S. 1 (1890).

100. Justice Bradley wrote for the Court:

It is distinctly stated in the pleadings and findings of fact, that the property of said corporation was held for the purpose of religious and charitable uses. But it is also stated in the findings of fact, and is a matter of public notoriety, that the religious and charitable uses intended to be subserved and promoted are the inculcation and spread of the doctrines and usages of the Mormon Church, or Church of Latter-Day Saints, one of the distinguishing features of which is the practice of polygamy—a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world. Notwithstanding the stringent laws which have been passed by Congress—notwithstanding all the efforts made to suppress this barbarous practice—the sect or community composing the Church of Jesus Christ of Latter-Day Saints perseveres, in defiance of law, in preaching, upholding, promoting and defending it. It is a matter of public notoriety that its emissaries are engaged in many countries in propagating this nefarious doctrine, and urging its converts to join the community in Utah. The existence of such a propaganda is a blot on our civilization. The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world. The question, therefore, is whether the promotion of such a nefarious system and practice, so repugnant to our laws and to the principles of our civilization, is to be allowed to continue by the sanction of the government itself; and whether

In summary, the Mormon cases stood for the proposition that the free exercise of religion, secured by the first amendment, is a guarantee of absolute freedom of belief. If a substantial number of fellow citizens are annoyed by this belief,<sup>101</sup> however, and outlaw one or more of one's religious practices, the courts also permitted the state or the federal government to:

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the funds accumulated for that purpose shall be restored to the same unlawful uses as heretofore, to the detriment of the true interests of civil society.

It is unnecessary here to refer to the past history of the sect, to their defiance of the government authorities, to their attempt to establish an independent community, to their efforts to drive from the territory all who were not connected with them in communion and sympathy. The tale is one of patience on the part of the American government and people, and of contempt of authority and resistance to law on the part of the Mormons. Whatever persecutions they may have suffered in the early part of their history, in Mississippi and Illinois, they have no excuse for their persistent defiance of law under the government of the United States.

One pretence for this obstinate course is, that their belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and, therefore, under the protection of the constitutional guaranty of religious freedom. This is altogether a sophistical plea. No doubt the Thugs of India imagined that their belief in the right of assassination was a religious belief; but their thinking so did not make it so. The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifices by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to condemnation and punishment by the civil authority.

The State has a perfect right to prohibit polygamy, and all other open offences against the enlightened sentiment of mankind, notwithstanding the pretence of religious conviction by which they may be advocated and practiced. *Davis v. Beason*, 133 U.S. 333. And since polygamy has been forbidden by the laws of the United States, under severe penalties, and since the Church of Jesus Christ of Latter-Day Saints has persistently used and claimed the right to use, and the unincorporated community still claims the same right to use, the funds with which the late corporation was endowed for the purpose of promoting and propagating the unlawful practice as an integral part of their religious usages, the question arises, whether the government, finding these funds without legal ownership, has or has not, the right, through its courts, and in due course of administration, to cause them to be seized and devoted to objects of undoubted charity and usefulness—such for example as the maintenance of schools—for the benefit of the community whose leaders are now misusing them in the unlawful manner above described; setting apart, however, for the exclusive possession and use of the church, sufficient and suitable portions of the property for the purposes of public worship, parsonage buildings and burying grounds, as provided in the law.

136 U.S. at 48-50.

101. See Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 399 (1941) (depicting Jehovah's Witnesses as "a sect distinguished by great religious zeal and astonishing powers of annoyance").

(1) criminally prosecute anyone who practices the disfavored religion;<sup>102</sup>

(2) ban any member of a sect from voting or holding public office, regardless of whether he or she practices the disfavored acts;<sup>103</sup> and

(3) abolish the church as an institution and seize all of its property (including burial grounds and houses of worship if Congress so decrees).<sup>104</sup>

On September 25, 1890, Mormon President Wilford Woodruff issued the "Woodruff Manifesto," wherein he declared his intention to submit to the laws that proscribed polygamy and advised all Latter-Day Saints to refrain from contracting any marriage prohibited by the laws of the land. Whether this "revelation" was a change in doctrine is hotly disputed to this date. Congress appears to have been satisfied, however, because in 1893 it ordered the personal property of the church restored and in 1896, the real property. Utah was admitted to the Union on January 4, 1896, with an unrepeatable constitutional provision that forever outlaws polygamy.

### B. *The Catholic Question*

In 1875 President Grant touched upon a raw nerve when, in an address to the convention of the Army of the Tennessee, he stated:

Encourage free schools, and resolve that not one dollar appropriated for their support shall be appropriated to the support of any sectarian schools. Resolve that neither the State nor nation, nor both combined shall support institutions of learning other than those sufficient to afford every child growing up in the land the opportunity of a good common-school education, unmixed with sectarian, pagan or atheistical dogmas. Leave the matter of religion to the family altar, the church and the private school, supported entirely by private contributions. Keep the church and the state forever separate.<sup>105</sup>

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102. *Reynolds v. United States*, 98 U.S. 166 (1878). See *supra* note 84 and accompanying text.

103. *Davis v. Beason*, 133 U.S. 333 (1890). See *supra* notes 95-97 and accompanying text.

104. *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890). See *supra* notes 99-100 and accompanying text.

105. *The President's Speech at Des Moines*, 22 CATH. WORLD 433, 434-35 (1876). See *McCullum v. Board of Educ.*, 333 U.S. 203, 218 (1947).

The parochial school system began to develop in New York City and other urban centers during the 1840s, partially in response to the nondenominational Protestantism that was being inculcated in the "public schools." For example, in 1848 Horace Mann, the greatest of American public school exponents, issued his final report to the Massachusetts Board of Education, in which he expounded upon the need to continue the fundamentally religious character of the "nonsectarian" public schools.<sup>106</sup>

A second aspect of the public school question was the utilization in the public schools of various texts containing religious and ethnic slurs; for example, "popery," "deceitful Catholics," "the Pilgrims fled from the persecution of Catholics," and "there is no doubt the lower classes of Ireland are so."<sup>107</sup>

In President Grant's annual message to Congress on December 7, 1875, he called for a constitutional amendment to prohibit the use of public funds for sectarian schools.<sup>108</sup> In the same remarkable message, President Grant urged that the traditional tax exemption for religious property be abolished so that property would be taxed equally "whether church or corporation, exempting only the last resting place of the dead, and possibly, with proper restrictions, church edifices."<sup>109</sup>

On December 14, 1875, in response to the President's call, Mr. Blaine of Maine introduced the Blaine amendment, which provided:

No State shall make any law respecting an establishment of

106. H. MANN, ANNUAL REPORT, 1845-1848 (1891).

I believe then [1837] as now, that religious instruction in our schools, to the extent which the Constitution and the laws of the State allowed and prescribed, was indispensable to their highest welfare, and essential to the vitality of moral education.

I avail myself of this, the last opportunity which I may ever have, to say in regard to all affirmations or intimations that I have ever attempted to exclude religious instruction from the schools, or to exclude the Bible from the schools, or to impair the force of that volume, that they are now, and always have been, without substance or semblance of truth.

Our system earnestly inculcates all Christian morals; it founds its morals on the basis of religion; it welcomes the religion of the Bible; and in receiving the Bible, it allows it to do what it is allowed to do in no other system, to speak for itself.

107. See STOKES & PHELPS, *Incidental References to Religion in Textbooks*, in 2 CHURCH AND STATE IN THE UNITED STATES 572 (1958).

108. Annual Message of the President of the United States, 4 CONG. REC. 175 (1875).

109. *Id.*

religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.<sup>110</sup>

On August 4, 1876, the Blaine amendment passed the House by a vote of 180-7<sup>111</sup> and began to move through the Senate, where, on August 11, a much longer version was approved.<sup>112</sup>

No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. No public property, and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught; and no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or denomination, or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights of property already vested.<sup>113</sup>

This expanded version of the Blaine amendment could not muster the necessary two-thirds vote in the Senate, and the effort to modify the federal Constitution died in chambers.<sup>114</sup> The defeat of the proposed Blaine amendment, however, was by no means the end of the controversy. In 1884 when the "plumed knight," James G. Blaine of Maine, was the Republican standardbearer against Grover Cleveland, the Catholic question cost the Republican Party its entrenched position in the White

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110. H.R.J. Res. 1, 44th Cong., 1st Sess., 4 CONG. REC. 205 (1875).

111. *Id.* at 5191 (1876).

112. *Id.* at 5457.

113. *Id.* at 5453.

114. *Id.* at 5595.

