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CHURCH AND STATE IN THE STATES*

G. Alan Tarr**

Abstract: In many state constitutions, the provisions dealing with the relationship of church and state differ substantially from the federal establishment clause. In this Article, Professor Tarr demonstrates that relying on the state constitutional guarantees may lead to markedly different results than would obtain under the first amendment. He argues that state constitutional provisions very often are ignored, apparently because practitioners mistakenly believe that state provisions merely repeat the strictures of the first amendment. Professor Tarr maintains that this is unfortunate and untrue, because our constitutional system allows a state constitution to provide for less, equal, or greater separation of church and state than is mandated by the federal Constitution. Moreover, state constitutions often incorporate a distinctive perspective on church and state relations, due to many states' historical experiences in dealing with issues of religious freedom. Professor Tarr traces the historical experiences in Virginia and New York, demonstrating how they affected those states' constitutional protections of church and state, and shows that many state guarantees either reflect similar struggles over religion or borrow language from states that experienced such battles. More specifically, Professor Tarr argues that the historical experiences in many states led to clearer language relating to the separation of church and state than is found in the first amendment, and that fidelity to state constitutional mandates requires that state courts not dismiss the state constitution and decide issues solely based on the first amendment, but rather give effect to the distinctive state constitutional perspective. He concludes that turning first to state constitutional guarantees in establishment clause cases is desirable and proper under our federal system.

When the *Harvard Law Review* surveyed current developments in state constitutional law in 1982, it completely ignored rulings by state courts interpreting their states' religion guarantees.[1] This was hardly an isolated omission. The rediscovery of state bills of rights, usually referred to as the new judicial federalism, has prompted the publication in law reviews and social science journals of numerous articles dealing with state constitutional law.[2] Only a handful of these articles,

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1. *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982) [hereinafter *Developments in the Law*].

2. Seminal articles promoting the new judicial federalism include: Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Linde, *Without "Due Process"—Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970); *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973).

however, has examined state rulings dealing with religious liberty or with church and state, and even fewer have offered in-depth analyses of state constitutional provisions dealing with religion.[3]

This failure to give more than cursory attention to state constitutions and state constitutional rulings is regrettable, because a number of states have sought to devise their own solutions to the complex issues of religious liberty and of church and state.[4] The omission is doubly unfortunate because it comes at a time when the United States Supreme Court's jurisprudence under the first amendment's religion clauses is widely perceived to be in disarray.[5] Often in recent years the Supreme Court's rulings under the establishment clause have commanded only narrow majorities, with dissenters directly challenging

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Recent collections of articles include: *New Developments in State Constitutional Law,* 17 PUBLIUS 1 (1987), *State Constitutions in a Federal System,* 496 ANNALS 12 (1988). For bibliographies of the extensive and growing literature on the new judicial federalism, see DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 317–35 (B. McGraw ed. 1985)[hereinafter DEVELOPMENTS]; Tarr, *Bibliographical Essay,* in STATE SUPREME COURTS 206–08 (1982); Collins, *State Constitutional Law,* NAT'L L.J., Sept. 29, 1986, at S-8. Until recently, it was not far off the mark to suggest that there were as many articles extolling the new judicial federalism as there were decisions exemplifying it. However, this situation seems to be changing. For a listing of "rights affirming" rulings based on state constitutions since 1950, see Collins & Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions,* 16 PUBLIUS 111 (1986).

3. Among the articles devoted to state courts' interpretations of state guarantees of religious liberty, see Tarr, *State Constitutionalism and "First Amendment Rights,"* in HUMAN RIGHTS IN THE STATES (1988); Conklin & Vache, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court,* 8 U. PUGET SOUND L. REV. 411 (1985); Utter & Larsen, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution,* 15 HASTINGS CONST. L.Q. 451 (1988); Note, California Teachers Association v. Riles: *California Sets a New Standard for Public Aid to Parochial Schools,* 10 HASTINGS CONST. L.Q. 433 (1983); Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions,* 71 VA. L. REV. 625 (1985).

4. This Article refers both to "religious liberty" and to "church and state." This reflects the fact that American constitutions, whether federal or state, have pursued dual objectives in dealing with religious liberty. Thus both federal and state constitutions protect the right of each person to choose his or her religious beliefs and to practice that faith. Second, they have sought to regulate the relationship between church and state, usually by requiring the state to maintain a degree of separation between itself and religious institutions.

For the distinctive solutions of the states to problems of church and state, see *infra* notes 117–67 and accompanying text.

5. Illustrative of this perception is the comment of Mark V. Tushnet: "Dean Choper, like virtually everyone else who has thought about the religion clauses, finds the Supreme Court's treatment of religion clause issues unsatisfactory." Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses,* 27 WM. & MARY L. REV. 997, 997 (1986). For further evidence, see Johnson, *Concepts and Compromise in First Amendment Religious Doctrine,* 72 CALIF. L. REV. 817 (1984); Marshall, *"We Know It When We See It"— The Supreme Court and Establishment,* 59 S. CAL. L. REV. 495 (1986); Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770.

the Court's basic understanding of the clause. Even justices who are sympathetic to the Court's interpretation of the establishment clause have acknowledged difficulties in applying the Court's standards to specific situations.[6] The Court's rulings under the free exercise clause have produced similar fragmentation among the justices.[7]

Scholarly commentary on the relationship between church and state has largely mirrored these intracourt divisions. Some scholars, usually identified as "separationists," maintain that the establishment clause of the first amendment is meant to erect a wall of separation between church and state and closely monitor judicial decisions for breaches in the wall.[8] Other scholars, known as "accomodationists," insist that the primary aim of the establishment and free exercise clauses is to promote religious liberty.[9] Therefore, they urge that the clauses be interpreted in such a way that voluntary religious exercise might flourish. Over the decades the debate has raged, with little evidence that either the accomodationists or the separationists are changing their positions.

Because this judicial and scholarly stalemate shows no sign of ending, it might be worth considering whether state constitutional guarantees can offer surer and more consistent direction for a jurisprudence of church and state. In support of this project, this Article examines how state constitutions and state constitutional law have contributed and can contribute to resolving issues concerning the proper relationship between church and state, often referred to as "establishment clause" issues.[10]

6. Cases illustrating the divisions on the United States Supreme Court in establishment clause cases include: School Dist. v. Ball, 465 U.S. 1064 (1984), *aff'd*, 473 U.S. 373 (1985); Lynch v. Donnelly, 465 U.S. 668 (1984); Mueller v. Allen, 463 U.S. 388 (1983). The challenge to the Court's interpretation of the establishment clause is presented in Chief Justice Rehnquist's dissent in Wallace v. Jaffree, 472 U.S. 38, 91 (1985). On the difficulties faced even by those justices who have subscribed to the Court's position on establishment clause issues, see Justice Marshall's comment in Witters v. Washington Dep't. of Servs. for the Blind, 474 U.S. 481, 485 (1986): "The Establishment Clause has consistently presented this Court with difficult questions of interpretation and application."

7. Indicative of the divisions on the United States Supreme Court in free exercise cases are Goldman v. Weinberger, 475 U.S. 503 (1986); Bowen v. Roy, 476 U.S. 693 (1986); Quaring v. Peterson, 472 U.S. 478 (1985). On the relation between the Court's free exercise and establishment rulings, Justice Scalia complained in Edwards v. Aguillard, 107 S. Ct. 2573, 2595 (1987): "We have not yet come close to reconciling Lemon [v. Kurtzman, 403 U.S. 602 (1971)] and our Free Exercise cases, and typically we do not really try."

8. For a vigorous presentation of the separationist position, see L. PFEFFER, CHURCH STATE AND FREEDOM (1967), and L. PFEFFER, RELIGION, STATE, AND THE BURGER COURT (1985).

9. A major accomodationist analysis is presented in McConnell, *Accomodation of Religion*, 1985 SUP. CT. REV. 1.

10. In actuality, although most state constitutions deal with the relationship between church and state, relatively few have an "establishment clause" closely resembling that found in the first

In suggesting that jurists explore the possibility of a state constitutional jurisprudence of church and state, this Article is not endorsing either a separationist or an accommodationist stance. In fact, given the distinctiveness of state constitutional guarantees and state constitutional history, those who approach state constitutions with preconceived positions derived from federal constitutional law likely will be disappointed. Many states' constitutional provisions dealing with religion developed over time, largely in response to specific conflicts. Characteristically they reflect their origins in these disputes, displaying greater specificity and detail than do the analogous provisions of the federal Constitution. In many instances, the state provisions also reveal a different perspective on the relationship between church and state than is found in the federal Bill of Rights.

To explore these distinctive state provisions, this Article is divided into four parts. Part I briefly places the state constitutional provisions dealing with church and state in context by showing how they relate to state guarantees of religious liberty and to the free exercise and establishment clauses of the first amendment. Part II analyzes the historical and constitutional experience underlying several states' constitutional provisions dealing with church and state. Part III explores the implications of this history for the development of a state jurisprudence of church and state by critically examining rulings interpreting the state provisions. Finally, Part IV considers whether states should pursue an independent constitutional course on church-state issues.

I. THE LEGAL CONTEXT

A. *Religious Liberty Under State Constitutions*

Although this Article focuses on "establishment clause" issues, this does not mean that state bills of rights offer no independent direction for resolving issues involving religious liberty or the free exercise of religion.[11] On the contrary, a survey of state constitutional guarantees suggests just the opposite. For one thing, many state constitutions contain protections for religious liberty that are more detailed and specific than those found in the federal Constitution. Several of the origi-

amendment of the United States Constitution. For an invaluable guide to state constitutional provisions dealing with religion, see Collins, *Bills and Declarations of Rights Digest*, in THE AMERICAN BENCH 2500–01 (3d ed. 1985/86).

11. For fuller treatments of the free exercise of religion under state constitutions, see C. ANTIEAU, P. CARROLL, & T. BURKE, RELIGION UNDER STATE CONSTITUTIONS 65–99 (1965) [hereinafter C. ANTIEAU]; Tarr, *supra* note 3.

nal thirteen states, for example, recognized in their initial constitutions a "natural and indefeasible right to worship Almighty God according to the dictates of [one's] own conscience."[12] Similar language has been adopted by constitutionmakers in sister states.[13] Nineteen states also specifically bar religious tests for witnesses or jurors.[14]

Additionally, while the first amendment offers no express guidance on how to reconcile the claims of free exercise of religion with the legitimate exercise of the state police power,[15] some twenty state constitutions have attempted to resolve potential conflicts by including a police power qualification on the free exercise of religion.[16] Several state bills of rights have also specifically taken account of religious scruples involving military service by exempting conscientious objectors from service in the state militia.[17] Finally, at least two state constitutions—those of Louisiana and Montana—prohibit certain types of discrimination based on religion not only by government but also by private parties.[18]

Despite the strong commitment to religious liberty indicated by these provisions, state courts have generally relied on federal law and federal doctrine in deciding "free exercise" cases.[19] One effect of relying on federal precedent has been to retard the development of a state constitutional law of religious liberty.[20] Another effect has been to

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12. Pennsylvania Declaration of Rights, § 3; *see also* DEL. CONST. art. 29; N.J. CONST. of 1776, art. XVIII.

13. *See, e.g.*, TENN. CONST of 1870, art. I, § 3, *reprinted in* 6 F. THORPE, FEDERAL AND STATE CONSTITUTIONS 3253 (1909).

