THE RELIGION PROVISIONS OF THE NEBRASKA CONSTITUTION: AN ANALYSIS AND LITIGATION HISTORY

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THE RELIGION PROVISIONS OF THE NEBRASKA CONSTITUTION:

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"MASON: The Chinaman who scoffs at your religion; who bows down and worships blocks of wood and stone; and who defiles your temples of Christianity with his blasphemy and who refuses to declare that he is a liege subject of your government—he is to be allowed to exercise the elective franchise. A most dangerous experiment indeed is sought to be interpolated in the very first section of the Bill of Rights."

"ESTABROOK: They require a right to build a place wherein they shall maintain their idols, wherein they may worship. I believe it is right because it is in obedience to the fundamental idea, that no man shall be interfered with in the enjoyment of his religion. He shall worship howsoever[,] whethersoever[,] and whensoever he may."

—Proceedings of the 1871 Nebraska Constitutional Convention[1]

I. INTRODUCTION

In the Nebraska Constitutional Convention of 1871, the debates between Oliver Mason, first Chief Justice of the Nebraska Supreme Court, and Experience Estabrook, first District Attorney of the Territory of Nebraska, were frequent and contentious. The two well-respected delegates squared off over many issues, but arguments over the proper role of religious freedom in the newly made State of Nebraska proved to be the most passionate and heated. Although Mason and Estabrook led the discussion over religion, neither had conventional religious beliefs.[2]

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† J.D., University of Nebraska, 2002. The author welcomes feedback at <jhaeman@hotmail.com> and wishes to thank Professor Richard F. Duncan for the education, Tim Butz and Amy Miller for the freedom, and Daniel Justice for not letting me quit.

1. *Official Report of the Debates and Proceedings of the Nebraska Constitutional Convention*, 11 Pub. Neb. St. Hist. Socy. 1, 210, 214 (Addison E. Sheldon ed. 1906). There are three volumes of the debates of the 1871 Convention, printed as volumes 11, 12, and 13 of the *Publications of the Nebraska State Historical Society*.

2. *See* J. Sterling Morton & Albert Watkins, *Illustrated History of Nebraska* 72, 645 (1905)

The records of the debates at the 1871 Convention between Mason, Estabrook, and others demonstrate that the delegates had very different views on how to handle disputes between the State's authority to enact laws and expect obedience, and the individual's right to worship as he or she chose. However, heated arguments over the proper role of religion in nineteenth-century Nebraska were not confined to constitutional conventions. They took place in newspapers, political rallies, pamphlets, and the state legislature. The debates over religion *outside* the Convention influenced the debates *inside* the Convention, and it is clear from reading the records of the debates that the Convention delegates chose the particular language of the new Constitution's religion clauses carefully and with particular goals in mind.

The Nebraska Constitution contains two major provisions on religion: Article I, Section 4, entitled "Religious Freedom," guarantees individual religious belief and prohibits the State from preferring some religions over others or from compelling anyone to worship. Article VII, Section 11 of the Nebraska Constitution specifically prohibits the appropriation of public money for private or parochial schools, and forbids sectarian instruction in public schools.[3] Suffice it to say that the religion clauses of the Nebraska Constitution have been almost completely ignored by academics.[4] This Article seeks to understand the meaning of these provisions by examining their text, historical underpinnings, and interpretation by the Nebraska Supreme Court.

Determining the precise meaning of the Nebraska Constitution's religion provisions is not a mere academic exercise; these clauses may have an important role to play in the future of religious freedom in Nebraska. Part II of this Article briefly discusses why the Nebraska Constitution remains relevant in an era of a nationalized Bill of Rights and explains the methodology used in trying to determine if the Nebraska Constitution provides greater protection for religious liberty than does the United States Constitution. Part III discusses the history of the Nebraska Constitution and the role religion played in both the Territory, and later, the State of Nebraska. Part IV examines how the

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(stating that Mason "never affiliated with any church" and that Estabrook "lived and died an avowed spiritualist").

3. [Hereinafter *No Sectarian Aid Provision*].

4. The closest is Richard E. Shugrue, *Faithful to the Constitution: The Roadblock for Nebraska's Schools*, 79 Neb. L. Rev. 884 (2000). This excellent work focuses on education but unfortunately does not include an historical or comparative analysis of the religious freedom provisions. The last work on religious freedom in Nebraska generally is almost fifty years old. *See* Orville H. Zabel, *God and Caesar in Nebraska: A Study of the Legal Relationship of Church and State, 1854-1954*, 14 U. Neb. Stud. 1 (1955). Further, I have been unable to find an article or book devoted to Nebraska religion in general.

Religious Freedom Provision has changed over time. Part V focuses on the free exercise aspect of the Nebraska Religious Freedom Provision, while Part VI focuses on the Provision's anti-establishment language. Part VII examines Article VII, Section 11 of the Nebraska Constitution, dealing with sectarian instruction. The Conclusion of this Article provides a few brief suggestions for practitioners and notes which areas need further research.

II. BACKGROUND AND METHODOLOGY

When the Nebraska Constitution was drafted, and for the first several decades of the State's existence, the federal Constitution's Bill of Rights applied only to the federal government, not to state or local governments.[5] Because of this, state constitutions created after the ratification of the First Amendment of the United States Constitution continued to include detailed Bills of Rights because state constitutions were the only restraints on state officials.[6] According to one commentator, however, "the state supreme courts often interpreted the state constitutional religion clauses to provide less restraint on the state governments than the First Amendment would have imposed on the federal government."[7]

Several decades after the passage of the Fourteenth Amendment, the U.S. Supreme Court began to selectively "incorporate" provisions of the Federal Bill of Rights and make them applicable to the states; the Court formally incorporated the Free Exercise Clause in 1940[8] and the Establishment Clause in 1947.[9] Incorporation and nationalization of the First Amendment in effect created a "federal floor" of constitutional rights, upon which even a state official could not infringe.[10] This put

5. *See Barron v. Baltimore*, 32 U.S. 243 (1833).

6. *See* Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. Rev. 199, 201 (1998):

> During the period called "dual federalism," the federal Bill of Rights served only to limit the federal government from infringing on individual rights, and was not a limitation on the states. Thus, states historically had the burden of serving as the primary protectors of individual rights.

7. Neil McCabe, *The State and Federal Religion Clauses: Differences of Degree and Kind*, 5 St. Thomas L. Rev. 49, 63 (1992). This may help explain why "the suspicion that the state courts show less hospitality to individual rights in general . . . has deep roots." Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 St. Thomas L. Rev. 235, 244 (1998) (footnotes omitted). Nebraska provides a good example of this, although in a context other than religion. In *Billings v. St.*, 109 Neb. 596, 603 N.W. 721 (1923), the Nebraska Supreme Court departed from federal precedent and refused to apply the exclusionary rule under the "reasonable searches and seizures" provision of the Nebraska Constitution.

8. *See Cantwell v. Conn.*, 310 U.S. 296 (1940).

9. *See Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

10. *See e.g.* Van Cleave, *supra* n. 6, at 201 (using "federal floor" analogy). However, it is

state supreme courts in the position of enforcing federal rights, but also caused state supreme courts to neglect their own state constitutions.[11]

State constitutions remained below the radar until the 1970s. After Warren Burger became Chief Justice of the Supreme Court in 1969, many civil libertarians feared that the Court was becoming increasingly hostile towards a robust protection of individual rights.[12] The idea of turning to state constitutions as a solution gained considerable momentum after Justice Brennan delivered an influential speech on the subject at Harvard Law School which was quickly reprinted in the Harvard Law Review.[13]

The movement was largely successful: between 1970 and 1986, state courts relied on state constitutions to provide greater protection than under the federal constitution over three-hundred times, as opposed to only ten times between 1950 and 1969.[14] One study has estimated

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important to note that the "federal floor" analogy is not precisely accurate. Although a state court must apply the federal Bill of Rights to state or local actors, it is still possible for a state court to hold that its state constitution provides *less* protection than the federal Constitution. In most situations, a plaintiff would raise the federal Constitution either alone or in conjunction with the state constitution, and the fact that the state constitution offers less protection would be irrelevant because the federal Constitution would control. One can imagine a situation, however, where either for strategic reasons or through sheer negligence, a plaintiff brings *only* a state law claim; in this case, the plaintiff could lose even though he or she would have won if he or she had brought a federal claim. For somewhat complicated reasons, this theoretical exception has the potential to become very real in the area of religious freedom. *See* McCabe, *supra* n. 7, at 62 ("state constitutions can provide for a lower level of rights protection, particularly in the area of religion").

11. *See* Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 Sw. L.J. 951, 964 (1982) ("[i]n the 1960s and 1970s the lawyers and the courts got out of the habit of examining the state constitutional claim"); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 495 (1977) ("during the 1960's our rights and liberties were in the process of becoming increasingly federalized, [and] state courts saw no reason to consider what protections, if any, were secured by state constitutions"); and Jennifer Friesen, *State Constitutional Law: Litigating Individual Rights, Claims and Defenses* at v (3d ed., Michie 2000) ("[e]xclusive reliance on federal constitutional law decided by the U.S. Supreme Court since the 1960s left the theoretical development of many state Bills of Rights in a condition approaching atrophy").

12. *See* G. Alan Tarr, *Foreword* to Robert D. Miewald & Peter J. Longo, *The Nebraska State Constitution: A Reference Guide* xx (1993) (arguing that reliance on state constitutions was a method of "evad[ing] the mandates of the Burger Court"); and Robert A. Shapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 Cal. L. Rev. 1409, 1449-1450 (1999) (discussing "the complaints of disappointed liberals, who sought refuge in state constitutions when the achievements of the Warren Court appeared threatened by the Burger and Rehnquist Courts") (footnote omitted).

13. *See* Brennan, *supra* n. 11. *See* Van Cleave, *supra* n. 6, at 199 (discussing the "famous speech" of Justice Brennan).

14. *See* G. Alan Tarr, *Understanding State Constitutions* 165-166 (Princeton U. Press 1998). State courts are "entirely free to read [their] own [s]tate's constitution more broadly than [the Supreme] Court reads the Federal Constitution, or to reject the mode of analysis used by [the Supreme] Court in favor of a different analysis of its corresponding constitutional guarantee." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982). If the state court includes a

that "state courts extended rights beyond the federal levels in approximately one out of every three state constitutional decisions."[15]

However, Nebraska is clearly an exception to this trend. Usually without any discussion, the Nebraska Supreme Court has already held that the following rights guaranteed by the Nebraska Constitution are no broader than that guaranteed by parallel provisions in the United States Constitution: the right to be free from illegal searches and seizures,[16] the right to confront one's accusers,[17] the right to assistance of counsel,[18] the right to an impartial judge,[19] the right to an impartial jury,[20] the right to freedom of speech,[21] the right to freedom of the press,[22] the right to be free from excessive fines,[23] and probably the right to equal protection of the laws.[24] According to one scholar, Nebraska was one of only six

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"plain statement" that its decision is premised on state constitutional grounds, its decision is not reviewable by the U.S. Supreme Court. *See Mich. v. Long*, 463 U.S. 1032, 1041 (1983); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Murdock v. City of Memphis*, 87 U.S. 590, 626 (1874). *See generally* Friesen, *supra* n. 11.

15. *See* James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 Alb. L. Rev. 1183, 1202 (2000). This trend of states expanding broader rights under their state constitutions is known as the "new judicial federalism." *See id.* at 1191; and Shapiro, *supra* n. 12, at 1412.

16. *See St. v. Havlat*, 222 Neb. 554, 560, 385 N.W.2d 436, 440 (1986); *St. v. Arnold*, 214 Neb. 769, 336 N.W.2d 97 (1983). *See* John M. Ryan, *Note, Home on the Range: The Vitality of the Open Fields Doctrine Under the Nebraska Constitution*, 66 Neb. L. Rev. 844 (1987) (criticizing *Havlat*); and Mark R. Killenbeck, *Note, Closing the Gates: A Nebraska Constitutional Standard for Search and Seizure*, 63 Neb. L. Rev. 514 (1984) (criticizing *Arnold*). The area of search and seizure is perhaps the only occasion in which there has been a dissenting opinion on the issue of whether the Nebraska Constitution should provide more protection. *See Havlat*, 222 Neb. at 573, 385 N.W.2d at 447 (Shanahan, J., dissenting):

> When called upon to construe the Nebraska Constitution, this court should not exhibit some pavlovian conditioned reflex in an uncritical adoption of federal decisions as the construction to be placed on provisions of the Nebraska Constitution analogous to the U.S. Constitution's.

17. *See In re* S.B., 263 Neb. 175, 639 N.W.2d 78 (2002).

18. *See St. v. Stewart*, 242 Neb. 712, 719, 496 N.W.2d 524, 529 (1993).

19. *See St. v. Ryan*, 257 Neb. 635, 653, 601 N.W.2d 473, 487-488 (1999).

20. *St. v. Simants*, 194 Neb. 783, 790, 236 N.W.2d 794, 799 (1975) (*per curiam*). It should be noted that this opinion was premised on an unusual emergency petition, and the Court was forced to issue an opinion barely a week after oral argument. It is therefore understandable that the Court would not have time to examine the perhaps subtle differences between the United States and Nebraska Constitution. This may render its holding somewhat doubtful.

21. *See id.* The Court's holding in *Simants* that the Nebraska Constitution's guarantee of freedom of speech was no greater than that of the First Amendment was recently reaffirmed in *St. v. Hookstra*, 263 Neb. 116, 120, 638 N.W.2d 829, 833 (2002).

22. *See Simants*, 194 Neb. at 790, 236 N.W.2d at 799 (1975).

23. *See St. v. Hynek*, 263 Neb. 310, 640 N.W.2d 1 (2002).

24. *See St. v. Reeves*, 258 Neb. 511, 521, 604 N.W.2d 151, 160 (2000) (*per curiam*). Although the Court did not explicitly hold that the State and Federal equal protection clauses were the same, it analyzed a State equal protection claim solely through use of federal precedents. *See id.* For more on the State's new Equal Protection Clause, *see* Jason W. Hayes, *Amendment One: The Nebraska Equal Protection Clause*, 32 Creighton L. Rev. 611 (1998).

states that did not have a single instance of granting criminal defendants broader rights under its state constitution.[25]

State constitutional scholar Rachel Van Cleave has stated:

> [t]he ways in which state courts approach the threshold question of when to rely on the state constitution and at what point to consider federal precedent, if at all, break down into roughly four, well-recognized categories: dependent, supplemental, dual sovereignty, and primacy.[26]

The "dependent" or "lock-step" method is demonstrated when:

> state courts simply assume that rights declared in the state charter are equal or parallel to federal precedent interpreting the federal Bill of Rights . . . [and] the court fails to engage in independent analysis of the state constitutional provision.[27]

Only once has the Nebraska Supreme Court given any provision of the Nebraska Constitution's Bill of Rights a meaning different than its federal counterpart, and even this was a rather narrow extension.[28] Because the Nebraska Supreme Court simply assumes the Bill of Rights' provisions are coextensive with federal law, and does not analyze them for textual, historical, or other differences, the Court clearly falls into the "dependent" category. Although the Court has never expressly held that they are coextensive, any argument that the religion clauses of the Nebraska Constitution deserve independent weight will face a heavy

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25. *See* Barry Latzer, *State Constitutions and Criminal Justice* 160-161 (Greenwood Press 1991). Even when it appears as if the Court may be inclined to grant greater protection, it usually changes its mind. For example, in *St. v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995), the Nebraska Supreme Court seemed to indicate that it would allow criminal defendants to make collateral attacks against earlier convictions, even though under recent U.S. Supreme Court precedent they would not be able to do so. The Nebraska Court stated:

> states are free to afford their citizens greater due process protection under their state constitutions than is granted by the federal constitution. Accordingly, the Nebraska Court of Appeals erred in presuming that this court would automatically apply to Nebraska a U.S. Supreme Court holding[.]

Id. at 8, 541 N.W.2d at 385-386 (citation omitted). However, four years later, the Court overruled *LeGrand* and applied the U.S. Supreme Court's holding under the Nebraska Constitution. *See St. v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999).

26. Van Cleave, *supra* n. 6, at 206 (footnote omitted).

27. *Id.* at 207 (footnote omitted). *See* Friesen, *supra* n. 11, § 1-6 (b).

28. In *Strom v. City of Oakland*, 255 Neb. 210, 583 N.W.2d 311 (1998). The Court stated that "Nebraska's constitutional right to just compensation includes compensation for damages occasioned in the exercise of eminent domain and, therefore, is broader than the federal right which is limited only to compensation for a taking." *Id.* at 216, 583 N.W. 2d at 316. However, the Court immediately qualified its statement:

> Notwithstanding the difference between the federal and the state constitutions, this court has analyzed the state constitutional issue of whether there has been a regulatory taking or damage for a public use by treating federal constitutional case law and our state constitutional case law as coterminus.

Id.

burden.[29]

When state courts relying on their state constitutions reach different holdings than they would under the Federal Constitution, they are often criticized as being "result-oriented."[30] In response, the Supreme Court of Washington in *State v. Gunwall*[31] developed a non-exclusive, neutral list of criteria it uses when determining if the Washington Constitution provides greater protection than that of its federal counterpart.[32] The court uses six criteria: "(1) the textual language; (2) differences in [other provisions of] the texts (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern."[33]

This Article will attempt to determine if the Nebraska Constitution provides greater protection for religious freedom than the First Amendment by paying particular attention to *Gunwall* criteria numbers (1), (3), and (4). The general history of the Nebraska Constitution, and of religion in Nebraska in general, will be described in the next section. Following sections will examine the particular changes the Religious Freedom and No Sectarian Aid provisions went through and examine how they have been applied by the Nebraska Supreme Court.

III. CONSTITUTIONAL AND RELIGIOUS HISTORY

In early Nebraska history, religion and constitutional development were intertwined. As we will see, interdenominational strife led to the defeat of one proposed constitution, and caused several important

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29. In 1997, the Nebraska Constitutional Revision Commission proposed adding a provision to the Bill of Rights: "The rights granted to the people in this Constitution are not to be construed as limited by the interpretation placed on similar provisions in the Constitution of the United States." *Report of the Nebraska Constitutional Revision Commission* 7 (1997). Needless to say, the proposal did not become law. The Commission stated:

> States courts still have the latitude to announce decisions which may afford their citizens greater constitution protections .... On several recent occasions, the Nebraska Supreme Court has voiced this precise and welcome declaration. Very few Nebraska citizens, however, are aware of a heightened protection of their rights that the State's Supreme Court has said is possible in appropriate cases.

Id.

These "several recent occasions" on which the Court is supposed to have invited state constitutional claims have not come to my attention.

30. *See* Van Cleave, *supra* n. 6, at 219; and *St. v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986).

31. 720 P.2d 808 (Wash. 1986).

32. Some commentators feel that states should adopt a "primacy" approach and always decide issues under their state constitutions first, reaching federal precedent only when the state constitution does not provide protection. On this view, there is no more need for a state to "justify" why it departed from federal precedent than there would be for a state such as Washington to explain why it departed from a decision of the Louisiana Court of Appeals. *See e.g.* Van Cleave, *supra* n. 6, at 217.

33. *Gunwall*, 720 P.2d at 811.

changes in others, including the one we have today. Nineteenth-century Nebraska was much more exciting than some would expect: election fraud, impeachment, and inter-governmental rivalry abounded. Understanding Nebraska's religious and constitutional history is important because historical practice often sheds an important light on the meaning of a constitutional text.[34]

A. Nebraska as a Territory

The title and claim to the land now compromising Nebraska were bought by the United States as part of the famous Louisiana Purchase in 1803.[35] As part of the sale, the United States agreed to protect its current inhabitants in "the free enjoyment of their liberty, property and the religion which they profess."[36] The next year the United States divided the Territory of Louisiana into two territories, placing present-day Nebraska under the government of the Indiana Territory.[37] In doing so, Congress placed only three restrictions on the Territorial government, one of which was that "no restriction be laid on individual exercise of religion."[38] In 1812, present-day Nebraska became part of a newly created territory, with a "detailed bill of rights" which "insist[ed] upon freedom of religious worship[.]"[39]

In 1833, the first Christian missionaries arrived in present-day Nebraska.[40] Moses Merrill and his wife, Eliza Wilcox Merrill, Baptist

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34. *See e.g.* Stuart G. Parsell, *Note, Revitalization Religion Under State Constitutions: A Response to Empl. Div. v. Smith*, 68 Notre Dame L. Rev. 747, 770 (1993) ("Scholars and judges, who have focused on the recent movement of state courts increasing individual rights by relying independently on state constitutions, argue that an historical analysis is an essential element for an independent state constitutional interpretation"); Stephen E. Gottlieb, *Forward: Symposium on State Constitutional History: In Search of a Usable Past*, 53 Alb. L. Rev. 255, 258 (1989) ("[c]onstitutional history is valuable whether or not one subscribes to a jurisprudence of original intent"); and Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1415 (1990) ("[e]ven opponents of originalism generally agree that the historical understanding is relevant, even if not dispositive").