House. The defeat of Blaine in this bitterly partisan campaign resulted from Blaine's reluctance to disavow the exuberance of his ardent supporter, the Reverend Samuel Burchard, who denounced the Democrats as the party of "rum, Romanism and rebellion." The backlash brought out the "Catholic" vote with a vengeance, thus placing New York in the Democratic column by a scant 1,087 votes and Mr. Cleveland in the White House.<sup>115</sup>

More significant for our purposes is the fact that the substantial majorities in Congress, which had endorsed the principle of the Blaine amendment, required that any new states to the Union must, *as a condition of admission*, enact "Blaine amendments" in their state constitutional documents as a part of their "compact" with the United States. These Blaine amendments could not be changed nor otherwise modified without the consent of Congress.<sup>116</sup>

Before directing our attention to that topic, however, fairness requires that some mention be made of what may be perceived as a substantial basis for opposition to aid for parochial

115. To complete the picture, the following details should be added:

The first proposal to amend the Constitution and prohibit appropriations to sectarian schools was made by Mr. Burdett of Missouri on April 18, 1870. CONG. GLOBE, 41st Cong., 2d Sess. 2754 (1870). In 1871 Senator Stewart of Nevada proposed a similar amendment. CONG. GLOBE, 42d Cong., 2d Sess. 206 (1871).

While the Blaine amendment was pending, Congressman O'Brien of Maryland proposed an amendment that would exclude ministers of religion from public office and forbid appropriations to religious sects. H.R.J. Res. 36, 44th Cong., 1st Sess., 4 CONG. REC. 440 (1876).

Amendments forbidding payment of public funds to sectarian schools were also proposed in the House by Mr. Williams of Wisconsin, H.R.J. Res. 44, 44th Cong., 1st Sess., 4 CONG. REC. 476 (1876), and by Mr. Lawrence of Ohio, H.R.J. Res. 163, 44th Cong., 1st Sess., 4 CONG. REC. 5318-19 (1876).

In 1878 Senator Edmunds of Vermont proposed a constitutional amendment that forbade the states to make any law respecting an establishment of religion or to appropriate public funds to sectarian schools. S.J. Res. 13, 45th Cong., 2d Sess., 7 CONG. REC. 252 (1878).

In 1880 Mr. McCoid of Iowa proposed an amendment that required the states to maintain free public schools and made attendance at public or private schools for five years a prerequisite for voting. This amendment also prohibited the expenditure of public funds for sectarian schools. H.R.J. Res. 344, 46th Cong., 3d Sess., 11 CONG. REC. 107 (1880).

Finally, in 1888 Senator Blair of New Hampshire introduced an amendment that would prohibit the grant of public funds to sectarian schools. S.J. Res. 86, 50th Cong., 1st Sess., 19 CONG. REC. 4615 (1888).

Further details may be found in: Ames & Herman, *The Proposed Amendments to the Constitution of the United States During the First Century of its History*, in 2 ANNUAL REPORT OF THE AMERICAN HIST. ASS'N FOR THE YEAR 1896 (1897).

116. See, e.g., Washington Enabling Act, ch. 180, § 4, 25 Stat. 676 (1889).

schools. There is no doubt that the flames of bigotry were fanned by the Know Nothings, the Ku Klux Klan, and the American Protective Association (APA), to mention only a few of the organizations on the lunatic fringe. But the prejudice of the hate-mongers was able to influence substantially the American mainstream because some leaders of the Catholic Church demonstrated an incredible insensitivity to political realities in the United States. It would, in fact, be difficult to find two more reactionary personages in the history of the papacy than Gregory XVI (1831-1846) and Pius IX (1846-1878).

Gregory, an autocrat among autocrats, longed to turn the clock back to the golden age of absolute monarchy that preceded the French Revolution. On August 15, 1832, Gregory issued *Mirari Vos*,<sup>117</sup> an encyclical condemning separation of church and state, "liberalism," freedom of opinion, and freedom of the press. In fairness, it must be added that the literal translation of Gregory's encyclical is terribly misleading; but in the politics of nineteenth-century America, what the Pope appeared to say counted for far more than what he actually said.

Pius IX gained few admirers in the North when he failed to condemn slavery as a moral outrage, and his brief diplomatic flirtation with the Confederacy did not help his public image.<sup>118</sup> Pius IX is notorious, however, for his encyclical *Quanta Cura*, dated November 8, 1864, because attached to the encyclical was a Syllabus of Errors, officially called "Syllabus of the principal errors of our time, which are censured in the consistorial Allocutions, Encyclicals and other Apostolical Letters of our Most Holy Lord, Pope Pius IX."<sup>119</sup> This extremely negative document denounced as error the following statements:

15. Every man is free to embrace and profess that religion which, guided by the light of reason, he shall consider true. (Allocution *Maxima quidem*, June 9, 1862;<sup>120</sup> *Damnatio "Multiplices inter,"* June 10, 1851).<sup>121</sup>

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117. See R. CORRIGAN, *THE CHURCH AND THE NINETEENTH CENTURY* (1938); BENDIC-TINE MONKS OF SOLESMES, *THE CHURCH* 124-27 (M. O'Gorman trans. 1962) [hereinafter cited as *THE CHURCH*].

118. STOKES & PHELPS, *supra* note 107, at 241-43.

119. See E. HALES, *PIO NONO: A STUDY IN EUROPEAN POLITICS AND RELIGION IN THE NINETEENTH CENTURY* (1954). See also *THE CHURCH*, *supra* note 117, at 178.

120. *THE CHURCH*, *supra* note 117, at 168.

121. *Id.* at 153-54.

47. The best theory of civil society requires that popular schools open to children of every class of the people, and generally, all public institutes intended for instruction in letters and philosophical sciences and for carrying on the education of youth, should be freed from all ecclesiastical authority, control and interference, and should be fully subjected to the civil and political power at the pleasure of the rulers, and according to the standard of the prevalent opinions of the age. (*Epistle to the Archbishop of Freiburg* "Quum non sine," July 14, 1864).<sup>122</sup>

In the rarefied stratosphere of epistemological logicism that preoccupied the theologians of the time, the papal condemnation of one proposition did not mean that its converse was true. Thus, to say that the statement "all white men are thieves" is false does not mean that no white man is a thief. But whatever these abstractions may have meant in a Europe affected by the full-blown development of the industrial age, the metaphysical niceties of nuance were lost upon the American public. The common patron of taverns, together with not a few enlightened individuals, simply heard what was said and reacted with outrage. The issue was further clouded by the uproar resulting from the declaration of papal infallibility that emanated from the Vatican Council in 1870.<sup>123</sup>

To the popular mind, it appeared that the Pope was seeking to enslave men's minds by seizing control of the schools and declaring himself infallible. This approach obviously would have suppressed all dissent and would have deprived Americans of their cherished liberties. While compelling reasons existed to oppose any expenditure of public funds, the concept of funding the dissemination of these abhorrent ideas was unthinkable. With this background in mind, one can better appreciate the impetus to include a Blaine amendment in each new state

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122. *Id.* at 174.

123. Bishop Edward Fitzgerald, Bishop of Little Rock, was one of only two delegates to Vatican Council I who voted *non placet* [no] on the issue of papal infallibility. Upon his return to the United States, it is reported that he complained about other votes being stolen by the papal forces who had the audacity to round up votes during siesta. In the final weighing of votes, however, the big rock outweighed Little Rock.

constitution.

#### V. CONVERGENCE OF ANTI-MORMON AND ANTI-CATHOLIC SENTIMENT IN THE WASHINGTON CONSTITUTION

On February 22, 1889, Congress approved enabling legislation providing for the division of the Dakotas into two states and permitting the people of North Dakota, South Dakota, Montana, and Washington to draft constitutions, form state governments, and to be admitted into the Union on an equal footing with the original states.<sup>124</sup> This legislation contained very specific provisions regarding religion. Section 4 provided in part:

[A]nd said conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of said states: First: That perfect toleration of religious sentiment shall be secured and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship . . . Fourth: That provision shall be made for establishment and maintenance of systems of public schools which shall be open to all the children of said States and free from sectarian control.<sup>125</sup>

Senator Blair of New Hampshire rose to explain that the fourth provision "is a feature of redeeming, of saving grace, and of the greatest importance."<sup>126</sup>

124. Act of Feb. 22, 1889, ch. 180, 25 Stat. 676 (1889).

125. *Id.* § 4.

126. The dialogue in the Congressional Record is as follows:

Now Mr. President, not to occupy too long the time of Senate, I will call attention to one other feature in this report which I am very glad to commend: I find on page 5, paragraph 4, this provision:

Fourth, That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of said States, and free from sectarian control.

