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Article I, Section 5: A Remnant of Prerevolutionary Oregon Constitutional Law

Despite an occasional glimmer of independent state constitutional jurisprudence in Oregon before January 1977, it was not until Hans Linde was appointed to the Oregon Supreme Court in that month that the court began in earnest to develop a body of state constitutional law independent of federal constitutional interpretation.[1] As a result of this "Oregon Constitutional Revolution . . . [t]he primacy of our state's constitution, so long neglected, [became] accepted by all."[2]

Twenty-one years after Justice Gillette made that observation, however, the revolution has still yet to reach one of the most important sections of the Oregon Bill of Rights: the first clause of article I, section 5, which provides that "[n]o money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution."[3]

On December 16, 1976, eighteen days before Justice Linde joined the Oregon Supreme Court, the court issued its decision in *Eugene Sand & Gravel, Inc. v. City of Eugene*.[4] In *Eugene Sand & Gravel*, the court held, without analysis and without explanation, that the three-part test adopted by the U.S. Supreme

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[1] *See* State v. Kennedy, 295 Or. 260, 262, 666 P.2d 1316, 1318 (1983) (citing eight cases, all decided in 1982 or 1983, illustrating "the rule . . . that all questions of state law be considered and disposed of" before reaching a federal constitutional claim).

[2] State v. Owens, 302 Or. 196, 208, 729 P.2d 524, 531 (1986) (Gillette, J., concurring).

[3] OR. CONST. art. I, § 5.

[4] 276 Or. 1007, 558 P.2d 338 (1976), *cert. denied*, 434 U.S. 876 (1977).

Court in *Lemon v. Kurtzman*[5] for use in evaluating claims under the Establishment Clause of the First Amendment is the "appropriate" test to apply "in determining whether a law is constitutional" under article I, sections 2, 3, and 5 of the Oregon Constitution.[6]

Even in the context of state constitutional jurisprudence as it stood in 1976, the opinion in *Eugene Sand & Gravel* was curious. Long before the state constitutional revolution of the 1980s, the court had construed article I, section 5 independently of its federal analogue. In *Dickman v. School District No. 62C*,[7] the court considered a challenge to a state statute that authorized public school districts to provide textbooks without charge to pupils in parochial schools. The court held that the statute violated article I, section 5, and that it was "unnecessary, therefore, to consider plaintiffs' contention that the statute violates also the First or Fourteenth Amendments to the United States Constitution."[8]

In response to the dissenting justice's assertion that the court should "apply," "embrace[ ]," and "adhere to" a U.S. Supreme Court decision construing the Establishment Clause of the First Amendment,[9] the court in *Dickman* stressed that it had a "duty" to decide the state constitutional issue without being bound by federal court decisions:

> A decision of the Supreme Court of the United States holding that certain legislation is not in violation of the federal constitution is not an adjudication of the constitutionality of the legislation under a state constitution. In such a case, it is not only within the power of the state courts, *it is their duty* to decide whether the state constitution has been violated. Our views on the policy or interpretation of a particular constitutional provision do not always coincide with those of the Supreme Court of the United States.[10]

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[5] 403 U.S. 602, 612-13 (1971). The *Lemon* test has been criticized by several U.S. Supreme Court Justices. *See* McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2750-51 (2005) (Scalia, J., dissenting) (citing cases). However, it has never been overruled; indeed, the "secular purpose" prong of the test was the tool used by the majority in *McCreary* to conclude that certain Ten Commandments displays on public property violate the Establishment Clause. *Id.* at 2732-37 (majority opinion) (analyzing and applying the "purpose" prong); *id.* at 2745 (affirming injunction against Ten Commandments display because of its "predominantly religious purpose").

[6] *Eugene Sand & Gravel*, 276 Or. at 1012-13, 558 P.2d at 342.

[7] 232 Or. 238, 366 P.2d 533 (1961), *cert. denied*, 371 U.S. 823 (1962).

[8] *Id.* at 246, 366 P.2d at 537.

[9] *Id.* at 261, 266, 366 P.2d at 545, 547 (Rossman, J., dissenting).

[10] *Id.* at 260-61, 366 P.2d at 545 (majority opinion) (stating that the trial court was not bound by *Everson v. Board of Education*, 330 U.S. 1 (1947)) (emphasis added).

Despite the *Dickman* court's declaration of independence with respect to state constitutional adjudication, and despite the fact that *Dickman* construed the same section of the Oregon Constitution that was at issue in *Eugene Sand & Gravel*, the court in *Eugene Sand & Gravel* did not even cite *Dickman*, let alone explain why it was rejecting the *Dickman* holding that the court had a "duty" to construe the state constitution according to its own terms.