35. *See Brittle v. People*, 2 Neb. 198, 205, 1872 WL 6048, at * 4 (1872).

36. *See* Victor Rosewater, *The Political and Constitutional Development of Nebraska*, 5 Trans. & Rep. Neb. Hist. Socy. 240, 243 (1893).

37. *See id.* at 247.

38. *See id.*

39. *Id.* at 248.

40. *See Clerk of the Legislature, Nebraska Bluebook 200-01*, at 65 (45th ed. 2001); *Federal Writers' Project of the Works Progress Administration for the State of Nebraska, Nebraska: A Guide to the Cornhusker State* 116 (1939); and *Nebraska: The Land and the People* 198 (Addison E. Sheldon ed., Lewis Publg. Co. 1931). *See generally* Dorothy W. Creigh, *Nebraska: A Bicentennial History* 29-30 (1977). It is important to note than in no sense did the Christian missionaries "bring" religion to present-day Nebraska. The Otoe and Pawnee Native American tribes had deeply-held religious beliefs of their own. *See generally* Jace Weaver, *Native American Religious Identity: Unforgotten Gods* (1998); and Vine DeLoria, *God is Red: A Native View of*

missionaries sent to the Otoe tribe, "were two earnest, sincere, Christian souls, [but] not altogether wise as the world reckons[.]"[41] Shortly thereafter, in 1835, the first Congregationalist missionaries were sent to Nebraska and stayed with the Pawnee tribe,[42] and in 1838 the first Catholic missionaries arrived.[43] Although largely unsuccessful in converting the Native American tribes to Christianity,[44] by the early 1850s the "chief denominations began to establish churches among the white settlers."[45] Eighteen fifty-five saw the erection of the first Presbyterian, Baptist, Catholic, and Disciples of Christ churches, followed by a Methodist church in 1856, a Lutheran church in 1858,[46] and a Unitarian church in 1870.[47]

Erection of permanent religious buildings was spurred by creation of Nebraska as an independent territory in the Kansas-Nebraska Act of 1854.[48] Unlike previous documents, "the Kansas-Nebraska bill contain[ed] no formal bill of rights; it fail[ed] altogether to establish any domain of civil liberty for the individual against the territorial government."[49] However, the Territorial Legislature was favorably inclined toward religion, as demonstrated by its barring of liquor sales within one mile of religious meetings,[50] providing imprisonment and fines for anyone who disturbed a religious service,[51] electing an official

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Religion (1973). One Nebraskan historian stated that "[t]he missionary work among Nebraska Indians did not convert the tribes to Christianity" because "the Indian already had a religion of his own, which had been slowly evolved through ages of tribal experience." Sheldon, *supra*, at 208.

41. Sheldon, *supra* n. 40, at 198. Another source describes Merrill as "an almost morbid religious devotee." *See* Morton & Watkins, *supra* n. 2, at 70.

42. *See* Sheldon, *supra* n. 40, at 202. One source dates the arrival of the Congregationalist missionaries as 1834. *See Federal Writers' Project*, *supra* n. 40, at 118.

43. *See Federal Writers' Project*, *supra* n. 40, at 116.

44. *See supra*, n. 40.

45. *See Federal Writers' Project*, *supra* n. 40, at 117. *See also* James C. Olson, *History of Nebraska* 99 (1966) ("Churches, like schools, faced an uphill struggle to get started and keep going.").

46. *See Federal Writers' Project*, *supra* n. 40, at 117-119.

47. *See* Harrison Johnson, *Johnson's History of Nebraska* 148 (1880). For histories of each major denomination in early Nebraska history, *see* J. Sterling Morton & Albert Watkins, *Illustrated History of Nebraska* vol. 2 (1906). Note that these histories are written by church officials and generally discuss only their respective denomination's internal history and do not address what sort of religious climate Nebraska had at the time.

48. *See Federal Writers' Project*, *supra* n. 40, at 117. For more on the Kansas-Nebraska Act, *see* Creigh, *supra* n. 40, at 46-50; and Frederick C. Luebke, *Nebraska: An Illustrated History* 43-44 (1995).

49. Rosewater, *supra* n. 36, at 252. The text of the Act is reprinted in *Western Historical Company. History of the State of Nebraska* 103-106 (1882).

50. *See* Zabel, *supra* n. 4, at 22.

51. *See* Zabel, *supra* n. 4, at 23. A good discussion on the special privileges afforded to religious groups by the Nebraska Legislature can be found in Zabel, *supra* n. 4, at 9-13 & 26-37.

chaplain within a week of its very first session,[52] and providing tax exemptions for religious institutions.[53]

In 1860 the Territorial Legislature passed legislation allowing for a special election to decide whether a convention should be called to draft a constitution and make the first move toward statehood.[54] However,

> [s]tatehood was a highly partisan issue. Republican politicians, strongly in the majority in that era of civil strife, favored statehood because they believed it would be to their advantage, both locally and nationally. Democrats were opposed, arguing that it would only increase taxes.[55]

The proposal was soundly defeated by the voters, by a vote of two thousand, seven hundred thirty-two to two thousand, ninety-four.[56]

The issue lay dormant until 1864, when Congress passed legislation finalizing the geographical boundaries of the Territory of Nebraska and authorizing it to become a state if a majority of its inhabitants voted for statehood and if they enacted a constitution that met certain conditions.[57] The first condition was that slavery be forever abolished, the second condition was that "perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship."[58] However, Democrats remained opposed to

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52. *See* Morton & Watkins, *supra* n. 2, at 201-202. The second Territorial Legislature attempted to find a joint chaplain for both of its Houses, but were unable to come to an agreement over who should be elected, and each House was forced to elect its own chaplain. *See id.* at 265.

53. *See Ancient & Accepted Scottish Rite of Freemasonry v. Bd. of County Commissioners*, 122 Neb. 586, 596, 241 N.W. 93, 96 (1932).

54. *See* Olson, *supra* n. 45, at 122.

55. Luebke, *supra* n. 48, at 77. *See* Miewald & Longo, *supra* n. 12, at 4 ("Statehood, for many, seemed an unnecessary extravagance"). Whether Democrat or Republican,

> Nebraska's founders were not distinguished statesmen. Compared to the illustrious company who gathered . . . to create the United States of America, Nebraska's first political leaders were a rude, self-serving lot . . . they were interested in economic success and little else.

Id. at 48. *See* Olson, *supra* n. 45, at 116 ("politics in Nebraska territory were lusty, the debates frequently acrimonious, and the proceedings often characterized by the excesses common to a frontier society"). The rancorous debates between Republicans and Democrats are somewhat reminiscent of today's political climate. However, it should be kept in mind that in many ways today's Democrats would have been 1860's Republicans, and vice versa. *See* Sheldon, *supra* n. 40, at 332-333 (stating that the Democratic Party was "the party of conservatism [and] strict construction of the constitution" as opposed to the Republican Party, which was "under control of the radicals and fanatical abolitionists").

56. *See* A.B. Winter, *Constitutional Revision in Nebraska: A Brief History and Commentary*, 40 Neb. L. Rev. 580, 580 (1961); Miewald & Longo, *supra* n. 12, at 4. *See generally Official Report of the Debates and Proceedings of the Nebraska Constitutional Convention*, 13 Pub. Neb. St. Hist. Socy. 1, 473-75 (Albert Watkins ed., 1913).

57. *See* Olson, *supra* n. 45, at 123. *See* Sheldon, *supra* n. 40, at 336.

58. 13 Stat. 47 (1864). *See Western Historical Company*, *supra* n. 49, at 122-124 (reprinting

statehood and succeeded in getting a large number of their party elected as delegates to the Constitutional Convention.[59] After assembling at the Territorial capitol in Omaha, the first resolution proposed was: "Resolved that this convention adjourn, sine die, without forming a constitution."[60] The resolution was passed by a vote of thirty-seven to seven and supporters of statehood had lost once again.[61]

However, the Republicans were not to be defeated easily and in 1866 "developed a new scheme"[62] to gain statehood without the necessity of a constitutional convention. A secret committee[63] assembled to draft a constitution, and then submitted it to the Territorial Legislature for approval. The constitution did not go through the normal committee process, no amendments were allowed, and, because there were no printed copies, "[f]ew of the legislators had more than a foggy notion of the constitution's provisions."[64] However, the new constitution passed the Legislature and was submitted to the people at a special election.[65] Fresh from defeat in a vote over statehood just two years before, the Republicans decided they needed an advantage, so they rigged the canvassing board.[66] In an election in which votes were "'counted in' by not too scrupulous methods,"[67] which was "determined

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text of the enabling act).

59. *See* Olson, *supra* n. 45, at 123.

60. *See* Miewald & Longo, *supra* n. 12, at 5. Adjourning "sine die" means adjourning without setting a date to reconvene.

61. *See id.* at 5; Winter, *supra* n. 56, at 581. *See generally* Watkins, *supra* n. 56, at 479-487.

62. Winter, *supra* n. 56, at 581.

63. There are different theories as to who constituted this secret committee, and it's likely that we'll simply never know for sure. *See* Olson, *supra* n. 45, at 123 ("A voluntary committee, the composition of which is not definitely known, met secretly to draft a constitution"); Watkins, *supra* n. 56, at 495 ("[T]he constitution of 1866 was compiled by a committee of nine appointed by the legislature that year"); Miewald & Longo, *supra* n. 12, at 5 ("Even contemporary observers were uncertain about the exact membership of the committee that met to put together the document."); *Brittle v. People*, 2 Neb. 198, 211, 1872 WL 6048 at * 8 (1872) ("the constitution was originally drafted in a lawyer's office by a few self-appointed individuals"); and Bruce M. Raymond, *Nebraska's Constitution: An Historical Study* 10 (1937) (unpublished Ph.D. thesis, U. Neb. (Lincoln) (available at University of Nebraska-Lincoln Love Library)) (stating that nine members of the legislature met with Experience Estabrook to draft the document); Sheldon, *supra* n. 40, at 338 (discussing various theories as to who the drafters were).

64. Olson, *supra* n. 45, at 124. *See* Sheldon, *supra* n. 40, at 340-341; and Miewald & Longo, *supra* n. 12, at 6. Morton and Watkins sum it up by saying "While this state document of gravest importance was clandestinely and arbitrarily framed it was carried through the legislature in an indefensibly bold and arbitrary matter." Morton & Watkins, *supra* n. 2, at 511.

65. *See* Rosewater, *supra* n. 36, at 258 ("the action of the territorial legislature in submitting a constitution to the people was entirely extra-legal and without the shadow of authority"). *See also Brittle*, 2 Neb. at 215, 1872 WL 6048 at * 9 ("we have noted that it was submitted by nobody lawfully empowered to do so").

66. *See* Miewald & Longo, *supra* n. 12, at 7.

67. Victor Rosewater, *A Curious Chapter in Constitution-Changing*, 36 Pol. Sci. Q. 409, 409 (1921).

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Drafted just a year after the end of the Civil War, the new Nebraska Constitution contained a controversial clause: it gave voting rights only to whites.[71] After a bill to admit Nebraska into the Union suffered a pocket veto in 1866,[72] Congress drafted a new bill that would allow Nebraska to become a state only if it removed the racially restrictive suffrage provision.[73] President Johnson, a Democrat, again vetoed the bill, because he was opposed to Congress' restriction on Nebraska's suffrage clause and because he feared adding to the Republicans' strength.[74] Congress overrode Johnson's veto; the only time a statehood bill has ever become law over presidential veto.[75] After Nebraska agreed to Congress' demands and removed the restrictive suffrage provision, Johnson was forced to proclaim that Nebraska was admitted to the Union on March 1, 1867.[76]

Describing what sort of religious climate Nebraska had in the decades before and the years shortly after statehood is not easy, as contemporaneous accounts and later historical scholarship vary. Although all of the sources agree that Nebraska had a wide variety of religious groups present[77] and allowed a relatively high degree of

68. Olson, *supra* n. 45, at 125.

69. Luebke, *supra* n. 48, at 78.

70. *See* Miewald & Longo, *supra* n. 12, at 7. *See generally* Watkins, *supra* n. 56, at 488-495. A more in-depth look at what Nebraska was like as a Territory can be found in Jay Amos Barrett, *Nebraska and the Nation* 38-51 (2d ed. 1898).

71. *See* Sheldon, *supra* n. 40, at 341.

72. *See* Miewald & Longo, *supra* n. 12, at 7.

73. *See id.*

74. *See Clerk of the Legislature*, *supra* n. 40, at 67. Johnson's veto message is reprinted in Raymond, *supra* n. 63, at 207-209.

75. *See* Donald R. Hickey, *Nebraska Moments: Glimpses of Nebraska's Past* 42 (U. Neb. Press 1992). This source also provides a good general discussion of the drive towards statehood. *See id.* at 37-43.

76. *See* Rosewater, *supra* n. 36, at 260. The full text of the proclamation of statehood is reprinted in Luebke, *supra* n. 48, at 79.

77. *See e.g.* Sheldon, *supra* n. 40, at 578 ("There were wide variations in the religious aspect of different neighborhoods. It could not be otherwise, for land hunger, not freedom to worship God, was the magnet which drew them together on the frontier"); Zabel, *supra* n. 4, at 3 ("Nebraska has had numerous religious sects represented within its borders from the earliest days of its history"); L.D. Burch, *Nebraska as it is: Resources, Advantages and Drawbacks, of the Great Prairie State* 14, 108 (C.S. Burch & Co. 1878) (discussing the "diversity of religious . . . thought" in Nebraska and stating that "[t]here are hundreds of pretty churches . . . representing almost every shade of religious thought and belief in America"); and James M. Woolworth, *Nebraska in 1857*, at 30 (C.C. Woolworth 1857) (stating "[t]he various religious denominations

religious freedom,[78] there is some disagreement over whether the various denominations were able to live harmoniously. For example, one contemporaneous account states:

> There is another peculiarity that has been marked in the progress of the Christian Churches of this State, and that has been the conspicuous absence of denomination[al] rivalries and disputes. Bigotry has seemed to have no place in the denominational work. There have been few or no angry discussions or denunciations of different religious beliefs or theories.[79]

However, this vision of peaceful and idyllic religious communities living in harmony may not be supported by the facts. For example, in 1858, a territorial newspaper railed against attempts by ministers to win passage of "theological bills" (special privileges) and stated that "[a]ll appearance of a union of church and state must be avoided or our liberties are hazarded."[80] In 1865, the Republican nominee for Treasurer was attacked by Democrats as a "distant relative of the man who killed Christ" and as a "money lender of the Jewish persuasion" even though he was a prominent member of the Lutheran Church.[81] As will be discussed in-depth below, a dispute between Methodists, Episcopalians, and Catholics over the taxation of church property led to the complete defeat of the 1871 Constitution.[82] In 1879, the faculty and administration of the University of Nebraska became caught up in a controversy over religion, and the Chancellor eventually resigned because of it.[83] Whether these are simply isolated examples or reflective of a larger atmosphere of sectarian strife is difficult to determine given the paucity of available materials on religion in mid-nineteenth century Nebraska.[84]

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78. *See* Johnson, *supra* n. 47, at 144 ("[t]heir religious convictions, and the expression of them, is free as the air they breathe on our vast prairies"); and Burch, *supra* n. 77, at 14 ("[t]here is vastly more freedom of thought and independent action in Nebraska than in any of the older States").

79. *See* Johnson, *supra* n. 47, at 144. Compare this statement with Miewald & Longo, *supra* n. 12, at 36 ("[b]y 1875, Nebraska contained a number of mutually antagonistic denominations"); Olson, *supra* n. 45, at 344 ("religious issues provided grounds for much high controversy, particularly in the early years"). I tend to think that Johnson's statement about the various denominations living together peacefully is probably inaccurate, both because it simply does not accord with the facts, and because his book reads more like an advertisement for the new state than an objective description of its political and religious climate.

80. *See* Sheldon, *supra* n. 40, at 297.

81. *See id.* at 334.

82. *See infra* pp. 116-118.

83. *See* Sheldon, *supra* n. 40, at 564.

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B. Nebraska as a State

In terms of religion, the only distinguishing feature[85] of the 1866 Constitution is its acknowledgment of "Almighty God" in the Preamble.[86] In its secular aspects, the Constitution was considered an abject failure and "from the outset was under attack from every quarter."[87] As one historian put it, "[e]ven the most able and conscientious men would have found it difficult to administer the state's affairs under the hastily drawn and inadequate constitution of 1866."[88] Its major problems included "ridiculously low salaries" for public officials, disgruntlement over where the state capitol should be located, an inefficient court system, and frustration over the failure to properly regulate railroads.[89] The movement for a new constitutional convention grew quickly and in 1871 the voters approved one by the count of three thousand, nine hundred sixty-eight to nine hundred seventy-nine.[90]

Although it was never ratified by the people, the Constitution of 1871 and the debates of the Convention which produced it are of great

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suffered little religious strife, while the "urban" areas of eastern Nebraska (Omaha and Lincoln) suffered much more. *See id.* at 670 ("[i]n the early rural period union [interdenominational] religious meetings were the rule. In the absence of a settled pastor preachers of every denomination were eagerly welcome").

85. As mentioned, the development and language of the Religious Freedom Clause and the No Sectarian Aid Clause will be discussed separately in Part IV and Part VII, respectively.

86. As is well known, the United States Constitution does not incorporate God or refer to any other divinity. In contrast, the Preamble of the 1866 Nebraska Constitution began "We the people of Nebraska, grateful to Almighty God for our freedom . . ." In the 1871 Constitution, defeated at the polls, the proposed Preamble was even more religious, beginning "We, the people of the State of Nebraska, grateful to Almighty God for the civil, political and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavours . . ." The Preamble proposed in the 1875 Constitutional Convention, (and the one existing today), retained the "grateful to Almighty God" language of the 1866 Constitution but did not adopt the additional language of the 1871 Constitution. *See Nebraska Constitutions of 1866, 1871 & 1875 and Proposed Amendments Submitted to the People September 21, 1920*, at 6-7 (Addison E. Sheldon ed. 1920) (this rare but valuable work arranges all of the provisions of past and present Nebraska constitutions in parallel columns for easy comparison).

There was also a motion in the Constitutional Convention of 1871 to completely strip the Preamble of all of its religious language, but an opponent of the proposal stated that "[w]hen the people of Nebraska cannot be thankful to Almighty God for his blessings, I think they are pretty hard up," and the motion lost by a vote of 44-2. *See* Sheldon, *supra* n. 1, at 522. Interestingly enough, Experience Estabrook was the only person, other than its sponsor, to vote in favor of the proposal. *See* Ruth M. Stanley, *N.K. Griggs and the Nebraska Constitutional Convention of 1871*, 46 Neb. Hist. 39, 49 (1965). Because the Nebraska Supreme Court has stated that "the Preamble is not a part of the Constitution, but only a general statement of purpose." *Omaha Natl. Bank v. Spire*, 223 Neb. 209, 215, 389 N.W.2d 269, 274 (1986), I do not further consider its implications on the other religion clauses of the Nebraska Constitution.

87. Miewald & Longo, *supra* n. 12, at 10.

88. Olson, *supra* n. 45, at 179 (footnote omitted).

89. *See* Miewald & Longo, *supra* n.12, at 10; and Olson, *supra* n. 45, at 179.

90. *See* Miewald & Longo, *supra* n. 12, at 10.

importance. First, the Constitution of 1875 (Nebraska's current Constitution) was modeled largely upon the failed Constitution of 1871.[91] Second, the 1875 Constitutional Convention refused to hire a shorthand reporter due to budgetary constraints.[92] In contrast:

> The minutes of 1871 are complete—every word spoken in the convention. The same topics were discussed in 1871 as in 1875 and the constitution defeated in 1871 is the real model upon whose lines the present constitution is built. The record of 1871 is, therefore, the most valuable existing commentary on our present document.[93]

The delegates to the 1871 Constitutional Convention took as their starting point the recently created Illinois Constitution of 1870,[94] but the actions of the Nebraska delegates shed an important light on how they viewed the proper relation between religion and government. For example, the Convention hired an official Convention Chaplain[95] and opened every day with a prayer, many of them specifically mentioning

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91. *See id.* at 31; Winter, *supra* n. 56, at 583; *Clerk of the Legislature*, *supra* n. 40, at 212; and Olson, *supra* n. 45, at 182.