14. See Collins, *supra* note 10, at 2501 (listing states barring religious tests for witnesses or jurors).

15. This has resulted in the Supreme Court developing its own standards for reconciling the demands of free exercise with the states' legitimate police power ends. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

16. Representative is N.Y. CONST. art. I, § 3, which reads: "[B]ut the liberty of conscience hereby secured shall not be construed as to excuse acts of licentiousness, or so justify practices inconsistent with the peace or safety of this state." For a full listing of these provisions, see Collins, *supra* note 10, at 2496–99.

17. *See, e.g.*, COLO. CONST. art. XVII, § 5; IDAHO CONST. art. XIV, § 1; ILL. CONST. of 1870, art. XII, § 1.

18. LA. CONST. art. I, § 12; MONT. CONST. art. II, § 4.

19. The tendency of state courts to rely on the Supreme Court's doctrine, even in resolving contentious issues on which the United States Supreme Court has not ruled, is illustrated by Katz v. Superior Court, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977) (deprogramming); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (religious use of drugs); John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971) (withholding of medical treatment).

20. It should be noted that the Oregon Supreme Court has made important efforts to resuscitate the "free exercise" provisions of the Oregon Constitution. *See, e.g.*, Cooper v. Eugene School Dist., 301 Or. 358, 723 P.2d 298 (1986), *appeal dismissed*, 107 S. Ct. 1597 (1987); Salem College & Academy v. Employment Div., 298 Or. 471, 695 P.2d 25 (1985).

absolve state courts from the necessity of resolving possible tensions between state constitutional provisions mandating a separation of church and state or forbidding aid to nonpublic schools and provisions guaranteeing freedom of worship and the free exercise of religion. Perhaps, given the greater specificity of state constitutional guarantees, such tensions are less likely to arise. Certainly they have not yet arisen, and therefore this Article shall concentrate on "establishment" issues and on state constitutional provisions affecting the relationship between church and state.

B. State Guarantees and Federal Constitutional Mandates

Throughout the nation's history, state constitutions have regulated the states' involvement with religion. With the incorporation of the free exercise clause in 1940[21] and of the establishment clause in 1947,[22] state governments became subject to an additional set of constitutional mandates. When the state and federal constitutions impose identical requirements, this dual obligation poses no problem. When state and federal constitutions impose different requirements, however, questions necessarily arise about the relationship between these requirements.

Basically, three principles govern the relationship between state and federal constitutional law.[23] First is the supremacy of federal law within its sphere: under the supremacy clause of the United States Constitution, all conflicts between federal and state law must be resolved in favor of the federal law.[24] Second is the authority of each system of courts—be it federal or state—to expound its own body of law. This means that state courts must not only give precedence to federal over state law, but they must also interpret federal law in accordance with the rulings of the United States Supreme Court.[25] Perhaps less obviously, this principle also means that states need not

21. Cantwell v. Connecticut, 310 U.S. 296 (1940).

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

23. This paragraph draws upon the analysis in Tarr & Porter, *State Constitutionalism and State Constitutional Law*, 17 PUBLIUS 1, 8 (1987).

24. The Supremacy Clause, U.S. CONST. art. VI, § 2 states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

25. As Justice Inzer of the Mississippi Supreme Court explained in Smith v. State, 242 So. 2d 692, 696 (Miss. 1970): "In determining this question we are constrained to follow the decisions of the Supreme Court of the United States wherein that Court has construed similar statutes involving the First Amendment to the Constitution of the United States." For further recognition of this requirement by state jurists deciding "establishment" cases, see Bowerman v.

be guided by the rulings of the Supreme Court in interpreting their own constitutions. Third is the so-called autonomy principle: when a case raises issues of both federal and state law, the United States Supreme Court will not review a ruling grounded in state law unless that ruling is inconsistent with federal law. Thus, when a state ruling rests on an "independent and adequate state ground," it is immune from review by the Supreme Court.[26]

How do these principles apply to the relation between the states' "establishment" provisions and the federal religion clauses, and what are their implications for the development of a state jurisprudence of church and state? First, because state judges can interpret their constitutions independently—without reference to federal precedent or constitutional norms—they may conclude that state constitutions require less, more, or the same level of separation of church and state as is required under the federal establishment clause.[27] Thus it is simply wrong to claim, as is so often done, that state constitutions can only provide greater protection than is available under the federal Constitution, for the meaning of state provisions does not depend upon the meaning of their federal counterparts.[28]

Second, should a state permit greater support for religion than is permissible under the federal establishment clause, this does not mean

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O'Connor, 104 R.I. 519, 247 A.2d 82, 83 (1968); State *ex rel.* Warren v. Nusbaum, 55 Wis. 2d 316, 198 N.W.2d 650, 653 (1972).

26. Although the doctrine of "independent and adequate state grounds" is of long standing, the application of this principle has varied over time. For a most important recent ruling, see Michigan v. Long, 463 U.S. 1032 (1983). For discussion of the doctrine, see Kramer, *State Court Constitutional Decisionmaking: Supreme Court Review of Nonexplicit State Court Judgments,* 1983 ANN. SURV. AM. LAW 277; Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts; a Critique of* Michigan v. Long, 59 NOTRE DAME L. REV. 1118 (1984); *Developments in the Law, supra* note 1, at 1332–47.

27. For discussion of a less restrictive state provision on church and state, see Resnick v. East Brunswick Bd. of Educ., 77 N.J. 88, 389 A.2d 944, 952 (1978).

28. As noted by a leading commentator on the new judicial federalism:

> In a sense, the oft-quoted maxim [that states may extend greater protection than is available under the Federal Bill of Rights] is wrong, if only because it is unduly simple. It is erroneous because states may certainly extend an *equal* measure of constitutional protection under their state charters, though they may do so for different reasons. More importantly, there is no constitutional impediment preventing state courts from granting a lesser degree of protection under state law, *provided* only that these courts then proceed to apply the command of the Federal Constitution as interpreted by the United States Supreme Court. In other words, the logic of principled interpretation at the state level, being other than reactionary oriented, demands that any given argument be tested on its own merits independently of what level of constitutional protection could result.

Collins, *Reliance on State Constitutions—Away from a Reactionary Approach,* 9 HASTINGS CONST. L.Q. 1, 15 (1981). For a more recent discussion of this fallacy— which the authors term "the equivalence plus model" of judicial federalism—and its role in state judicial rulings, see Collins & Galie, *supra* note 2, at 117–20.

that litigants challenging state support for religion would be denied relief. It merely would mean that they could not obtain relief *under the state constitution.* Although their claims might be denied under the state constitution, state judges still must grant the litigants' claims under the federal establishment clause, because the judges "may not interfere with or abridge any federally protected rights or interests."[29] Put differently, the federal Constitution continues to provide a national "floor" for rights, whatever the interpretation of the state constitution.[30]

Third, it follows that the federal establishment clause in effect provides a floor but not a ceiling. State law may require a less stringent separation of church and state than is mandated by federal law, but in such circumstances federal law would determine the outcome of a case. However, state law may—without violating the federal Constitution—mandate a stricter separation of church and state than is required under federal law, and in such circumstances state law would be decisive. Admittedly, at some point a state might require such a stringent separation of church and state that it would impinge on the free exercise of religion guaranteed by the first amendment. Should this occur, the state constitutional mandate would yield to the superior federal requirement. In the absence of a conflict with federal constitutional requirements, however, state law is determinative.

II. LESSONS FROM HISTORY

A. The Struggle for Religious Liberty in Virginia

1. The Development of the Controversy

Virtually every student of American constitutional law is familiar with the struggle, led by James Madison and Thomas Jefferson, for the establishment of religious freedom in Virginia.[31] The story is among the most hallowed in American constitutional history, containing as it does uncompromising heroes fighting for a valiant cause, eloquent rhetoric in support of liberty, an opposition sufficiently strong that the

29. Collins & Galie, *supra* note 2, at 116.

30. This does not mean, of course, that state constitutional protections should be viewed as merely supplementary to the "real" federal protections, although some commentators have drawn this conclusion. *See Developments in the Law, supra* note 1.

31. This Article relies largely on the following accounts of the Virginia struggle for religious freedom: T. BUCKLEY, S.J., CHURCH AND STATE IN REVOLUTIONARY VIRGINIA 1776-1787 (1977); T. CURRY, THE FIRST FREEDOMS (1986); L. LEVY, THE ESTABLISHMENT CLAUSE (1986); W. MILLER, THE FIRST LIBERTY, pt. 2 (1986); L. PFEFFER, CHURCH STATE AND FREEDOM 104–05 (1967); A. STOKES, CHURCH AND STATE IN THE UNITED STATES, ch. 3 (1950).

outcome remained in doubt until the last moment, and finally a glorious victory for the forces of progress and tolerance. Yet even this familiar story can offer new insights if viewed from the perspective of state constitutionalism.

Although almost all of the colonies had established churches prior to 1776, the establishment in Virginia was "probably more severe and oppressive than any other in the country."[32] The state strictly enforced its requirement of compulsory attendance at Anglican services, and it taxed members and nonmembers alike for the support of the established church.[33] Members of dissenting sects were subject to various disabilities, and Baptist preachers in particular were routinely arrested and imprisoned for "breach of the peace."[34] Not surprisingly, the establishment of a state church was unpopular with large segments of the population. In the aftermath of independence, the more oppressive features of the establishment were eliminated, and free exercise of religion was guaranteed by Virginia's Declaration of Rights.[35] Nonetheless, as Thomas Jefferson noted, the legislature reserved "the question whether a general assessment should not be established by law on every one to the support of the pastor of his choice; or whether all should be left to voluntary contributions."[36]

Postponing consideration of the question of state-mandated support for religion did little to reduce the intense feelings the issue provoked. Battle was joined in earnest in 1784 when Patrick Henry introduced a "Bill for Establishing a Provision for Teachers of the Christian Religion."[37] On the one side were arrayed the Episcopal (Anglican) Church and its supporters, who were convinced that an assessment was necessary for the church's effective operation. They were joined by others who, although not necessarily adherents of the established

32. L. PFEFFER, *supra* note 31, at 104–05.

33. T. CURRY, *supra* note 31, at 105–06; L. LEVY, *supra* note 31, at 3–4.

34. T. CURRY, *supra* note 31, at 134–35. This mistreatment of Baptist ministers particularly incensed James Madison and strengthened his commitment to religious liberty. *See* W. MILLER, *supra* note 31, at 5–6, 94–96.

35. Virginia Declaration of Rights, § 16 (1776). The language guaranteeing the "free exercise of religion" was proposed by James Madison as a substitute for the guarantee of "toleration" proposed by George Mason, the author of the Declaration of Rights. *See* W. MILLER, *supra* note 31, at 5; A. STOKES, *supra* note 31, at 390–97.

36. 1 WRITINGS OF THOMAS JEFFERSON 54 (1894), *quoted in* L. PFEFFER, *supra* note 31, at 108.

37. Under Henry's proposal, Virginia would collect a property tax, with the taxpayer determining the denomination to which his money would be given. For a discussion, see L. LEVY, *supra* note 31, at 54–55; W. MILLER, *supra* note 31, at 24–29.

church, believed that religion could not fulfill its vital civil function of inculcating morality in the absence of public funding.[38]

James Madison orchestrated the opposition to the bill. Numerically, however, the main opposition came from the Baptists, Presbyterians, and other dissenting sects, who insisted on a strict separation of church and state not out of hostility or indifference toward religion, but out of a concern that civil authority not come between the individual and the working of God's grace.[39] After considerable political maneuvering and marshalling of popular support, the opponents of the bill prevailed. Seizing the moment, Madison then introduced Thomas Jefferson's "Bill for Establishing Religious Freedom," which decreed that:

> No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or beliefs, but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.[40]

In January, 1786, the Virginia legislature eliminated the state's religious establishment once and for all by enacting the bill.