Twenty-one years after Justice Gillette stated that the Oregon constitutional revolution had been "accomplished," the anomaly of the *Eugene Sand & Gravel* opinion is even more glaring. As part of that revolution, the Oregon Supreme Court developed a methodology for deciding the meaning of the 1857 Constitution. In *Priest v. Pearce*, the court stated that in determining the meaning of a constitutional provision, it would examine "[i]ts specific wording, the case law surrounding it, and the historical circumstances that led to its creation."[11] Moreover, in construing a provision of the 1857 Constitution, a court's "focus must be on the intent of the enactors of the provision at issue,"[12] with the goal of "understand[ing] the wording [of the provision] in the light of the way that wording would have been understood and used by those who created the provision."[13]

None of those elements of Oregon constitutional jurisprudence was present in the *Eugene Sand & Gravel* opinion. If a student in any state constitutional law class in an Oregon law school were asked on an exam to describe the methodology that Oregon courts use in interpreting article I, section 5, and if the student were to answer that question by saying, "The Oregon Supreme Court would borrow a test developed by the U.S. Supreme Court for interpreting the Establishment Clause of the First Amendment, rather than inquiring into the specific wording of article I, section 5, or into the intent of its framers," that student would receive an "F" on the exam. Yet that is exactly what the court itself did in *Eugene Sand & Gravel*.

On at least one occasion, the Oregon Supreme Court has de-

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[11] Priest v. Pearce, 314 Or. 411, 415-16, 840 P.2d 65, 67 (1992). The court has frequently applied the *Priest v. Pearce* methodology in subsequent cases, and it has twice said that it "must" do so. Armatta v. Kitzhaber, 327 Or. 250, 256, 959 P.2d 49, 53 (1998); Neher v. Chartier, 319 Or. 417, 422, 879 P.2d 156, 158 (1994).

[12] Stranahan v. Fred Meyer, Inc., 331 Or. 38, 57 n.12, 11 P.3d 228, 239 n.12 (2000).

[13] Smothers v. Gresham Transfer, Inc., 332 Or. 83, 90-91, 23 P.3d 333, 338 (2001) (quoting Vannatta v. Keisling, 324 Or. 514, 530, 931 P.2d 770, 781 (1997)).

clined the opportunity to revisit the *Eugene Sand & Gravel* holding. In *Powell v. Bunn*,[14] the court of appeals held that it was bound by *Eugene Sand & Gravel* to apply the *Lemon* test in a case challenging governmental action as a violation of article I, section 5, noting that the Supreme Court has never overruled *Eugene Sand & Gravel* and "the fact that the Supreme Court is free to revisit its own precedents . . . does not mean that we may do so."[15] The plaintiffs petitioned the Oregon Supreme Court to review the court of appeals decision in *Powell*, but the court denied the petition, over the objection of Justices Durham and Balmer.[16] *Eugene Sand & Gravel* thus remains on the books as an anachronistic vestige of prerevolutionary state constitutional jurisprudence in Oregon.

If and when the court does take the opportunity to reexamine *Eugene Sand & Gravel*, there is no doubt that it will repudiate its application of the *Lemon* test to article I, section 5. In 1985, the court specifically abandoned deference to the U.S. Supreme Court's interpretation of the Free Exercise Clause of the First Amendment when analyzing the analogous sections of Oregon's Bill of Rights, article I, sections 2 and 3. In *Salem College & Academy, Inc. v. Employment Division*,[17] the court rejected the contention that subjecting a private religious school to the Unemployment Compensation Act would violate the school's rights under the First Amendment and under article I, sections 2 and 3. In doing so, the court criticized the court of appeals for failing to address the state constitutional issue separately:

> The Court of Appeals held that the statutory distinction between church-supported and independent religious schools constitutes an establishment of religion forbidden by the First Amendment, and it stated that "[i]n view of our conclusion with respect to the federal Constitution, we need not, and do not, consider the Oregon Constitution." *That approach departed from the judicial responsibility to determine the state's own law before deciding whether the state falls short of federal constitutional standards*.[18]

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[14] 185 Or. App. 334, 59 P.3d 559 (2002), *review denied*, 336 Or. 60, 77 P.3d 635 (2003) (table).

[15] *Id.* at 357, 59 P.3d at 576.

[16] 336 Or. 60, 77 P.3d 635 (2003) (table).

[17] 298 Or. 471, 695 P.2d 25 (1985).

[18] *Id.* at 484, 695 P.2d at 34 (citation omitted) (alteration in original) (emphasis added).