There, sir, is a feature of redeeming, of saving grace, and of the very greatest importance, as it seems to me. It is the substance of a constitutional amendment now pending before this body designed to secure the same in substance to the people of all the States and those already in the Union as well as to those which may hereafter be admitted. That amendment I consider the most important measure now pending in the United States in any legislative body or before the great forum of the people. We have made some advance in the hearings upon that amendment before the Committee on Education and Labor and we shall make still more, and I take this opportunity to express my gratification that this leading feature is recognized and is to be adopted in the fundamental law of these States. This makes a precedent, compliance with which will require the extension of the provisions of this amendment to all the States in the Union.

Senator Blair went on to remark that although the enabling

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Nor, Mr. President, is this a matter upon which there is but slight public interest. All over the country our people are learning that a great question has arisen. It is this: Which shall be the survivor, the common school or the parochial, the denominational school in this country? That is the really leading issue of the immediate future so far as the politics of this country are concerned.

I have in my hand the expression of sentiment of many of the leading citizens of one of the great cities of this country, which in this connection, I will read to the Senate. It is a memorial addressed to the Senate and House of Representatives of the United States in Congress assembled, in behalf of the citizens of Philadelphia, and it showeth:

*To the Senate and House of Representatives in Congress assembled:*

This memorial, on behalf of citizens of Philadelphia, showeth: Two grave dangers threaten at this hour the American system of common schools, the atheistic tendency in education and the strenuous demand for a division of the school funds in the interest of sectarian or denominational schools. Through the former tendency the reading of the Christian Scriptures and the offering of prayer have been forbidden in the schools of some of our principal cities, while one at least has gone so far as to throw out of her schools every text-book containing any reference to God. This attempt to exclude all religious ideas from the instruction given in the public schools we hold to be both unphilosophical and inimical to the public good, because it neglects the moral faculties, which are the most important faculties of man, and the right exercise of which is most important to the State; and because it does not correspond to the character of the institutions for which the common school is designed to prepare the citizens of this Republic.

Mr. PAYNE. What is the paper from which the Senator is reading?

Mr. BLAIR. It is the memorial of citizens of Philadelphia.

Mr. PAYNE. Will the Senator state in what States the practices referred to are said to prevail?

Mr. BLAIR. It is alluding to many of the prominent cities in different States, quite a number, some fifteen or twenty cities in different parts of the country where this has been done, as I am informed.

On the other hand, to accept the proposal for a division of the school funds would be for the State to destroy the whole school system which we have built up with so much care and at such vast expense; to renounce all responsible or effective control of the work of education, and to become a mere tax-gatherer for the sects. The one great argument by which this proposal is sustained is that Christian parents can not accept for their children an education which, while ostensibly neutral, is virtually hostile to religion. The adoption of the secular theory of education, therefore, so far from reconciling those who advocate the division of the funds, only stimulates them to fresh efforts, and supplies them with fresh arguments against the public schools. These two adverse tendencies, therefore, assist each other, and between them there is danger that our school system may perish or be seriously crippled at the very time when it is most urgently needed; for, more than any other single institution, it may be regarded as the digestive organ of the body-politic through which we assimilate to the national character the foreign elements which every year brings in increasing volume to our shores.

Against both these dangers we shall provide most effectively by simply keeping our school system on the foundations where it was placed by our fathers. We believe that the time has come when constitutional safeguards

act was deficient because it did not provide for women's suf-

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ought to be erected in the nation's fundamental law around this most precious institution. We have, therefore, observed with pleasure the introduction of a joint resolution now pending before one of your honorable bodies (Senate Res. 86) proposing an amendment to the Constitution of the United States which, while it recognizes the Christian character and purpose of our system of public education, forbids the appropriation of public money to any school or institution in which the peculiar doctrines or ceremonials of any religious sect or denomination are practiced or taught; and we earnestly pray that you will speedily submit this or some similar amendment to the Legislatures of the several States for their approval.

In this connection we are reminded that General Grant, when President, recommended to Congress the passage of an amendment to the national Constitution 'prohibiting the granting of any school funds or school taxes, or any part thereof, either by legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination.' The Republican national convention, at Cincinnati, June 15, 1876, recommended 'an amendment to the Constitution of the United States forbidding the application of any public funds or property for the benefit of any schools or institutions under sectarian control.'

The Democratic national platform, adopted in the same year at St. Louis, declared for the maintenance of the public schools 'without prejudice or preference for any class, sect, or creed, and without largesses from the Treasury to any.' A joint resolution to this effect, introduced into the House of Representatives by Hon. James G. Blaine, was adopted in that body by an almost unanimous vote. Amended in the Senate by the addition of a proviso that it should not be construed against the reading of the Bible in the schools, it was adopted there by a vote of 28 to 16, or a little less than the requisite two-thirds. The danger is now more manifest, the need is more urgent than then. The lapse of a dozen years has strengthened every argument which was then employed in support of this measure.

At a largely attended public meeting, the call for which was signed by a large number of the leading citizens of Philadelphia, the undersigned were appointed a committee to act for their fellow-citizens in this matter. In support, therefore, of the desired action we lay before you this memorial, and beg leave also to submit the resolutions adopted at the aforesaid meeting, which are as follows:

*Resolved*, That this nation, in its origin and history, is Christian. Our colonial compacts of government and charters, our State constitutions and statutes, our common law, our days of fasting and thanksgiving, our State and national institutions and usages generally, have given our political being a marked and distinctive Christian character.

*Resolved*, That the type of Christianity which has characterized our State and national life is that which secures to our people an open Bible, the right of private judgment, freedom of speech and of the press, and the entire independence of our Government against all foreign domination, whether ecclesiastical or civil. The sovereign people and their government are not amenable to spiritual pontiffs or civil potentates, but to God and His law.

*Resolved*, That our common schools, as one of the most important institutions of our country, should correspond to the Christian origin, history, and character of the Republic itself. Our schools

should teach the history of our country and the character of our institutions; our laws, and the reasons for them; the prerogatives and responsibilities of the sovereign people and their government, and the loyalty [sic] due, under God, to the authority of our own rulers. The Bible ought not only to be read, but taught, in all the schools. The public schools must prove a failure if they do not train our rising generation to be honest, virtuous, and loyal citizens. Such training, as the ordinance for the Territory of the Northwest and Washington's Farewell Address assure us, can be found only in the principles of religion.

*Resolved*, That while our schools are and should be Christian, no preference or advantage should be given to any one sect or denomination in connection with the public schools. Above all, no sect can justly or fairly claim any portion of the public money for the support of its own sectarian schools.

*Resolved*, That in both these respects our school system should be kept on the foundations on which it was placed by our fathers. We seek no change, and we will withstand all attempts to revolutionize, in either of these features, our system of public education.

*Resolved*, That we approve of the general features of the constitutional amendment now pending in the Senate of the United States, "respecting establishments of religion and free public schools," in that, while it recognizes the Christian character and purpose of our system of education, it forbids the appropriation of public money to any school in which the peculiar tenets or ceremonials of any religious sect or denomination are practiced or taught.

*Resolved*, That a committee of nine be appointed by this meeting to co-operate with the National Reform Association in its further efforts in behalf of this or any similar measure which may be directed to the same ends, and that this committee shall have power to add to its numbers.

Then follow the signatures of a large number of the leading citizens of the city of Philadelphia. The constitutional amendment referred to is in these words:

Joint resolution proposing an amendment to the Constitution of the United States respecting establishments of religion and free public schools.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of the House concurring therein)*, That the following amendment to the Constitution of the United States be, and hereby is proposed to the States, to become valid when ratified by the Legislatures of three-fourths of the States as provided in the Constitution:

Article —

SEC. 1. No State shall ever make or maintain any law respecting an establishment of religion, or prohibiting the free exercise thereof.

SEC. 2. Each State in this Union shall establish and maintain a system of free public schools adequate for the education of all the children living therein, between the ages of six and sixteen years, inclusive, in the common branches of knowledge, and in virtue, morality, and the principles of the Christian religion. But no money raised by taxation imposed by law or any money or other property or

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conference committee [has] embodied in this great enabling act, . . . the very essence of the provision in the constitutional amendment which I have just read, [the Blaine amendment, as modified by the Senate] and this feature I most highly commend and I shall look to it in the struggles of the future.<sup>127</sup>

credit belonging to any municipal organization, or to any State, or to the United States, shall ever be appropriated, applied, or given to the use of purposes of any school, institution, corporation, or person, whereby instruction or training shall be given in the doctrines, tenets, belief, ceremonials, or observances peculiar to any sect, denomination, organization, or society, being, or claiming to be, religious in its character, nor shall such peculiar doctrines, tenets, belief, ceremonials, or observances, be taught or inculcated in the free public schools.