2. *Implications for Interpreting the First Amendment*

Scholars and jurists typically have examined the church-state conflict in Virginia because of its possible implications for the interpretation of the first amendment's religion guarantees.[41] Yet their investigations have produced more controversy than agreement, and the recent escalation of this debate suggests that consensus is a long way off.

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38. The connection between virtue and republican government is stressed in W. MILLER, *supra* note 31, at 27–29.

39. The Baptists, of course, had considerable experience with the adverse effects of a religious establishment in Virginia, but their opposition was principled rather than tied to the history of persecution in the state. For example, the primary opponent of a religious establishment in Massachusetts was a Baptist, Isaac Backus. For a discussion of Backus and his efforts, see W. MILLER, *supra* note 31, at 211–16.

40. "Bill for Establishing Religious Freedom," *quoted in* THE PORTABLE JEFFERSON 253 (1975).

41. Indeed, early rulings of the United States Supreme Court sought direction in interpreting the religion clauses of the first amendment from the struggle for religious liberty in Virginia. *See* Everson v. Board of Educ., 330 U.S. 1, 11–13 (1947); Reynolds v. United States, 98 U.S. 145 (1878).

Those endorsing a separationist interpretation of the establishment clause[42] claim that because James Madison introduced in the first Congress what later became the first amendment of the federal Bill of Rights and played a crucial role in securing its adoption, his views are particularly relevant for determining the meaning of the provision.[43] Furthermore, the separationists argue that Madison never wavered in his views on church and state, citing his efforts to secure a strict separation of church and state in Virginia and scrupulous avoidance, while president, of even ceremonial acts which might be construed as a governmental endorsement of religion.[44] Therefore, they conclude, one can legitimately rely on the views Madison expressed during the Virginia conflict for determining the meaning of the first amendment. In 1947, in *Everson v. Board of Education,*[45] the United States Supreme Court endorsed the centrality of the Virginia disestablishment struggle for understanding the establishment clause and specifically embraced the separationist interpretation of that struggle and its outcome. In subsequent rulings the Court has reiterated its separationist reading of the establishment clause.[46]

42. Major scholarly works supporting a separationist interpretation of the establishment clause include L. LEVY, *supra* note 31; L. PFEFFER, *supra* note 31.

43. Four states—Virginia, North Carolina, New York, and New Hampshire—proposed amendments to the Constitution dealing with church and state. James Madison introduced a reworked version of these proposals and also introduced an amendment of his own that would have banned state infringements on the rights of conscience. Excerpts from the texts of some of the state proposals, as well as the amendments proposed by Madison, are reproduced in M. MALBIN, RELIGION AND POLITICS—THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 3–4 (1978).

44. During his presidency Madison did proclaim several days for fasting and thanksgiving, which might seem to conflict with a strict separation of church and state. R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION, chs. 2–3 (1982). In a letter written some years after his presidency, Madison acknowledged that this constituted a deviation from "strict principle" brought on by the fact that a war was in progress on the nation's soil. Madison also noted, however, that during his term of office he "was always careful to make the Proclamation absolutely indiscriminate, and merely recommendatory; or, rather mere *designations* of a day on which all who thought proper might unite in consecrating it to religious purposes, according to their own faith and forms." L. LEVY, *supra* note 31, at 100 (quoting 9 WRITINGS OF MADISON, 100–03 (1907)). For an elaboration of Madison's later views on church and state, see *Madison's Detached Memoranda,* 3 WM. & MARY Q. 3d Ser. 535, 554–62 (1946).

45. 330 U.S. 1, 11–13 (1947).

46. As Justice Black explained in his opinion for the Court in *Everson*: "[T]he provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." 330 U.S. at 13.

This connection between the Virginia struggle for religious liberty and meaning of the first amendment was reiterated by the dissenters in *Everson*. Justice Rutledge, writing for the four dissenters in the case, noted that "[t]he [First] Amendment . . . is the compact and exact

Most commentators who espouse an accommodationist reading of the first amendment acknowledge the depth of Madison's convictions on the separation of church and state.[47] They tend, however, to downplay the importance to understanding the establishment clause of Madison's personal convictions, as expressed in the Virginia struggle for disestablishment. Three justifications are offered for downplaying Madison's personal views in interpreting the first amendment. First, the relationship between church and state which Madison championed in Virginia might have differed from what he sought at the national level. Second, some commentators argue that in introducing the first amendment, Madison was not seeking to vindicate his own views but merely to present the views of those who believed that a bill of rights was necessary.[48] Finally, some accomodationists suggest that even if Madison sought to replicate nationally the strict separation found in Virginia, his views were idiosyncratic and did not represent the thinking of the first Congress.[49]

3. *The Development of State Guarantees*

Because debate has centered on how the campaign for religious liberty in Virginia affects the interpretation of the establishment clause, the implications of this debate for the interpretation of state constitutions have not been considered adequately. Most obviously, the disestablishment struggle in Virginia illustrates that a state might, in

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summation of its author's views formed during his long struggle for religious freedom." 330 U.S. at 31. Therefore, he concluded:

> No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history. The history includes not only Madison's authorship and the proceedings before the First Congress but also the long and intensive struggle for religious freedom in America, more especially in Virginia, of which the Amendment was the direct culmination.

330 U.S. at 33–34.

For later reliance by the U.S. Supreme Court on the historical picture painted in *Everson*, see, e.g., School Dist. v. Schempp, 374 U.S. 203, 213–14 (1963); McCollum v. Board of Educ., 333 U.S. 203, 210–12 (1948).

In a major dissenting opinion, Justice (now Chief Justice) Rehnquist recently challenged the Court's assumption of a close connection between the struggle for religious liberty in Virginia and the meaning of the first amendment. Wallace v. Jaffree, 472 U.S. 38, 92-108 (1985) (Rehnquist, J., dissenting).

47. Among the major accommodationist scholars, Robert L. Cord is alone in arguing that Madison was not in fact a consistent separationist. *See* R. CORD, *supra* note 44, at 20–36. For convincing refutations of Cord's position, see L. LEVY, *supra* note 31, ch. 5; W. MILLER, *supra* note 31, pt. 2.

48. *See, e.g.*, M. MALBIN, *supra* note 43, at 16–17.

49. *See, e.g.*, W. BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 4–11 (1976).

response to the political and religious forces within its borders, devise its own solution to the problem of church and state. Whatever their other differences, neither the accommodationists nor the separationists challenge the propriety of states embarking on an independent course. Thus instead of reproducing the relationship between church and state found at the federal level, the states remain free to impose a stricter or less strict separation of church and state than is required by the first amendment.[50]

This is important, because what occurred in Virginia in 1786 was far from unique. On the contrary, it exemplifies what has been the practice among the American states throughout history, namely, the independent creation of solutions to the problem of church and state.[51] Between the Declaration of Independence and the ratification of the Constitution—that is, prior to any action by the national government—each of the original thirteen states reconsidered the relationship between church and state within its borders.[52] Most formalized new arrangements between these institutions in constitutional provisions. Some states, such as New Jersey, had no formal establishment during the colonial period and wrote prohibitions against instituting one into their constitutions.[53] Others, such as South Carolina, which had maintained exclusive establishments[54] throughout the colonial period, moved toward multiple establishments[55] under pressure from the Baptists and from other dissenting sects.[56] Still others, such as Massachusetts, which had required all citizens to support the established church, liberalized their establishments by permitting citizens to support the churches of their choice.[57]

50. As noted, the ratification of the fourteenth amendment and subsequent incorporation of the establishment clause mean that if a state's guarantees are less strict than the comparable federal provisions, litigants may still prevail on federal grounds. *See supra* note 28 and accompanying text.

51. For general treatments of developments in the states from 1776-1787, see T. CURRY, *supra* note 31, chs. 6–7; L. LEVY, *supra* note 31, chs. 1–2.

52. No state other than the original thirteen had a religious establishment prior to statehood, and thus none had a reason to abolish an establishment.

53. N.J. CONST. of 1776, art. XIX, *reprinted in* 5 F. THORPE, FEDERAL AND STATE CONSTITUTIONS 2597 (1909).

54. An "exclusive establishment" refers to an establishment of religion benefitting a single church or sect.

55. A "multiple establishment" refers to an establishment of religion benefitting a multiplicity of churches and/or sects. In America, this usually meant an establishment benefitting all Protestant sects.

56. On South Carolina's establishment prior to Independence, see T. CURRY, *supra* note 31, at 57–60.

57. On the evolution of religious establishments in Massachusetts after Independence, see L. LEVY, *supra* note 31, at 26–38.

As these examples indicate, there was considerable variation in the arrangements adopted in the various states. Nonetheless, the overall direction of the movement, as in Virginia, was away from exclusive establishments and toward disestablishment.[58] The pace of this change varied from state to state. Although all states had begun the process of disestablishment by 1787, a few—for instance, Connecticut—retained establishments even into the nineteenth century.[59] Eventually, however, religious establishments in all thirteen original states were eliminated, and state constitutions were revised to reflect their abolition.[60] The language employed in banning religious establishments typically focused on infringements on freedom of worship and on taxation for the support of an established church, the two most objectionable features of the colonial experience. Pennsylvania's guarantee in large measure is representative:

> That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding; And that no man ought or of right can be compelled to attend, erect, or support any place of worship, or to maintain any ministry, contrary to, or against his own free will and consent.[61]

Yet as important as they are, such guarantees are not the whole story, and to focus exclusively on the elimination of religious establishments is to distort state constitutional development during the late eighteenth century. For one thing, the states' constitutional experiences were not homogeneous.[62] As noted, this is even true of the process of disestablishment, in which all states eventually moved to a common position. The substantial interstate differences which can be found in the pace and course of disestablishment reveal how intrastate political factors and relationships existing in the states prior to Independence shaped the states' constitutional development.[63] The influence of such intrastate factors on the states' resolution of church-state issues has continued to the present day.

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58. This is thoroughly documented in T. CURRY, *supra* note 31, chs. 6–7.

59. L. LEVY, *supra* note 31, at 40–44; A. STOKES, *supra* note 31, at 73–76.

60. A. STOKES, *supra* note 31, chs. 3 & 6.

61. PENN. CONST. of 1776, art. II, *reprinted in* 5 F. THORPE, *supra* note 53, at 3082.

62. T. CURRY, *supra* note 31, chs. 6–7.

63. The dynamic character of church-state relationships during the period, as well as the interstate differences in the course of disestablishment, appear to offer some indirect support for Mark DeWolfe Howe's contention that the establishment clause served the ends of federalism by allowing the states to work out their own distinct relationships between church and state without the interference of the national government. *See* M. HOWE, THE GARDEN AND THE WILDERNESS 26 (1965).