92. *See* Olson, *supra* n. 45, at 182 ("a shorthand report of the proceedings was dispensed with as too expensive, with the result that there is no verbatim report of the convention"); and Miewald & Longo, *supra* n. 12, at 12:

> It was a somber group which met and frugality was their driving motivation. The members cut back on their own expenses, including the elimination of a verbatim shorthand transcript of the proceedings. Therefore, our knowledge of this meeting is not as complete as the convention of 1871.

However, three newspapers and the Convention Secretary kept a journal of motions made at the 1875 Convention. These are reprinted in Watkins, *supra* n. 56, at 506. Apparently a few of the original committee reports still exist, but as far as I can tell these have never been printed. *See* Sheldon, *supra* n. 1, at 8.

93. Sheldon, *supra* n. 1, at 10. Sheldon states that he discovered the transcripts of the 1871 Convention debates in a statehouse vault in 1899. *See id.* at 7. *See* Raymond, *supra* n. 63, at 49-52 (discussing various stories of the discovery and existence of the minutes and journals of the 1871 and 1875 conventions).

94. *See* Olson, *supra* n. 45, at 180; Miewald & Longo, *supra* n. 12, at 10; and Winter, *supra* n. 56, at 583. Raymond states that the Preamble and the Bill of Rights of the Illinois Constitution were copied almost verbatim. *See* Raymond, *supra* n. 63, at 24. Sheldon explains that "The new Illinois constitution was generally regarded in the west as the best and latest expression of a prairie people in the structure of government." Sheldon, *supra* n. 40, at 519. Because the Nebraska Constitution of 1871 (and of 1875) was modeled on it, the Illinois Constitution and the way it has been interpreted may be a valuable source for understanding the meaning of the Nebraska Constitution. Although such an analysis is outside the scope of this Article, more information on the Illinois Constitution can be found in Glen V. Salyer, *Free Exercise in Illinois: Does the State Constitution Envision Constitutionally Compelled Religious Exemptions?*, 19 N. Ill. U. L. Rev. 197 (1998) and Janet Cornelius, *Constitution Making in Illinois, 1818-1970* (1972).

95. The Convention debated over whether the chaplain should be paid or instead whether a committee of volunteers from local churches should be invited. After the former option was agreed to, the Convention voted on which particular religious leader they wished to be chaplain. *See* Sheldon, *supra* n. 1, at 98-100.

Jesus.[96] The Convention entertained proposals to encourage the State or municipalities to set Sunday Sabbath laws,[97] but also examined a proposal to allow people who observed Saturday as the Sabbath to work on Sunday.[98]

The most controversial proposal at the 1871 Convention regarded the taxation of church property. The debate began as the Convention examined a proposal that would allow the Legislature to exempt property used for agricultural, charitable, and religious purposes from taxation.[99] As the Convention was debating other provisions, it received a letter from the Methodist Church urging it to remove or limit the religious property exemption.[100]

Oliver P. Mason, an influential delegate to the Convention, responded by introducing an amendment to remove the word "religious" from the tax-exemption provision.[101] Mason stated:

> I think it is wrong to exempt any religious denomination from the ordinary burden of taxation . . . not that I would do anything in the world to injure or cripple those various denominations. But I would put them all on an equal footing before the law.[102]

Many of the delegates viewed this proposal as one motivated by religious bigotry. One delegate responded to Mason's proposal by saying:

> I imagine I understand the motives prompting the gentlemen in the Methodist and other churches for making this move to tax churches. It is for the purpose of striking at one particular denomination and no other. It is a move aimed at the Catholic Church.[103]

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96. An example of a prayer recited in the 1871 Convention is:
Almighty and allwise God, who art able to command the light to shine out of darkness, make plain before us the path of duty, we beseech Thee. May this convention provide well for the State; may the work here done be strong enough to endure the shock of parties and the wear of years and to God, the only wise, shall be praise through Jesus Christ, even praise and glory for ever. Amen.
See Sheldon, *supra* n. 1, at 395-396.

97. *See id.* at 70, 136.

98. *See id.* at 51.

99. This proposal would eventually become Art. VIII, § 3 of the 1871 Constitution.

100. *See Official Report of the Debates and Proceedings of the Nebraska Constitutional Convention*, 12 Pub. Neb. St. Hist. Socy. 1, 427 (Addison E. Sheldon ed., 1907). *See* Othman A. Abbott, *Reflections of a Pioneer Lawyer*, 11 Neb. Hist. Mag. 1, 169-170 (1928). The Methodist Episcopal Church Conference had adopted a resolution "That we are in favor of equal taxation of all property other than state, county and municipal possessions." Raymond, *supra* n. 63, at 34.

101. *See* Sheldon, *supra* n. 100, at 427.

102. *Id.*

103. *Id.*

According to historians, the proposal to tax church property was pushed by Protestant (particularly Methodist) religious groups because they were envious of the much larger, ornate, and expensive church buildings erected by the Catholic and Episcopalian churches.[104] As Addison E. Sheldon put it, "[i]n the popular mind the battle over this proposition was regarded as a fight between the Methodist Church on one side and the Catholic and Episcopalian churches on the other.[105]

In a surprising response to the criticism, Mason changed his proposal: instead of making all religious property taxable, he proposed taxing all religious property valued at five thousand dollars or more.[106] In many ways this made the problem worse, as it was even more explicitly an attack on wealthier churches. Mason defended himself with a not-so-subtle attack on Catholicism:

> I regret that I should be understood as reflecting upon any church, but if any of them are hit, they are the churches I meant to hit . . . . I think those men who worship in God's temples, possess more religious sentiment farther [sic] than those who repose upon their cushions of damask on Sunday, and listen to the music of the organ or well[-]rounded sentences from the lips of highly educated men.[107]

The heated debate continued for hours.[108] Several speakers gave a defense of Catholicism,[109] while other delegates defended the proposal

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104. *See* Olson, *supra* n. 45, at 180 (stating that the provision was "inserted at the insistence of certain Protestant groups who looked askance at the fine churches being constructed by the Catholics in Omaha and elsewhere"); and Miewald & Longo, *supra* n. 12, at 11 (stating that the provision "was urged by poor Protestant congregations, particularly Methodist, and alienated the wealthier Catholic and Episcopalian churches in Omaha"). Othman Abbott, one of the delegates to the 1871 Convention, later recalled the proposal in his memoirs:

> The convention spent two days in the discussion of the subject of this resolution. There was a vigorous and lengthy debate. The majority in favor of it was small. Among the majority were the few who were opposed to all churches and all religions and the many belonging to the Methodist and other Protestant churches who worshipped in the modest churches, built in accord with their needs and necessities and who were opposed to what they considered extravagant church buildings.

Abbott, *supra* n. 100, at 170.

105. Sheldon, *supra* n. 40, at 455.

106. *See* Sheldon, *supra* n. 100, at 429.

107. *Id.* This is likely the passage Abbott is referring to in his memoirs when he states:

> I remember that the eloquence and the pathos were all in favor of "taxing the rich man's church." There was a good deal of talk of the softly cushioned pews, the shaded lights through stained glass windows, the warmth and comfort that wealth provided while without the poor widow passed by on the way to her modest house of worship, "mingling her tears with the rain drops that froze as they fell."

Abbott, *supra* n. 100, at 170.

108. *See Official Report of the Debates and Proceedings of the Nebraska Constitutional Convention*, 13 Pub. Neb. St. Hist. Socy. 1, 233-251 (Albert Watkins ed. 1913).

109. *See e.g. id.* at 238.

on broader grounds. One speaker stated: "[i]t seems it is the determination of some men in this hall to make a drive at religion of all kinds . . . . My opinion is that any church is better than no church."[110]

The numbers were on Mason's side, however, and the final draft of the Convention's work included his proposal.[111] Ironically, "the clause aroused strong opposition from churchmen and became a power in the final defeat of the constitution."[112] One delegate to the Convention remembers that opponents "put up flaming posters on the subject of church taxation. I remember some huge posters with the words in flaring capitals: 'To your tents. Oh [sic] Israel, The enemy is upon you!'"[113] Attempted ballot fraud in some counties was easily detected,[114] and the entire constitution was defeated by a vote of eight thousand, two hundred sixty-seven to seven thousand, nine hundred eighty-six.[115]

Members of the Convention were determined not to give up without a fight. The Legislature passed a bill to reconvene the Convention, planning to simply remove the Constitution's most objectionable elements and submit it again for ratification.[116] However, the bill was vetoed by the Governor who argued that the Legislature did not have the constitutional right to reconvene the Convention.[117] The Legislature narrowly failed to override the Governor's veto,[118] and it appeared that Nebraska would be stuck with its "hastily drawn and inadequate" constitution for quite some time. Fortunately, after a period where the state government was beset by scandals and power struggles between the executive and legislative branches,[119] the Legislature

110. *Id.* at 249. The speaker also cited the proposal to remove "Almighty God" from the Preamble as another example of the Convention's hostility toward religion. *See* discussion in *supra* n. 86.

111. For more on the Constitution of 1871, *see generally* Watkins, *supra* n. 108, at 496-502.

112. *Western Historical Company*, *supra* n. 49, at 144. Sources disagree as to the other major factor in its defeat; some say that it was a provision regulating railroads, while others say it was a provision making shareholders liable for the debts of corporations. *See* Sheldon, *supra* n. 40, at 455 (railroads); and Abbott, *supra* n. 100, at 170-171 (corporations).

113. Abbott, *supra* n. 100, at 171.

114. *See Western Historical Company*, *supra* n. 49, at 145.

115. *See* Olson, *supra* n. 45, at 180.

116. *See* Sheldon, *supra* n. 40, at 457.

117. *See id.*

118. *See id.* at 458. The override attempt succeeded in the Senate, but failed in the House. *See* Raymond, *supra* n. 63, at 31.

119. Although outside the scope of this Article, the scandals that took place in 1870s Nebraska provide important insight into its political process. The period included embezzlement, fraud, impeachment, and a period where the Governor barred the doors to the capitol building and eventually cut off the coal supply to force the Legislature to adjourn. *See generally* Creigh, *supra* n. 40, at 83-84; *Western Historical Company*, *supra* n. 49, at 136-148.

successfully enacted a bill to call a new constitutional convention and the voters approved it by a ratio of almost six to one.[120]

The Constitution of 1875 is often called the "Grasshopper Constitution" because as the Convention delegates prepared to meet, "Nebraska and the entire Missouri region was invaded by billions of flying Rocky Mountain grasshoppers."[121] As discussed, it's difficult to know exactly what went on during the 1875 Convention because we only have minutes, not transcripts of the debates.[122] It is clear, however, that the 1875 Convention relied almost exclusively on the 1871 Constitution,[123] with the (wise) exception of removing the controversial provisions, including church taxation.[124] The devastation brought by the grasshoppers had some interesting effects on the way in which the delegates dealt with religious issues. For example, while they still held daily prayer,[125] the delegates dispensed with hiring a chaplain and instead relied on volunteers from local churches.[126] One of the delegates proposed the following resolution:

> RESOLVED, That we, the representatives of the people of the State of Nebraska, believing in the presence of Almighty God, also that the prosperity of nations and states depends upon his divine will, respectfully ask his excellency the governor of the state, that he proclaim an immediate day of fasting, prayer and humiliation, asking the protection of Almighty God against the locust which now threatens our land to desolation.[127]

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120. *See* Winter, *supra* n. 56, at 583. Sheldon attributes this overwhelming vote to the fact that over 100,000 people in central and western Nebraska simply did not have any representation in the Legislature under the 1866 Constitution. *See* Sheldon, *supra* n. 40, at 511.

121. *See* Addison E. Sheldon, *The Nebraska Constitutional Convention, 1919-20*, 15 Am. Pol. Sci. Rev. 391, 391 (1921). *See also* Charles S. Lobingier, *The Nebraska Constitution: Some of its Original and Peculiar Features*, 10 Pub. Neb. St. Hist. Socy. 96, 100 (1902); and Sheldon, *supra* n. 40, at 493-495. A first-hand account can be found in Abbott, *supra* n. 100, at 160-168.

122. *See supra* p. 115. The primary reason we do not have transcripts is because the grasshoppers caused such economic turmoil in the State that the delegates felt a shorthand reporter would be a luxury. *See* Olson, *supra* n. 45, at 182.

123. *See* Winter, *supra* n. 56, at 583; Miewald & Longo, *supra* n. 12, at 31; and Abbott, *supra* n. 100, at 172. Raymond disputes this, stating:

> Some students of Nebraska history seem to have been satisfied with the assumption that the document produced in 1875 was merely a re-hash of the defeated document of 1871. The newspapers of the period, as has been shown above, certainly did not regard it as such, as many of them mercilessly criticized the convention for the completeness of its revision.

Raymond, *supra* n. 63, at 74.

124. *See* Olson, *supra* n. 45, at 182.

125. *See* Watkins, *supra* n. 108, at 578.

126. *See* Sheldon, *supra* n. 40, at 517.

127. *See* Watkins, *supra* n. 108, at 572.

Surprisingly, the resolution lost.[128] Without the verbatim transcript, it's impossible to tell why, but it seems likely that there was simply too much work to be done on most family farms to make an extra day of fasting and prayer feasible.

In terms of religion, probably the only important change rendered by the 1875 Convention was a modification of the Religious Freedom Provision to highlight the positive aspects of religion and reduce the number of occasions when it would not apply.[129] With the omission of the controversial provisions relating to church taxation and other issues, the Constitution of 1875 was approved by the voters by a count of thirty thousand, three hundred thirty-two to five thousand, four hundred seventy-four.[130]

The Constitution of 1875 proved largely successful and the bulk of it remains intact to the present day. However, a few problems became apparent over time. Most importantly, the 1875 Constitution was notoriously difficult to amend: in the thirty years after its passage, only one of several dozen proposed amendments were successfully added.[131] Other problems included the lack of a provision for the Legislature to add new executive positions and the inability of the Legislature to create a state income tax.[132] Caught up in the progressive spirit of the times, in 1919 the voters approved a Constitutional Convention to fix these and other problems.

The Constitutional Convention of 1919-20 began with an invocation,[133] hired a chaplain,[134] and ended with all of the delegates rising to their feet and singing a doxology.[135] Other matters relating to religion, however, were much more controversial, and often involved heated disputes between Protestants and Catholics.[136] For example, the

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128. *See id.*

129. *See* Sheldon, *supra* n. 40, at 519 ("In section four relating to religious freedom more emphasis is given to religion, thereby interpreting the more active religious sentiment of 1875."). This change will be discussed in Part IV, *supra*.

130. *See* Olson, *supra* n. 45, at 183.

131. *See* Rosewater, *supra* n. 67, at 411. The only amendment to pass in this period was a provision to raise the pay of state legislators, which succeeded "thanks to the dubious expedient of a 'recount'" conducted by the lawmakers. *Id.*

132. *See* Sheldon, *supra* n. 121, at 394.

133. *See Proceedings of the Constitutional Convention 1919-20* vol. 1, at 1 (Clyde H. Barnard ed. 1920).

134. *See id.* at 11-12.

135. *See Proceedings of the Constitutional Convention 1919-20* vol. 2, 2882-2883 (Clyde H. Barnard ed. 1920).

136. Strife between Catholics and Protestants was frequent at the time of the Convention. In 1919, anti-Catholicism caused the Nebraska Legislature to prohibit nuns from wearing their habits while teaching in public schools. *See* Zabel, *supra* n. 4, at 118-119. In the same session, the Legislature narrowly rejected a proposal to require Bible reading in public schools, *see id.* at 112.

Convention considered a proposal that would have eliminated parochial schools and compelled all children to attend secular public schools.[137] Its backer stated "I fail to see what connection the rules of syntax, the multiplication table, the pons ansinorum, the rule of three, or the geographical location of Patagonia or Camp Kamchatka have to do with theology."[138] The bill was defeated in the Bill of Rights Committee, which stated: "We deemed it unwise to present to this Convention a proposition which would stir up a controversy so severe that it would hamper the good results we might accomplish by our labors here[,]"[139] presumably referring to the defeat of the 1871 Constitution caused by Catholic and Episcopalian opposition to a church-taxing clause. Similarly, new proposals to tax religious property were also quickly defeated.[140]

Probably the most contentious debate regarding religion took place over a proposal to amend Article 9, Section 11 by adding:

> nothing in this section shall be construed to prohibit the daily reading of the Bible in the public schools for such non-sectarian teaching of the principles of morality as may be provided by the Department of Public Education.[141]

The proposal was prompted by the Nebraska Supreme Court's decision in *State ex rel. Freeman v. Scheve*[142] which forbade certain kinds of Bible reading in the public schools, a practice generally favored by

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a proposal backed by Protestants and opposed by Catholics. *See id.* at 4 ("the demand for Bible reading in the public schools has usually been backed by Protestants and opposed by Catholics and Jews"). The Bible reading argument was caused by the Nebraska Supreme Court's decision to forbid certain kinds of Bible reading in public schools in *St. ex rel. Freeman v. Scheve*, 65 Neb. 853, 91 N.W. 846 (1902), *aff. on rehrg*, 65 Neb. 877, 93 N.W. 169 (1903) (discussed in *infra* nn. 280-293 and accompanying text). Further agitation between the two sects was caused by World War I, leading many "patriotic" Americans to assert national unity could come only through universal public education and that therefore private and parochial schools should be eliminated. *See supra* n. 138. *See also* Zabel, *supra* n. 4, at 3 ("Protestants have always greatly outnumbered Catholics in Nebraska"); and Luebke, *supra* n. 48, at 179 (discussing heated differences between religious groups in Nebraska).

137. Proposal Number 21 stated:

> The right of parents to instruct and to train their children in the doctrine, the discipline and the rites of any religion—not immoral—until such child reaches the age of discretion—shall not be questioned. But the right of the state to control and to direct the purely secular education of children within its jurisdiction is hereby declared to be absolute, universal, indivisible and inviolate.

Barnard, *supra* n. 133, at 67.

138. *Id.* at 442. The bill's backer also argued that his bill would promote national unity and diminish the influence of Catholicism. *See id.* at 444, 445.

139. *Id.* at 450.

140. *See id.* at 67, 76.

141. *See id.* at 335.

142. 65 Neb. 853, 91 N.W. 846 (1902), *aff. on rehrg.*, 65 Neb. 877, 93 N.W. 169 (1903).

Protestants and opposed by Catholics.[143] The proposition narrowly passed in committee by a nine to seven vote,[144] but faced heavy opposition on the floor. One delegate stated, "the reading of the Bible in the public schools is permitted and it is a common practice, and for that reason . . . should not be dealt with in the Constitution[.]"[145] Another opponent, I.L. Albert, stated:

> I also appreciate the fact that a great many of my fellow-citizens object to this Book being read in the public schools . . . . It does not make for harmony, it does not make for good feeling, it breeds dissention[,] [sic] it breeds too much of the old time intolerance to do this, and now let us omit it.[146]

One sponsor of the proposal responded by stating:

> It is my conviction, and I state it as a conclusion, that the Bible should have a definite and permanent place in the educational system of Nebraska, where we not only wish to teach our children, but where we wish to make them good citizens . . . . It is my belief that we are not indifferent to the fact that this is a Christian country.[147]

After its backers argued that the proposal only *allowed* Bible reading and did not *compel* it, Albert shot back with a statement that could have been made by a modern civil libertarian:

> You say you do not compel them to introduce this Book into the public schools. No you do not compel them to do so, and you do not have to force the majority to do anything. It is the minority that needs protection, and all in the world you need a bill of rights for is to protect the minority against the encroachment of the majority.[148]

Eventually Albert's side carried the day and the proposal was indefinitely postponed on a forty-eight to thirty-four vote.[149] However, the Convention passed a second resolution stating that the negative vote on the Bible-reading proposal "shall not be construed as in any wise intended to vary the present judicial interpretation on this question."[150]

Three hundred thirty-six changes were proposed at the 1919-20 Convention, but only forty-one were eventually proposed for ratification

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143. *See supra* n. 136.
144. *See* Barnard. *supra* n. 133. at 335.
145. *Id.* at 1116.
146. *Id.* at 1117.
147. *Id.* at 1119-1120.
148. *Id.* at 1123.
149. *See id.* at 1125.
150. *Id.* at 1127.

(all of which succeeded at the polls).[151] With the defeat of the proposals to eliminate parochial schools, tax church property, and permit Bible reading, the only permanent change regarding religion effected by the Convention was an amendment to the No Sectarian Aid Provision to make even clearer that the State could not fund sectarian activities.[152] The Convention of 1919-20 was the last constitutional convention Nebraska would have, and the religion provisions of the Nebraska Constitution have remained largely unchanged since.