SEC. 3. To the end that each State, the United States, and all the people thereof, may have and preserve governments republican in form and in substance, the United States shall guaranty to every State, and to the people of every State and of the United States, the support and maintenance of such a system of free public schools as is herein provided.

SEC. 4. That Congress shall enforce this article by legislation when necessary.

. . . .  
Mr. President, the conference committee have embodied in this great enabling act, so defective with reference to one-half of the population living within the Territory concerned; so defective, I had almost said, in the light of the times in which we live; so wickedly defective in that regard, the committee have embodied in this great bill a provision substantially the same, the very essence of the provision in the constitutional amendment which I have just read, and this feature I most highly commend and I shall look to it in the struggles of the future, if I participate in them, as the great precedent for the general adoption of the substance of the constitutional amendment which has been proposed, is now pending before us, and which I have just read to the Senate.

I am not one of those who think these States should have been admitted at this time under these circumstances; I gladly defer to the judgment of those who, in so much greater numbers, are individually quite my peers upon a question of this kind. But I should have preferred that we should have taken a little more time, that we should have given to these separate Territories a little more of individual consideration, and that in this great act we should have done much more of justice and should have placed these coming States upon a foundation of enduring prosperity and of stable institutions, republican in form, working justice to everybody, regardless of sex. I should, I say, have preferred this could I have had my own judgment complied with, and I should defeat this bill for six months or a year if we could achieve these grand results. But, sir, the majority rules, and I bow to the majority, specifying the reasons why I should have been glad that while doing so much of justice that we might have done more.

I will no longer claim the attention of the Senate.

20 CONG. REC. 2100-01 (1889).

127. *Id.* at 2101.

The thrust of the enabling act and its history was that proposed states could not gain admission to the Union unless the people adopted a Blaine amendment in their proposed constitutions that would outlaw any form of public assistance to schools under sectarian control or influence. A brief look at the Washington State Constitution illustrates the consequences of such a demand.

Three different provisions in the state constitution set out the basic law on state and religion:

*Article I, Section 11. RELIGIOUS FREEDOM*

Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: *Provided however*, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional and mental institutions as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.<sup>128</sup>

*Article IX, Section 4. SECTARIAN CONTROL OR INFLUENCE PROHIBITED*

All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.<sup>129</sup>

128. WASH. CONST. art. I, § 11 (1889, amended 1904, 1957). The present text of the religion clause (art. I, § 11) follows the language of amend. 34 (S.J. Res. 14, 35th Leg., 1957 Wash. Laws 1299). This article is substantially identical to the original text. In 1904, however, the following sentence was inserted: "*Provided however*, That this article shall not be so construed as to forbid the employment by the State of a chaplain for the State penitentiary, and for such of the State reformatories as in the discretion of the Legislature may seem justified." S.B. 142, 8th Leg., 1903 Wash. Laws 283 (amended 1957).

The 1957 amend. 34 expanded the language to its present form and included "state custodial, correctional and mental institutions." WASH. CONST. amend. 34.

129. WASH. CONST. art. IX, § 4.

Article XXVI provides in part:

**Fourth.** Provision shall be made for the establishment and maintenance of systems of public schools free from sectarian control which shall be open to all the children of said state.<sup>130</sup>

It is not remarkable that the constitutional provisions so carefully reflect the enabling act. The drafters undoubtedly understood that, realistically, there was no choice. What is remarkable, however, is that the provisions reflect the greater debate that we have demonstrated, which had shaped the congressional motivation to make the demands made in the enabling act. Where the drafters of the Washington Constitution had a choice, the debate was vigorous.

### A. *Tax Exemption of Church Property*

One issue that received serious consideration during the Washington Constitutional Convention was the tax status of church property. One faction sought to include a provision in the new constitution that exempted ecclesiastical property from taxation; their opponents favored a provision requiring that churches be taxed. The compromise that the convention adopted was silence, a solution that leaves the issue up to the legislature. The Tacoma *Morning Globe* for August 8, 1889, told the story in elegant style.<sup>131</sup>

130. WASH. CONST. art. XXVI. Comparable state constitutional provisions are found in N.M. CONST. art. XII, §§ 1-4 (§ 1, 1911, amended 1953); N.D. CONST. art. XIII, § 1 (1889, amended 1958); S.D. CONST. art. 22.

131. Tacoma Morning Globe, Aug. 8, 1889, at 1, col. 1.

#### *Exemption of Church Property*

The question of exempting church property from taxation found little favor. Cosgrove was the only one who made any effort in behalf of the churches. The majority considered that the committee had struck a happy medium by giving the legislature the power to pass exemption laws. It was the general opinion, however, that churches should pay a proper share of the taxes.

Godman argued if churches were exempted it would violate a great principle. It would unite church and state. To exempt churches would simply be a contribution by the state to the church of the amount of the taxes. If the matter was left to the people it would be defeated, as it was before, two to one. "If you unite church and state, goodbye to civil government. It is dangerous and pernicious," he said.

All this opposition was aroused by an amendment offered by Comegys that churches should be exempted to the extent of \$1,000, which Judge Hoyt amended by making it \$5,000. This found stray advocates in Dyer, Griffiths, and Warner; Buchanan and Stiles were opposed to any limits. If the principle of exempting or taxing church property was right then the limit was wrong.

## The compromise survives today in the language of article

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Stiles said he had a petition signed by 185 persons, among them leading businessmen of Tacoma, and one of the ablest clergymen he had ever heard preach, Rev. W.E. Copeland, protesting against the exemption of church property.

Both amendments were lost, and in order to get the sense of the convention whether it was in favor of taxing or exempting church property, Godman moved that his minority report against exempting be substituted for a majority report, which was lost.

It was interesting to note that pious interest displayed by some of the statesmen who needed the support of the faithful at the coming election. Some of them betrayed the ranked demagogy by offering amendments to exempt the property of the poor widow, the lone orphan and the toiling mechanic. One man went so far as to draw a distinction between taxing the rich man and the poor man. Another feeling referred to the struggling widow who was compelled to sell her washing and her sewing machines to meet relentless demands of the hated tax collector.

Amendment after amendment was offered and after three hours of incubation the following was hatched out to be known as section 4, leaving the question of taxing church property to the legislature. The property of the United States and of state, counties, school districts and other municipal corporations and such other property as the legislature may by general law provide, shall be exempt from taxation.

The remainder of the article as published in the *Globe* yesterday, except sections 5, 8, and 13, which were stricken out, was adopted.

On motion of Govey section 1 was amended as follows: "The legislature shall provide by law for an annual tax sufficient with other sources of revenue to defray the estimated ordinary expenses of the state for each fiscal year."

When the article was presented to the convention for concurrence in the amendments Judge Turner said he hoped section 4 would not be agreed to. Aside from leaving the question of taxing church property to the legislature it gave that body too much scope in regard to exempting other property. The section was however, retained by the following vote, which shows that the members stand two to one against the constitutional exemption of church property.

Ayes—Blalock, Buchanan, Burk, Coey, Cosgrove, Dickey, Dunbar, Durie, Dyer, Eldridge, Eshelman, Fay, Glascock, Griffiths, Henry, Jamison, Jones, Jay, Kellogg, Kinnear, Lillis, Lindsley, McCroskey, McElroy, McReavy, Minor, Moore, J.Z. (Spokane), Morgans, Newton, Power, Prosser, Reed, T.M. (Thurston), Reed, J.M. (Whitman), Schooley, Shoudy, Sohns, Stiles, Tibbetts, Weir, Weisenberger, West Winsor; total, 43.

Nays—Berry, Bowen, Clothier, Comegys, Crowley, Godman, Govey, Gray, Hicks, Manley, McDonald, More, R.S. (Pierce), Neace, Sharpstein, Stevenson, Sturdevant, Suksdorf, Sullivan, E.H. (Whitman), Turner, VanName, Warner, Willison, President Hoyt. Noes—22.

Absent—Allen, Browne, Dallam, Fairweather, Hayton, Hungate, Jeffs, Mires, Sullivan, P.C. (Pierce), Travis, 10.

A half dozen amendments in various forms, all in favor of exempting church property to a certain extent, were promptly voted down, together with several others to other sections. The article was next placed on final passage and adopted by a vote of 41 to 17.

This is the eighth article which the convention has adopted.