A year later, in *Cooper v. Eugene School District No. 4J*,[19] involving a challenge to the constitutionality of a statute that prohibited public school teachers from wearing religious dress while teaching, the court once more stressed that questions under the religion clauses of the Oregon Constitution must be decided independently of the First Amendment:

> This court sometimes has treated [Oregon's religion clauses] and the First Amendment's ban on laws prohibiting the free exercise of religion as "identical in meaning," but identity of "meaning" or even of text does not imply that the state's laws will not be tested against the state's own constitutional guarantees before reaching the federal constraints imposed by the Fourteenth Amendment, or that verbal formulas developed by the United States Supreme Court in applying the federal text also govern application of the state's comparable clauses. . . . Judicial formulas or "factors" are not themselves the law but aids to analysis that a court from time to time may employ, rephrase, or replace with a better interpretation of their constitutional source.[20]

The court added that it had *already* interpreted the meaning of the guarantees in article I, sections 2 through 7 of the Oregon Constitution "independently [of the U.S. Constitution], sometimes with results contrary to those reached by the United States Supreme Court."[21]

In *Meltebeke v. Bureau of Labor and Industries*,[22] the court again stressed the differences between the guarantees of religious freedom in the Oregon Constitution and in the U.S. Constitution:

> [Article I, Sections 2 and 3] are obviously worded more broadly than the federal First Amendment, and are remarkable in the inclusiveness and adamancy with which rights of conscience are to be protected from governmental interference. From our current vantage point of a society that is religiously diverse and *relatively* unconcerned about that diversity, it is difficult to fully appreciate why Oregon's pioneers approved these broad and adamant protections. However, the history of religious intolerance was fresh in the minds of those who settled Oregon, many of whom themselves represented relatively diverse religious beliefs.[23]

In none of these cases was *Eugene Sand & Gravel* even men-

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[19] 301 Or. 358, 723 P.2d 298 (1986).

[20] *Id.* at 369-70, 723 P.2d at 306-07 (citation and footnote omitted).

[21] *Id.* at 370-71, 723 P.2d at 307 (citing, inter alia, *Salem College* and *Dickman)*.

[22] 322 Or. 132, 903 P.2d 351 (1995).

[23] *Id.* at 146, 903 P.2d at 359.

tioned, let alone distinguished; indeed, the Oregon Supreme Court has never cited *Eugene Sand & Gravel* in any opinion since it was decided in 1976. There is good reason for that omission, for the kind of analysis of the first clause of article I, section 5 that is required by *Priest v. Pearce*[24] leads to a conclusion regarding the meaning and application of that clause very different from the court's conclusion in *Eugene Sand & Gravel*. As noted above, *Priest v. Pearce* requires analysis of the "specific wording" of a constitutional provision, "the case law surrounding it, and the historical circumstances that led to its creation."[25]

Specific Wording. The first seventeen words of article I, section 5 are simple and straightforward: "[n]o money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution."[26] And they are unusually clear. "No money" means "no money"—not a penny, not a sou. "Drawn from the Treasury" refers to the expenditure of public funds—that is, money paid to governmental taxing authorities by taxpayers. "Benefit," when used as a noun, was defined in the leading American dictionary at the time of Oregon's constitutional convention to mean "[a]n act of kindness; a favor conferred" or "[a]dvantage; profit; a word of extensive use, and expressing whatever contributes to promote prosperity and personal happiness, or adds value to property."[27]

As for "religeous" and "theological," both the dictionary and the wording of the Oregon Constitution itself indicate that those terms were understood broadly in 1857. "Religion," according to the 1854 dictionary, "comprehends the belief and worship of pagans and Mohammedans, as well as of Christians."[28] That broad understanding of "religion" is reflected in article I, sections 2 and 3, which acknowledge a "Natural right" on the part of humans, prior to and independent of any social structure, to worship God "according to the dictates of their own consciences," and which bar government from interfering in any way with "the free exercise, and enjoyment of religeous [sic] opinions" or "with the rights of conscience."[29]

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[24] 314 Or. 411, 840 P.2d 65 (1992). *See supra* text accompanying note 11.

[25] *Id.* at 415-16, 840 P.2d at 67.

[26] OR. CONST. art I, § 5.

[27] NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 115 (Chauncey A. Goodrich ed., George and Charles Merriam 1854).

[28] *Id.* at 933.

[29] *See* OR. CONST. art I, §§ 2-3.

That leaves the word "institution." The 1854 dictionary contained these relevant definitions of the word:

> 2. Establishment; that which is appointed, prescribed, or founded by authority, and intended to be permanent. Thus we speak of the institutions of Moses or Lycurgus. We apply the word *institution* to laws, rites, and ceremonies, which are enjoined by authority as permanent rules of conduct or of government.
> 3. An organized society, established either by law or by the authority of individuals, for promoting any object, public or social. . . .
> 4. A system of the elements or rules of any art or science.[30]

Thus, at the time of the creation of article I, section 5 in 1857, the word "institution" was understood to have a very broad meaning, including both organizations and belief systems.