This tangled history of Nebraska constitutional development is not easy to understand, but is important to know in order to intelligently discuss the development of its religion provisions. The process can be summarized in the following manner: in 1866, an unknown committee secretly drafted a proposed constitution that, by virtue of election fraud, was enacted into law. In 1871, another convention was held and based their proposed constitution on the Illinois Constitution of 1870. Provisions relating to taxation of church property caused the new constitution to be defeated at the polls. In 1875, a second convention resurrected the 1871 constitution, omitted its most objectionable elements, and succeeded in having it approved. A convention in 1919-20 also somewhat modified its provisions.

The period between the 1875 Convention and the 1920 Convention provide further insight into Nebraska's religious history, but as with so many questions of history, what insight is to be gleaned is not clear. For example, anecdotal accounts regarding the pervasiveness of religious belief and statistics vary greatly. An account written in 1880 states:

> There is no State in the Union, with the same number of inhabitants, that has so many and so good Churches . . . nor one that gathers more to the services of the various Churches, considering that the State is yet comparatively in its infancy.[153]

Similarly, a modern Nebraskan historian states "[r]eligious belief was a sturdy strand in the social fabric of Nebraska in the late nineteenth century."[154] However, by 1906, only thirty-four percent of Nebraskans were church members.[155] Addison E. Sheldon states that the decade of

151. A complete list of the amendments can be found in Sheldon, *supra* n. 86.

152. This change will be discussed in depth in Part VII, *supra*.

153. Johnson, *supra* n. 47, at 143.

154. Luebke, *supra* n. 48, at 178.

155. *See* Olson, *supra* n. 45, at 343. It should be noted that a church membership rate of 34% is not abnormally low for the time period, but is significantly less than the 1990 rate of 63.8%. *See e.g.* Jon Butler, *Protestant Success in the New American City, 1870-1920*, in *New Directions in American Religious History* 296, 313 (Harry S. Stout et al. eds. 1997) (noting that church membership in several cities the decades before and after the turn of the century ranged from 32 to 46%); Rodney Stark, *Sociology* 426 (5th ed. 1994) (stating Nebraska's 1990 percentage of church

1880 to 1890 was "one of great religious expansion in our state"[156] but later in the same book quotes the 1890 census as showing that only eighteen point thirty-six percent of Nebraskans were church members.[157] If eighteen percent church membership was the *result* of the "great religious expansion," it can only be presumed that church membership was even lower prior to this time.

With such conflicting accounts, and the paucity of independent scholarship on Nebraska's religious history, only a few firm conclusions can be drawn. First, Nebraska has always been represented by a wide variety of religious groups within its borders. Second, these religious groups have often come into heated conflict with each other, as demonstrated by the rivalry between Protestants and Catholics. Finally, the "problems of adjustment between church and state have been more frequent than is generally realized."[158] After understanding Nebraska's religious and constitutional history, we can now turn to an exploration of the particular language used in the Nebraska Constitution's religion provisions.

IV. EVOLUTION OF THE RELIGIOUS FREEDOM PROVISION

When the Washington Supreme Court delineated five factors it would consider when faced with a state constitutional claim, it placed as number one on the list "the textual language[.]"[159] Although there is a heated debate over how much meaning can be derived from the literal language of a text,[160] almost everyone agrees that the textual language is at least a good starting point. This Part of the Article traces the evolution of the text of the Nebraska Constitution's Religious Freedom Provision and makes a few tentative stabs at analyzing what the text of the Provision means.

First embodied in the Nebraska Constitution of 1866, the Religious Freedom Provision was clearly much longer and more specific than the First Amendment of the United States Constitution:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of

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membership). *See generally* Roger Fink & Rodney Stark, *The Churching of America, 1776-1980: Winners and Losers in our Religious Economy* (1992).

156. Sheldon, *supra* n. 40, at 670.

157. *See id.*

158. Zabel, *supra* n. 4, at 183.

159. *St. v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986).

160. *See e.g.* Jeremy Patrick, *Sacred Texts: The Myth of Historical Literalism*, Humanist 22 (Sept.-Oct. 2001).

> worship, or maintain any form of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted. No religious test shall be required as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality and knowledge, however, being essential to good government, it shall be the duty of the legislature to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.[161]

As discussed, the framers of the 1866 Convention met in secret and no records of their deliberations are extant. Judging purely from the text, the provision seems to have provided a rather broad guarantee of religious freedom. Much like the Free Exercise Clause of the United States Constitution, it prohibited government interference with the freedom to worship. In addition, and perhaps broader, it guaranteed the "rights of conscience." Unlike the Establishment Clause of the United States Constitution, this provision explicitly forbade the government from preferring one religion over another. The prohibition on religious tests for holding office or giving testimony are in many ways simply more specific guarantees of the broad guarantee of freedom of conscience already provided. Perhaps the most interesting innovation of the 1866 Provision is the last sentence, providing that religion and morality are "essential to good government" and stating that it is the duty of the State to "encourage schools and the means of instruction."

The Constitutional Convention of 1871, probably relying on the Illinois Constitution of 1870,[162] completely rewrote this Provision. The Convention proposed the following:

> The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state. No person shall be required to attend or support any ministry or place of worship; nor shall any preference be given by law to any religious denomination or mode of worship.[163]

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161. 1866 Neb. Const. art. I, § 16, repr. in Sheldon, *supra* n. 86, at 6, 8.
162. *See supra* n. 94.
163. 1871 Neb. Const. art. I, § 3, repr. in Sheldon, *supra* n. 86, at 6.

There was little discussion about this provision during the debates of the Convention. One of the delegates proposed to amend the Provision by striking out everything after the word "guaranteed" and up to and including "state" and replacing it with "but the civil rights, privileges, or capacities of any person shall in no wise be increased or diminished on account of any religious opinion or belief."[164] The proposal's backer argued that the change "governs all in general terms, not making a speciality of this or any other subject" and would be "good for all time to come."[165] For unknown reasons, the rest of the delegates rejected this amendment and adopted the Provision as it was originally proposed.[166]

Two major differences between the 1866 Provision and the 1871 Provision can be gleaned from reading the text. First, the 1871 Provision guarantees the "free exercise" of religion, while the 1866 Provision guarantees the "rights of conscience."[167] Second, the 1866 Provision seemed focused on emphasizing the positive aspects of religion, whereas the 1871 Provision adds additional limitations to the occasions when religious belief will not excuse certain conduct. In the 1866 Provision, the only limitation was that religious belief could not be used to "dispense with oaths or affirmations[.]"[168] In contrast, the 1871 Provision states that religious belief "shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state."[169] When combined with the provision on church taxation, it becomes reasonable to infer that the framers of the 1871 Constitution had either a less charitable view towards religious belief or a stronger belief that individual rights could not be used to interfere with the business of government. Because the 1871 Constitution was never adopted, we will never know if the change in wording would have created a change in practice.

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164. Sheldon, *supra* n. 1, at 219. The proposal would have changed the Clause to read:
> The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; but the civil rights, privileges, or capacities of any person shall in no wise be increased or diminished on account of any religious opinion or belief. No person shall be required to attend or support any ministry or place of worship; nor shall any preference be given by law to any religious denomination or mode of worship.

165. *Id.*

166. *See id.*

167. *See supra* nn. 161 & 163 and accompanying text. The possible implications of a distinction between "exercise" and "conscience" is discussed. *Supra* p. 128.

168. *See supra* n. 161 and accompanying text.

169. *See supra* n. 163 and accompanying text.

The Convention of 1875 returned to a formulation of the Religious Freedom Provision that was nearly exactly that of the 1866 Constitution. Besides changing the opening words "All men" to "All persons," the only substantive change was removing the phrase "or maintain any form of worship against his consent" in the second sentence. Unfortunately, because there are no records of the debates of the 1875 Convention,[170] it is difficult to determine the delegates' reasons for preferring the 1866 formulation over that of the 1871 formulation. Addison Sheldon states that "[t]he change in 1875 to more positive recognition of religion justly interprets the more active religious sentiment of that time,"[171] but it seems odd that religious sentiment in Nebraska would change so quickly from 1866 to 1871, and again from 1871 to 1875. In any event, the Provision as adopted by the 1875 Convention has remained unchanged to the present:

> [1] All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. [2] No person shall be compelled to attend, erect or support any place of worship against his consent, and [3] no preference shall be given by law to any religious society, [4] nor shall any interference with the rights of conscience be permitted. [5] No religious test shall be required as a qualification for office, [6] nor shall any person be incompetent to be a witness on account of his religious beliefs; [7] but nothing herein shall be construed to dispense with oaths and affirmations. [8] Religion, morality, and knowledge, however, being essential to good government, [9] it shall be the duty of the Legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, [10] and to encourage schools and the means of instruction.[172]

As currently formulated, the Religious Freedom Provision of the Nebraska Constitution has several interesting features. For example, in a formal sense, the Religious Freedom Provision is phrased as a guarantee of individual rights, as opposed to the Free Exercise and Establishment Clauses of the United States Constitution which are phrased as direct limitations on government power.[173] However, it is

170. *See supra* n. 92.

171. Sheldon, *supra* n. 86, at 9. *See* Sheldon, *supra* n. 40, at 519 ("In section four relating to religious freedom more emphasis is given to religion, thereby interpreting the more active religious sentiment of 1875."); and Raymond, *supra* n. 63, at 236 ("A more positive recognition of religion [was] added.").

172. Neb. Const. art. I, § 4 (bracketed numbering added). Each portion of the Provision corresponding to a bracketed number will be referred to as a clause.

173. *See* Shugrue, *supra* n. 4, at 897-898.

unclear what, if any, difference this should make in actual interpretation of the Provision.

Other features may be more substantive. The fourth clause of the Religious Freedom Provision guarantees the "rights of conscience," unlike the Federal Constitution which protects the "free exercise of religion[.]" The drafters of the 1875 Constitution rejected the Religious Freedom Clause proposed by the 1871 Convention that included both "free exercise" and "liberty of conscience" language. In one sense, the difference in wording may make the Religious Freedom Provision broader than the Free Exercise Clause because it "rais[es] the possibility that some kinds of non-religious, but deeply held moral convictions are included in the ban on interference."[174] In another sense, however, the Religious Freedom Provision might be construed as narrower than the Federal Clause because "'[c]onscience' was more likely to have been understood as opinion or belief"[175] than "free *exercise*," with the result that "free exercise is more likely than mere liberty of conscience to generate conflicts with, and claims for exemption from, general laws and social mores."[176] However, it is also possible that "the concepts of 'liberty of conscience' and 'free exercise of religion' were used interchangeably."[177]

A somewhat similar ambiguity exists in relation to the second and third clauses of the Religious Freedom Provision that roughly parallel the Federal Establishment Clause. The second clause, which guarantees that no one has to attend or support a "place of worship" against his or her consent, could conceivably be construed narrowly to mean that citizens *may* be compelled to support certain religious activities by the government so long as the activities do not turn a government facility into a "place of worship."[178] The third clause, which states "no preference shall be given by law to any religious society[,]" could be interpreted to mean that it is "not offended by state action that fosters all religions, as opposed to action that favors one creed over another."[179]

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174. Friesen, *supra* n. 11, § 4-5.

175. McConnell, *supra* n. 34, at 1489.

176. *Id.* at 1490.

177. *Id.* at 1488. McConnell was discussing the meaning of these phrases at the time of the drafting of the United States Constitution. It's unknown if their meaning changed substantially by the time of the drafting of the Nebraska Constitution.

178. *See id.* at 1460 ("[t]he word 'worship' usually signifies the rituals or ceremonial acts of religion, such as the administration of sacraments or the singing of hymns"). Indeed, one early Nebraska case hinged directly on this phrase, finding that a public schoolhouse could be used for occasional religious ceremonies because this did not convert it into a "place of worship." *See St. ex rel. Gilbert v. Dilley*, 95 Neb. 527, 145 N.W. 999 (1914) (discussed *infra* nn. 295-301 and accompanying text).

179. Friesen, *supra* n. 11, § 4-2. However, Friesen states that state courts often interpret their

Alternatively, or perhaps additionally, it could be interpreted as a blanket prohibition on denominational preferences, practices which currently receive strict scrutiny under United States Supreme Court doctrine.[180]

The eighth, ninth, and tenth clauses of the Religious Freedom Provision are something of a mystery. They charge the Legislature with the duty of "encourag[ing] schools and the means of instruction" because "religion, morality, and knowledge" are "essential to good government[,]"[181] but it is difficult to determine how they are supposed to relate to the other clauses of the Provision dealing with religious freedom generally. The clauses seem rather out of place in such a provision, especially considering that there are other sections of the Constitution dealing with education specifically. One possibility is that they are intended as a limitation on the religious freedom provided by the other clauses, but only in the context of the public schools. Another interpretation, perhaps better reflecting the era in which they were drafted, is that the clauses allow "generic" non-denominational instruction in religion in public schools. However, this interpretation would render portions of the No Sectarian Aid Provision redundant and would imply that the other clauses of the Religious Freedom Provision do indeed prohibit even non-denominational government endorsement of religion.

As we have seen, examining the text of the Religious Freedom Provision of the Nebraska Constitution probably leads to more questions than answers. Although there are a few practices, such as denominational preferences and compelled worship, which are clearly prohibited by the Provision, there are many "gray areas" in religious liberty jurisprudence that the text simply does not shed any light upon. The next Part of this Article discusses what steps the Nebraska Supreme Court has taken to answer these questions.

"no preference" provisions in a manner analogous to the United States Supreme Court's *Lemon* test. *See id.*

180. *See Larson v. Valente*, 456 U.S. 228 (1982). *See generally* Daniel W. Evans, *Note, Another Brick in the Wall: Denominational Preferences and Strict Scrutiny Under the Establishment Clause*, 62 Neb. L. Rev. 359 (1983); and Jeremy Patrick-Justice, *Strict Scrutiny for Denominational Preferences: Larson in Retrospect*, N.Y. City L. Rev. (forthcoming 2005). California has apparently interpreted its constitution's "no preference" language to prohibit more conduct than *Lemon* or *Larson* would. *See e.g. Hewitt v. Joyner*, 940 F.2d 1561 (9th Cir. 1991) (discussing cases).

181. *See supra* n. 172 and accompanying text.

V. FREE EXERCISE UNDER THE RELIGIOUS FREEDOM PROVISION

If one were to look solely at Nebraska Supreme Court opinions, one would get the impression that religious organizations in the late-nineteenth and early-twentieth centuries cared much more about gaining tax exemptions[182] and settling intra-church disputes[183] than about religious freedom generally. However, there are a handful of cases interpreting the Religious Freedom Provision in issues akin to those dealt with under the Free Exercise Clause.

In the early years of Religious Freedom Provision jurisprudence, it appears as if the Court was simply applying a "reasonable exercise of the police power" test. That is, if the challenged law was legitimate and not purposefully discriminatory, it was considered valid and the plaintiff lost. Sometime in the 1960s or 1970s, however, the Court stayed in "lock-step" with the United States Supreme Court and began applying strict scrutiny under the Nebraska Constitution without actually holding that it was the proper standard or overruling any past cases. As we will see, there is a fairly strong argument that the Nebraska Constitution now provides more protection to religious liberty than does the Free Exercise

182. Art. IX, § 2 of the Nebraska Constitution allows the Legislature to exempt property used for religious purposes from taxation. One could easily write an entire article about Nebraska jurisprudence on the subject and the issue continues to be litigated today. *See e.g. Neb. Annual Conf. United Methodist Church v. Scotts Bluff County Bd. Equalization*, 243 Neb. 412, 499 N.W.2d 543 (1993); *Indian Hills Community Church v. County Bd. of Equalization*, 226 Neb. 510, 412 N.W.2d 459 (1987); *Berean Fund. Church Council, Inc. v. Bd. of Equalization*, 186 Neb. 431, 183 N.W.2d 750 (1971); *Ancient & Accepted Scottish Rite of Freemasonry v. Bd. of County Commissioners*, 122 Neb. 586, 241 N.W. 93 (1932), *overruling Scottish Rite Bldg. Co. v. Lancaster County*, 106 Neb. 95, 182 N.W. 574 (1921); *Scott v. Socy. of Russian Israelites*, 59 Neb. 571, 81 N.W. 624 (1900); and *First Christian Church v. City of Beatrice*, 39 Neb. 432, 58 N.W. 166 (1894). *See* James A. Doyle, Note, *Tax Exemption in Nebraska*, 11 Neb. L. Bull. 430 (1933); Zabel, *supra* n. 4, at 160-181.

183. Most of the disputes revolved around who was the proper owner of church property when a schism appeared within a church, but a surprising number involved attempts by a sponsoring organization to expel the current religious leader of a church. Although today we would consider much of the Court's action in resolving these intra-church disputes as bordering on unconstitutional excessive entanglement with religion, defendants never seemed to raise this as a bar to the Court's jurisdiction. *See Reichert v. Saremba*, 115 Neb. 404, 213 N.W. 584 (1927); *St. Paul English Lutheran Church v. Stein*, 115 Neb. 114, 211 N.W. 611 (1926); *Gaddis v. St.*, 105 Neb. 303, 180 N.W. 590 (1920); *Kennesaw Free Baptist Church v. Lattimer*, 103 Neb. 755, 174 N.W. 296 (1919); *Parish of the Immaculate Conception v. Murphy*, 89 Neb. 524, 131 N.W. 949 (1911); *St. Vincent's Parish v. Murphy*, 83 Neb. 630, 120 N.W. 187 (1909); *Bonacum v. Murphy*, 71 Neb. 463, 98 N.W. 1030 (1904), *rev'd on rehrg*, 71 Neb. 487, 104 N.W. 180 (1905); *Bonacum v. Harrington*, 65 Neb. 831, 91 N.W. 886 (1902); *St. Andrew's Church v. Shaughnessy*, 63 Neb. 792, 89 N.W. 261 (1902); *Wehmer v. Fokenga*, 57 Neb. 510, 78 N.W. 28 (1899); *Moseman v. Heitshusen*, 50 Neb. 420, 69 N.W. 957 (1897); *Powers v. Budy*, 45 Neb. 208, 63 N.W. 476 (1895); *Pounder v. Ash*, 36 Neb. 564, 54 N.W. 847 (1893), *rev'd on rehrg*, 44 Neb. 672, 63 N.W. 48 (1895); *Jones v. St.*, 28 Neb. 495, 44 N.W. 658 (1890); *Wicks v. Nedrow*, 28 Neb. 386, 44 N.W. 457 (1889); and *Barton v. Erickson*, 14 Neb. 164, 15 N.W. 206 (1883). *See generally* Zabel, *supra* n. 4, at 48-63.

Clause as construed by modern United States Supreme Court jurisprudence.[184]

A. Rise of the Police Power

In the first test of the Nebraska Supreme Court's attitude towards the Religious Freedom Provision, religion did not fare very well. In 1894, a young Christian Scientist named Ezra Buswell was indicted for practicing medicine without a license.[185] The indictment charged that Buswell

> falsely and unlawfully did assume upon himself to execute, exercise, and occupy the art, faculty, and science of a physician and surgeon, and did then and there profess to heal and otherwise treat sick persons.[186]

At trial, Buswell testified that he had learned spiritual healing under Mary Baker Eddy, the founder of Christian Science,[187] and that of the hundred or more people he treated since coming to Nebraska, only two died.[188] Several witnesses were called who testified to the miraculous results of Buswell's work: one man testified that Buswell allowed him to walk again, while another testified that Buswell cured him of pneumonia.[189]

Although the jury acquitted Buswell, the prosecution appealed the case, arguing that the trial judge erred by instructing the jury that Buswell could be convicted only if he were practicing "'medicine, surgery, or obstetrics,' as these terms are usually and generally understood."[190] At oral argument, Buswell's attorney explicitly invoked the Religious Freedom Provision of the Nebraska Constitution and

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184. The discussion of cases in this section will proceed roughly chronologically. There are some cases in which both free exercise and anti-establishment claims were raised, and these will be discussed in the part of this article corresponding to the primary claim raised. Finally, there are some cases in which free exercise or anti-establishment claims could have been raised (at least under today's standards), but were not. These will not be discussed in the text. *See e.g. Roberts v. St.*, 82 Neb. 651, 118 N.W. 574 (1908) (upholding conviction of defendant charged with "profane swearing" under a statute which provided that "If any person of the age of fourteen years and upwards shall profanely curse or damn, or profanely swear by the name of God, Jesus Christ, or the Holy Ghost, each and every person shall be fined in a sum not exceeding one dollar nor less than twenty-five cents for each offense.").