VII, section 1, which provides: "Such property as the legislature may by general laws provide shall be exempt from taxation." The constitutionality of this provision under the federal Constitution was determined in *Walz v. Tax Commission*,<sup>132</sup> in which the Court held that Congress and the states may exempt religious property from general real estate taxes without running afoul of the establishment clause. The recent decision in *Mueller v. Allen*,<sup>133</sup> however, upholding the right of the State of Minnesota to permit certain income tax deductions of amounts spent for tuition and transportation of students, may fall into the *Everson* category of actions permitted in the United States but not in the State of Washington, if (or when) Washington enacts a state income tax.

### *B. Free Exercise of Religion and Disestablishmentarianism*

The full implications of the *Reynolds* test for freedom of religion cannot be appreciated without a slight digression into the realm of freedom of speech. One of the most significant decisions for an understanding of the development of the constitutional doctrines of freedom of speech and freedom of the press was *Fox v. Washington*.<sup>134</sup> Fox was a Tacoma newspaper editor who had been prosecuted because his statements tended to bring the law into disrespect. Following the San Francisco fire, many people sought salvation by fleeing from California to the Pacific Northwest, where many of them gravitated into a variety of communes.

One of these groups, known as Homeites, was the subject of Fox's article "The Nude and the Prudes," in which Fox pointed out that the Homeites bathed sometimes in evening dress and sometimes in the clothes that nature gave them. Unfortunately, this idyllic existence was interrupted when a dispute broke out within the group and some of the dissidents reported the shocking conduct to the authorities. As a result, the joint was raided and the nudists were properly apprehended and prosecuted.

Fox ran afoul of the law because, when he described the untoward events that resulted in the suppression of nudity, he editorialized that the force of the law was brought down upon this community by a few prudes who proceeded in a brutal and

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132. 397 U.S. 664 (1970).

133. 103 S. Ct. 3062 (1983).

134. 236 U.S. 273 (1915).

unneighborly way to blow the whistle. Fox thought that his comment on the evidence was protected by the first amendment, but the United States Supreme Court was quick to point out in pure Blackstonian logic that even if freedom of speech and of the press were liberties protected by the fourteenth amendment, Fox's conduct was not within the parameters of protected speech.<sup>135</sup>

The glory of English liberty, as extolled by Blackstone, was that there could be no prior restraint. But the English law of seditious libel stood clear: God help the person who said the wrong thing. The "wrong thing" was anything treasonable, seditious, or (as in Washington) tending to bring the law into disrepute. All that the prosecution must establish, according to the Court in *Fox*, is that the speech complained of has a *dangerous tendency*. Thus, what the speaker said or intended is irrelevant—the test is what someone might do if he or she believed the speaker. As applied to Fox: if people read his complaint about the stoolies and believed that it was unneighborly to squeal, this could undermine law enforcement that is so critically dependent upon informants.

But if *Fox* is not appreciated, it is easy to miss the point in *United States v. Schenk*,<sup>136</sup> *Abrams v. United States*,<sup>137</sup> and *Gitlow v. New York*<sup>138</sup> that what the defendant said is irrelevant because the constitutional test is what *might happen* if, for example, young men believed that the Draft Act violated the thirteenth amendment. Similarly, the theme of guilt by association, which is the hallmark of *Whitney v. California*,<sup>139</sup> is a reiteration of the doctrine that the Court had endorsed against the Mormons in *Davis v. Beason*.<sup>140</sup>

This brief digression into the free speech area helps to elucidate the free exercise issues. Curiously, the tremendous evolution in the scope of protected speech, culminating in such cases as *Brandenburg v. Ohio*,<sup>141</sup> which places the constitutional line of demarcation protecting communication at the point of incitement to imminent lawless action, and *Law Students Civil Rights*

135. *Id.* at 277.

136. 249 U.S. 48 (1919).

137. 250 U.S. 616 (1919).

138. 268 U.S. 652 (1923).

139. 274 U.S. 357 (1927).

140. 133 U.S. 333 (1890). See *supra* notes 95-97 and accompanying text.

141. 395 U.S. 444 (1969).

*Research Council v. Wadmond*,<sup>142</sup> which stands for the proposition that membership may not be punished unless the government proves that the membership was knowing and with the specific intent to further illegal aims, has not been accompanied by a comparable doctrinal development in the free exercise area.

The United States Supreme Court has indeed articulated an occasional viewpoint that cannot be reconciled with the plain language of *Reynolds*. For example, in *Sherbert v. Verner*,<sup>143</sup> the Court indicated that a compelling state interest must be found to justify the state's decision to impose a substantial burden upon a citizen by requiring the citizen either to work on Saturday or to forgo unemployment compensation. In *Wisconsin v. Yoder*,<sup>144</sup> the Court indicated that a state must demonstrate an interest of sufficient magnitude to override the religious interest claiming protection under the free exercise clause. Only those state interests of the highest order that are not otherwise served can outweigh an identifiable religious sect's legitimate claims to the free exercise of religion.

In *Gillette v. United States*,<sup>145</sup> however, virtually the same Court held that Congress could constitutionally compel a selective conscientious objector to bear arms in a war that his religion taught him was "unjust." The Court stated that to invalidate a religious claim, the government need only show that a "substantial government interest" will be adversely affected.<sup>146</sup>

The purpose of this dissertation is not to do the impossible by reconciling *Reynolds*, *Sherbert*, and *Gillette*. The basic problem with the *Reynolds* approach is that under *Reynolds*, freedom of religion means that one can *believe* anything; if others do not like that belief, however, one cannot *practice* it. In all of the often heated congressional debates about Mormonism, no one sought to prove that polygamy was a social evil in any sense of the word. Instead, proponents relied upon interminable scriptural citations to show that polygamy was *sinful*. Toward the end of the debates, it is true, the social argument was voiced that the true evil of polygamy was that a man would not provide for his wives in their declining years and the wives would become public charges. This was a type of Catch-22 argument

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142. 401 U.S. 154 (1971).

143. 374 U.S. 398 (1963).

144. 406 U.S. 205 (1972).

145. 401 U.S. 437 (1971).

146. *Id.* at 454-60.

because the empirical evidence upon which it rested was simply that Mormons were threatened with imprisonment for unlawful "cohabitation" if they so much as contacted more than one female, let alone provided sustenance for more than one.

The Mormon story does illustrate the oft-repeated theory that the Constitution is only a scrap of paper, and that if a true majority wishes to compel a minority to alter its religious beliefs, nothing in our governmental system prevents the majority from having its way. An early Washington case, *State v. Neitzel*,<sup>147</sup> quoted *Reynolds* and upheld the prosecution of a fortuneteller on the ground that any religious "practice" may be outlawed. The early laws against fortunetellers and soothsayers were purely religious in character because the established church in England sought to eliminate these false religious practices. To many a devout voter, the *possible danger* from permitting fortunetelling—for example, fraud or devil worship—justified the banishment of this false religion.

In a slightly different vein, the Washington Supreme Court adopted a less restrictive test for free exercise of religion in *State ex rel. Holcomb v. Armstrong*.<sup>148</sup> In *Armstrong*, the court stated that religious freedom to act can be restricted only to prevent grave and immediate danger to interests that the state may lawfully protect.<sup>149</sup> In *Armstrong*, a student had objected on religious grounds to an x-ray examination required by the University of Washington. However, the test enunciated is vastly different from *Reynolds*.

More recently, in *City of Sumner v. First Baptist Church*,<sup>150</sup> a plurality of the court endorsed a two-pronged test that would require the court to determine first whether the magnitude of the governmental interest outweighs the first amendment values and, if so, whether the means chosen to enforce the governmental interest are the least restrictive necessary. *First Baptist Church* involved the validity of a city ordinance that, as applied, prevented the use of a church building as a parochial school. Of interest was Judge Dolliver's dissent, in which he stated that the zoning statute was "presumed constitutional,"<sup>151</sup> an approach that is incorporated in the minimum scrutiny tests

147. 69 Wash. 567, 569, 125 P. 939, 940 (1912).

148. 39 Wash. 2d 860, 239 P.2d 545 (1952).

149. *Id.* at 864, 239 P.2d at 548.

150. 97 Wash. 2d 1, 639 P.2d 1358 (1982).