More importantly, if one looks only at the process of disestablishment, one might conclude that the original state constitutions embodied a secularist perspective or, if not, that subsequent constitutional revisions initiated a movement in that direction. A more comprehensive survey of state constitutional provisions dealing with religion, however, reveals that such conclusions are inaccurate.[64] In marked contrast with their federal counterpart, several early state constitutions expressly recognized the existence of God, and later constitutions typically acknowledged the state's dependence on His favor.[65] The New Jersey Constitution of 1776, for example, decreed that "no person shall ever, within this Colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience."[66] The state's constitution of 1844, in addition to repeating that language, began:

> We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations do ordain and establish this Constitution.[67]

In addition, while the federal Constitution is silent on a person's religious duties, some early state constitutions are not. The Massachusetts Constitution of 1780, for example, states that "[i]t is the right as well as the Duty of all men in society, publicly, and at stated seasons to worship the Supreme Being."[68] Virginia's 1776 Constitution notes that "it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other."[69] Furthermore, while the federal Constitution forbids religious tests,[70] several early state constitu-

64. For an overview that presents developments in the states as a movement toward the United States Constitution's model of church-state relations, see A. STOKES, *supra* note 31, at 151–69.

65. The United States Constitution, as originally ratified, refers to religion only once: article VI, § 3 bans religious tests as a qualification for "any Office or public Trust under the United States." Although some opponents of the Constitution during the ratification debates alleged that the new government would imperil the rights of conscience or establish a national church, others criticized the Constitution for failing to establish tests that would exclude Jews, Catholics, and pagans from federal office. *See* L. LEVY, *supra* note 31, ch. 3.

66. N.J. CONST. of 1776, art. XVIII, *reprinted in* 5 F. THORPE, *supra* note 53, at 2597.

67. N.J. CONST. of 1844, preamble and art. I, § 3, *reprinted in* 5 F. THORPE, *supra* note 53, at 2599.

68. MASS. CONST. of 1780, pt. I, art. III.

69. VA. CONST. of 1776, art. I, § 16 (Declaration of Rights), *reprinted in* 7 F. THORPE, *supra* note 53, at 3814.

70. *See supra* note 65.

tions retained them, either prescribing beliefs to be held by office-holders or prohibiting clergymen from holding political office.[71]

Taken altogether, what these provisions indicate is that although the states moved to eliminate formal religious establishments, they did not do so to secularize society. Rather, the states dispensed with governmental coercion in religious matters largely out of religious faith, to permit men to respond freely to the call of God's grace. Indeed, the predominance of Baptists and members of other dissenting sects in the forefront of those promoting the separation of church and state underscores the point that the concern was not to circumscribe the influence of religion in society or to prevent religious influences on government, but rather to prevent governmental intrusion in the religious sphere.[72]

Given this orientation, it is not surprising that disestablishment did not, at least through much of the nineteenth century, result in governmental neutrality between religion and irreligion. Rather, the prevailing assumption was that government should continue to be supportive of religion in general and of Protestant Christianity in particular, although this support would not take the form of direct financial aid.[73] The preambles to state constitutions of the nineteenth century reflect this assumption.[74] So too does political and legal practice during the early nineteenth century.[75] This was true even in Virginia, where—despite Madison's and Jefferson's efforts to secure a strict separation of church and state—the sects that had opposed assessments thereafter banded together with their opponents to ensure that government maintained a legal and political climate conducive to religious practice.[76]

Certainly political and judicial practice in other states followed this pattern. State courts continued to recognize Christianity as part of the common law and to sustain convictions for blasphemy when speakers disparaged Christian beliefs.[77] Similarly, despite acknowledging the religious character of Sunday-closing laws, state courts consistently

71. For a representative provision requiring adherence to specified doctrinal tenets, see N.C. CONST. art. XXXII (1776, amended 1835); for a representative provision banning clergy from holding public office, see S.C. CONST. of 1778, art. XXI, *reprinted in* 6 F. THORPE, *supra* note 53, at 3253. An overview of religious tests and their use is provided by C. ANTIEAU, *supra* note 11, at 100–19.

72. For a sympathetic discussion of this perspective, see W. MILLER, *supra* note 31, at 153–224.

73. *Id.* at 232–34.

74. *See supra* notes 65–67 and accompanying text.

75. The analysis here depends heavily on C. ANTIEAU, *supra* note 11, and W. TORPEY, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA (1948).

76. *See* T. BUCKLEY, *supra* note 31, at 181–82.

77. *See, e.g.*, Updegraph v. Commonwealth, 11 Serg. & Rawle 393 (Pa. 1824).

upheld them. As a state judge noted in one case, "the Christian Sunday may be protected from desecration by such laws as the legislature in its wisdom may deem necessary."[78] Thus law became a mechanism for enforcing the prevailing (Protestant) consensus and for protecting religiously based practices.

B. The Clash Over Religion and the Schools in New York

1. History of the Common-Schools Movement

If disputes over religious establishments supplied the initial impetus for the states to address church-state relations in their constitutions, conflict over education provided the second. This conflict arose with the widespread development of systems of free public schools in the states.[79] In the late 1770's, when the first state constitutions were adopted, the New England states—especially Massachusetts—had long-established systems of public education.[80] Yet New England was the exception, not the rule. Elsewhere, public education was rudimentary at best, and until the 1800's other states were slow to follow Massachusetts' lead.[81] Building on some tentative attempts to create public school systems during the early decades of the nineteenth century, educational reformers in the 1830's launched what came to be known as the common-school movement.[82] Their campaign to promote the establishment of publicly controlled and funded schools throughout the nation met with extraordinary success. "By 1865 all the states outside the South had achieved or were on the threshold of establishing universal, tax-supported, free common schooling."[83]

The very success of this movement, however, forced educators and governmental officials to confront difficult questions about the character and aims of public education. Of particular importance was the question of the place that religion should occupy in the newly founded public schools. Initially the public schools reflected the Protestant cultural consensus that prevailed in America during the early nine-

78. Neuendorff v. Duryea, 69 N.Y. 557, 563 (1877).

79. The major works on the development of public education in America are L. CREMIN, THE AMERICAN COMMON SCHOOL: AN HISTORICAL CONCEPTION (1951); L. CREMIN, AMERICAN EDUCATION: THE NATIONAL EXPERIENCE, 1783-1876 (1980) [hereinafter L. CREMIN, AMERICAN EDUCATION]. For a concise treatment of the crucial period of expansion of public education, see F. BINDER, THE AGE OF THE COMMON SCHOOL, 1830-1865 (1974).

80. L. CREMIN, AMERICAN EDUCATION, *supra* note 79, ch. 5.

81. *Id.* at 157–63.

82. F. BINDER, *supra* note 79, at 23, 29–54.

83. *Id.* at 161.

teenth century.[84] In giving a religious orientation to the public schools, school officials merely were continuing practices found in the private schools that had dominated American education prior to the common-school movement.[85] They also were responding to the public's expectation that the schools would undertake to inculcate morality as well as to transmit knowledge.[86] Indeed, given the religious character of the American populace, the reliance on religious means to serve that purpose was consistent with widely shared beliefs about the relation between religion and morality.[87] In any event, religious exercises were prevalent in the early public schools, with teachers leading students in prayer, and students daily reading aloud from the King James version of the Bible.[88] More generally, a Protestant Christian perspective permeated the curriculum, from the materials used in teaching reading to the interpretation given to religious conflicts in modern European history.[89]

Initially, given the religious homogeneity of most communities, this "Protestantizing" of public education occasioned little controversy—or at least promoted acquiescence rather than protest. But the situation changed dramatically with the immigration of large numbers of Catholics to America during the 1830's and 1840's.[90] These new Americans rejected the prevailing Protestant ethos of the public schools. In particular, they objected that the religious observances in the public schools were contrary to their religious convictions and that the allegedly one-sided history taught in the schools tended to promote hostility toward the Catholic Church and prejudice against Catholics.[91]

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84. On the Protestant religious character of early public schools, see R. CULVER, HORACE MANN AND RELIGION IN THE MASSACHUSETTS PUBLIC SCHOOLS (1929); L. PFEFFER, *supra* note 31, at 321, 338–42; J. PRATT, RELIGION, POLITICS, AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK STATE HISTORY ch. VII (1967).

85. L. CREMIN, AMERICAN EDUCATION, *supra* note 79, at 24–34, 39–49.

86. J. PRATT, *supra* note 84, at 158–59.

87. L. CREMIN, AMERICAN EDUCATION, *supra* note 79, at 19–100; *see also* J. PRATT, *supra* note 84, at 164–65.

88. V. LANNIE, PUBLIC MONEY AND PAROCHIAL EDUCATION: BISHOP HUGHES, GOVERNOR SEWARD, AND THE NEW YORK SCHOOL CONTROVERSY 1–5 (1968).

89. *Id.* at 5–6.

90. For an overview of Catholic immigration and Protestant reactions, see R. BILLINGTON, THE PROTESTANT CRUSADE, 1800-1860 (1938).

91. This is reflected in the pronouncements of the Catholic hierarchy. The American bishops attending the Fourth Provincial Council in 1840, for example, concluded that "[t]hey could not conscientiously permit Catholic attendance at schools which they considered a danger to the religious faith of their children." V. LANNIE, *supra* note 88, at 5.

2. The Situation in New York

Catholic opposition to the Protestant orientation of public schools was particularly intense in New York.[92] When the New York legislature authorized establishment of public schools throughout the state in 1812 and 1813, New York was relatively homogeneous religiously. Thus the pervasive Protestantism of the schools occasioned no comment. Rather quickly, however, the religious composition of the state changed: while in 1815 there were only 13,000 Catholics in the diocese of New York (which included the entire state plus part of New Jersey), eleven years later the number had swelled to an estimated 150,000, with 25,000 in New York City.[93] The influx of Catholics raised questions about the educational system in the state. On the one hand, despite the requirements of church doctrine, the poverty of the Catholic Church in America did not permit the immediate institution of a system of parochial schools.[94] On the other hand, the Protestant religious exercises and curriculum posed a barrier to the integration of Catholics into the public schools. Therefore, Catholic children often did not attend any school.[95]

This uneasy situation flared into open conflict in 1840 when Governor William Seward, a Whig, concerned both about the educational plight of Catholic children and about the success of the Democratic Party among the immigrant population, proposed "the establishment of schools in which [the children of foreigners] may be instructed by teachers speaking the same language with themselves and professing the same faith."[96] Seward's proposal of public funding for parochial schools—language was not an issue, since most of the Catholic immigrants were Irish—prompted an immediate response from the Catholic Church, which submitted a petition for funding to the Common Council of New York City.[97] The Council, however, rejected the request as a violation of constitutional principle.[98] Undaunted, the Catholic Church continued its campaign for funding under the leadership of Bishop John Hughes, who conducted mass meetings at which

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92. This discussion of the conflict in New York relies on R. BILLINGTON, *supra* note 90; V. LANNIE, *supra* note 88; J. PRATT, *supra* note 84, chs. VII–IX; D. RAVITCH, THE GREAT SCHOOL WARS (1974).

93. The figures, based on diocesan records, are reported by J. PRATT, *supra* note 84, at 169–70.

94. As of 1840, there were only about two hundred Catholic schools in the United States. A. STOKES, CHURCH AND STATE IN THE UNITED STATES 229 (revised ed. 1964).