185. *See St. v. Buswell*, 40 Neb. 158, 58 N.W. 728 (1894).

186. *Id.* at 159, 58 N.W. at 729.

187. *See id.* at 163, 58 N.W. at 730. Christian Scientists "normally rely wholly on the power of God for healing rather than on medical treatment." Frank S. Mead & Samuel S. Hill, *Handbook of Denominations in the United States* 106 (10th ed., Abdingdon Press 1995).

188. *See Buswell*, 40 Neb. at 165, 58 N.W. at 731.

189. *See id.* at 161-162, 58 N.W. at 729-730.

190. *Id.* at 160, 58 N.W. at 729. Because Buswell was acquitted, the only question facing the Court was whether the instruction given was proper.

argued that:

> The defendant, and those of the same faith with him, believe, as a matter of conscience, that the giving of medicine is a sin; that it is placing faith in the power of material things, which belongs alone to Omnipotence. To the Christian Scientist, it is as much a violation of the law of God to take drugs for the alleviation of suffering or the cure of disease, as for a Methodist clergyman to take the name of his God in vain to relieve his overwrought feelings. It is as much the duty of the defendant, as his conscience and understanding teach him his duty, to visit the sick and afflicted, and relieve their distress of mind, as it is for the Presbyterian minister to go into his pulpit on Sabbath morning[.][191]

In a surprising move, the Court begins its analysis not by discussing the statutory language or the Religious Freedom Clause, but by basically accusing Buswell of committing simony.[192] The Court noted "the perfect toleration of religious sentiment, and enjoyment of liberty in all religious matters is of paramount importance,"[193] but went on to state "The defendant relied upon the teachings of the Bible as his authority as a Christian Scientist. It will not, therefore, be amiss to refer to it for instances applicable to his case."[194] The Court read the following testimony as evidence that Buswell had been accepting money in exchange for healing people:

> Q. You may state whether or not you make any charges when people come to you for advice, or when you go to them. A. As a rule, I do not. We tell them we leave the question to them and God. I spend my whole time at work, showing to the people, through examination and administration, what the teachings of the Scripture are; and Jesus says the laborer is worthy of his meat (?), [sic] and we expect that those who we spend our time for to remunerate us for it. If they are not willing to part with the sacrifice themselves, it is not expected that those should reap the benefit.[195]

The passage is rather ambiguous as to what Buswell's attitude towards contributions actually was. The first part makes it sound like he welcomed contributions but left it totally up to the patient, while the second part may be more of an indication that he would not perform

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191. *Id.* at 166, 58 N.W. at 731.

192. Simony is the Biblical sin of expecting money in exchange for conferring sacred or spiritual things. *See* Zabel, *supra* n. 4, at 15.

193. *Buswell*, 40 Neb. at 161, 58 N.W. at 729.

194. *Id.* at 166, 58 N.W. at 731.

195. *Id.*

spiritual healing unless he was paid for it. The Court adopted the second reading, and went on to quote several lengthy Biblical passages for the proposition that it is immoral to exchange money for spiritual healing.[196] The Court then summarized its argument as to why the Religious Freedom Provision did not protect Buswell:

> In the light of these instances cited from defendant's own authority, it is confidently believed that the exercise of the art of healing for compensation, whether exacted as a fee or expected as a gratuity, cannot be classed as an act of worship. Neither is it the performance of a religious duty, as was claimed in the district court.[197]

The Court went on to conclude:

> There was involved no question of sentiment, nor of religious practice or duty. If the defendant was guilty as charged, neither pretense of worship, nor of the performance of any other duty, should have exonerated him from the punishment that an infraction of the statute involved.[198]

It's fairly clear that the Court considered Buswell, and Christian Science in general, as a sham. The Court states that the object of the statute is to protect the sick "from the pretensions of the *ignorant* and *avaricious*,"[199] and later states that the statute must be "rendered effective against *pretensions based upon ignorance*, on the one hand, and *credulity*, on the other."[200]

The Nebraska Supreme Court continued its rather narrow view of religious freedom in a pair of cases that would have national prominence and eventually lead the United States Supreme Court to construct a doctrine that would revolutionalize constitutional jurisprudence.[201]

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196. *See id.* at 68-69, 58 N.W. at 731-732.

197. *Id.* at 169, 58 N.W. at 732.

198. *Id.*

199. *Id.* (emphasis added).

200. *Id.* (emphasis added). A few years after its decision in *Buswell*, the Nebraska Supreme Court stated that "With the rule announced in that case, we are fully satisfied, although it is possible that the decisions of some other courts are in conflict with it." *Little v. St.*, 60 Neb. 749, 751-752, 84 N.W. 248, 249 (1900). The Christian Scientists were successful in the long run, however, as they were able to use the decision in support of a legislative exemption from the law, which finally passed in 1921. *See* Zabel, *supra* n. 4, at 16-17. The Nebraska Christian Science Church would later describe *Buswell* as follows:

> As this was the first case ever decided against a Christian Scientist, in a court of last resort, for the practice of praying for the recovery of the sick, it would certainly have been followed as a precedent by the courts of other states if the law had been correctly stated. But this opinion of the Nebraska commissioner stands alone . . . and the decision, even in Nebraska, has been a dead letter for a decade[.]

Morton & Watkins, *supra* n. 47, at 480.

201. Because *Neb. Dist. of Evangelical Lutheran Synod v. McKelvie*, 104 Neb. 93, 175 N.W.

After the United States entered World War I, Nebraskans became suspicious of foreigners, especially Germans.[202] This suspicion prompted the Nebraska Legislature to pass new laws severely limiting the teaching of foreign languages in public, private, and parochial schools.[203] In *Nebraska District of Evangelical Lutheran Synod v. McKelvie*,[204] several churches, private schools, and foreign language-speaking parents brought suit to restrain the enforcement of one such law, alleging that "if the act is enforced their children will be unable to obtain instruction in religion and morals in accordance with the doctrines of the religious denominations to which the parents belong[.]"[205] The plaintiffs further alleged that it was "an invasion of the inherent discretion of parents in prescribing the course of instruction best adapted to the spiritual and material needs of children of their respective faiths"[206] and that "the teaching of foreign languages is largely to enable them to participate in the same religious services and exercises in the home and in the church[.]"[207]

The Nebraska Supreme Court first gave the statute a limiting construction, holding that it prohibited the teaching of foreign languages only during regular school hours.[208] It was not otherwise charitable to the plaintiffs' complaints, stating that the purpose of the law was to mold intelligent American citizens[209] and taking judicial notice that communities with foreign language teaching private and parochial schools were often "local foci of alien enemy sentiment[.]"[210] The Court concluded:

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531 (1919) and *Meyer v. St.*, 107 Neb. 657, 187 N.W. 100 (1922) have been discussed at length elsewhere (and because *Meyer* is one of the most famous United States Supreme Court cases) I will not spend as much time on them as they would otherwise merit. *See e.g.* William G. Ross, *Forging New Freedoms: Nativism, Religion, and the Constitution, 1917-1927* (1994); Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion: Meyer, Pierce and the Origins of Wisconsin v. Yoder*, 25 Cap. U. L. Rev. 887 (1996); and Zabel, *supra* n. 4, at 145-148. I will also focus almost exclusively on their treatment by the Nebraska Supreme Court and will not discuss *Meyer's* impact on Federal substantive due process jurisprudence.

202. *See* Zabel, *supra* n. 4, at 19-21.

203. *See id. See Meyer v. St.*, 107 Neb. 657, 669, 187 N.W. 100, 104 (1922) (Letton, J., dissenting) ("It is patent, obvious, and a matter of common knowledge that this restriction was the result of crowd psychology; that it is a product of the passions engendered by the World War, which had not had time to cool"). However, the driving force behind the anti-foreign language laws may actually have been much more complex than mere anti-German prejudice. *See* Bybee, *supra* n. 201, at 892-894.

204. 104 Neb. 93, 175 N.W. 531 (1919) [hereinafter *McKelvie I*].

205. *Id.* at 94, 175 N.W. at 532.

206. *Id.* at 96, 175 N.W. at 533.

207. *Id.*

208. *See id.* at 100, 175 N.W. at 534.

209. *See id.*

210. *See id.* at 97, 175 N.W. at 533.

> Neither the Constitution of the state nor the Fourteenth Amendment takes away the power of the state to enact a law that may fairly be said to protect the lives, liberty, and property of its citizens, and to promote their health, morals, education, and good order.[211]

As one commentator has noted, the Court dispensed with the plaintiffs' freedom of religion claims without even quoting the Nebraska Constitution's Religious Freedom Provision or discussing the language of the Fourteenth Amendment.[212]

Three years later, in *Meyer v. State*,[213] the Court was again faced with a challenge to an anti-foreign language law. The defendant, a teacher at a Lutheran parochial school, was fined twenty-five dollars for teaching German to a ten year-old boy.[214] The textbook used was a book of Bible stories written in German,[215] and the teacher claimed that the lessons served the dual purpose of teaching children German and teaching them religion.[216] The Court summarized the issue in a forthright manner:

> Does the statute interfere with the right of religious freedom, by prohibiting the teaching of a foreign language, when that language is taught with the idea and purpose of later using it, at some other time or place or in the school itself, in religious worship?[217]

Relying on *McKelvie*, the Court answered in the negative. It stated that teaching children foreign languages "naturally inculcate[s] in them the ideas and sentiments foreign to the best interests of this country"[218] and:

> [t]hough the statute . . . may, to an extent, limit the younger children from as freely engaging in religious services . . . as otherwise might be the case, we cannot say that such restriction is unwarranted. The law in no way attempts to restrict religious teachings, nor to mold beliefs, nor interfere with the entire freedom of religious worship.[219]

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211. *See id.* at 104, 175 N.W. at 536.
212. *See* Bybee, *supra* n. 201, at 896 ("While the Nebraska Supreme Court rejected the churches' claim that the law interfered with the families' religious practices, it referred to no particular provision of the Nebraska Constitution or of the Fourteenth Amendment.").
213. 107 Neb. 657, 187 N.W. 100 (1922), *rev'd by* 262 U.S. 390 (1923).
214. *See id.* at 659, 187 N.W. at 101.
215. *See id.*
216. *See id.* at 659-660, 187 N.W. at 101-102.
217. *Id.* at 661, 187 N.W. at 102.
218. *Id.*
219. *Id.*

Like *McKelvie*, the Court in *Meyer* dismissed the plaintiff's religious freedom claim without even quoting the Religious Freedom Provision or discussing the meaning of the Fourteenth Amendment.[220] In some ways, *Meyer* was even more hostile to religious liberty than *McKelvie*. The defendant in *Meyer* had attempted to avoid the law by teaching German outside of the formal school hours.[221] The Court saw this as an attempted end-run around the law and quickly put a stop to it: "The real bombshell [in *Meyer*], however, was the overruling of the decision in [*McKelvie*] that the law applied only to the regular school hours set apart for the teaching of secular subjects."[222]

While a petition for certiorari to the United States Supreme Court was pending in *Meyer*, the Nebraska Supreme Court upheld an anti-foreign language law even more restrictive than the one addressed in that case.[223] Eventually the United States Supreme Court granted certiorari in *Meyer* and a trio of companion cases, and reversed the judgment of the Nebraska Supreme Court.[224] However, the United States Supreme Court's holding was based purely on a substantive due process theory[225]—that the anti-foreign language laws infringed upon parents' Fourteenth Amendment rights to control the upbringing of their children—and did not discuss religious freedom at all.[226]

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220. *See* Bybee, *supra* n. 201, at 898.

221. *See Meyer*, 107 Neb. at 666, 187 N.W. at 103. *See* Bybee, *supra* n. 201, at 896 ("In response to the Court's decision in *McKelvie I*, some churches changed the hours of the afternoon session of school from 1 to 4 o'clock to 1:30 to 4 o'clock. This had the effect of freeing the half hour from 1 to 1:30 from formal school control.").

222. Zabel, *supra* n. 4, at 146 (foonote omitted). Notably, the author of *McKelvie I* dissented in *Meyer* because of this change. *See Meyer*, 107 Neb. at 667, 187 N.W. at 1041-1005 (Letton, J., dissenting).

223. *See Neb. Dist. of Evangelical Lutheran Synod v. McKelvie*, 108 Neb. 448, 187 N.W. 927 (1922) [*McKelvie II*].

224. *See Meyer v. Neb.*, 262 U.S. 390 (1923). The Nebraska Supreme Court, relying on the authority of this decision, reversed the conviction of Lutherans convicted of teaching foreign languages in *Busboom v. St.*, 110 Neb. 629, 194 N.W. 734 (1923).

225. *See* Bybee, *supra* n. 201, at 891 ("the Supreme Court ignored the claims of infringement of religious liberty and resorted to the reasoning of substantive due process to recognize a parental right to direct children's education").

226. There are three likely reasons why the Court did not address religious freedom. First, counsel for Meyer simply did not press a religious freedom claim before the United States Supreme Court as he had in front of the Nebraska Supreme Court. *See* Bybee, *supra* n. 201, at 900-901. Second, at the time it was not thought that the Free Exercise Clause applied to state conduct. As Bybee puts it:

> [T]he Supreme Court had long held, and had reaffirmed shortly before *Meyer*, that the First Amendment did not apply to the states, either on its own terms or based on the Fourteenth Amendment .... The Court had reaffirmed this position, both prior and subsequent to ratification of the Fourteenth Amendment.

Id. at 912-913.

Finally, even if the Free Exercise Clause had applied, it likely would not have offered much protection: "The few Free Exercise Clause cases decided by the Supreme Court—beginning with

Although the plaintiffs were ultimately vindicated by the United States Supreme Court, *McKelvie* and *Meyer* had lasting harmful effects on Nebraska Supreme Court religious liberty jurisprudence. The cases continued the trend of ignoring the specific language of the Religious Freedom Provision, and even worse, enunciated a very minimal test for when that Provision was infringed. After *Meyer*, religious freedom claims would face a simple "lawful police power" test: "whether the law is reasonable, and not capricious and arbitrary; whether it was enacted in the interests of the welfare of the state; whether it is a lawful exercise of the police power; in general, whether it is constitutional."[227] The Court even went so far as to adopt the "belief/action" test from the United States' decision in *Reynolds v. United States*,[228] stating:

> Though every individual is at liberty to adopt and to follow with entire freedom whatsoever religious beliefs appeal to him, that does not mean that he will be protected in every act he does which is consistent with those beliefs, for when his acts either disturb the public peace, or corrupt the public morals, or otherwise become inimical to the public welfare of the state the law may prohibit them, though they are done in pursuance of and in conformity with the religious scruples of the offending individual.[229]

For almost a half-century after *Meyer*, this "lawful police power" test would be the only protection afforded Nebraskans by the Religious Freedom Provision. Although the Nebraska Supreme Court decided only three religious liberty cases between 1923 and 1965, all three were found to be valid exercises of the police power.[230]

B. Tenuous Emergence of Strict Scrutiny

A year after the last of the police power cases was decided in Nebraska, a near-revolution occurred in United States Supreme Court

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Reynolds v. United States—were remarkably hostile to religion." *Id.* at 914 (footnote omitted).

227. *See Meyer*, 107 Neb. at 663, 187 N.W. at 102.

228. 98 U.S. 145 (1879).

229. *Meyer*, 107 Neb. at 664, 187 N.W. at 103. The Court cited *Reynolds*, along with several other cases, in support of this contention. *See id.* at 662, 187 N.W. at 102 (discussing how the statute comes within police power of the state); and *id.* at 663-664, 187 N.W. at 102-103 ("Whenever the actions of individuals, even though in pursuance of religious beliefs . . . are considered as not in harmony with the public welfare, then it is proper that those acts be curbed").

230. *See Dill v. Hamilton*, 137 Neb. 723, 291 N.W. 62 (1940) (upholding a law prohibiting public séances); *St. v. Hind*, 143 Neb. 479, 10 N.W.2d 258 (1943) (upholding a regulation forbidding advertisements on motor vehicles, including advertisements for religious purposes); and *Meyerkorth v. St.*, 173 Neb. 889, 115 N.W.2d 585 (1962) (upholding teacher certification requirements for religious schools). As we will see, although *Meyerkorth* would be the last official use of the "lawful police power" test in a religious freedom claim, many commentators suspect it was the de facto criterion in many subsequent cases.

jurisprudence regarding the Free Exercise Clause. The Court broke with the *Reynolds* "belief/action" test and held that governmental actions which substantially burden religious conduct must be justified by a compelling state interest.[231] However, almost twenty years would pass before the Nebraska Supreme Court would face another religious freedom challenge.[232]

In *State ex rel. Douglas v. Faith Baptist Church*,[233] the Nebraska Supreme Court was again faced with the question of when, if ever, the religious beliefs of parents could trump the interests of the State in compulsory education. The "Christian School Controversy" as the case came to be called, filled the front pages of Nebraska newspapers, generated national interest, and provoked an unusual amount of legal scholarship.[234] In *Faith Baptist*, the State of Nebraska brought an action to enjoin the operation of a small Christian school because the school refused to have accredited teachers and an approved curriculum.[235] The school responded by asserting that their actions were protected by the Free Exercise Clause,[236] but it is not clear whether they also asserted a violation of the state Religious Freedom Provision.[237]

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231. *See Sherbert v. Verner*, 374 U.S. 398 (1963).

232. The closest case during this period was *Goodman v. Goodman*, 180 Neb. 83, 141 N.W.2d 445 (1966), in which the Nebraska Supreme Court reversed a trial court's order barring a noncustodial parent "from rearing the children in his religious faith[.]" *Id.* at 85, 141 N.W.2d at 447. The Court may have been recognizing the new principle of *Sherbert* when it stated "We question whether even a noncustodial parent might legally be, or should be, enjoined from imparting religious instruction to his child in the absence of a showing of serious threat to the health or well-being of the child." *Id.* at 89, N.W.2d at 449.

233. 207 Neb. 802, 301 N.W.2d 571 (1981).

234. *See* Richard E. Shugrue, *An Approach to Mutual Respect: The Christian Schools Controversy*, 18 Neb. L. Rev. 219 (1985); Timothy J. Binder, *Comment, Douglas v. Faith Baptist Church Under Constitutional Scrutiny*, 61 Neb. L. Rev. 74 (1982); Michael J. Higgins, *State v. Faith Baptist Church: State Regulation of Religious Education*, 15 Creighton L. Rev. 183 (1981); and Kent Turnbull, *Christian School Controversy* (Dec. 13, 1982) (unpublished manuscript, on file at the University of Nebraska-Lincoln Schmidt Law Library). Because these articles cover the topic well, and because the case was decided on Federal rather than State constitutional grounds, I will not discuss it at length.

235. *Faith Baptist*, 207 Neb. at 805, 301 N.W.2d at 574.

236. *See id.* at 806, 301 N.W.2d at 574:

> It is the defendants' belief that the public schools of today are overrun with an increase in crime, drug and alcohol addiction, teacher assaults, vandalism, and disrespect for authority and property. Additionally [they believe that] secular humanism is the basic philosophy of the public educational system, which is in direct opposition to the defendants' belief in biblical Christianity.

237. It is not clear whether the defendants raised or briefed a state Religious Freedom Provision claim. The majority opinion makes no mention of a state constitutional claim, but the concurring/dissenting opinion of Chief Justice Krivosha states, "[s]uch action would not, in my mind, constitute a violation of the religious clauses of either the United States Constitution or the Nebraska Constitution" *See id.* at 820, 301 N.W.2d at 581 (Krivosha, C.J., concurring and dissenting). Chief Justice Krivosha did not discuss the Nebraska Constitution's Religious

Throughout its opinion, the Court made reference to both the *Meyerkorth* lawful police power test and the *Yoder* compelling interest test. The Court never made it plain which test it was applying and there are some indications that the Court thought they meant the same thing.[238] In an especially revealing conclusion, the Court denies the school's Free Exercise claim and states:

> The refusal of the defendants to comply with the compulsory education laws of the State of Nebraska as applied in this case is an arbitrary and unreasonable attempt to thwart the legitimate, reasonable, and compelling interests of the State in carrying out its educational obligations, under a claim of religious freedom.[239]

Thus, the Court combines the language of *Meyerkorth* and *Yoder* in a single sentence, using the words "legitimate" and "reasonable" to refer to the former and the phrase "compelling interests" to refer to the latter. The Court's holding received conflicting appraisals from legal commentators,[240] but it seems clear that regardless of the outcome, the Court's reasoning was suspect because it simply failed to distinguish between two conceptually different tests which may have led to very different outcomes. The Court went on to apply *Faith Baptist* to several other challenges to state education laws brought by Christian schools[241] until the Legislature stepped in in 1984 and allowed the State Board of

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Freedom Provision any further or attempt to distinguish it from the United States Constitution. One commentator has argued that the defendants should have raised such a claim, stating that "*Faith Baptist* is just one of many Nebraska decisions over the years which has ignored [the Religious Freedom Provision] of the Nebraska Constitution." Turnbull, *supra* n. 234, at 27.