151. *Id.* at 19, 639 P.2d at 1368.

traditionally applied to economic regulation and other exercises of the police power in an equal protection context.<sup>152</sup>

The deep divergence in philosophical views that underlies the confusing and contradictory cases involving free exercise of religion rarely surfaces in plain language. Instead, it is most commonly evidenced by the summary disposition of a case, more by reference to the respectability of the religious group involved than by reference to any coherent principle. Thus, for example, in *United States v. Kuch*,<sup>153</sup> the court summarily dismissed the religious claims of the chief boo hoo of the Neo-American Church and upheld the seven-count conviction for possession of marijuana and LSD. The court expressed its displeasure with the "nihilistic, agnostic, and anti-establishment attitude" evidenced in such sacramental appendages as the church seal, with the motto: "Victory over Horseshit."<sup>154</sup> In the course of his opinion, Judge Gesell pines for the simpler days of the *Reynolds* test, which articulated the "pristine view taken by our founding fathers".<sup>155</sup>

Unfortunately we have been gradually drifting from this pristine view taken by our founding fathers that religious beliefs were to be upheld at all costs but that acts induced by religious beliefs could be prohibited where Congress spoke in the interests of society as a whole. Recent decisions of the Supreme Court [*Sherbert v. Verner*] suggest that there must be a balancing of the legislative end to be achieved against the effect of the legislation on practices . . . of a particular religion . . . . No United States District Judge who must act within the confines of a record and available judicial time has the wisdom or means of doing adequately what the cases appear to require.<sup>156</sup>

An intermediate, but nonetheless curious view was expressed by the Tenth Circuit in *Williams v. Eaton*.<sup>157</sup> In *Williams*, the court validated the expulsion of several black athletes from the University of Wyoming because these athletes insisted upon wearing black armbands when competing against teams from Brigham Young. The purpose of the black armbands was

152. See *Lindsley v. National Carbolic Gas*, 220 U.S. 61 (1911).

153. 288 F. Supp. 439 (D.D.C. 1968).

154. *Id.* at 445.

155. *Id.* at 446.

156. *Id.*

157. 468 F.2d 1079 (10th Cir. 1972).

to protest the racial policies of the latter institution. The court held, however, that it was permissible for state institutions to punish severely anyone who *disparaged* another religion.<sup>158</sup>

To underscore the implications of *Williams*, one should reflect for a moment upon *Calvary Bible Presbyterian Church v. Board of Regents*,<sup>159</sup> in which the Supreme Court of Washington held that it was constitutionally permissible to teach the "liberal" view of scriptural authenticity: Moses did not author the Pentateuch; Isaiah did not author the Book of Isaiah; David did not author the Psalms; the story of Adam and Eve is a myth. The court reasoned that open, critical, and scholarly examination of the literature (even if somewhat one-sided) does not constitute expending public funds for religious purposes.<sup>160</sup>

The black athletes in *Williams* could be punished because their devoutly held religious belief that they were not cursed and inferior persons must never be expressed in such a way as to disparage their antagonists. This is pure *Reynolds*. *A pari*, religious indoctrination and inculcation can be subsidized by taxes in Washington State, despite the vehement protest of fundamentalists, as long as the teaching is done in a suave, urbane, and sophisticated manner. This is equally pure *Reynolds*: you can believe whatever you want, but if the "liberal" view rates higher in the state academic hierarchy, your personal beliefs are *de minimis*.

The true meaning of *Reynolds* is a political-religious one that is hinted at in Justice Waite's opinion for the Court. One recurring theme throughout the congressional debates was that the "real" problem with Mormonism was not polygamy itself but the theocratic nature of the Mormon political institutions. For example, Senator Bayard of Delaware declared:

The government of Utah today has no semblance to republican government . . . . All that was intended to be conserved of republican institutions and theory has been displaced by a system of theocracy. And therefore, for the purpose of obtaining the spirit and meaning and principle of republican government it is necessary that theocracy shall be displaced.<sup>161</sup>

Finally, perhaps the case that best illustrates the depen-

158. *Id.* at 1083.

159. 72 Wash. 2d 912, 921, 436 P.2d 189, 194 (1967).

160. *Id.* at 919-22, 436 P.2d at 193-95.

161. 47th Cong., 1st Sess., 13 CONG. REC. 1156 (1882).

dence of the constitutional test upon the religion being challenged is *Leary v. United States*.<sup>162</sup> Timothy Leary challenged his conviction for illegally importing marijuana on the grounds that marijuana plays a vital part in the rituals of the Hindu sect of which he was a member. The Court summarily announced:

Appellant's reliance on *Sherbert v. Verner*, [374 U.S. 398 (1963)] for authority that the constitutionally guaranteed right of free religious exercise imposes on the Government the burden of showing a compelling interest in its abridgment, is misplaced and inapposite on the facts . . . .

Here the paramount Government interest in the enforcement of the laws relative to marijuana is the protection of society. We cannot reasonably equate deliberate violation of federal marijuana laws with the refusal of an individual to work on her Sabbath Day and nevertheless claim compensation benefits.<sup>163</sup>

Rather than focus upon the disparity of treatment that is accorded different or unconventional religious beliefs, the Court has drawn a line of demarcation between government action that orders a person to do something that violates his or her religious belief and government prohibition of some action that may have religious connotations for a citizen. Thus, in the flag salute case, *Board of Education v. Barnett*,<sup>164</sup> the Court upheld the right of Jehovah Witnesses' children to refuse to salute the flag. In sweeping language, the Court said: "If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."<sup>165</sup>

Whatever that oft-quoted statement of public policy may have meant to the Court, it was of little avail to Ms. Struck, an officer in the United States Air Force who ran afoul of Air Force Regulation 36-12, which required the immediate termination of any officer who has given birth to a living child while in a commissioned officer status.<sup>166</sup> Ms. Struck was given the choice of

162. 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969).

163. *Id.* at 860.

164. 319 U.S. 624 (1943).

165. *Id.* at 642.

166. *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir.) (judgment vacated and case remanded to consider mootness in light of government's change of position), *vacated*, 409 U.S. 1071 (1972).

either obtaining an abortion, in violation of her Roman Catholic religious beliefs, or terminating her commission. The Ninth Circuit made a brief concession to the religious issue and concluded that the administrative convenience of uniformity in military regulations outweighed any inconvenience to Ms. Struck.<sup>167</sup>

Perhaps the issue can be more artfully focused by a hypothetical illustration. Section 49.12.200 of the Revised Code of Washington provides:

Women may pursue any calling open to men . . . [and] hereafter in this state every avenue of employment shall be open to women; and any business, vocation, profession and calling followed and pursued by men may be followed and pursued by women, and no person shall be disqualified from engaging in or pursuing any business, vocation, profession, calling or employment or excluded from any premises or place of work or employment on account of sex.<sup>168</sup>

Section 49.12.170 probably makes the violation of the above statute a misdemeanor, and we shall assume for the sake of argument that it does. Thus, our scenario unfolds with a Roman Catholic Bishop being prosecuted because he refuses to ordain a woman.

Under *Reynolds*, the only question is the amount of the fine to be imposed, from twenty-five dollars to one thousand dollars, because RCW 49.12.170 does not provide for a prison term. Under *Sherbert* and its progeny, there will be some burden upon the state to demonstrate either a compelling state interest or, at the least, a substantial state interest justifying this infringement of religious liberty.

Since the voters of Washington enacted the equal rights amendment,<sup>169</sup> the articulated public policy of Washington would seem to favor the prosecution. Obviously, any "extra protection" afforded by the language of the Washington constitutional provision for free exercise of religion is negated insofar as it conflicts with the subsequently enacted ERA. In this sense it probably does not matter which test one adopts, since the result will be the same. At least a high probability exists that all the tests will converge upon the same result. There is, however, another factor. The defendant is not a member of just any reli-

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167. *Id.* at 1376-77.

168. WASH. REV. CODE § 49.12.200 (1983).

169. WASH. CONST. art. XXXI.

gion, but belongs to a long-established, respected, and well-recognized religion. The religious tenet of the defendant is probably more outcome-determinative than all of the "tests" laid end to end.

This example suggests that the main reason it is impossible to reconcile the divergent constitutional analyses of the "freedom of religion" article is that it is virtually impossible to know the depth and sincerity of religious or philosophical conviction that motivates or motivated the authors. In the best of all possible worlds, it might be possible to dissect these traumatic religious convictions objectively and dispassionately. This cannot be done, however, in a world in which the court follows the election returns.

This evanescent complexity of religious problems in the law is only hinted at in a recent, truly Delphic, pronouncement of the Washington Supreme Court. In *Lund v. Caple*,<sup>170</sup> the court held that an aggrieved husband could not sue a pastor (and the church) for damages resulting from the pastor's sexual misconduct with his wife, who had gone to the pastor for counseling. The court held that this was simply too close to "alienation of affections,"<sup>171</sup> a cause of action that had been abolished in *Wyman v. Wallace*.<sup>172</sup> The opinion, however, does not stop at that point. The court adds:

This opinion, however, should not be read as precluding an action against a counselor, pastoral or otherwise, in which a counselor is negligent in treating either a husband or wife. It is conceivable that a malpractice action would be appropriate where a counselor fails to conform to an appropriate standard of care . . . .<sup>173</sup>

If a pastor is liable for negligent performance of his counseling function, will he be financially liable for inflicting economic harm because he pronounced a sentence of excommunication? The doctrinaire analysis of the establishment clause that underlies *Weiss* and its predecessors would impose liability. The free speech and free exercise language of our state and federal constitutions may impose a different result. A famous case and the

170. 100 Wash. 2d 739, 746-47, 675 P.2d 226, 231 (1984).