Case Law. Apart from *Eugene Sand & Gravel*, only two decisions of the Oregon Supreme Court contain any significant discussion of article I, section 5. One of those decisions is *Dickman*, in which the court held that article I, section 5 prohibits the State from providing free textbooks to students in a Roman Catholic school.[31] The other is *Lowe v. City of Eugene*,[32] an earlier chapter in the battle over the cross on Skinner's Butte that led ultimately to *Eugene Sand & Gravel*.[33]

The plaintiffs in *Lowe* challenged the maintenance, at taxpayer expense, of a fifty-one-feet-high lighted concrete cross in a city park, asserting that governmental support of the cross constituted both an "establishment of religion" in violation of the First Amendment and an expenditure of "money from the Treasury for the benefit of a religious institution" in violation of article I, section 5.[34] In its first opinion in the case, the Oregon Supreme Court held, on a four-to-three vote, that the City's action in maintaining the cross did not violate the First Amendment or article I, section 5. However, the majority did not question the assumption that was a necessary predicate for the plaintiffs' challenge: namely, that the expenditure of municipal funds to

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[30] WEBSTER, *supra* note 27, at 612.

[31] Dickman v. Sch. Dist. No. 62C, 232 Or. 238, 366 P.2d 533 (1961), *cert. denied*, 371 U.S. 823 (1962).

[32] Lowe v. City of Eugene (*Lowe I*), 254 Or. 518, 451 P.2d 117 (1969).

[33] There was one more chapter after *Eugene Sand & Gravel*. In *Separation of Church and State Committee v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996), the court held that the City's ownership and display of the cross in a public park violated the Establishment Clause. *Id.* at 620.

[34] *See Lowe I*, 254 Or. at 520-21, 451 P.2d at 118-19.

pay for the maintenance of the cross was an expenditure for the benefit of a religious "institution." Rather, the majority concluded that this particular cross was not "religious." The majority stated that "[t]he evidence indicates that to many people the cross . . . carries connotations that are not essentially religious in character and to such people it has primarily secular meanings,"[35] and held that maintenance of the cross was not "a religious activity."[36]

The three dissenting justices used similar terminology, referring to the "display of the lighted cross" as "a religious activity" and "a popular religious display."[37] On rehearing, the original dissenting opinion was adopted as the opinion of the court.[38] On second rehearing, the court made it clear that its decision was "grounded . . . in part upon state as well as federal constitutional concepts."[39] The court held that this particular cross was "a testimonial to a religious faith,"[40] that the expenditure of public funds to maintain it constituted "the use of public funds to support [a] preferred religious institution,"[41] and that "the enlistment of the hand of government to erect the religious emblem . . . offends the [state and federal] constitutions."[42] Further, the court noted that proponents of the cross contended that article I, section 5, "in limiting its expression to a proscription against spending public 'money' on religious institutions, by implication approved of turning over public land to them," and the court squarely rejected that contention as a "mechanistic interpretation of the state constitution."[43]

Thus, the court in *Lowe* recognized that the word "institution" in article I, section 5 must be given a broad meaning, in keeping with the intent of the framers "not . . . to permit the state to sponsor any particular religion."[44] *Lowe* stands for the proposi-

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[35] *Id.* at 528, 451 P.2d at 122.

[36] *Id.* at 529, 451 P.2d at 122.

[37] *Id.* at 532-33, 451 P.2d at 124 (Goodwin, J., dissenting).

[38] Lowe v. City of Eugene (*Lowe II*), 254 Or. 534, 539, 459 P.2d 222, 224 (1969), *cert. denied sub nom.* Eugene Sand & Gravel, Inc. v. Lowe, 397 U.S. 1042 (1970) (rehearing of *Lowe I*).

[39] Lowe v. City of Eugene, 254 Or. 539, 548, 463 P.2d 360, 364 (1969) (denying rehearing of *Lowe II*).

[40] *Id.* at 546, 463 P.2d at 363.

[41] *Id.* at 547, 463 P.2d at 364.

[42] *Id.* at 548, 463 P.2d at 364.

[43] *Id.* at 547-48, 463 P.2d at 364.

[44] *Id.* at 548, 463 P.2d at 364.

tion that taxpayer support of the symbol of a particular religion constitutes "benefit" to a religious "institution," within the meaning of article I, section 5.

Historical Circumstances. Although the Oregon Supreme Court in *Eugene Sand & Gravel* held that it was "appropriate" to use a test borrowed from U.S. Supreme Court cases for interpreting the Establishment Clause of the First Amendment, the court made no inquiry into the historical circumstances out of which article I, section 5 arose in 1857, and the court made no effort to compare those circumstances with the circumstances that prevailed sixty-six years earlier, in 1791, when the First Amendment was adopted. Both the religious landscape and the constitutional landscape of the nation had changed considerably in those sixty-six years.