238. *See e.g. Faith Baptist*, 207 Neb. at 811, 301 N.W.2d at 577 ("the *Yoder* court did recognize the principle upon which our decision in *Meyerkorth* was based"); Shugrue, *supra* n. 234, at 240; and Binder, *supra* n. 234, at 89.

239. *Faith Baptist*, 207 Neb. at 817, 301 N.W.2d at 580.

240. *Compare* Shugrue, *supra* n. 234, at 242 (footnote omitted):

> The problem with the decision in *Faith Baptist Church* is that it virtually ignores the modern doctrine handed down by the United States Supreme Court, murky though it may be. It ignores the least restrictive alternative admonition, takes for granted the existence of a compelling state interest in teacher certification, and in effect, assumes that the issue in *Yoder* was not the depth and centrality of the religious belief but the superannuation and isolation of the sect.

and Binder, *supra* n. 234, at 96 ("*Douglas v. Faith Baptist Church*[,] even if correct in its ultimate decision, constitutes a severe blow to religious freedom in Nebraska and is contrary to the free exercise test which has evolved through United States Supreme Court decisions") (footnotes omitted) *with* Higgins, *supra* n. 234, at 195 ("In light of the uncertain state of the law, the Nebraska Supreme Court has made a reasonable effort to accommodate the free exercise rights of the Faith Baptist Church.").

241. *See St. ex rel. Douglas v. Calvary Acad.*, 217 Neb. 450, 348 N.W.2d 898 (1984) (*per curiam*); *St. ex rel. Kandt v. N. Platte Baptist Church*, 216 Neb. 684, 345 N.W.2d 19 (1984) (*per curiam*); *St. ex rel. Douglas v. Morrow*, 216 Neb. 317, 343 N.W.2d 903 (1984) (*per curiam*); and *St. ex rel. Douglas v. Bigelow*, 214 Neb. 464, 334 N.W.2d 444 (1983).

Education to exempt church-affiliated schools from the laws.[242]

After *Faith Baptist*, it would be several more years before the Nebraska Supreme Court would be faced with another freedom of religion claim. In the meantime, the United States District Court for the District of Nebraska decided a case in which the plaintiffs brought both Free Exercise Clause and Religious Freedom Provision claims. In *Rushton v. Nebraska Public Power District*,[243] Judge Warren Urbom was faced with an unusual fact pattern: employees of a nuclear power plant had sued their employer, alleging that mandatory drug testing violated their freedom of religion because the power plant's employees' handbook called alcoholism an "illness" while the plaintiffs believed that alcoholism was a "sin."[244] Because the plaintiffs' religion forbade them from associating with "heretical" documents, they argued that their freedom of religion was burdened because the mandatory drug testing was looking for a disease when it should have been looking for a violation of God's law.[245]

In a long and careful opinion, Judge Urbom found that although the plaintiffs had established that their freedom of religion was burdened by drug testing,[246] the power plant had a compelling interest in maintaining safety standards,[247] and mandatory drug testing was the least restrictive way of achieving this interest.[248] Although the bulk of his opinion dealt with the Free Exercise Cause claim, Judge Urbom did address the Religious Freedom Provision claim. He stated:

> These constitutional provisions are no different, as far as I can tell from the related constitutional provisions of the United States Constitution. No cases have been cited by the parties to indicate any difference in outcome under the Constitution of the State of Nebraska from the United States Constitution[249]
>
> and that
>
> Article I, Section 4 of the Constitution of the State of Nebraska is different in wording from the First Amendment to the Constitution of the United States, but I cannot find in the wording any difference in meaning as it may apply to this case.[250]

242. *See* Shugrue, *supra* n. 234, at 248, 252.
243. 653 F. Supp. 1510 (1987), *affd.*, 844 F.2d 562 (8th Cir. 1988).
244. *See id.* at 1518.
245. *See id.*
246. *See id.* at 1519.
247. *See id.* at 1520.
248. *See id.* at 1521.
249. *Id.* at 1529.
250. *Id.*

The Court, in a five to four ruling, held that the Free Exercise Clause does not provide protection against laws which are "neutral [and] generally applicable."[258] Although the Court did not overrule *Yoder*, it limited the application of the compelling interest test to cases in which the law was not neutral and generally applicable or to cases where Free Exercise claims were brought in conjunction with another Constitutional claim.[259]

However, before the Nebraska Supreme Court could react to *Smith*, Congress in 1993 passed the Religious Freedom Restoration Act[260] ("RFRA") which purported to abrogate the effect of *Smith* and restore the *Yoder* compelling interest test. The next (and so far only) time the Nebraska Supreme Court would consider a religious freedom claim occurred when the RFRA was in effect.

C. Palmer

Palmer v. Palmer[261] is to date the best explanation we have as to what the Religious Freedom Provision of the Nebraska Constitution actually means. However, *Palmer's* meaning is not unambiguous; attempting to interpret it while keeping in mind the changing legal environment before and after it is something like riding a merry-go-round. The ride is worth taking, however, as *Palmer* can reasonably be interpreted to mean that the Nebraska Constitution affords a compelling interest test to government practices that burden religion in contrast to the Free Exercise Clause, which now offers much less protection.

The issue in *Palmer* was very similar to that in *LeDoux*. After Teresa Palmer, a Jehovah's Witness, and Gary Palmer, a Catholic, filed for divorce, the trial court awarded custody to Teresa but placed restrictions in the divorce decree, forbidding her to "take the minor child with her on door-to-door visitation until the minor child reaches age seven"[262] and forbidding either parent from "requir[ing] the minor child

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constitutionally compelled religious exemption and its abandonment of strict scrutiny analysis for a more deferential standard of review."); and McCabe, *supra* n. 7, at 52 ("the *Smith* Court greatly narrowed First Amendment protection").

258. *Smith*, 494 U.S. at 881.

259. *See id.* at 881. This is the so-called "hybrid exception." *See generally* William L. Esser IV, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen*. 74 Notre Dame L. Rev. 211 (1998).

260. 42 U.S.C.A. § 2000bb *et seq.* (West 1994).

261. 249 Neb. 814, 545 N.W.2d 751 (1996).

262. *Id.* at 816, 545 N.W.2d at 754. Door-to-door witnessing was an important part of Teresa's faith as a Jehovah's Witness. *See id.* at 815, 545 N.W.2d at 753-754:

> every other Sunday, approximately two Sundays a month, she participates in a 1-hour door-to-door visitation ministry in which she visits people at their homes, distributes

to sit in a regular church service until age seven[.]"[263] The trial court placed the door-to-door visitation restrictions on the advice of a guardian ad litem who testified that Teresa shouldn't take her child on the door-to-door calls because "it's boring"[264] and because the "weather can either be hot or cold[.]"[265] The same guardian ad litem testified against regular church services for the child because "I think that's too long for youngsters. They don't understand those sermons, they're way over their head . . . . I think that's too much religion for a three-year or four-year-old or a five-year-old."[266]

On appeal, Teresa argued that her freedom of religion was violated by these provisions in the divorce decree.[267] However, unlike in *LeDoux*, the Court made several references to the Nebraska Constitution in holding the decree overly restrictive and unconstitutional. Interestingly enough, neither party raised state law claims in their briefs,[268] which makes the fact that the Court addressed the issue at all rather unusual.[269] The Court began its analysis by stating:

> The First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." This prohibition applies to states by virtue of the 14th Amendment to the U.S. Constitution and to judicial as well as legislative functions. Similarly, the Nebraska Constitution also protects religious freedom and prohibits interference therewith.[270]

In the next paragraph, the Court states what test it will apply. I quote this paragraph with citations included because doing so casts

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literature, and discusses her faith with willing participants. The mother testified that if awarded custody, she would bring [her daughter] with her during these activities.

See Mead & Hill, *supra* n. 187, at 154-157 (discussing religious tenets of Jehovah's Witnesses).

263. *Palmer*, 249 Neb. at 815, 545 N.W.2d at 753-754.

264. *Id.* at 816, 545 N.W.2d at 754.

265. *Id.*

266. *Id.*

267. *See id.* at 814-815, 545 N.W.2d at 753.

268. *See* Brief for Appellant, *Palmer v. Palmer*, 249 Neb. 814, 545 N.W.2d 751 (1996) (No. S-94-279); and Brief for *Amicus Curiae* Watchtower Bible & Tract Society of New York, Inc., *Palmer v. Palmer*, 249 Neb. 814, 545 N.W.2d 751 (1996) (No. S-94-279). The appellee made no appearance in the case. *See Palmer*, 249 Neb. at 814, 545 N.W.2d at 753. Teresa's brief is interesting because it does not assign either federal or state freedom of religion as independent error, though it does discuss the Free Exercise Clause on several occasions. When doing so, it relies wholly upon the *Yoder* test and does not mention or cite to *Smith* or the RFRA. In contrast, the *amicus* brief of the Watchtower Bible & Tract Society (supporting Teresa's claim) does not cite to either the federal or state freedom of religion provisions, but does cite to the RFRA.

269. *See e.g. Skinner v. Ogallala Pub. Sch. Dist.*, 262 Neb. 387, 631 N.W.2d 510 (2001) (holding that Court will not address claims not discussed in briefs); and *Meyers v. Neb. Equal Opportunity Commn.*, 255 Neb. 156, 582 N.W.2d 362 (1998) (same).

270. *Palmer*, 249 Neb. at 817, 545 N.W.2d at 754-55 (citations omitted).

important light on the Court's point of view:

> The inquiry does not end here, however, as a state may abridge religious practices upon a demonstration that some compelling state interest outweighs a complainant's interests in religious freedom. *LeDoux v. LeDoux, supra* (citing *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). *See, also,* 42 U.S.C. § 2000bb (1994) (Religious Freedom Restoration Act restoring compelling state interest test after *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)).[271]

Thus, the Court cites a Nebraska case for the proposition that strict scrutiny applies, but notes that the prior case's holding was derived from United States Supreme Court precedent. Importantly, the Court cites the RFRA as "restoring" the compelling interest test after *Smith*. The rest of the Court's opinion is then spent discussing prior Nebraska case law on custody disputes involving religion.[272] The Court concludes by stating:

> There has been no showing that the *compelling end* of the best interests of the child would be served by the restrictions imposed in this case. We, therefore, hold that the district court abused its discretion in placing limitations on the custodial mother's right to control the religious upbringing of her minor child in violation of the Free Exercise Clause found in the First Amendment to the U.S. Constitution and article I, § 4, of the Nebraska Constitution.[273]

A careful analysis shows that the Court never directly states that the compelling interest test applied under the Nebraska Constitution. On the other hand, there are several signs that the Court assumed it did. First, the Court states that the Nebraska Constitution protects religious freedom "similarly" to the Free Exercise Clause.[274] Second, the Court cites the compelling interest test without distinguishing between federal and state law and gives no indication that a lesser test applies for the state claim.[275] Finally, in a conclusion referring to the compelling interest test, the Court finds that the challenged restriction violates *both* the United States and Nebraska Constitutions without discussing either of them separately.[276]

Yet even if we were to assume that the compelling interest test applied under the Nebraska Constitution at the time of *Palmer*, there is

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271. *Id.* at 818, 545 N.W.2d at 755.
272. *See id.* at 819-820, 545 N.W.2d at 755-756.
273. *Id.* at 820, 545 N.W.2d at 756 (emphasis added).
274. *See supra* n. 270 and accompanying text.
275. *See supra* n. 271 and accompanying text.
276. *See supra* n. 273 and accompanying text..

good reason to doubt that it still applies today, because a year after that case was decided, the United States Supreme Court held the RFRA unconstitutional and re-implemented the *Smith* "neutral and generally applicable" test.[277] Because the Nebraska Supreme Court has not faced a freedom of religion claim since *Palmer*,[278] it's not clear what the fall of the RFRA means for the Religious Freedom Provision. A brief timeline may help explain the problem:

> February 23, 1990: Nebraska Supreme Court unambiguously applies strict scrutiny to a Free Exercise claim for the first time in *LeDoux*
>
> April 17, 1990: United States Supreme Court holds that strict scrutiny no longer automatically applies to Free Exercise claims in *Smith*
>
> 1993: Congress passes the RFRA, purporting to restore the strict scrutiny test to Free Exercise claims
>
> 1996: Nebraska Supreme Court, citing to both *Yoder* and RFRA, applies strict scrutiny to a case with both federal and state freedom of religion claims in *Palmer*
>
> 1997: United States Supreme Court holds RFRA unconstitutional, restoring *Smith* test

The result of the Nebraska Supreme Court's freedom of religion jurisprudence to date is that the Court is in the unusual position of having the freedom to decide which test is appropriate without having to overrule any prior binding precedent. The Court could reasonably hold

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277. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

278. The Court has cited to *Palmer* several times in the past few years, but only for the rather mundane proposition that a trial court's decision on custody is subject to an abuse of discretion standard. *See e.g. Davidson v. Davidson*, 254 Neb. 357, 576 N.W.2d 779 (1998); and *Betz v. Betz*, 254 Neb. 341, 575 N.W.2d 406 (1998). On behalf of ACLU Nebraska, I recently filed an *amicus curiae* brief with the Nebraska Supreme Court arguing that the Religious Freedom Provision provides greater protection than that of the Free Exercise Clause. However, the case was decided on statutory rather than constitutional grounds. *See* Brief for *Amicus Curiae* ACLU Nebraska Foundation at 8-9, *City of Omaha v. Kum & Go, LC*, 263 Neb. 724, 642 N.W.2d 154 (2002). The fact that *Palmer* applied strict scrutiny has been mentioned in passing by two other sources. *See* Rubenstein, *supra* n. 257, at 302 n. 71 (citing *Palmer* for the proposition that "State courts might frame their analysis differently but are consistently refusing to apply the *Smith* standard"); and Crane, *supra* n. 7, at 245 n. 72:

> In *Palmer v. Palmer*, the Supreme Court of Nebraska applied the *Sherbert* strict scrutiny test in invalidating a restriction on a custody award that prohibited a Jehovah's Witness from involving her three-year-old daughter in religious activities. The court did not address the *Smith* or RFRA issues. Arguably, this situation may not have involved a facially neutral law, because the challenged state action singled out religious conduct for disfavorable treatment, a practice that even the *Smith* Court would have disallowed.

(citations omitted).

that it applied strict scrutiny under the state law claim in *Palmer*, and that even though federal law may have changed, the test for state claims should remain strict scrutiny.[279] Alternatively, the Court has a solid basis for holding that in *Palmer* it was simply tying the state standard to the federal standard, so that if the federal standard changed, the state standard automatically changed with it and therefore the neutral and generally applicable test is appropriate. Conceivably, although doubtfully, the Court could even return to its "original understanding" of the Religious Freedom Provision and apply the lawful police power test.

The only certainty is that the next time the Court decides a state freedom of religion claim, the result, whatever it is, will have important and long-lasting consequences for the future of religious liberty in Nebraska.

VI. ANTI-ESTABLISHMENT UNDER THE RELIGIOUS FREEDOM PROVISION

As difficult as it is to determine the meaning of the Religious Freedom Provision's free exercise language by looking at Nebraska Supreme Court cases, it is even harder to gauge the meaning of the Provision's anti-establishment language. This is due to a simple fact: most of the traditional cases involving establishment issues have been dealt with under the No Sectarian Aid Provision, with the result being that the Court has not squarely addressed an establishment claim under the Religious Freedom Provision since 1914.

The first, and in many ways still most important, case brought under the anti-establishment clauses of the Religious Freedom Provision is *State ex rel. Freeman v. Scheve*.[280] In 1902, the parent of a public

279. This has been the approach of most state courts which have addressed the issue since *Smith*. *See e.g.* Crane, *supra* n. 7, at 245 (discussing "scrutiny mutiny" of several state courts refusing to apply *Smith* under their state constitutions); Rubenstein, *supra* n. 257, at 302-303 ("states have ignored the Court's new approach and have chosen to follow the old compelling interest standard, which they constructively approved and institutionalized by their previous adoption and application of the federal approach") (footnotes omitted); and Cauthen, *supra* n. 15, at 1196 (stating that between 1970 and 1994, state courts expanded freedom of religion rights beyond that of the U.S. Supreme Court over half the time).

280. 65 Neb. 853, 91 N.W. 846 (1902), *affd. on rehrg.*, 65 Neb. 853, 93 N.W. 169 (1903). There are a few important things to note about *Freeman*. First, the Nebraska Reports version of *Freeman* contains excerpts from the attorney's briefs and oral arguments, unlike the Northwest Reports version which contains only the Court's opinion. Second, *Freeman* contains some discussion of the No Sectarian Aid Provision in addition to discussion of the Religious Freedom Provision. The case is also ambiguous as to whether the Bible reading is invalid under the Religious Freedom Provision because it violates the child's freedom of religion (akin to a Free Exercise claim) or because the father is forced to pay for religious teaching he does not support (akin to an Establishment Clause claim). Because the United States Supreme Court has treated the issue as an Establishment Clause issue, *see Engel v. Vitale*, 370 U.S. 421 (1962), I deal with it in this Part of the Article as opposed to another Part. Another discussion of the *Freeman* decision

school elementary student brought suit against the school district, alleging that one of his child's teachers was leading her classes in Bible readings and prayer.[281] The Court began its discussion by taking judicial notice that the religious services were Protestant in nature[282] and stated "[t]hat such exercises are also sectarian in their character is not less free from doubt."[283] The Court clearly saw the issue as one of denominational strife between Catholics and Protestants, as demonstrated by its statement:

> The several popular versions [of the New Testament] differ in some particulars from each other, and all differ from the Catholic canon, both in rendition of passages from which sectarian doctrines are derived by construction and in the number of books or gospels constituting what is regarded as the written record of Divine revelation.[284]

Anticipating the United States Supreme Court by almost sixty years,[285] the Court held that the Bible reading violated the Religious Freedom Provision because:

> [I]f the system of compulsory education is persevered in, and religious worship or sectarian instruction in the public schools is at the same time permitted, parents will be compelled to expose their children to what they deem spiritual contamination, or else, while bearing their share of the burden for the support of public education, provide the means from their own pockets for the training of their offspring elsewhere.[286]

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can be found in Zabel, *supra* n. 4, at 106-111.

281. *See Freeman*, 65 Neb. at 869-870, 91 N.W. at 846. The plaintiff specifically alleged:

> [T]he [school] board permitted a teacher . . . to engage daily . . . in the presence of the pupils, in certain religious and sectarian exercises, consisting of the reading of passages of her own selection from a book commonly known as "King James' Version or Translation of the Bible," and in singing certain religious and sectarian songs, and in offering prayer to the Deity according to the customs and usages of the so-called "Orthodox Evangelical Churches" of this country, and in accordance with the belief and practices of such churches, the pupils joining in the singing of such songs or hymns.

Id.

282. *See id.*

283. *Id.*

284. *Id.* at 870-871, 91 N.W. at 847. Nebraska has had a long history of conflict between Catholics and Protestants. *See supra* nn. 104 & 136, and Freeman's attorneys made a point of alleging that the Bible read was the Protestant King James' version as opposed to the Catholic Douay version. *See Freeman*, 65 Neb. at 858, 867-868. An attorney for the school board argued that Freeman's lawsuit was an assault on "Christianity itself" and stated that "[t]he genius of our institutions was not created by infidels of the Freeman type, but by men who revered the Book as the common law of our faith[.]" *Id.* at 868.

285. *See Abington v. Schempp*, 374 U.S. 203 (1963).

286. *Freeman*, 65 Neb. at 872, 91 N.W. at 847.

Two members of the Court concurred in the judgment, but argued that the Bible reading was invalid *only* because it was sectarian in nature and therefore prohibited by the No Sectarian Aid Provision, but that it was not invalid under the Religious Freedom Provision because allowing Bible reading did not automatically turn a schoolhouse into a "place of worship."[287]

However, the decision was very controversial and the Court granted a rehearing the next year, stating that "the distinguished counsel for respondents has with considerable ardor attacked, not only the decision, but what he supposes to be its implications."[288] However, the Court unanimously affirmed its prior decision. The second *Freeman* decision contains important statements by the Court as to what the Nebraska Constitution means in regard to religious liberty.