95. V. LANNIE, *supra* note 88, at 21; *see also* J. PRATT, *supra* note 84, at 175.

96. J. PRATT, *supra* note 84, at 175.

97. V. LANNIE, *supra* note 88, at 29–50.

98. *Id.* at 46–50; *see also* J. PRATT, *supra* note 84, at 176–77.

he lambasted the public schools, insisting that they were in reality tax-supported Protestant schools. Simple justice, Bishop Hughes proclaimed, demanded that Catholic schools share equally in the revenues from education taxes.[99]

Not surprisingly, Bishop Hughes' demands and his rhetoric alarmed many partisans of the public schools and activated nativist sentiment.[100] In 1842, a bill was introduced in the New York Assembly which would have allowed each district in New York City to maintain its own religious orientation, and permitted funding for Catholic parochial schools in districts where Catholics were a majority.[101] Instead of passing this bill, however, the legislature adopted an amended version that prohibited public funding of any school in New York City in which "any religious sectarian doctrine or tenet shall be taught, inculcated, or practiced."[102]

Faced with tensions arising out of religious diversity, the legislature responded by restricting the teaching of sectarian views in public schools rather than by incorporating parochial schools into the public school system. When New York ratified a new constitution in 1846, it constitutionalized its ban on the use of the common school fund for other than the common schools.[103] The constitution of 1894, adopted following the expansion of the system of Catholic parochial schools and a period of intense debate over their funding, emphatically prohibited funding schools "under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught."[104]

3. *Implications of the New York Schools Controversy*

Like the story of the struggle for religious liberty in Virginia, the conflict over religion and education in New York is important because of its implications for understanding state constitutional development. First, although the militancy of Bishop Hughes and the size of the state's Catholic population served to intensify the conflict, the controversy in New York was hardly unique. During the nineteenth century the issue of education emerged as the flashpoint for conflict between Protestants and Catholics in a number of states.[105] Second, as in New

99. V. LANNIE, *supra* note 88, chs. 3–4.
100. *Id.*
101. *Id.* at 212.
102. *Id.* at 233.
103. N.Y. CONST. of 1846, art. IX.
104. N.Y. CONST. of 1894, art. IX, § 4.
105. For a general summary of this conflict, see A. STOKES, *supra* note 31, chs. 9 & 15.

York, the emergence of the issue provided the occasion for the states to adopt new constitutional provisions dealing with religion and education.[106]

Third, again as in New York, this response took the form of a constitutional ban on aid to parochial schools. Often, a prohibition of religious practices in schools receiving public funds also was added. Typically the bans were couched in language which was emphatic and all-inclusive. Washington's Declaration of Rights, for example, mandates that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."[107] The Washington constitution's education article requires that "[a]ll schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."[108]

Fourth, the adoption of these new provisions illustrates the interplay of intrastate factors, horizontal federalism, and national influences in state constitutional development.[109] Some states established bans on aid to religious schools and on religious observances in publicly funded institutions to resolve conflicts similar to the one that occurred in New York.[110] Other states, mindful of the corrosive effects of religious conflicts, adopted similar constitutional provisions in order to forestall them.[111] In some religiously homogeneous states, aid to parochial education never emerged as a serious issue, but because the sentiments expressed were congenial, the states nonetheless borrowed the constitutional language banning such aid from sister states.[112] Moreover, in those states admitted to the Union after the Civil War, adoption of constitutional provisions banning aid to sectar-

106. *Id.* at 271. In addition to New York's provisions, cited above, see ALA. CONST. of 1875, art. 12, § 8, *reprinted in* 1 F. THORPE, *supra* note 53, at 177; ARK. CONST. of 1869, art. 9, § 1, *reprinted in* 1 F. THORPE, *supra* note 53, at 322; CAL. CONST. art. 9, § 8; COLO. CONST. art. 9, §§ 7, 8; DEL. CONST. art. X, § 3; KAN. CONST. of 1855, art. 7, § 2, *reprinted in* 2 F. THORPE, *supra* note 53, at 1189; MASS. CONST. of 1780, art. XVIII (amended 1855), *reprinted in* 3 F. THORPE, *supra* note 53, at 1918; MINN. CONST. art. 8, § 3; N.D. CONST. art. 8, §§ 1, 5; OHIO CONST. art. VI, § 2; OR. CONST. art. I, § 5; PA. CONST. of 1874, art. X, § 2; WASH. CONST. art. I, § 11 (1889, amended 1957); WYO. CONST. art. I, § 19.

107. WASH. CONST. art. I, § 11 (1889, amended 1957).

108. *Id.* art. IX, § 4.

109. On the operation of horizontal federalism in state constitutional development, see Tarr & Porter, *supra* note 23, at 9–12.

110. *See. e.g.,* MASS. CONST. of 1780, art. XVIII (amended 1855), *reprinted in* 3 F. THORPE, *supra* note 53, at 1918.

111. *See, e.g.,* NEB. CONST. art. VII, § 11.

112. *See, e.g.,* ALA. CONST. of 1875, art. 12, § 8, *reprinted in* 1 F. THORPE, *supra* note 53, at 177.

ian institutions was demanded by Congress as a condition of admission.[113]

Finally, whatever the factors prompting particular states to take a constitutional position on the relation between religion and education, the important point, as Stokes has noted, is that: "From 1844 on, all states amending their constitutions, and new states when admitted to the Union (except West Virginia, which later corrected the omission), decreed in their fundamental laws against any diversion of public funds to denominational purposes."[114]

C. *Constitutional History and Constitutional Interpretation*

Several conclusions may be drawn from the analyses of the two great periods of state constitution-making of church-state relations. First, and most obviously, while the relationship between church and state under the federal Constitution was fixed during the founding period and has not since been altered, the state experience has been very different. The states have amended and revised their constitutions in recognition of changing views, exemplified by the abolition of religious establishments, and in response to the emergence of new church-state issues, as in the case of aid to parochial schools. From this, it follows that even if one seeks to interpret state constitutions in the light of original intention,[115] one must look beyond the late eighteenth century and the perspectives of that era to understand state constitutional guarantees.

Second, the constitutional guarantees in many states reflect their origin in specific disputes about the relationship between church and state. Thus the language found in state constitutions tends to be considerably more concrete and more specific than that found in the federal document. Furthermore, because they have roots in particular disputes, the state provisions have characteristically been phrased in

113. This requirement is discussed in the concurring opinion of Justice Frankfurter in McCollum v. Board of Educ., 333 U.S. 203, 219–20 (1948).

114. A. STOKES, *supra* note 94, at 271.

115. Debate about the viability and desirability of constitutional interpretation based on the "original intention" of the founders has been intense in recent years. For widely differing perspectives on how to interpret the federal Constitution, see S. BARBER, ON WHAT THE CONSTITUTION MEANS (1984); R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); J. ELY, DEMOCRACY AND DISTRUST (1980); G. JACOBSOHN, THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION (1986); Murphy, *Constitutional Interpretation: The Art of Historian, Magician, or Statesman?* 87 YALE L.J. 1752 (1978).

The sole attempt to consider what this literature offers for the interpretation of state constitutions is Linde, *E. Pluribus— Constitutional Theory and State Courts*, in DEVELOPMENTS, *supra* note 2, at 273.

language aimed at the specific evils which brought them forth. This accounts, for example, for the emphasis on "no aid" and on freedom of worship in the states' early religion guarantees. Moreover, because of their origins in concrete disputes, state provisions represent considered constitutional judgments about contentious church-state issues and, as such, should lend themselves to direct application with only minimal interpretation.

Third, despite interstate variation, one can detect some common features in the treatment of church-state issues in state constitutions. Most state constitutions acknowledge the existence of God in their preambles, and some encourage citizens to worship Him. Almost all state constitutions contain emphatic prohibitions on favoritism toward a particular religion and on aid to religious groups and institutions, frequently premising these bans on the importance of avoiding intrusion by government into the realm of freedom of conscience. Most state constitutions also seek to maintain a separation of church and state in the field of education, in part by safeguarding public funds for public schools and preventing their diversion to sectarian institutions and purposes, in part by banning religious practices in schools receiving state funds. Nevertheless, some states, particularly during the nineteenth and early twentieth centuries, sought to ensure that these prohibitions would not interfere with traditional practices such as Bible reading in public schools by inserting provisions either permitting or requiring such practices.[116]

The adoption of these last provisions is interesting, for it highlights the incompatibility of many traditional practices with state constitutional principles. In doing so, it directs attention to how the states have—and should have—interpreted their state guarantees. It is to this question that this discussion now turns.

III. INTERPRETING STATE CONSTITUTIONAL GUARANTEES[117]

A. State Aid to Religious Schools

Almost all state constitutions expressly prohibit direct aid to schools which are controlled by religious denominations or which teach religious doctrines.[118] Given the clarity of the constitutional language, few cases have arisen involving direct aid to religious

116. *See, e.g.*, MISS. CONST. of 1890, art. III, § 18: "The rights hereby secured shall not be construed . . . to exclude the Holy Bible from use in any public school of this state."

117. This section draws upon material presented in Tarr, *supra* note 3.

118. For a survey of these provisions, see Collins, *supra* note 10, at 2500.

schools. When the issue has been raised, state courts have almost unanimously struck down such aid as unconstitutional.[119] The sole exception to this pattern of invalidation, a 1913 Massachusetts ruling upholding aid to sectarian colleges and universities, was promptly overturned by a constitutional amendment outlawing such aid.[120]

Particularly since World War II, however, a large number of state cases have arisen focusing on the constitutionality of indirect aid to religious schools and their students, such as providing transportation or textbooks to children attending nonpublic schools.[121] The United States Supreme Court has ruled that such programs do not transgress the first amendment.[122] The Court also has indicated, however, that the federal Constitution does not require states that furnish textbooks and transportation to public school students likewise make such aid available to children attending nonpublic schools.[123] Therefore, such aid programs have been subject to challenge under state constitutions.

As the preceding section demonstrated, most states adopted strongly worded constitutional prohibitions on aid to religious schools in the wake of the Catholic Church's efforts to secure funding for its schools.[124] Given the emphatic and comprehensive "no aid" language found in most state constitutions and the historical circumstances leading to its adoption, one may well conclude that indirect aid to parochial schools also should be viewed as constitutionally suspect. Some states, recognizing the implication of their constitutional prohibitions, have revised their constitutions specifically to authorize such aid. Thus in 1947, after the New Jersey Court of Errors and Appeals (as the state's supreme court was then known) had upheld a program of bus transportation for parochial school students,[125] the state included an authorization for such programs in its new constitu-

119. Wright v. School Dist., 151 Kan. 485, 99 P.2d 737 (1940); Atchison, T. & S. F. Ry. Co. v. City of Atchison, 47 Kan. 712, 28 P. 1000 (1892); Berghorn v. Reorganized School Dist., 361 Mo. 121, 260 S.W.2d 573 (1953); Harfst v. Hoegen, 349 Mo. 808, 163 S.W.2d 609 (1941); State *ex rel.* Pub. School Dist. v. Taylor, 122 Neb. 454, 240 N.W. 573 (1932); Murrow Indian Orphans Home v. Childers, 197 Okla. 249, 171 P.2d 600 (1946); Collins v. Kephart, 271 Pa. 428, 117 A. 440 (1921); Nance v. Johnson, 84 Tex. 401, 19 S.W. 559 (1892).

Many of these cases are discussed in C. ANTIEAU, *supra* note 11, at 24–36.

120. MASS. CONST. amend. art. XLVI, § 2 (adopted in response to Re Opinion of the Justices, 214 Mass. 599, 102 N.E. 464 (1913)).

121. *See infra* notes 122–47 and accompanying text.

122. On provision of bus transportation, see Everson v. Board of Educ., 330 U.S. 1 (1947); on the loaning of textbooks, see Board of Educ. v. Allen, 392 U.S. 236 (1968).

123. *See Everson,* 330 U.S. at 16.

124. *See supra* notes 105–14 and accompanying text.