The last quarter of the eighteenth century was a period of relative religious calm in America; "the rationalism and Deism of the Age of Reason" had left their mark in American religious life, and many people had become

> indifferent or even hostile to religion. Despite the growth of churches through immigration, a situation in which a steadily increasing segment of the population had no religious connections was spreading. . . .
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> . . . [C]hurch life was at a low ebb during the Revolutionary period, and at the opening of the [nineteenth] century less than ten [percent] of the population were church members. . . .[45]

The situation soon changed. Beginning at the end of the eighteenth century, religious interest reawakened across the country.[46] "The first three decades of the nineteenth century were a time of intense religious fervor in America. The Second Great Awakening . . . swept across the land. Camp meetings, revivals, [and] sectarian controversies . . . were all part of the religious commitment."[47] Revivalist fervor was so intense in upstate New York that it became known as the "burned-over" district,[48] and out of that district "a vast swarm of Yankee 'isms' descended on

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[45] WILLISTON WALKER, A HISTORY OF THE CHRISTIAN CHURCH 436, 507 (Cyril C. Richardson et al. eds., rev. ed. 1959).

[46] *Id.*

[47] Stephen Dow Beckham, *Oregon History*, *in* OREGON BLUE BOOK 2005–2006, at 324, 333 (Sec'y of State ed., 2005).

[48] WALKER, *supra* note 45, at 516.

the West like a flight of grasshoppers."[49] The result in Oregon was a period of "ethnic-religious bitterness in the Oregon Country,"[50] marked by conflicts between Jason Lee, the first Methodist missionary in the Oregon Territory, and John McLoughlin, the Chief Factor of the Hudson's Bay Company, which "[left] a lasting impression on politics and society, contributing to strains of anti-Catholicism as well as anti-(Protestant)-clericalism, magnifying ideological distinctions, and affecting the development of the local political culture long after the demise of its American–Protestant and English–Catholic antagonists."[51]

The delegates to the constitutional convention of 1857 were well aware of the diversity of religious belief that existed in the Oregon Country, and of the political divisiveness that had accompanied it. During the first week of the convention, delegate Hector Campbell told the delegates that "[t]he clergy have been very severely and perhaps justly censured by the public journals for the course which they have pursued in reference to political affairs, and engaging in political strife."[52] Later, in the debates over the wording of the religion clauses, Matthew Deady, president of the convention, noted that this country "contains persons of all religious denominations as well as nonbelievers,"[53] while Frederick Waymire stated, "The people of this country were composed of every shade of opinion upon the subject of religion, from the half-crazy religious fanatic to the unbelieving atheist."[54]

This was the setting in which the delegates to Oregon's constitutional convention assembled in Salem in August 1857. The debates during the convention demonstrate that a majority of delegates favored strong constitutional protections for this diversity of belief, and an equally strong constitutional separation of

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[49] SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 518 (1965).

[50] DAVID ALAN JOHNSON, FOUNDING THE FAR WEST: CALIFORNIA, OREGON, AND NEVADA, 1840–1890, at 49 (1992).

[51] *Id.* at 50.

[52] THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, at 113 (Charles Henry Carey ed., 1926) [hereinafter THE OREGON CONSTITUTION AND PROCEEDINGS]. The transactions of the constitutional convention are listed in the official *Journal of the Proceedings*, and also printed in the *Weekly Oregonian* and *Oregon Statesman*. *Id.* at 57. While this Article traces the constitutional debates chronologically, the citations to the convention alternate between the various sources to provide a full picture of the events that transpired.

[53] *Id.* at 300.

[54] *Id.* at 301.

religion and government. During the first week of the convention, for example, Campbell urged the convention to consider employing a chaplain; after making the comment quoted above concerning the criticism that had been leveled at some clergy for their political involvement, he argued:

> But, sir, it seems to me that here is a place, and this is an occasion where [clergy] may exercise the functions of their office without giving offense, and in a proper manner to the acceptance of all. It may be urged by some as a reason why the resolution should not be adopted—the danger of a union of church and state. But, sir, from present indications, I think there is no danger here or in the United States of that union being formed.[55]

The convention, however, apparently felt otherwise, and rejected the Campbell resolution by a vote of thirty-four to nineteen.[56]