First, the Court dispensed with the notion that simply because a practice was commonplace at the time the Constitution was ratified, the practice was Constitutional:

> The fact that there have been Bible reading and religious exercises in many of the public schools ever since the present constitution was adopted is cited as evidence of a contemporaneous and practical construction in favor of the practice; but, in our opinion, it is rather to be regarded as evidence of the temperate and tolerant spirit of our people[.][289]

Second, the Court made some general statements about the religious and constitutional history of Nebraska, many of which have surprising application to current events:

> So far as religion is concerned, the laissez faire theory of government has been given the widest possible scope. The suggestion that it is the duty of government to teach religion has no basis whatever in the constitution or laws of this state, nor in the history of our people.[290]

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287. *See id.* at 874, 91 N.W. at 848 (Sedgwick, J., concurring); and *id.* at 874-876, 91 N.W at 848-849 (Holcomb, J., concurring).

288. *St. ex rel. Freeman v. Scheve*, 65 Neb. 877, 877, 93 N.W. 169, 169 (1903). Although this opinion is normally considered as a rehearing of the former decision, it is also something in the nature of a review by a higher court. At the turn of the century, the Nebraska Legislature had created Commissioners to assist the Supreme Court in carrying out their duties. Thus, the first *Freeman* opinion was decided by two Justices and three Commissioners. It is not clear who took part in the second *Freeman* decision, but the opinion was written by the Chief Justice of the Nebraska Supreme Court.

289. *Id.* at 878, 93 N.W. at 170. In many ways this view is the opposite of the United States Supreme Court as expressed in *Marsh v. Chambers*, 463 U.S. 783 (1983).

290. *Freeman*, 65 Neb. at 878, 93 N.W. at 170.

> In section 4 of the bill of rights we find this language:
>
> Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the legislature to pass suitable laws to protect every denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.
>
> There is no uncertainty as to the meaning of this clause; there is no room for construction; and where as Judge Cooley has said, the meaning of an instrument is plainly declared by the instrument itself, courts are not at liberty to search elsewhere. The duty of the state with respect to religion—*its whole duty*—is "to protect every religious denomination in the peaceable enjoyment of its own mode of public worship."[291]

Finally, the Court held that the "reasonableness" of a person's religious belief had absolutely no relation to whether that belief had been infringed by government conduct:

> Whether Mr. Freeman was reasonable or unreasonable in objecting to his children actively or passively participating in the simple religious service conducted by the teacher is altogether immaterial. Some men always have been unreasonable in such matters, and their right to continue to be unreasonable is guaranteed by the constitution, and characterized as a natural and indefeasible right.[292]

Importantly, the Court tried not to go too far in this direction. It made it very clear that not all Bible reading was banned—only that Bible reading which was used for religious "propaganda" was prohibited.[293]

In many ways, the Court's robust protection of the plaintiff's and his child's religious belief seems hard to square with the Court's almost derisive treatment of another religious freedom claim it dealt with a few years before *Freeman*.[294] However, if *Freeman* is still good law, and to all indications it is, it indicates that the anti-establishment language of the Religious Freedom Provision is to be strictly and rigorously applied

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291. *Id.* (emphasis added).

292. *Id.* at 880. 93 N.W. at 171.

293. *See id.*

> Certainly the Iliad may be read in the schools without inculcating a belief in the Olympic divinities, and the Koran may be read without teaching the Moslem faith. Why may not the Bible also be read without indoctrinating children in the creed or dogma of any sect? Its contents are largely historical and moral. . . . . Among the classics of our literature it stands pre-eminent.

294. The case referred to is *St. v. Buswell*, 40 Neb. 158 (1894), discussed in nn. 185-200.

to government conduct.

After *Freeman*, the Court would only squarely address an anti-establishment argument under the Religious Freedom Provision once more. In *State ex rel. Gilbert v. Dilley*,[295] a taxpayer brought suit to enjoin a local school board from allowing a schoolhouse to be used as a place of religious worship.[296] The taxpayer alleged that the school board had allowed a religious group to use the schoolhouse for religious meetings and that this was unconstitutional under the Religious Freedom Provision because it both converted a public building into a place of public worship and compelled him to support a religious faith.[297]

The Court addressed the claims separately. First, it held that the school house had not been converted into a place of public worship because the religious meetings took place less than four times a year and never interfered with the school day.[298] Next, it held that the taxpayer had not been compelled to support the religious meetings because he did not even live in the school district and could not articulate how much, if any, of his tax dollars had been used for those meetings.[299] The Court noted, however, that a different fact pattern could lead to the application of the Religious Freedom Provision:

> If the [taxpayer] had shown that the schoolhouse had been used for religious meetings to such an extent as to make it a place of worship, or that [he] had been compelled to pay anything for the erection, the support, or the repairs of the building for that purpose, we might hold that [he was] entitled to the relief prayed for.[300]

Interestingly, the opinion doesn't give any clues as to what religious group was using the schoolhouse or what sort of activities were going on during the worship services. A year after *Dilley* was decided, the Legislature passed a law allowing schoolhouses to be designated as social centers for religious, educational, social, political, and fraternal purposes.[301] After *Dilley*, the Court twice managed to avoid ruling on the merits of anti-establishment challenges.[302]

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295. 95 Neb. 527, 145 N.W. 999 (1914).
296. *See id.* at 528, 145 N.W. at 999.
297. *See id.*
298. *See id.* at 529, 145 N.W. at 999.
299. *See id.* at 531, 145 N.W. at 1000.
300. *Id.*
301. *See* Zabel, *supra* n. 4, at 116.
302. *See Skag-Way Dept. Stores, Inc. v. City of Omaha*, 179 Neb. 707, 140 N.W.2d 28 (1966) (challenge to Sunday closing law); and *St. v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000) (challenge to trial judge's practice of holding *ex parte* prayer session with jurors). *Bjorklund* implies, but does not clearly hold, that the same rules for standing under the Federal Establishment

As we have seen, the Nebraska Supreme Court simply has not decided very many cases under the anti-establishment language of the Religious Freedom Provision. If all of the cases are still valid, two principles can be discerned. First, *Freeman* tells us that the Provision can invalidate even conduct that was commonplace at the time the Nebraska Constitution was ratified, and that the language should be construed as a rigorous prohibition on government attempts to further religion. As the Court stated, "The duty of the state with respect to religion—its whole duty—is 'to protect every religious denomination in the peaceable enjoyment of its own mode of public worship.'"[303] Second, *Dilley* tells us that occasional uses of state property for religious purposes does not transform that property into a "place of worship," and that taxpayers must articulate how their tax money has been used to further a religious purpose before they will be able to succeed on a claim that they have been compelled to support a religious faith.

VII. THE NO SECTARIAN AID PROVISION

Since incorporation, the Establishment Clause of the United States Constitution has often been interpreted by the United States Supreme Court to prohibit certain forms of religious activity in the public schools.[304] However, as rivalries between religious groups were ongoing at the time of the formation of many Western state constitutions, many constitutional conventions at the time included a *specific* prohibition on sectarian activity in public schools.[305] In terms of religion, "[t]he single most significant difference between state and federal texts is the common state ban on financial aid to sectarian institutions and schools."[306]

Clause apply under the Nebraska Religious Freedom Provision.

303. *St. ex rel. Freeman v. Scheve*, 65 Neb. 877, 879, 93 N.W. 169, 170 (1903).

304. *See e.g. Doe v. Santa Fe Indep. Sch. Dist.*, 530 U.S. 290 (2000) (prayers); *Stone v. Graham*, 449 U.S. 39 (1980) (Ten Commandments displays); and *Abington v. Schempp*, 374 U.S. 203 (1963) (Bible readings).

305. *See* Friesen, *supra* n. 11, § 4-1(b) ("clauses that placed strict limits on funding and prohibitions on 'preference' to any one creed often reflected a desire to forestall political division and mistrust among the adherents of different faiths").

306. *Id.* § 4-2. It should be noted that these provisions, so-called "Blaine Amendments," have come under heavy fire recently for allegedly discriminating against religious schools. It's not clear whether the Nebraska No Sectarian Aid Clause is a Blaine Amendment since it prohibits aid to *all* nonpublic schools (both secular and religious), but at least one commentator includes the Nebraska provision on what he calls a "relatively expansive list" of Blaine Amendments. *See* Toby J. Heytens, *Note, School Choice and State Constitutions*, 86 Va. L. Rev. 117, 123 n. 32 (2000). *See generally* Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Policy 657 (1998).

The Constitution of Nebraska is no different, and contains a lengthy section regarding state aid to sectarian schools.[307] As we shall see, the Nebraska No Sectarian Aid Provision was once interpreted broadly to prohibit a wide variety of aid to nonpublic schools; however, an apparently minor change to the language of the Provision in the 1970s led to an almost complete turnaround on the subject by the Nebraska Supreme Court, and now the Provision likely does not prohibit any government action not already prohibited by the Establishment Clause of the United States Constitution. This section of the Article discusses the textual evolution of the No Sectarian Aid Provision and its controversial interpretation by the Nebraska Supreme Court.

The earliest approximation of the No Sectarian Aid Provision is found in the secretly drafted Constitution of 1866, which states in part that "no religious sect or sects shall ever have any exclusive right to, or control of, any part of the school funds of this state."[308] Because the language was drafted secretly, we have no way of telling what the intent of its drafters was. Similarly, the prohibition was never challenged in court, and within a decade would be substantially changed.

The Nebraska Constitutional Convention of 1871 was clearly very fearful that religious organizations would find a way to use public money. Many members of the Convention submitted detailed proposals to ensure it would not happen. For example, early in the Convention, a delegate proposed the following addition:

> That neither the General Assembly nor any county, town, or township, school district, or other public corporation shall ever make any appropriation, or pay from any public fund whatever, anything in aid of any church or sectarian purpose or to help support or sustain any school, Academy, Seminary, College, University, or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever, nor shall any grant or donation of land, money, or other personal property, ever be made by the State, or any such public corporation to any church or for and [sic] sectarian purpose.[309]

Similarly, another delegate proposed a resolution:

> WHEREAS: In several states there have been repeated attacks made against the public school system by attempting to divert school money to the use of different religious sects; therefore be it,

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307. *See* Neb. Const. art. VII, § 11.

308. 1866 Neb. Const. art. VII, § 1, repr. in Sheldon, *supra* n. 86, at 128.

309. Sheldon, *supra* n. 1, at 66. This proposal was referred to the Committee on Public Accounts and Expenditures and was not heard from again.

> RESOLVED: That there should be engrafted into our Constitution a clause prohibiting, forever, a division of school funds among different denominations.[310]

What would become Article 11, Section 13 of the 1875 Constitution was first proposed in simple, direct language: "No sectarian instruction shall be allowed in any school or institution supported by the public funds set apart for educational purposes."[311] However, the Convention had passed another provision that stated that all bequests and gifts to the State would be used according to their terms.[312] This led many delegates to fear that if the State accepted a gift from a citizen, it might be forced to use that gift to provide sectarian education.[313] After a lengthy debate, the Convention heard a proposal to add to the end of the first provision: "nor shall the state accept any grant, conveyance, or bequest of moneys, lands, or other property to be used for sectarian purposes."[314] One of the delegates, discussing the sponsor of this proposal, stated

> His objection is that he does not wish to allow the State to receive and disburse moneys for sectarian education and schools. We all agree with him in opposing that, and will support any section that will attain that.[315]

The proposal to add the restriction on disbursing money from gifts and bequests failed at first,[316] but was later adopted by the Convention.[317]

However, some delegates were not satisfied that the provision did enough to prevent public aid from being used to further religious purposes. One delegate attempted to tack to the end of the provision a clause stating that "nor shall any part of the school fund be devoted or appropriated to the support of private schools."[318] One of the supporters of this amendment stated:

> The object of this is to prevent a division of the school fund for every charitable, sectarian or religious purpose. It is to keep the school fund intact and divided only among the schools. It is to prevent the moneys of the State from being divided, taken or appropriated from the treasury to the support of a Lutheran, Presbyterian or any other school that wants to make a levy upon

310. *Id.* at 185. This resolution was also referred to a committee.
311. *Id.* at 255.
312. *See* 1871 Neb. Const. art. VII, § 2, repr. in Sheldon, *supra* n. 86, at 132-133.
313. *See* Sheldon, *supra* n. 1, at 257-264.
314. *See id.* at 338.
315. *Id.* at 266.
316. *See id.* at 266.
317. *See id.* at 338.
318. *Id.*

> the general school fund for the advancement of their sectarian interests. I think it is the policy of the State to keep the money intact, and appropriate entirely for the support of State schools; and no religious institution shall claim any of this fund for the advancement of their peculiar ideas.[319]

However, opponents of the amendment argued that the problem spoken of was already covered in the current proposal. The sponsor of the amendment decided to withdraw it when another delegate proposed to change the first portion of the provision to read: "No sectarian instruction shall be allowed in any school institution supported *wholly or in part* by the public funds set apart for educational purposes[.]"[320] Chief Justice Mason argued against this new amendment, stating:

> "No sectarian institution" etc., and can any one doubt but that you have driven the nail fast and fixed it? I have no objection to the amendment only that it does not look well when construed with the other section of the bill.[321]

The amendment failed at the time,[322] but apparently was adopted later in the Convention because the final draft of the No Sectarian Aid Provision read as follows:

> No sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes; nor shall the state accept any grant, conveyance, or bequest of moneys, land, or other property to be used for sectarian purposes.[323]

Although the entire Constitution of 1871 failed at the polls, the drafters of the successful 1875 Constitution included the No Sectarian Aid Provision without making a single change to its language.[324]

When the 1919-20 Convention began, Bible reading in the public schools was a hot issue.[325] Accordingly, one supporter of Bible reading proposed to add to the No Sectarian Aid Provision an amendment which stated:

> The word "sectarian," as used in this section, is descriptive of the doctrine and practices of any church, denomination or cult,

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319. *Id.*

320. *Id.* at 339 (emphasis added). The italicized portion of the quoted text is what the new amendment would have added to the previous language.

321. *Id.* at 339.

322. *See id.*

323. 1871 Neb. Const. art. VII, § 13, repr. in Sheldon, *supra* n. 86, at 132-133.

324. They did move the Provision slightly. *See* 1875 Neb. Const. art VII, § 11, repr. in Sheldon, *supra* n. 86, at 133.

325. *See supra* pp. 121-122.

> specific or comprehensive, but it is not descriptive of the belief in one self-existant [sic] and self-conscious God—the essential basis of all religion—nor of natural religion nor of social ethics.[326]

This proposal was indefinitely postponed in committee,[327] and several other attempts to allow Bible reading were also defeated.[328]

The Convention also heard proposals to tighten the language of the No Sectarian Aid Provision to make it even harder for public money to be used for the support of religious schools. One proposal would have added to the end of the Provision a lengthy paragraph on the subject:

> Neither the state legislature, nor any county, city, or other public corporation shall ever make any appropriation from any public fund, or grant any public land in aid of any sectarian or denominational school or college, or any educational institution which is not *under the exclusive control of the state*; nor shall any religious test of religious qualification ever be required either for teacher or student, as a requirement for admission to or continuance in any public school or educational institution supported in whole or in part by public taxation.[329]

This proposal passed by a count of seventy-five to zero on its second reading, and was referred to the Committee on Correlation and Comparison for grammatical tinkering before it would come up for its third and final vote. However, the Committee angered some delegates by changing "under the exclusive control of the state" to "exclusively owned and controlled by the state."[330] The Committee believed it was simply "expressing the [Convention's] intent and . . . improv[ing] the grammatical construction"[331] of the provision, but delegate Fred Nye believed that the change was substantive and should not have been made by the Committee.[332] This caused some discussion over whether it should be permissible for the state to grant aid to a school *owned* by a private organization, so long as the school was *exclusively controlled* by the State. The following debate between delegates C. Petrus Peterson and Fred Nye illustrate the conflict:

> PETERSON: That is to say, you are in favor of permitting the state to grant aid to a privately owned institution under certain

326. Barnard, *supra* n. 133, at 68.
327. *See id.* at LX.
328. *See supra* pp. 121-122.
329. Barnard, *supra* n. 135, at 1457-1458 (emphasis added).
330. *Id.* at 2612.
331. *Id.* at 2629.
332. *See id.* at 2629-2630.

> conditions?
>
> NYE: Yes.
>
> PETERSON: Will that be true regardless of whether it is a private institution otherwise denominational in its character?
>
> NYE: It would make no difference if the state has exclusive control of the institution; there might be times when the state would need the assistance of private institutions in respect to certain matters.[333]

Peterson wasn't satisfied with Nye's response, however. A strict proponent of separating church and state, he answered Nye in a passage that would be quoted by the Nebraska Supreme Court as late as the 1970s:[334]

> As far as I am personally concerned, I desire to have the Constitution prohibit any state aid under guise to any educational institution other than the public school. It is not a difficult matter, if the Legislature sees fit to find an excuse in the interests of general welfare, to make donations under the guise of the military training or normal training or what not, in a private institution. I have no hostility to those institutions, but it will invariably bring on the kind of war fare [sic] that this state should steer clear from, if you mingle the state and church even to that extent.[335]

Nye responded that the amendment, as worded, would cut off public schools from receiving funding because they are owned by school districts, not the state.[336] Peterson offered to change the provision so that it prohibited state money to schools not exclusively owned and controlled by the state "or governmental subdivisions thereof."[337] He then stated that "I want to vote squarely on the proposition of whether this Convention wants to leave the door open to set up denominational schools[,]"[338] and the entire proposal, as amended, passed by a vote of ninety-four to zero.[339] In its "Address to the People," the Convention stated that the purpose of its change was "to make more certain the intent of the old section."[340]

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333. *Id.* at 2660.
334. *See St. ex rel. Rogers v. Swanson*, 192 Neb. 125, 128, 219 N.W.2d 726, 729 (1974); and *Gaffney v. St. Dept. of Educ.*, 192 Neb. 358, 363, 220 N.W.2d 550, 553-554 (1974).
335. Barnard, *supra* n. 135, at 2661.
336. *See id.* at 2661.
337. *Id.* at 2662.
338. *Id.*
339. *See id.* at 2736.
340. *Id.* at 2847.

The first major test of the No Sectarian Aid Provision came in 1932, when a school district sued the State, arguing that it was entitled to a share of Nebraska's public school funds.[341] The State defended on the ground that although the plaintiff was a public school district, it was actually conducting a parochial school on the grounds and therefore. distributing state money to it would violate the No Sectarian Aid Provision.[342] The State was able to amass a wealth of evidence to support its claim by proving that the plaintiff school district did not even own a schoolhouse, but instead rented rooms from the St. Boniface Catholic Church.[343] The State demonstrated that the schoolhouse was labeled "St. Boniface School," displayed a cross on its roof, and that the pupils were forced to say prayers, recite the catechism, and attend mass in the school's chapel.[344] Further, all of the teachers were ordained nuns and wore their religious garb while they taught.[345]

In many ways, this was a paradigmatic example of what the No Sectarian Aid Provision was intended to prevent, and the Nebraska Supreme Court had little difficulty in holding that the State could not distribute funds to the school. After reciting the evidence, the Court stated "[t]he word 'sectarian,' as used in the Constitution, obviously applies to the Catholic church without any distinction between the original church and later denominations,"[346] and ruled against the school district without much further discussion.

The practice in Nebraska over the next several decades was to read the No Sectarian Aid Provision strictly. In many cases, school districts sought opinions from the Nebraska Attorney General's office in order to avoid litigation. For example, the Attorney General issued opinions stating that it would be unlawful for a public school district to purchase textbooks for pupils attending private schools[347] and that public schools could not transport children to private or parochial schools, even if they were reimbursed.[348]

The Nebraska Supreme Court would not face another direct challenge under the No Sectarian Aid Provision until 1972. In *School District of Hartington v. Nebraska State Board of Education*,[349] the Court was faced with a somewhat familiar issue. The Hartington School

341. *See St. ex rel. Public Sch. Dist. No. 6 v. Taylor*, 122 Neb. 454, 240 N.W. 573 (1932).
342. *See id.* at 455, 240 N.W. at 573.
343. *See id.* at 456, 240 N.W. at 574.
344. *See id.* at 456-457, 240 N.W. at 574.
345. *See id.* at 457, 240 N.W. at 574.
346. *Id.* at 458, 240 N.W. at 574.
347. *See* 1936 Neb. Atty. Gen. Annual Rpt. 189 cited in Zabel, *supra* n. 4.
348. *See* 1954 Neb. Atty. Gen. Annual Rpt. 262 cited in Zabel, *id.*
349. 188 Neb. 1, 195 N.W.2d 161 (1972).