125. Everson v. Board of Educ., 133 N.J.L. 350, 44 A.2d 333 (1945).

tion to prevent any judicial backsliding from that position.[126] Similarly, after the New York and Wisconsin high courts struck down school transportation programs,[127] amendments were adopted which authorized their reinstitution.[128]

Most state constitutions, however, neither expressly authorize nor prohibit providing bus transportation or loaning textbooks to students or providing other forms of indirect aid to nonpublic schools. Thus state courts have had to determine whether the general constitutional bans on aid to religious institutions likewise prohibit programs of indirect aid. In ruling on these programs, state courts have divided almost evenly. For the most part, these differing outcomes cannot be attributed to differences in constitutional language, because the "no aid" language in most state constitutions is clear and emphatic. Rather, the variation among state courts seems to reflect the willingness—or unwillingness—of the justices to read the applicable state provisions as independent constitutional judgments on the permissibility of aid to religious institutions.

The state courts that have upheld the challenged programs have tended to assume, often without supporting analysis, that the relevant state provisions impose no greater restriction than is imposed by the first amendment.[129] In addition, many of these courts have claimed that the challenged programs benefitted the schoolchild rather than

126. N.J. CONST. art. VIII, § 4, ¶ 3.

127. Judd v. Board of Educ., 278 N.Y. 200, 15 N.E.2d 576 (1938); Reynolds v. Nusbaum, 17 Wis. 2d 148, 115 N.W.2d 761 (1962).

128. The state rulings in *Judd* and *Reynolds* were overturned by N.Y. CONST. art. XI, § 4 and WIS. CONST. art. I, § 21, respectively.

129. State rulings upholding the loaning of textbooks to students in sectarian schools include: Borden v. Louisiana State Bd. of Educ., 168 La. 1005, 123 So. 655 (1928); Chance v. Mississippi State Textbook Rating & Purchasing Bd., 190 Miss. 453, 200 So. 706 (1941); Opinion of the Justices, 109 N.H. 578, 258 A.2d 343 (1969); Board of Educ. v. Allen, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967), *aff'd,* 392 U.S. 236 (1968); Bowerman v. O'Connor, 104 R.I. 519, 247 A.2d 82 (1968).

State rulings upholding provision of transportation to students in sectarian schools include: Everson v. Board of Educ., 133 N.J.L. 350, 44 A.2d 333 (1945), *aff'd,* 330 U.S. 1 (1947); Bowker v. Baker, 73 Cal. App. 2d 653, 167 P.2d 256 (1946); Snyder v. Town of Newtown, 147 Conn. 374, 161 A.2d 770 (1960), *appeal dismissed,* 365 U.S. 299 (1961); Board of Educ. v. Bakalis, 54 Ill. 2d 448, 299 N.E.2d 737 (1973); Nicholas v. Henry, 301 Ky. 434, 191 S.W.2d 930 (1945); Americans United Inc. as Protestants v. Independent School Dist., 288 Minn. 196, 179 N.W.2d 146 (1970), *appeal dismissed,* 403 U.S. 945 (1971); Honohan v. Holt, 17 Ohio Misc. 57, 244 N.E.2d 537 (1968); Rhoades v. School Dist., 424 Pa. 202, 226 A.2d 53, *appeal dismissed,* 389 U.S. 11, *cert. denied sub nom.* Worrell v. Matters, 389 U.S. 846 (1967); State *ex rel.* Hughes v. Board of Educ., 154 W. Va. 107, 174 S.E.2d 711 (1970), *cert. denied and appeal dismissed,* 403 U.S. 944 (1971), *overruled,* Janasiewicz v. Board of Educ., 299 S.E.2d 34 (W. Va. 1982).

the religious school, invoking the so-called child-benefit theory.[130] Alternatively, they have maintained that the valid public purposes served by the programs—ensuring the safety of schoolchildren in transportation cases, or providing better education in textbook cases—justified their continuation.

Representative of these decisions is *Snyder v. Town of Newtown,*[131] in which the Connecticut Supreme Court upheld a transportation program against constitutional challenge. The Connecticut Constitution provides that no one shall be compelled "to join or support, nor be classed with, or associated to, any congregation, church or religious association"[132] and that the school fund shall not be diverted "to any other use than the encouragement and support of public, or common schools."[133] Nevertheless, the Connecticut court chose to emphasize the public purpose served by the program rather than the constitutional language, asserting that "a statute which serves a public purpose is not unconstitutional merely because it incidentally benefits a limited number of persons."[134] In rejecting the contention that the program violated the constitutional prohibition on aid to religion, the court simply asserted that "in light of our history and policy, [the program] cannot be said to compel support of any church."[135]

In contrast, the courts that have invalidated programs of indirect aid have been more attuned to the differences in language between federal and state constitutions and to the differing historical experiences underlying their adoption.[136] A model of the sort of independent constitutional analysis which should occur under state constitutions is

130. The "child-benefit theory" was first enunciated by the United States Supreme Court in Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930). In *Cochran,* the Court upheld a state law that authorized providing free textbooks to children attending church-related schools. Because the establishment clause had not at that point been incorporated, see *supra* note 22 and accompanying text, the constitutional challenge to Louisiana's law was based on the claim that the program involved spending public funds for a private purpose. The Court based its analysis on the theory that "the state may extend certain welfare aid to students attending church-related schools in situations where general aid to the parochial schools themselves would be unconstitutional." *See* LaNoue, *The Child Benefit Theory Revisited: Textbooks, Transportation, and Medical Care,* 13 J. PUB. L. 76, 79 (1964).

131. 147 Conn. 374, 161 A.2d 770 (1960); *see also* C. ANTIEAU, *supra* note 11, at 33.

132. CONN. CONST. art. VII, § 1.

133. *Id.* art. VIII, § 2.

134. *Snyder,* 161 A.2d at 774–75.

135. *Id.* at 779.

136. State rulings striking down the loaning of textbooks include: California Teachers Ass'n. v. Riles, 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300 (1981); Bloom v. School Comm., 376 Mass. 35, 379 N.E.2d 578 (1978); Advisory Opinion re Constitutionality of 1974 PA 242, 394 Mich. 41, 228 N.W.2d 772 (1975); Paster v. Tussey, 512 S.W.2d 97 (Mo. 1974), *cert. denied,* 419 U.S. 1111 (1975); Gaffney v. State Dept. of Educ., 192 Neb. 358, 220 N.W.2d 550 (1974);

found in *Gaffney v. State Department of Education.*[137] *Gaffney* involved the constitutionality of a Nebraska law authorizing the loaning of textbooks to pupils attending nonpublic schools. The Nebraska Supreme Court, eschewing the tripartite analysis developed by the United States Supreme Court in *Lemon v. Kurtzman,*[138] instead focused on Nebraska's constitutional prohibition of any "appropriation in aid of any sectarian institution or any educational institution not owned and controlled by the state."[139] The clarity of this language, the court insisted, made interpretation unnecessary, and its broad sweep admitted of no exceptions.[140] Indeed, the records of the convention which drafted the provision indicated that a major aim of the delegates was to devise a precise prohibition which would prevent sectarian conflict over the funding of church-related schools.[141] The court therefore concluded that the law violated the state's constitution.

Other state courts have likewise looked to the language of their state constitutions in justifying the development of an independent constitutional position. The California Supreme Court, for example, concluded that the state constitution's ban on expenditures for "any sectarian purpose"[142] was designed to prevent the state from providing benefits to sectarian schools that furthered their educational purpose and on that basis struck down a textbook loan program.[143] Similarly, the Alaska Supreme Court concluded that, given the clear import of the constitution's "no aid" language,[144] if the state's founders had wished to permit the state to provide transportation to students attending parochial schools, they would have included a provision

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Dickman v. School Dist., 232 Or. 238, 366 P.2d 533 (1961), *cert. denied,* 371 U.S. 823 (1962); McDonald v. School Bd., 90 S.D. 599, 246 N.W.2d 93 (1976).

State rulings striking down the provision of transportation, which have not been overturned by constitutional amendments, include: Matthews v. Quinton, 362 P.2d 932 (Alaska 1961), *cert. denied and appeal dismissed,* 368 U.S. 517 (1962); State *ex rel.* Traub v. Brown, 36 Del. 181, 172 A. 835 (1934); Spears v. Honda, 51 Haw. 1, 449 P.2d 130 (1969); Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971), *cert. denied,* 406 U.S. 957 (1972); Board of Educ. v. Antone, 384 P.2d 911 (Okla. 1963); Visser v. Nooksack Valley School Dist., 33 Wash. 2d 699, 207 P.2d 198 (1949).

137. 192 Neb. 358, 220 N.W.2d 550 (1974).

138. In Lemon v. Kurtzman, 403 U.S. 602 (1971), the United States Supreme Court proposed a three-pronged test for determining whether a law violated the establishment clause: (1) does the law have a secular purpose? (2) is its primary effect to advance religion? and (3) does it foster an excessive entanglement between government and religion?

139. NEB. CONST. art. VII, § 11.

140. *Gaffney,* 220 N.W.2d at 553.

141. *Id.* at 553–54.

142. CAL. CONST. art. XVI, § 5; *cf. id.* art. IX, § 8.

143. California Teachers Ass'n. v. Riles, 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300 (1981).

144. ALASKA CONST. art. VII, § 1.

expressly indicating that intent.[145] Finally, the Massachusetts Supreme Judicial Court, noting that a challenged textbook loan program aided sectarian schools in carrying out their essential educational function, held that the program violated the amendment, adopted following its 1913 decision, which ruled out the "use" of money for "maintaining or aiding" sectarian schools.[146]

Considering the cases as a whole, the rulings banning indirect aid seem more faithful to the purposes and history of state constitutional guarantees than do the rulings upholding aid.[147] If the United States Supreme Court decides that forms of indirect aid currently prohibited are compatible with the establishment clause—not a farfetched possibility given the divisions on the Court and recent changes in the Court's personnel[148]—one can expect renewed litigation under state constitutions.[149] Should this occur, state courts will have both the opportunity and the constitutional basis to chart an independent course.

B. Religious Practices in Public Schools

Many state constitutions not only prohibit governmental expenditures for sectarian religious purposes but also expressly forbid sectarian control or influence in schools supported by state funds.[150] These provisions serve two purposes. First, they prevent the public funding of parochial schools. Second, as the review of the conflict in New York suggests, the provisions forbidding sectarian influence also serve to address Catholic concerns about the prevalence of Protestant religious practices and inculcating Protestant doctrine in the public schools.[151] More generally, several state constitutions guarantee an absolute freedom of worship and forbid government from compelling attendance at a place of worship. Typical is the Constitution of Washington, which safeguards "[a]bsolute freedom of conscience in all mat-

145. Matthews v. Quinton, 362 P.2d 932, 944 (Alaska 1961).

146. Bloom v. School Comm., 376 Mass. 35, 379 N.E.2d 578 (1978).

147. This conclusion is based on both the emphatic prohibitions found in state constitutions and the history previously reviewed regarding the adoption of these prohibitions. *See supra* notes 79–114 and accompanying text.

148. In recent school-aid cases the United States Supreme Court either has upheld the provision against constitutional challenges, as in Mueller v. Allen, 463 U.S. 388 (1983), or has divided sharply over its permissibility, as in School Dist. v. Ball, 473 U.S. 373 (1985). Because Justice Powell, who provided the decisive vote in the latter case, has retired and been replaced by Justice Kennedy, the Court's willingness to adhere to its position in *Ball* must be questioned.

149. Tarr, *Religion Under State Constitutions*, 496 ANNALS 65, 74–75 (1988).

150. For a summary of those provisions, see Collins, *supra* note 10, at 2500.

151. *See supra* notes 84–89 and accompanying text.

ters of religious sentiment, belief, and worship,"[152] decrees that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction,"[153] and mandates that "[a]ll schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."[154] Together, these provisions provide a clear basis for invalidating religious practices in the public schools and for ensuring that state government does not interfere with freedom of belief and worship.