That vote was consistent with the views expressed earlier in that same week during the debate over the proposal to include a separate bill of rights in the constitution. From the first day of that debate, it was clear that a majority of the delegates believed that a state constitution in 1857 had to be more specific in its guarantees of religious liberty than earlier state constitutions had been. On August 18, 1857, when Delazon Smith moved to establish "a committee on a bill of rights," George Williams opposed it, saying that he "thought such committee unnecessary. A bill of rights was sort of a Fourth of July oration in a constitution. . . ."[57] Smith responded the next day, saying that "of all the constitutions of all the states,"

> [Smith was] best pleased, as a whole, with that of the state of Indiana. . . . Its bill of rights I should hardly be disposed to dispense with. I should like their constitution much less if the bill of rights was stricken from it. It is gold refined; it is up with the progress of the age. *Many changes have taken place since our fathers first formed constitutions*.[58]

One of those changes, Smith noted, was that in earlier days, a man who did not profess a recognized religion "was not to [be] believed upon oath."[59] He continued:

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[55] *Id.* at 113.

[56] *Id.*

[57] *Id.* at 79.

[58] *Id.* at 101 (emphasis added).

[59] *Id.* at 102 (alteration in original).

> And I remember a great many other things which people held entirely republican and right, which subsequent experience and the progress of the age taught us are blots upon our national escutcheon. And this preamble to the constitution of Indiana recognizes this progress, and thus recognizing embodies them in her bill of rights. She nobly reasserts what our fathers said about the natural rights of man to the pursuit of life, liberty and happiness, but she proceeds to assert the civil rights of the citizens as ascertained in those 70 years of progress.[60]

Erasmus Shattuck spoke in favor of Smith's motion, saying:

> [T]he history of the world teaches us that the majority may become fractious in their spirit and trample upon the rights of the minority. . . . Then, if the individual citizen is to be protected in this point in which he is endangered, there must be restrictions put into this constitution. . . . For these reasons, then, I am in favor of all the essential principles of a bill of rights.[61]

The convention then approved Smith's motion for the appointment of a committee on the bill of rights.[62] Its members were appointed, along with the members of the convention's other standing committees, on August 20, 1857.[63] La Fayette Grover was named chairman.[64] The committee submitted its report just two days later. It proposed a bill of rights closely patterned after the bill of rights in the Indiana Constitution of 1851,[65] but that "differed most from the Indiana model in its treatment of organized religion and immigrant rights."[66] The committee's determination to erect a stronger barrier between government and religion than had marked the Indiana Constitution was evident in the words they chose to begin the preamble. Professor Johnson describes the differences:

> [T]he preamble to the Indiana Bill of Rights stated: "We, the people of the State of Indiana, grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this Constitution." In contrast, the report of Grover's committee pointedly removed all references to Godly ordination; it held instead that "we, the people of the state of Oregon, to the end that justice be established, order

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[60] *Id.*
[61] *Id.*
[62] *Id.* at 104.
[63] *Id.* at 106.
[64] *Id.* at 29.
[65] *Id.* at 468 (charting the sources of the Oregon Constitution).
[66] JOHNSON, *supra* note 50, at 178.

> maintained, and liberty be perpetuated, do ordain this constitution. . . ."[67]

The committee modified the first section of article I in a similar fashion. Eighteen of the first thirty sections of article I were copied verbatim from the Indiana Constitution of 1851,[68] but section 1 was one of the sections that the committee changed. Article I, section 1 of the Indiana Constitution began with the declaration "[t]hat all people are created equal; [and] that they are endowed by their CREATOR with certain inalienable rights."[69] The Oregon framers deleted the reference to the Creator, and made it clear that their conception of equality was a purely secular one, tied to the concept of a social compact among free men. In contrast to the language of the Indiana Constitution, article I, section 1 of the Oregon Constitution declares "that all men, when they form a social compact are equal in right."[70] That change in wording appears to be an intentional reflection of the idea advanced by Rousseau a century earlier, that humanity's best hope for freedom from tyranny lies in the willingness of humans to form a social compact with one another and to abandon their claims of natural right.[71]

That same secularizing impulse was evident in the debates over the original section 6, which ultimately became section 5 of article I in the final document. The August 22, 1857, report from Grover's committee on the bill of rights proposed the following wording for section 6: "No money shall be drawn from the treasury for the compensation of any religious services, or for the benefit of any theological institution."[72]

On September 8, 1857, the convention convened as a committee of the whole for the purpose of discussing the bill of rights.[73] When it came time to consider section 6, Campbell "moved to strike out that portion forbidding the drawing of money from the treasury for the compensation of religious services."[74] The basis of his opposition appeared to be the fact that the proposal would

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[67] *Id.*

[68] THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 52, app. a at 468.

[69] IND. CONST. of 1851 art. I, § 1.

[70] OR. CONST. art. I, § 1.

[71] *See* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (London, G.G.J. & J. Robinson 1791) (1762).

[72] THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 52, at 119.