District brought suit against the State Board of Education, alleging that it was entitled to a portion of state-controlled federal funding to provide special education services for both public and non-public students.[350] The Board of Education asserted that it could not distribute the money because the school district leased space with the Cedar Catholic High School for the special education classes and that therefore giving the school district money would violate the No Sectarian Aid Provision.[351] The Court found for the school district, noting that Hartington "would have full control over the classrooms and the educational program; and that no objects, pictures, or other articles having a religious meaning or connotation would be in the classrooms."[352] Importantly, the majority agreed with the United States Supreme Court's view that there is "a distinction between aid provided to parochial school students or their parents and aid provided to the school itself."[353]

The decision was a contentious one, as there were several concurrences, dissents, and responses to concurrences. Chief Justice White issued a stinging dissent, stating that the plain text of the No Sectarian Aid Provision made it clear that the practice would be unconstitutional:

> I do not think it is an over-simplification to simply state that the answer to our problem in this case lies in the clear, unequivocal, unambiguous, and forceful language of our state Constitution . . . . These words in our Constitution say what they mean and they mean what they say. They do not draw any distinction between sectarian or secular instruction, they do not permit any shadowy distinctions as to type of instruction, personnel of teachers, or any of the other distinctions and principles sought to be applied in the numerous cases under the First Amendment to the United States Constitution.[354]

The same year that *Hartington* was decided, the No Sectarian Aid Clause was amended with a provision that allowed the State to disburse Federal grants according to their terms, even if the grants were to be used for non-public or sectarian schools.[355] The 1970 Constitutional Revision Commission explained the amendment by saying that:

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350. *See id.*

351. *See id* at 2, 195 N.W.2d at 163.

352. *Id.* at 2, 195 N.W.2d at 162.

353. *See id.* at 4, 195 N.W.2d at 164. This controversial holding is central to the current debate over the constitutionality of school vouchers.

354. *Id.* at 8, 195 N.W.2d at 166 (White, C.J., dissenting).

355. The measure passed by only 3/10 of one percent. *See Clerk of the Legislature*, *supra* n. 40, at 266.

> The Commission decided . . . that they should permit those Federal grants to be used as the terms of the Federal grant dictated, with the proviso, however that state money could not be added to the Federal money. Therefore, if parochial schools want the Federal money they must meet any matching money conditions with money other than state money.[356]

In addition, the Commission proposed, and the voters adopted, a slight change to the language of the provision, substituting "to" in place of "in aid of[.]" This apparently insignificant change would have major effects on the No Sectarian Aid Provision jurisprudence of the Nebraska Supreme Court, but not for another decade.[357]

In the meanwhile, just two years after *Hartington*, Chief Justice White was able to persuade a majority of the Court to support his position in another No Sectarian Aid Provision case. In *State ex rel. Rogers v. Swanson*,[358] the Nebraska Legislature had passed a statute

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356. *Report of the Nebraska Constitutional Revision Commission* 84 (1970). *See* Stanley M. Talcott, *Comment, Amending the Nebraska Constitution in the 1971 Legislature*, 50 Neb. L. Rev. 676, 686 (1971) stating that amendment would:

> permit the legislature to distribute federal grants in accordance with the terms of those grants. The current section eleven of Article VII prohibits acceptance to be used for sectarian purposes. In view of present federal programs designed to provide some financial aid to nonpublic education, removal of this limitation would be desirable. (footnote omitted).

357. *See infra* pp. 161-162. The only other change to the actual text took place in 1976 and allowed the Legislature to provide nonsectarian services for handicapped persons through the use of non-public educational institutions; voters at the same election rejected a proposal to allow the Legislature to "Provide loans or grants to students attending non-public post high school educational institutions as long as such financial aid is expressly limited to nonsectarian purposes." *See Cunningham v. Exon*, 207 Neb. 513, 518, 300 N.W.2d 6, 9 (1980).

After these various amendments, the current No Sectarian Aid Provision reads as follows:

> Notwithstanding any other provision in the Constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof: *Provided*, that the Legislature may provide that the state or any political subdivision thereof may contract with institutions not wholly owned or controlled by the state or any political subdivision to provide for educational or other services for the benefit of children under the age of twenty-one years who are handicapped, as that term is from time to time defined by the Legislature, if such services are nonsectarian in nature.
>
> All public schools shall be free of sectarian instruction.
>
> The state shall not accept money or property to be used for sectarian purposes; *Provided*, that the Legislature may provide that the state may receive money from the federal government and distribute it in accordance with the terms of any such federal grants, but no public funds of the state, any political subdivision, or any public corporation may be added thereto.
>
> A religious test or qualification shall not be required of any teacher or student for admission or continuance in any school or institution supported in whole or in part by public funds or taxation.

Neb. Const. art. VII, § 11.

358. 192 Neb. 125, 219 N.W.2d 726 (1974).

providing for public tuition assistance to students attending private colleges.[359] The Court struck the statute down by a five to two vote and directly contradicted a key element of *Hartington* by stating:

> the Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly. Here the grant is not directly to a private school but rather to a student, but it must be used for tuition at a private school.[360]

The Court then buttressed its statement by saying:

> [d]irect allowance of such tuition funds to the students as distinguished from their parents is immaterial. The same factors are present. It is a patent attempt to sanction by indirection that which the Constitution forbids.[361]

The majority also thoroughly discussed the Establishment Clause and held that the challenged statute was invalid under it.[362]

The dissenting opinion of Justice Clinton (joined by Justice McCown) would lay the seeds for a future, and radically different, No Sectarian Aid Provision jurisprudence:

> If, of course, the plan which the statute authorizes is not "in aid of" then the First Amendment issue is effectively disposed of as is the [No Sectarian Aid Provision] question. . . . . The evidence shows that the cost of educating a student in each of the colleges in question exceeds the tuition charge by a substantial amount. The tuition grant which an eligible student will receive, together with the amount paid by him from his own funds or sources, does not in any case equal the cost to the institution of educating the student. The institution gets no more than it would in any event. *It is not aided in the constitutional sense.*[363]

In the same term that *Rogers* was decided, the Court struck down another statute under the No Sectarian Aid Provision. In *Gaffney v. State Department of Education*,[364] the Court held invalid, by the same five to two margin as in *Rogers*, a legislative program that would have provided funds to public school districts to purchase textbooks for private and parochial school students.[365] The majority opinion by Chief Justice White echoed his dissent in *Hartington*:

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359. *See id.* at 127, 219 N.W.2d at 728-729.
360. *Id.* at 129, 219 N.W.2d at 730.
361. *Id.* at 136, 219 N.W.2d at 733.
362. *See id.* at 139, 219 N.W.2d at 735.
363. *Id.* at 148-149, 219 N.W.2d at 739-740 (Clinton, J., dissenting) (emphasis added).
364. 192 Neb. 358, 220 N.W.2d 550 (1974).
365. *See id.* at 359, 220 N.W.2d at 552.

> It seems to us that to state the constitutional provision is to answer our question. By its terms the provisions furnish aid (in the form of textbooks) to private sectarian schools. By its terms the cost is paid by a public appropriation of tax funds. By its terms textbooks must be used and are given in aid of students in educational institutions that are not exclusively owned and controlled by the state or a governmental subdivision thereof.[366]

The majority opinion also included the strongest statement by the Nebraska Supreme Court (before or since) that the Nebraska Constitution holds independent force from the United States Constitution:

> The question, if we can call it that, here presented, is fundamentally different than the one presented by state action involving an examination of the standards set up by the United States Supreme Court under the Establishment Clause .... It is true the question under the Constitution of Nebraska and the Constitution of the United States both relate to the overall principle of separation of church and state. But, by its terms, the Constitution of Nebraska does not permit of an examination of secular or sectarian purposes, a determination of primary or incidental benefit, or a balancing of the issues involved in state-church entanglement and political divisiveness. *There is no ambiguity in our constitutional provision. The impact of the language and its purpose can be understood by any literate person.* The standards are not secular purpose, primary aid, or political divisiveness .... They are whether there is a public appropriation, whether the grant is in aid of any sectarian or denominational school ... and, perhaps, more importantly, the meaning of these two terms, if they would require any further definition, *is fastened down unequivocally, fundamentally, and permanently* by the statement that any educational institution which receives such aid must be exclusively owned and controlled by the state or a governmental subdivision thereof.[367]

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366. *Id.* at 362, 220 N.W.2d at 553.

367. *Id.* (emphasis added). Chief Justice White further stated:

> [S]urely no detached examination of our constitutional provision, its history, and declared purpose can come to any other conclusion than that the State of Nebraska attempted to avoid even opening the door to an involvement in the political, legislative, and judicial disputes involved in determining hairline and illusory distinctions of degree. The Constitution neither commands nor permits any financial aid by way of public appropriation. It does not limit it, it says that there shall be no aid at all.

Id. at 364, 220 N.W.2d at 554.

Justices Clinton and McCown again dissented on the ground that the institution received no benefit from the loan of textbooks,[368] but it appeared that Chief Justice White's position had been permanently vindicated by a clear majority of the Nebraska Supreme Court.

It would be seven years before the Court would again hear a challenge under the No Sectarian Aid Provision, and by then attitudes and court membership had changed. Additionally, the voters had approved a change in the Provision, substituting "Appropriation of public funds shall not be made *to* any school or institution of learning not owned or exclusively controlled by the state" in place of a prohibition on disbursement of public funds "*in aid of*" non-public schools.[369] This change from "in aid of" to "to" would be used by the Court (in the words of one commentator) to turn its previous jurisprudence "upside down[.]"[370]

In the 1981 case of *Lenstrom v. Thone*,[371] the Court examined the constitutionality of a statute rather similar to the one they struck down in *Rogers*. The "Scholarship Award Program" provided state financial aid to Nebraska undergraduates, regardless of whether they were attending public or private schools.[372] The Nebraska Attorney General's Office, relying on *Rogers*, issued an opinion that the Act was unconstitutional and advised the agency charged with the program not to disburse any state funds for students attending non-public colleges.[373] However, the Court unanimously held, in an opinion written by Justice Clinton, that the change in 1972 from "in aid of" to "to" merited a different outcome. The Court stated that since "the literal language of the amendment is to prohibit appropriations made 'to' a nonpublic school[,]"[374] the statute was constitutional because the money was disbursed to the students and not directly to the institution.[375]

The change from "in aid of" to "to" was an important one for the Court, and became the crux of several subsequent decisions. In the years following *Lenstrom*, the Court allowed public school districts to transport students to private and parochial schools,[376] public grants to be

368. *See id.* at 375, 220 N.W.2d at 559 ("It is clear that the textbook loan act does not relieve the private school of any of its obligations. It receives no aid or benefit and obtains no more dollars than it would otherwise have.").
369. *Compare* 1920 Neb. Const. art. VII, § 11 *with* Neb. Const. art. VII, § 11.
370. Shugrue, *supra* n. 4, at 897.
371. 209 Neb. 783, 311 N.W.2d 884 (1981).
372. *See id.* at 784, 311 N.W.2d at 886.
373. *See id.* at 785, 311 N.W.2d at 886.
374. *Id.* at 788, 311 N.W.2d at 888.
375. *See id.* at 791, 311 N.W.2d at 889.
376. *See St. ex rel. Bouc v. Sch. Dist. of Lincoln*, 211 Neb. 731, 737, 320 N.W.2d 472, 476

paid to non-public schools for research purposes,[377] public schools to purchase and loan textbooks to private school students,[378] and public funds to be distributed to non-public schools for educating state wards.[379] Indeed, since *Lenstrom*, the Court has not held any practice invalid under the No Sectarian Aid Provision.

These are difficult issues, ones that society and judges have struggled with for decades—one can usually see good arguments on both sides. The Nebraska Supreme Court's holdings on these issues are not necessarily wrong, but the problem many commentators have with the Court's approach is that it has pinned all of these recent decisions on the change from "in aid of" to "to." This seems to be a somewhat absurd rationale for several reasons. First, the Constitutional Convention of 1919-20 used "in aid of" and "to" synonymously on several occasions.[380] Indeed, when the amended No Sectarian Aid Provision was submitted to the voters, even though it still included the "in aid of" language, its subject matter was labeled on the ballot as "Prohibits state aid *to* sectarian institutions."[381] Second, the Nebraska Supreme Court itself used "in aid of" interchangeably with "to" on several occasions.[382] Third, the 1970 Nebraska Constitutional Revision Commission, which proposed the change from "in aid of" to "to," never intended the change to be substantive: it stated that it was "confirm[ing] the *present prohibition* against the state using public funds for sectarian purposes or appropriating public funds to institutions not exclusively owned or controlled by the state."[383] Fourth, and perhaps most importantly, when the Nebraska Legislature placed the change on the

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(1982) ("any benefit that may inure to the nonprofit private institution is merely incidental and certainly cannot be deemed an 'appropriation . . . to' that institution. Under *Lenstrom* such an incidental benefit is insufficient to render [the act] violative of article VII, § 11").

377. *See St. ex rel. Creighton U. v. Smith*, 217 Neb. 682, 690, 353 N.W.2d 267, 272 (1984) (stating that a "possible indirect benefit does not transform payments for contracted services into an appropriation of public funds proscribed by article VII, § 11").

378. *See Cunningham v. Lutjeharms*, 231 Neb. 756, 759-760, 437 N.W.2d 806, 810 (1989) (citing *Lenstrom* in support of constitutionality).

379. *See Father Flanagan's Boys Home v. Dept. of Soc. Serv.*, 255 Neb. 303, 313-314, 583 N.W.2d 774, 781 (1998) (citing *Lenstrom* in support of constitutionality).

380. *See* Barnard, *supra* n. 135, at 2629, 2677, 2678, 2680.

381. *See id.* at 2757 (emphasis added).

382. *See e.g Gaffney v. St. Dept. of Educ.*, 192 Neb. 358, 362, 220 N.W.2d 550, 553 (1974).

383. *Report of the Nebraska Constitutional Convention* 84 (1970) (emphasis added). *Compare* Miewald & Longo, *supra* n. 12, at 127 ("In its rewriting of the section, the Constitutional Revision Commission appeared to be sure it was not changing the essence of the prohibition against state aid to non-public schools. All it did was to suggest the word 'to,' replace 'in aid of'") *with* Shugrue, *supra* n. 4, at 897 n. 104 ("Whether the intent of the Constitutional Revision Commission of 1970 was to allow wholesale changes to previous bans on aid to non-public schools is not clear from the Commission's formal report.").

ballot, it stated:

> The adoption of this proposed amendment would retain the above-mentioned prohibitions against sectarian instruction in public schools, the appropriation of public funds to any non-public school, and the requirement [sic] of any religious tests of qualifications for public school teachers or pupils, although these provisions would be re-worded somewhat. *The meanings would remain the same.*[384]

As the Nebraska Supreme Court has already struck down proposed constitutional amendments because they did not fairly state the effect of the change,[385] it seems almost dishonest to assert that the change from "in aid of" to "to," without any warning to the voters, could have such dramatic effects on the No Sectarian Aid Provision.

Under either standard, however, the question in the end always becomes how *directly* or *indirectly* is public money being distributed for non-public purposes. For example, almost everyone would agree that the State could provide money to provide police and fire protection to parochial schools, even though in a sense this "aids" the school by providing them services they would otherwise have to purchase separately; on the other hand, many would vehemently attack any state program that directly distributed money to a school. The blurry cases are the hard ones to decide, and the real issue is whether the school is receiving public money directly or indirectly, and not whether the money is "in aid of" or "to" the school. These are difficult issues to untangle, and may ultimately be decided by nothing more than the policy preferences of any given court. In any event, although the Nebraska Supreme Court's holdings on these issues may be correct, its reasoning is clearly suspect.

VIII. CONCLUSION

Analyzing the independent meaning of the religion provisions of the Nebraska Constitution is not an easy task, as the Nebraska Supreme Court has not decided many of the "classic" issues that the United States Supreme Court has faced. However, with the cases and information that are available, a few tentative conclusions can be drawn. In terms of freedom of religion, the Nebraska Supreme Court has a great opportunity before it to clearly set forth which test is applicable under the Religious Freedom Provision; the Court could very well adopt a

384. *Nebraska Legislative Council, A Summary of Constitutional Amendments Proposed by the Nebraska Legislature* 28 (1972) (emphasis added).

385. *See Cunningham v. Exon*, 207 Neb. 513, 300 N.W.2d 6 (1980).

compelling interest test, and thus provide Nebraskans with greater protection than the Free Exercise Clause would. However, it could very well continue to tie Nebraska to the Federal standard as it has in so many other areas. The anti-establishment language of the Religious Freedom Clause has not been tested for almost a century: at the time it was given a strong separationist reading, and perhaps only time will tell if the Court continues to read it the same way. In contrast to the other provisions, the No Sectarian Aid Clause has received plenty of attention from the Nebraska Supreme Court and decisions in the last two decades have rendered it a virtual nullity.

This Article has attempted to draw the broad outlines of the Nebraska Constitution's religious freedom provisions. Several important lines of research must be explored before a well-developed theory of the provisions' meanings can be formulated. One important line of research is to compare the Nebraska Constitution to the Illinois Constitution on which it was based, and determine how their respective religion provisions have been interpreted by each state's highest courts. Similarly, a lengthy but important project would be to compare the interpretation of the Nebraska Supreme Court and the United States Supreme Court on those few issues they have faced in common. As an early commentator on the Nebraska Constitution said, "comparison may be most useful—it is the method of all true science and is productive of true knowledge and real advance."[386] Original research into the religious attitudes and lifestyles of early Nebraskans would be very useful, as would a thorough linguistic analysis of the language of the provisions.

Practitioners in Nebraska are put in a difficult position. As Justice Brennan said, "plainly it would be most unwise these days not also to raise the state constitutional questions."[387] At the same time, however, a hasty challenge based upon the Nebraska religion provisions could lead to a permanent holding by the Court that the provisions simply have the same meaning as the Federal Constitution. Practitioners must not simply throw in a paragraph about the state constitution and expect it to be successful: as the Supreme Court of North Dakota said, "Parties mounting constitutional challenges should bring up the heavy artillery or forego the attack entirely."[388] A viable state law claim needs to rely upon some of the factors the Washington Supreme Court set forth in *Gunwall*, such as textual differences, structural differences, and unique

386. William R. Riddell, *The Constitution of Nebraska, With an Occasional Comparison*, 5 Neb. L. Bull. 147, 147 (1925).

387. Brennan, *supra* n. 11, at 502.

388. *Jarvis v. Jarvis*, 584 N.W.2d 84, 92 (1998).

state constitutional history.[389] Resources are available to help practitioners successfully mount state law claims,[390] and these should be used extensively.

Through all of this discussion of "strict scrutiny" and "neutral and general applicability" and "in aid of" and "to," it is also important to remember the insight of the legal realists: in many cases, the language used in a statute, constitution, or judicially-created test is not as important as the judges who administer them.[391] In other words, "Is it not so much the form of a constitution as the spirit in which government is carried on, not so much the law as the men who administer it, which count?"[392]

This Article began with a discussion between Oliver Mason and Experience Estabrook over religious freedom in Nebraska. In a large part, Estabrook's view that an individual's religious beliefs and practices should be protected from State interference has prevailed. It seems fitting then to conclude with his words as well:

> Can anybody contemplate the possibility that this convention may adjourn without leaving somewhere upon the pages of the constitution we submit, the evidence of a recognition of the progress that all the world around us is making; or shall we content ourselves with making up this instrument simply out of the worn-out cobwebs of the past? Sir, there is a grand opportunity before us, for us to make one mark higher up than any state which has ever gone before[.][393]

389. The *Gunwall* factors are quoted in their entirety *supra* p. 107.

390. *See e.g.* Friesen, *supra* n. 11, § 1-8 (discussing "How to Raise, Brief, and Argue State Constitutional Rights").

391. *See* Karl Llewellyn, *The Bramble Bush* 2 (Oceana Publications, Inc. ed., 1981) ("We have discovered that rules *alone*, mere forms of words, are worthless. We have learned that the concrete instance, the heaping up of concrete instances, the present, vital memory of a multitude of concrete instances, is necessary to make any general proposition, be it rule of law, or any other, *mean* anything at all"). In the Free Exercise realm, for example, although many scholars yearn for a return to "strict scrutiny" after *Smith*, "[c]ommentators generally share the view that strict scrutiny pre-*Smith* was anything but strict." Crane, *supra* n. 7, at 252.

392. Riddell, *supra* n. 386, at 160.

393. Watkins, *supra* n. 108, at 81.