At least initially, however, restrictive state provisions had little effect. In those states where constitutional guarantees of freedom of worship and belief antedated the establishment of systems of public education, the guarantees did not prevent the institution of Bible reading and daily prayer in the public schools nor did they curtail the pervasive (nonmonetary) support for Protestant Christianity.[155] In those states which banned sectarian influences in state-funded schools, the constitutional guarantees typically did not eliminate religious practices as standard elements in the public school curriculum.[156] Nonetheless, adopting these constitutional principles, despite continuation of practices incompatible with them, was important because it furnished a weapon for litigants who would later challenge the states' sponsorship of religious practices.

The challenge to religious practices in the public schools began during the nineteenth century. Five state courts anticipated the Supreme Court's analysis in *School District v. Schempp*[157] by striking down Bible reading in the schools under their state constitutions.[158] The Florida and New Jersey Supreme Courts, despite upholding Bible

152. WASH. CONST. art. I, § 11.

153. *Id.*

154. *Id.* art. IX, § 4.

155. *See supra* note 95 and accompanying text. The frequency of litigation, described *infra* notes 158–65 and accompanying text, is itself testimony to the widespread character of the practice.

156. In the 1894 constitutional convention in New York, for example, the same committee that reported an amendment prohibiting sectarianism in the public school system and forbidding the expenditure of public funds to "propagate denominational tenets" assured the delegates that it was not intended thereby to "interfere with the reading of the Bible in public schools." J. PRATT, *supra* note 84, at 272.

157. 374 U.S. 203 (1963).

158. Rulings prior to *Schempp* which either struck down Bible reading in public schools or upheld laws banning it include: People *ex rel.* Ring v. Board of Educ., 245 Ill. 334, 92 N.E. 251 (1910); Herold v. Parish Bd. of School Directors, 136 La. 1034, 68 So. 116 (1915); State *ex rel.* Freeman v. Scheve, 65 Neb. 853, 91 N.W. 846 (1902); Board of Educ. v. Minor, 23 Ohio St. 211 (1872); State *ex rel.* Weiss v. District Bd., 76 Wis. 177, 44 N.W. 967 (1890).

reading programs,[159] similarly ruled that the distribution of copies of the Gideon Bible to students involved an unconstitutional preference for a particular religious sect.[160] The New Mexico Supreme Court forbade distribution of other religious literature on similar grounds.[161]

Most state courts, however, summarily rejected constitutional challenges to Bible reading and other sectarian observances in the public schools.[162] To do so, these courts were forced to deny that the Bible was sectarian, arguing that its "adopt[ion] by one or more denominations as authentic . . . or inspired, cannot make it a sectarian book."[163] They also had to contend that use of a version of the Bible favored by a particular sect did not constitute governmental endorsement of or preference for a particular religion.[164] Finally, these courts had to deny that school prayer and Bible reading transformed the classroom into a place of worship, insisting that the constitutional ban on compelled attendance at a placed of worship applied only to places where people met for that express purpose.[165]

These assertions, unconvincing though they are, demonstrate the commitment many state courts had to upholding Bible reading in the schools.[166] Indeed, even after the United States Supreme Court struck

159. The Florida Supreme Court upheld a Bible reading program in Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So. 2d 21 (Fla. 1962), *vacated,* 374 U.S. 487 (1963), *rev'd,* 377 U.S. 402 (1964), and the New Jersey Supreme Court upheld a similar program in Doremus v. Board of Educ., 5 N.J. 435, 75 A.2d 880 (1950), *appeal dismissed,* 342 U.S. 429 (1952).

160. Rulings striking down distribution of the Gideon Bible to students in public school include: Brown v. Orange County Bd. of Pub. Instruction, 128 So. 2d 181 (Fla. 1960), *aff'd,* 155 So.2d 371 (Fla. 1963); Tudor v. Board of Educ., 14 N.J. 31, 100 A.2d 857, *cert. denied,* 348 U.S. 816 (1954).

161. In Miller v. Cooper, 56 N.M. 355, 244 P.2d 520 (1952), the New Mexico Supreme Court forbade the distribution of Presbyterian religious literature in the state's public schools.

162. Rulings upholding Bible reading in the public schools include: People *ex rel.* Vollmar v. Stanley, 81 Colo. 397, 255 P. 610 (1927), *overruled,* Conrad v. Denver, 656 P.2d 662 (Colo. 1982); Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So. 2d 21 (Fla. 1962), *vacated,* 374 U.S. 487 (1963), *rev'd,* 337 U.S. 402 (1964); Wilkerson v. City of Rome, 152 Ga. 762, 110 S.E. 895 (1927); Moore v. Monroe, 63 Iowa 367, 20 N.W. 475 (1884); Billard v. Board of Educ., 69 Kan. 53, 76 P. 422 (1904); Hackett v. Brooksville Graded School Dist., 120 Ky. 608, 87 S.W. 792 (1905); Donahoe v. Richards, 38 Me. 376 (1854); Pfeiffer v. Board of Educ., 118 Mich. 560, 77 N.W. 250 (1898); Kaplan v. Independent School Dist., 171 Minn. 142, 214 N.W. 18 (1927); Doremus v. Board of Educ., 5 N.J. 35, 75 A.2d 880 (1950); Carden v. Bland, 199 Tenn. 665, 288 S.W.2d 718 (1956); Church v. Bullock, 104 Tex. 1, 109 S.W. 115 (1908).

163. Hackett v. Brooksville Graded School Dist., 120 Ky. 608, 87 S.W. 792, 794 (1905).

164. *Hackett,* 87 S.W. at 794.

165. Church v. Bullock, 104 Tex. 1, 109 S.W. 115 (1908).

166. As Monrad G. Paulsen observed, "[i]nstead of maintaining a 'wall of separation,' many state courts have upheld enactments benefiting religion by narrow technical readings of their state constitutions." Paulsen, *State Constitutions, State Courts and First Amendment Freedoms,* 4 VAND. L. REV. 620, 642 (1951). For a possible explanation of this commitment, see G. TARR, JUDICIAL IMPACT AND STATE SUPREME COURTS ch. 6 (1977).

down the practice under the federal Constitution, the Florida Supreme Court continued to insist that Bible reading was not a religious exercise.[167] Paradoxically, the state courts' opinions upholding Bible reading in the schools also underline the strength of state constitutional strictures on governmental sponsorship of religious practices. The clarity of the provisions precluded interpreting them in an accommodationist fashion, and state courts thus were forced to misrepresent the situations they confronted in order to uphold the practices they favored. Should new issues be presented, involving religious practices in the public schools or the introduction of religious perspectives into their curricula, these state constitutional provisions can and should serve as a barrier to efforts to compromise the secular character of the public schools.

C. Religious Displays on Public Property

A more difficult question is posed when state sponsorship of religious practices or displays occurs outside the school context. Because constitutional restrictions on sectarian influences in public schools do not apply in such circumstances, state courts must resolve the issues such sponsorship raises in the light of the state's more general constitutional provisions dealing with church and state.

An important recent issue of state sponsorship is raised by the states' erection and/or maintenance of religious displays on public property. Prior to 1984, when the United States Supreme Court ruled that the inclusion of a nativity scene in a Christmas display on public property did not violate the establishment clause,[168] the courts in five states had addressed the issue. In three instances the courts found no constitutional violation. Over several years, the Oregon Supreme Court initially upheld and then invalidated the erection in a city park of a permanent fifty-one-foot-high Latin cross which would be illuminated during the Christmas and Easter seasons, only to reverse itself once again when the cross was designated as a war memorial and illuminated only on patriotic holidays.[169] In a more straightforward fashion, the Oklahoma Supreme Court in 1972 upheld the erection of a

167. Chamberlin v. Dade County Bd. of Pub. Instruction, 160 So.2d 97 (Fla. 1962). For discussion of the court's justification of this ruling, see G. TARR, *supra* note 166, at 47–49.

168. The United States Supreme Court upheld inclusion of a creche in a Christmas display on public property in Lynch v. Donnelly, 465 U.S. 668 (1984).

169. Lowe v. City of Eugene, 254 Or. 518, 451 P.2d 117 (1969), *cert. denied,* 397 U.S. 1042 (1970); *see also* Eugene Sand & Gravel, Inc. v. City of Eugene, 276 Or. 1007, 558 P.2d 338 (1976), *cert. denied,* 434 U.S. 876 (1977).

similar cross in a public park,[170] and the Florida Supreme Court in 1967 ruled that a lighted cross could be displayed on the county courthouse each December.[171] On the other hand, the Colorado Supreme Court in 1983 reversed the dismissal of a suit challenging the inclusion of a creche in Christmas decorations displayed on the steps of the city and county building,[172] and the California Supreme Court in 1978 struck down the constitutionality of a lighted cross display on Los Angeles' city hall to commemorate Christmas and Easter.[173]

In only three of these cases did the state high courts consider whether the displays violated the states' bills of rights. The Colorado Supreme Court, maintaining that the state and federal religion guarantees "embod[ied] similar values,"[174] relied on the tripartite test developed by the Supreme Court in *Lemon*[175] in interpreting the state guarantee and concluded that the appellants had shown a prima facie case of constitutional violation. Yet because this ruling is linked so closely to the application of federal doctrine, some question exists regarding its continuing viability in the wake of the United States Supreme Court's contrary decision in *Lynch.*[176]

In contrast, the Oklahoma and California supreme courts undertook independent interpretation of their state guarantees, albeit with conflicting results. Acknowledging that expenditures to support or benefit a religious sect would violate the state constitution, the Oklahoma Supreme Court insisted that, despite the city's maintenance and illumination of the cross, no use of public monies was involved.[177] Furthermore, the court continued, the display of the cross did not entail forbidden governmental support for religion, because the commercial setting of the cross "stultif[ied] its symbolism and vitiate[d] any use, benefit or support for any sect, church, denomination, system of religion or sectarian institution as such."[178]

Considerably more convincing is the California Supreme Court's opinion in *Fox v. City of Los Angeles.*[179] The California court pointed out that the sectarian religious character of the display in question was apparent in both the selection of the cross, a symbol particularly perti-

170. Meyer v. Oklahoma City, 496 P.2d 789 (Okla.), *cert. denied,* 409 U.S. 980 (1972).
171. Paul v. Dade County, 202 So. 2d 833 (Fla. 1967), *cert. denied,* 390 U.S. 1041 (1968).
172. Conrad v. City and County of Denver, 656 P.2d 662 (Colo. 1982).
173. Fox v. City of Los Angeles, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978).
174. *Conrad,* 656 P.2d at 670.
175. *See supra* note 138.
176. *See supra* note 168.
177. Meyer v. Oklahoma City, 496 P.2d 789, 792 (Okla.), *cert. denied,* 409 U.S. 980 (1972).
178. *Id.* at 792–93.
179. 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978).

nent to the Christian religion, and in the efforts of Greek Orthodox Christians to ensure that the cross would be displayed on their Easter as well.[180] It thus concluded that the state's special recognition of one religion, at least where others were not similarly recognized, violated the state's constitutional ban on preference for religious sects.[181]

By emphasizing the sectarian character of the religious display, the California Supreme Court left unanswered the question of whether sponsorship of religious displays in recognition of all religions would violate the state's constitution. Moving beyond the California context and the specific issue of religious displays, one might well generalize the issue: is it valid under state constitutions for the states to recognize and support religion in general?[182] The answer to this question necessarily depends on the specific language in a state's constitution. Nonetheless, some general observations and a tentative conclusion are possible.