[73] *Id.* at 296, 301.

[74] *Id.* at 301.

"prevent the employment of a chaplain by the legislature."[75] He complained that the proposal was an "innovation" that was "unprecedented" in any of the other existing state constitutions, and that it was "a disregard of the injunctions of the New Testament."[76]

Frederick Waymire, who had previously stated that he thought "the Indiana bill of rights would honor any constitution,"[77] now spoke in opposition to Campbell's motion to strike:

> The people of this country were composed of every shade of opinion upon the subject of religion, from the half-crazy religious fanatic to the unbelieving atheist. And we had no right to compel by law the support of any from the pockets of all; that was what this would do.
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> Some ministers of the leading denominations would be selected as chaplains, and to perform other religious services, and all the smaller denominations, and all who professed no religion, and all who believed in none, would be taxed to pay them. Was this right? Manifestly it was not. It was a compulsory support of the church—at war with our institutions, and at war with civil and religious liberty. If legislators wished prayers he had no objection to their having them. But he did object to compelling any man against his will paying for them.[78]

Thomas Dryer then spoke in favor of Campbell's motion:

> He believed that money should be drawn from the treasury to pay for religious services just as readily and as liberally as to pay for other services. He was opposed to this constitution starting out in the world carrying upon its face features that are not attached to any other constitution in the United States.[79]

A prohibition on paying chaplains, Dryer said, "was infidelity, and nothing else,"[80] and if the constitution with this "extraordinary provision" were presented to the people, it "is sure to be defeated, and deservedly so."[81]

W.H. Watkins agreed with Dryer; he said the provision was "intended as a slur, not at any particular denomination, but at

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[75] *Id.* at 296.
[76] *Id.* at 297.
[77] *Id.* at 105.
[78] *Id.* at 301-02.
[79] *Id.* at 298.
[80] *Id.* at 305.
[81] *Id.* at 298-99.

religion itself."[82]

La Fayette Grover spoke against the Campbell motion. He noted, "Religious as well as civil liberty has been of progressive growth in our country since the time of the revolution."[83] He quoted a portion of the Massachusetts Constitution that required the expenditure of public funds "for the institution of the public worship of God, and for the support and maintenance of public, Protestant teachers of piety, religion and morality."[84] Grover objected to that clause, because

> to say that . . . religion should be established and sustained by the government is to go back two centuries in the world's history. Under this clause great civil abuses and much tyranny grew up in Massachusetts. Laws were passed requiring that a certain portion of a man's annual income should be devoted to the support of a particular church called the "standing order," to the exclusions of all others. Citizens were compelled, under penalties, to attend once a quarter upon that church; a "Church of England" was the favorite of the state.[85]

Grover noted that when Maine separated from Massachusetts and entered the Union in 1820, it rejected that clause in its new constitution, and that even the people of Massachusetts "since 1820 have gradually disregarded it themselves."[86] He then commented on the developments in constitutional protections for religious liberty that had taken place since the first state constitutions and the First Amendment had been adopted:

> The late constitutions of the western states have, step by step, tended to a more distinct separation of church and state, until the great state of Indiana, whose new constitution has been most recently framed, embraced very nearly the principle contained in this section, as reported, now under consideration.
>
> It is true this constitution goes a step farther than other constitutions on this subject; but if that step is in the right direction, and consistent with the proper development of our institutions, I see no weight in the objection that it is new. *Let us take the step farther, and declare a complete divorce of church and state.*[87]

In response to a contention by another delegate that attempts to eliminate religion from the public sphere during the French

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[82] *Id.* at 299.
[83] *Id.* at 302.
[84] *Id.*
[85] *Id.* (quoting MASS. CONST. pt. I, art. III, cl. 1 (1780)).
[86] *Id.*
[87] *Id.* at 302-03 (emphasis added).

Revolution had led to "calamities" in that country, Grover argued that "for centuries previously the public mind [in France] had become demoralized by a union of church and state, promulgation and enforcing forms rather than faith, conventionalisms rather than true morality."[88] Grover hoped for something different in Oregon: "Our government is based upon absolute freedom of conscience, guaranteeing full toleration and protection of religious faith, but at the same time withholding state patronage and political place from the churches."[89]

William Farrar then spoke in favor of the Campbell motion, stating that the convention's earlier decision not to employ a chaplain for its own sessions "has aroused in the minds of not a few individuals in this territory a deep-seated feeling of prejudice against any constitution that this convention may send forth to the people for their adoption."[90] Turning to Campbell's present motion, Farrar criticized Grover's comments in opposition to it as "entirely inopportune. It is not, sir, a question whether we shall unite church and state, as he (Mr. Grover) declared. It has no relevancy to any such proposition—it does not point in that direction."[91] He warned that if the Campbell amendment were not adopted, "nine-tenths of the professing Christians in Oregon . . . will denounce your constitution because the action of this convention has cast indirectly a slur upon their religious faith and practices, or upon their creed."[92]