171. *Id.*

172. 94 Wash. 2d 99, 615 P.2d 452 (1980).

173. 100 Wash. 2d at 747, 675 P.2d at 231.

viewpoints that it elicited aptly illustrate this topic.<sup>174</sup>

## VI. LABADIE V. RICHARD

Father Gabriel Richard holds a notable place in American history, quite apart from his involvement in this particular type of problem. In addition to being cofounder of the University of Michigan, Father Richard was the first Roman Catholic priest ever elected to serve in the United States Congress (delegate from Michigan Territory, 1823). For purposes of brevity, it seems best to narrate the events in *Labadie v. Richard* in chronological order.

1816: Father Richard pronounced sentence of excommunication against François Labadie. From the documentation set forth below, it seems clear that Labadie was declared *vitandus* (to be shunned)—which meant that no Catholic could have social or civil dealings with him, under pain of ipso facto excommunication. This drastic penalty was imposed upon Labadie for entering a civil marriage after divorce from his first wife.

1817: A trial court in Michigan Territory held that Father Richard was guilty of defamation and awarded Labadie \$1,116 in damages.

1823: Father Richard was elected as Michigan Territorial Delegate to the United States Congress. The unpaid judgment became a political football. The case was reargued on appeal in November of 1823, but the court was deadlocked and postponed making a decision.

1824: Father Richard was imprisoned under writ of body execution. He was released on bond and, despite the bond's limitation that he could not depart from Wayne County, his right to attend Congress under privilege of immunity accorded congressional delegates was eventually upheld in the territorial courts.

1825: Defeated for re-election as territorial delegate (also in 1827 and 1829).

1831: Writ of certiorari granted in the original defamation proceeding by the United States Supreme Court (January 10, 1831).

1834: Writ of certiorari dismissed by the United States Supreme Court. (Father Richard had died on September 13, 1832.) The writ seems to have been dismissed, however, because

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174. See *infra* notes 175-93 and accompanying text.

no one would post bond at triple the amount in question (a supersedeas bond) in the United States Supreme Court.

1835: Assignees of the Labadie claim moved for execution on the 1817 judgment.<sup>175</sup>

There does not seem to be any question that Father Richard vehemently denounced Labadie. One account of the event, narrated in his biography, states: "He cursed Labadie when he was awake and asleep; when he was well and when he was ill; lying down or standing up; feasting or fasting; cursed his head, body and soul; and condemned him to hell everlasting."<sup>176</sup> There may be less certitude about whether Labadie was declared *vitandus*, but the available evidence certainly points in that direction.<sup>177</sup> The biographers state that Father Richard first obtained the permission of Bishop Flaget of Bardstown, his superior, and actually issued the excommunication under directions from the higher prelate.<sup>178</sup> Moreover, in the averments in the records of the trial, Labadie states that in a private conversation with one John S. Roby, Father Richard said: "Mr. Labadie is an adulterer . . . I have given notice in church and I shall excommunicate him . . . I have forbidden the French people from trading with or speaking to him, and unless he will put away the woman he calls his wife I will ruin him."<sup>179</sup> The defendant denied all these averments of the plaintiff, but that may have been a tactical maneuver.<sup>180</sup>

Whether or not the sentence of *vitandus* was actually pronounced, the excommunication undoubtedly had that effect. Father Richard probably intended to injure Labadie in the lat-

175. The events outlined above will be found described in detail in F. WOODFORD & A. HYMA, *GABRIEL RICHARD: FRONTIER AMBASSADOR* 120-22, 130-31 (1958). The court records, sometimes in fragmentary form, may be found in 2 *TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN*, 1805-1836, at 598 (W. Blume ed. 1935-40) [hereinafter cited as *TRANSACTIONS*]. The opinion on Father Richard's right to leave Michigan to attend Congress will be found in 1 *TRANSACTIONS*, *supra* this note, at 474. The papers relative to proceedings in the United States Supreme Court are in 1 *TRANSACTIONS*, *supra* this note, at 462, 472. The final judgment is in 2 *TRANSACTIONS*, *supra* this note, at 365.

176. F. WOODFORD & A. HYMA, *supra* note 175, at 121.

177. *Id.* at 120.

178. 1 *TRANSACTIONS*, *supra* note 175, at 600.

179. *Id.* at 603. A difficulty parallel to the jury problem in the *Hasset* case is listed by Father Richard among the grounds for a new trial: The jury at the original trial was composed of "eleven Protestants and one Catholic"—in other words, Catholics had been systematically excluded in the selection of the jury. Of course, Labadie would argue that they should have been.

180. *Id.*

ter's business dealings, in the hope that such temporal deprivation would cause him to mend his ways.

When Father Richard went to Washington, D.C., he took along an opinion of his friend on the Michigan Territorial Court, Judge Woodward, which stated that the priest had "meant only to impute to the plaintiff that which the Roman Church considers an offense and not that which the municipal law regards as such."<sup>181</sup> While in Washington, Father Richard showed this opinion to his intimate friends, including Henry Clay, Daniel Webster, and others. Since their opinions on this matter have never before been printed, they will be included here in full:

Sir:

We have examined your statement, and consider the opinion of Judge Woodward which you have submitted to us. Our opinion is

First: That if a general verdict be rendered for the Plaintiff on a Declaration containing more than one count, and one of the counts be bad, the judgment must be arrested. Second: Words, in themselves actionable may nevertheless be spoken under such circumstances and in such connection as that they thereby cease to be actionable; and if in this case it sufficiently appear that the Defendant meant only to impute to the Plaintiff that which the Roman Church considers as an offense and not that which the municipal Law regards as such, no action will lie for such words.

We may add that there are many cases in which words are spoken before Ecclesiastical Jurisdictions, or in the exercise of ecclesiastical discipline, which can not be made the subject of a suit for slander altho they might be actionable if spoken without such causes or occasion, and maliciously. But the chief ground of our opinion in this case is that the words under the circumstances *given the connection*<sup>182</sup> in which they appear to have been spoken do not charge any offense punishable by the municipal Law; therefore we think they are not actionable.

June 17th, 1824

Daniel Webster  
Edw. Livingston  
John W. Taylor  
John Scott of Balt

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181. *Id.* at 604.

182. This portion of the letter in italics is badly faded.

Peter S. Da Ponceau of Philadpa.

I concur in the above opinion. H. Clay.

Hon. Gabriel Richard:

I have examined the opinion of Judge Woodward referred to above, and upon the statement contained in it, entirely concur in his view of the law.

Hon. Horace Binney

I have read the opinion of Judge Woodward and the words charged to have been slanderously spoken of François Labadie by the Reverend Gabriel Richard. These words spoken in the course of church discipline and expressive of a positive dogma of the Catholic Church cannot support an action of slander against the clergyman who uttered them in the course and exercise of his professional duties. Where one count is bad and the verdict is general the judgment must be arrested.

Having seen the declaration in the cause above referred to, I see no reason to alter my opinion. The term Excommunication has a meaning determinal and the plaintiff's own innuendo that the defendant spoke and acted as a priest explained it so fully that I cannot see how any temporal judge can award judgment of execution against a Catholic priest to whom that power is delegated, without violating the most fundamental principle of the constitution which provides against all religious interference and [leaves]<sup>183</sup> every religious communion<sup>184</sup> free to exercise the natural right of preserving its own purity by its own appropriate modes of government and discipline.

William Sampson

New York 19 Nov. 1824.<sup>185</sup>

183. This word is completely illegible in the original manuscript.

184. This word is almost illegible in the original manuscript.

185. The original letter is preserved in the Detroit Chancery Archives (DCA-I-55). I am indebted to Msgr. Edward Hickey of Detroit for this reference and the opportunity to examine the manuscript.

Edward Livingston (1764-1836) was a famous jurist. His revised system of penal law, which he wrote into the Criminal Code of Louisiana, is a landmark in American jurisprudence. John W. Taylor (1784-1854) was Speaker of the House during the 16th Congress, 2d Session, and is best remembered for his part in the passage of the Missouri Compromise. John Scott of Baltimore and Peter S. Da Ponceau were capable attorneys but have no historical claims comparable to the other signatories.