First, as noted earlier, the preambles of most contemporary state constitutions expressly recognize the existence of God, often admitting the state's dependence on His blessings. Some state constitutions also acknowledge a duty of religious worship.[183] Thus, most state constitutions are far from neutral on the question of religious belief.

Second, far more than the analogous provisions in the federal Constitution, the provisions on church and state in state constitutions, read in the light of the circumstances of their adoption, offer support for Justice William O. Douglas's dictum that "we are a religious people whose institutions presuppose a Supreme Being."[184] From this claim Justice Douglas drew the conclusion that "[w]hen the state encourages religious instruction or cooperates with religious authorities . . . it follows the best of our traditions."[185] Once again, the language and history of state constitutions seem compatible with this conclusion.

Third, this dual recognition of the religious character of the American populace and of the existence of a supreme being, even when tied to a duty of religious worship, neither imposes on the states an obligation to provide financial assistance to religion nor authorizes such sup-

180. *Fox,* 587 P.2d at 664–65.

181. *Id.* at 665–66.

182. This would include not only religious displays, such as were at issue in the cases we have surveyed, but also ceremonial observances, such as was at issue in Marsh v. Chambers, 459 U.S. 966 (1982), *rev'd,* 463 U.S. 783 (1983).

183. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

184. *Id.* at 313–14.

185. *Id.*

port. Indeed, many state constitutions, responding to the evils associated with religious establishments, preclude such support in no uncertain terms.

Finally, from the foregoing observations it appears that governmental recognition of religion and religious practices would not violate most state constitutions as long as this recognition (1) did not entail favoritism to particular sects or religions, (2) did not involve financial aid to religion, and (3) did not interfere with the freedom of religious belief, sentiment, and worship. Whether programs could be devised which would meet these exacting requirements is a difficult question, as is whether such programs would run afoul of the establishment clause of the first amendment.[186] Nonetheless, the fact that such criteria can be developed underscores once again that state constitutions tend to incorporate a different perspective on church and state than is found in the federal Constitution.

IV. THE DESIRABILITY OF A STATE JURISPRUDENCE OF CHURCH AND STATE

The preceding sections of this Article demonstrate that state constitutional provisions dealing with church and state have been fashioned out of distinctive historical experiences. Thus reliance on these provisions can lead to different results than would obtain if one relied on the first amendment as presently interpreted by the United States Supreme Court. Yet even if it is possible to develop a state jurisprudence of church and state, is it appropriate and desirable to do so?

Litigants can be expected to answer this question by examining how state courts, relying on their state constitutions, would likely rule on various church-state issues and then determine whether those results are more desirable than the likely results under the first amendment.[187] This is hardly the standard, however, that judges should use in determining whether or not to base their rulings on state constitutions. For one thing, such a result oriented approach retards, rather than promotes, the development of state constitutional law.[188] More-

186. For an example of a state's attempt to promote the free exercise of religion that did run afoul of the federal establishment clause, see Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

187. What is "desirable," of course, depends on the perspective of the judge. For a criticism of this sort of result oriented approach to state constitutional law, see Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297 (1977).

188. For a perceptive discussion of this issue, see Porter, *State Supreme Courts and the Legacy of the Warren Court: Some Old Inquiries for a New Situation*, in STATE SUPREME COURTS 3 (1982).

over, for judicial decisions to be defensible, they must be seen as rooted in judgment rather than in will, and a reliance on state constitutions that is opportunistic rather than principled undermines that perception.[189] Thus to justify the development of an independent state law of church and state, we must consider the various standards proposed by jurists and scholars for determining when judges should rely on state constitutional protections rather than on the federal Constitution when resolving issues of individual rights.[190] Examination of these standards reveals that the development of an independent state jurisprudence of church and state is not only possible but indeed legitimate and desirable.

The most expansive conception of the role to be accorded state constitutional protections is the "state law first" or "first things first" approach, which was originally proposed by Justice Hans Linde of the Oregon Supreme Court[191] and has since been adopted by that court.[192] Justice Linde argues that judges should always address and resolve state constitutional challenges to state legislative or executive action before addressing themselves to federal constitutional issues.[193] This insistence on looking at state law first logically follows, he contends, from the relationship of state and federal law in protecting rights. One cannot determine whether a state has violated the due process or equal protection clauses of the fourteenth amendment until the state has completed its action, and this includes not only action by the state's legislative and/or executive branches but also the evaluation by the state judiciary of the compatibility of their action with state law.[194]

If a violation of the state's bill of rights is found, then the success of the state constitutional challenge obviates the need for a court to

189. The classic exposition is found in *The Federalist No. 78,* where Alexander Hamilton observes that the judiciary "may truly be said to have neither *force* nor *will,* but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." THE FEDERALIST NO. 78, at 227 (A. Hamilton) (R. Fairfield 2d ed. 1981). For a recent discussion by a state supreme court justice, see Handler, *A Matter of Opinion,* 15 RUTGERS L.J. 1 (1983).

190. For a useful recent overview of various approaches to state bills of rights, see Collins & Galie, *supra* note 2.

191. For major statements by Linde of this position, see Linde, *supra* note 2; Linde, *supra* note 115; Linde, *First Things First: Rediscovering the States' Bills of Rights,* 9 U. BALT. L. REV. 379 (1980). Important analyses of this approach include: Carson, *Last Things Last: A Methodological Approach to Legal Arguments in State Courts,* 19 WILLAMETTE L. REV. 641 (1983); Collins, *supra* note 28.

192. The Oregon Supreme Court endorsed Linde's approach in State v. Kennedy, 295 Or. 260, 666 P.2d 1316 (1983), and Sterling v. Cupp, 290 Or. 611, 625 P.2d 123 (1981).

193. Linde, *supra* note 2, at 135, 182.

194. *Id.* at 133, 182–83.

address itself to federal constitutional issues.[195] Alternatively, if the action of the state's legislative and/or executive branches is compatible with the state constitution, then the state judge must determine its compatibility with federal constitutional requirements.[196] Because proponents of the "first things first" approach favor looking initially to the state constitution whenever a constitutional violation is alleged, it follows that from this perspective the development of a state jurisprudence of church and state is not only permissible but indeed essential for the state constitution to fulfill the role assigned to it in the American legal system.

A second group of scholars and jurists has concluded that the federal Constitution should provide the primary protection for civil liberties and that state bills of rights should be viewed as supplementary or subsidiary.[197] From this initial point, it follows that state courts must justify their action when they choose to rely on what is secondary, i.e., state constitutional protections, rather than on what is primary, i.e., the federal Bill of Rights. The presumption in favor of reliance on federal law is particularly strong, according to most advocates of this position, when the United States Supreme Court has provided direction by ruling on the same question confronting the state court.[198] In such circumstances state judges, even in interpreting provisions of their state's constitution, should usually be guided by the United States Supreme Court's interpretation of analogous provisions of the federal document.[199]

Yet proponents of this supplementary role for state guarantees of individual rights recognize that the state protections do have a role to play. To distinguish those situations in which reliance on the state constitution is appropriate from those in which it is not, they have identified various factors or criteria which would justify rejection of the reasoning used and results reached by the United States Supreme Court. Despite some variation among these lists, several criteria tend

195. *Id.* at 133–34.

196. *See supra* note 28 and accompanying text.

197. There is considerable variation in perspective even among those who subscribe to this viewpoint. Important presentations of this viewpoint include: Pollock, *State Constitutions as Separate Sources of Fundamental Rights,* 35 RUTGERS L. REV. 707 (1983); *Developments in the Law, supra* note 1. For commentary on this viewpoint, see Keyser, *State Constitutions & Theories of Judicial Review: Some Variations on a Theme,* 63 TEX. L. REV. 1051 (1985).

198. For a trenchant critique of the assumption that state courts should conform their rulings to those of the Supreme Court, see Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result,* 35 S.C.L. REV. 353 (1984).

199. In addition to the article cited *supra* note 197, see in particular the concurring opinion of Justice Alan Handler in State v. Hunt, 91 N.J. 338, 450 A.2d 952, 965–67 (1982).

to show up consistently, among them textual differences between the federal and state provisions and a distinctive legislative history for the state provisions which indicates the validity of a broader interpretation.

If one concludes that the repetition of these factors indicates a consensus about their adequacy as a justification for adopting an independent constitutional position, a state jurisprudence of church and state is warranted. As the previous discussion revealed, the criterion of textual differences is met by the significant differences in the specificity and scope of the federal and state guarantees.[200] Furthermore, the criterion of distinctive legislative history is met by the circumstances surrounding the adoption of state provisions on disestablishment, on aid to sectarian schools, and on religious influences in the public schools.[201] Therefore, even if one acknowledges a presumption in favor of relying on federal law, ample justification exists for looking to state constitutions in cases involving church and state.

Finally, some commentators argue that the societal interests in legal uniformity, consistency, and comprehensibility should lead state judges to rely on the federal Constitution, as interpreted by the Supreme Court, rather than on state guarantees of civil liberties.[202] Frequently what underlies this position is the assumption that state courts should defer to the Supreme Court and follow the constitutional rulings it announces because of the stature of the Court and the quality of its analyses. Yet, as former Justice Stanley Mosk of the California Supreme Court has insisted, if the justification for deference to the United States Supreme Court is the quality and consistency of its rulings, deference to the Court is not warranted when its rulings are inconsistent and its analyses unconvincing.[203] Indeed, an inability on the Court to provide adequate direction provides a justification for a

200. *See supra* notes 53–74 & 107–14 and accompanying text.

201. *See supra* notes 31–116 and accompanying text.

202. *See, e.g.*, Deukmejian & Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975 (1979); Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 DENVER U.L. REV. 85 (1985). For a judicial endorsement of this viewpoint, see Justice William Clark's opinion in People v. Norman, 14 Cal. 3d 929, 538 P.2d 237, 245–46, 123 Cal. Rptr. 109 (1975), *vacated*, *In re* Lance W., 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985).

203. Mosk, *State Constitutionalism After Warren: Avoiding the Potomac's Ebb and Flow*, in DEVELOPMENTS, supra note 2; *see also* Greenberg v. Kimmelman, 99 N.J. 552, 494 A.2d 294, 302–03 (1985), in which the New Jersey Supreme Court noted that: "By developing an interpretation of the New Jersey Constitution that is not irrevocably bound by federal analysis, we . . . avoid the necessity of adjusting construction of the state constitution to accommodate every change in federal analysis of the United States Constitution."

state court to look to its state constitution for guidance. Certainly the Supreme Court, by its inconsistent decisions in establishment clause cases, has forfeited the deference often given to its rulings.[204]

V. CONCLUSION

The development of an independent state jurisprudence of church and state is not only justified but desirable. State constitutional guarantees differ markedly in language and form from their federal counterparts. For many states, these differences reflect the process of constitutional development, in which provisions were adopted over time to resolve or prevent conflicts over such contentious issues as the maintenance of religious establishments and aid to sectarian schools. For others, they reflect a borrowing of provisions from sister states. Whatever the basis for the differences, the result has been that the states have constitutionalized a distinctive perspective on the separation of church and state and on claims of religious liberty. In this era of the new judicial federalism, it is time—and past time—for state courts to develop a jurisprudence that is faithful to this perspective.

204. *See* California Teachers Ass'n v. Riles, 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300 (1981).