Horace Binney was a famous lawyer from Philadelphia. He had been deeply involved in the struggle with Andrew Jackson over the United States Bank before coming to Congress. He argued and won the Girard will case against Daniel Webster in the Supreme Court. It is reported that he twice turned down a seat on the United States Supreme Court because he preferred to continue practicing law.

Daniel Webster and Henry Clay certainly rank among the most outstanding American jurists in the history of the Republic. Their flexible and accommodating philosophy of the first amendment contrasts starkly with the rigid doctrinairism that permeated the Grant Administration and, through the Blaine amendment, infects the current Washington State debate on these issues. Clay and Webster reflected and accurately articulated an earlier, more accommodating national consensus, which predates the rise of the vicious anti-Catholicism that marked the Blaine era. In the present age, the effect of that animus survives in the form of a rigid separationist philosophy. The Washington court continues to foster a high wall of separation between church and state—a structure that conserves judicial energy by short-circuiting rational analysis through the ritualistic invocation of platitudinous precedents. Yet, the preceding analysis suggests that there is more on heaven and on earth than is dreamt of by this philosophy.

## VII. FINAL REFLECTIONS

We turn to a summary of the language in the Washington Constitution to determine if the rigidity of the court's position is justified by the document's purpose and history. To read the language of the constitution without regard to the context in which it was written and to fail to consider the possibility that changing contexts should change the reading, would be inconsistent with modern perceptions of appellate court jurisprudence. Therefore, if a contemporary analysis should reveal that the values associated with the particular language have changed, one should entertain the possibility that the interpretation must change to accommodate modern conditions.

As sections V and VI of this Article demonstrate, the Washington Supreme Court has realistically appraised the restrictive religious freedom clause in the Washington State Constitution

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William Sampson (1764-1836) was the distinguished New York attorney who acted as *amicus curiae* and partial defense counsel for Fr. Anthony Kohlmann, S.J., in the landmark priest-penitent case in New York. Sampson was a Protestant. His vigorous invectives against the ossification of the common law helped bring about much-needed reforms in New York State.

The opinion of William Sampson was made available through the kind offices of Rev. Arthur L. Valade, Assistant Chancellor of the Archdiocese of Detroit. We are very much indebted to Mr. Howard Benard Gotlieb, Archivist, Sterling Library, Yale University, for his patient and timely assistance in deciphering Mr. Sampson's writing.

and in the process has moved beyond the social views incorporated in that document. In this context, it had no choice, as the possible intrusion of the state into religious practices would be barred by contemporary attitudes of the United States Supreme Court on free exercise issues.

The court has not been forced to do so in the establishment clause area, for it has not yet been challenged on a restrictive interpretation of federal equal protection or free exercise, although the court had noted that possibility as "[t]he only possible qualification upon the sweeping prohibition of Const. art. 9, § 4."<sup>186</sup> Yet, given the exploration of the contemporary attitudes that formed the basis for the language found in the Washington State Constitution, it is suggested in this Article that the court re-examine its historic attitude towards the impermeability of the wall allegedly separating church and state.

Such an approach entails political risks. Admittedly, for some members of the body politic, any change in the orthodox mandate of absolute separation would indeed be the end of civilization as we know it. Other citizens are more comfortable with the thought that the sun will probably continue to rise in the morning, even if a few more children are riding buses or getting free textbooks. But such calm persuasiveness may not prevail against the residue of bigotry that lies just below the surface of civic politeness.

In a calmer atmosphere, the Washington Supreme Court recently recanted its long-held views on the somewhat related topic of loaning public money or credit to private individuals.<sup>187</sup> One reason for denying funds to students attending church-related institutions has now apparently been completely eroded.<sup>188</sup> This reversal of a long-cherished "strict attitude" about the use of public funds entails a new realism and supports the view that no textual reason exists to prevent re-examination of the constitutional language prohibiting aid to schools under sectarian influence. The most recent aid-to-higher-education-students case decided by the Washington court shows no incli-

186. *Weiss v. Bruno*, 82 Wash. 2d 199, 206 n.2, 509 P.2d 973, 978 n.2 (1973).

187. *See Washington State Housing Fin. Comm'n v. O'Brien*, 100 Wash. 2d 491, 671 P.2d 247 (1983).

188. In *Higher Educ. Assistance Auth. v. Graham*, 84 Wash. 2d 813, 529 P.2d 1051 (1974), the court had argued that one reason for denying loans to students attending church-related schools was the "no loan of credit" provisions reinterpreted in *Washington State Housing Fin. Comm'n v. O'Brien*, 100 Wash. 2d 491, 671 P.2d (1983).

nation of the majority to do so.<sup>189</sup>

Even the compact provision's meaning<sup>190</sup> might be reread without the consent of Congress because the interpretation of constitutional language is ultimately a judicial, not a legislative function. In addition, any reliance upon the "compact provision" in the Washington State Constitution may be faulty for an entirely different reason related to the constitutional propriety of congressional demands for a Blaine amendment.

The Blaine amendment language, contained in what is now amendment 34 and article IX, section 4 of the state constitution, was inserted as the price of admission to the Union. Can Congress exact such a price? The United States Constitution provides that: "New states may be admitted by the Congress into this Union."<sup>191</sup> While this language suggests untrammelled congressional power to make the grant of statehood conditional, the United States Supreme Court has not so construed it. Instead, the Court has repeatedly stated that "[e]quality of constitutional right and power is the condition of all the States of the Union, old and new."<sup>192</sup> Thus, it might well be argued that the imposition of conditions limiting state choices regarding church-state relations or the regulation of private, religiously motivated behavior denied the equality of the petitioning territories and was therefore an act beyond the power of Congress, especially since at the time the other states were not yet bound to the first amendment.<sup>193</sup>

Perhaps the strongest statement and best discussion of the principle of equality among the states may be found in *Pollard v. Hagan*.<sup>194</sup> In *Pollard*, the Court held that because the original thirteen states had reserved to themselves the ownership of the beds of navigable streams, the principle of equality among the states requires that title to the beds of all navigable streams pass to a new state upon admission.<sup>195</sup> A case more directly on point is *Coyle v. Smith*,<sup>196</sup> in which the Court held unconstitutional a provision in the Oklahoma Enabling Act that required

189. *Witters v. Commission for the Blind*, 102 Wash. 2d 624, 689 P.2d 53 (1984).

190. WASH. CONST. art. XXVI.

191. U.S. CONST. art. IV, § 3.

192. *E.g.*, *Escanabe Co. v. Chicago*, 107 U.S. 678, 689 (1882).

193. The first amendment religion clauses were not held applicable to the states until after World War II.

194. 44 U.S. (2 How.) 212, 230 (1845).

195. *Id.*

196. 221 U.S. 559 (1911).

the state capital to be located at Guthrie. The rationale in the *Coyle* decision was that Congress may not include in an enabling act restrictions upon matters that are sovereign attributes and under state control. In dictum, the Court stated that:

The Constitutional provision concerning the admission of new states is not a mandate, but a power to be exercised with discretion. From this alone it would follow that Congress may require, under penalty of denying admission, that the organic laws of a new State at the time of admission shall be such as to meet its approval. A constitution thus supervised by Congress would, after all, be a constitution of a State, and as such subject to alteration and amendment by the State after admission. Its force would be that of a state constitution, and not that of an act of Congress.<sup>197</sup>

This dictum and the thrust of other decisions suggest that the provision in the enabling act for Washington,<sup>198</sup> which requires the consent of Congress before Washington constitutional provisions regarding church-state issues may be changed, is void because it both restricts the state's exercise of the police power, an attribute of sovereignty, and attempts to place the "deadhand" of Congress on the state's constitution-making process. Moreover, a close reading of *Coyle* suggests that the constitutional conditions or provisions that Congress may demand are those relating to a "republican form of government" and not greater restrictions unrelated to Congress' express powers.<sup>199</sup> Finally, historical evidence suggests that conditions were extracted to promote anti-Catholic and anti-Mormon ideology. Thus, even though a legislative act is facially neutral in its impact, if its purpose and effect are to disadvantage discrete minorities, it fails to grant equal protection of the law.<sup>200</sup>

Taken together, such principles suggest that the Washington court could change its position on the meaning of the anti-establishment clauses in the state constitution. Should a new legislature attempt again to aid private church-related endeavors, be they educational or social-service oriented, this Article suggests that the court need not use the language of the state constitution to defeat the will of the people.

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197. *Id.* at 568.

198. See Act of Feb. 22, 1889, ch. 180, 25 Stat. 676 (1889).

199. 221 U.S. at 574-75.

200. See *Hunter v. Erickson*, 393 U.S. 385, 390-91 (1969); *Reitman v. Mulkey*, 387 U.S. 369, 380-81 (1967).