Matthew Deady, president of the convention, opposed Campbell's motion, and disagreed with Farrar's comments about public opinion. Deady said that there were "persons in this community" who would oppose the constitution if it barred payment for religious services, but that it was "equally true" that there were others who would oppose it if it did *not* contain such a prohibition. He added:

> But I am not here to adapt myself altogether to the opinions of either of these classes. I am here to determine upon correct principles what is right and what is wrong. I have great respect for [Mr.Campbell]. . . . With him, I believe that morality and private virtue and a proper sense of dependence upon an overruling Providence are the true foundation of a nation's great-

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[88] *Id.* at 303.
[89] *Id.*
[90] *Id.* at 299.
[91] *Id.*
[92] *Id.* at 299-300.

> ness. But, sir, what is the theory of our government upon this subject? It is that the government shall be separated from churches, and the maintenance and administration of religion; that religious duties shall be no function of the government.[93]

Stephen Chadwick agreed with Deady; he favored the original committee report, stating, "He would have no connection of church and state."[94] He had been "taught to reverence prayer, and religious services," he said, but "he was also educated in the doctrine of the divorce of church and state."[95]

Reuben Boise stated that the original committee proposal went too far in prohibiting payment for all religious services, because "[i]t was the custom of all governments to employ chaplains in their penitentiaries and asylums; reformation was declared to be one object of punishment. The employment of chaplains was one mode of reformation."[96] George Williams agreed that the original proposal "went too far," but he was opposed to the payment of chaplains in the legislature, so he moved to modify the Campbell proposal by prohibiting "the drawing of money from the treasury for compensation of religious services in either branch of the legislature."[97] He asserted that "[a] man in this country had a right to be a Methodist, Baptist, Roman Catholic, or what else he chose, but no government had the moral right to tax all of these creeds and classes to inculcate directly or indirectly the tenets of any one of them."[98] "[T]he people," he said, "should not be taxed to give preference to one creed over another."[99]

The committee of the whole rejected Williams's compromise proposal, and adopted the Campbell amendment by a vote of twenty-four to sixteen, so that at the end of the day on September 8, 1857, section 6 read as follows: "No money shall be drawn from the state treasury for the benefit of any religious or theological institution."[100]

But that was not the end of the debate. On September 11, the convention, still meeting as a committee of the whole, approved

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[93] *Id.* at 300.
[94] *Id.* at 305.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at 301, 306.

the amended version of section 6 (although the *Journal of the Proceedings* states that the last word in the section was "institutions" rather than "institution"[101]), but Williams then renewed his motion to add the following language to the section: "Nor shall any money be appropriated for the payment of any religious services, in either house of the legislative assembly."[102]

This time, the amendment was approved, on a vote of twenty-six to twenty-one.[103] The delegates who had expressed the strongest sentiments in favor of strict separation of church and state (Chadwick, Deady, Grover, and Waymire) voted yes, and those who favored a more accommodating stance (Campbell, Farrar, and Logan) voted no.[104]

On September 12, the report of the committee of the whole came before the convention for final approval. Campbell "addressed the convention against the adoption of the anti-chaplain section," and David Logan "moved to recommit the bill with instructions to strike out" that section, but the motion to recommit failed, and the convention adopted the section as it was reported from the committee of the whole.[105] The vote was twenty-five to ten, with the strict separationist delegates (Chadwick, Deady, Grover, and Waymire) voting yes, and the accommodationist delegates (Campbell, Farrar, and Logan) voting no,[106] just as they had done on September 11.

The content of the debate on the original proposal for section 6, and the votes on the various proposals to modify that section that led to the present wording of article I, section 5, show that the strict separationists prevailed at the 1857 convention. Thus, Hector Campbell, who had asserted at the beginning of the convention that there was "no danger" of a "union of church and state" in Oregon,[107] lost on his proposal to employ a chaplain for the convention, and he lost in his proposal to eliminate all prohibitions on the payment for religious services. Further, Dryer did not want the constitution to include provisions hostile to religion "that are not attached to any other constitution in the

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101 *Id.* at 327.
102 *Id.*
103 *Id.* at 327-28.
104 *Id.*
105 *Id.* at 343.
106 *Id.* at 342.
107 *Id.* at 113.

United States,"[108] Watkins viewed the prohibition on taxpayer-supported religious services "as a slur . . . at religion itself,"[109] and Farrar agreed with Watkins that the provision would be regarded as "a slur upon . . . religious faith and practices."[110] These delegates were on the losing end of the debate, and they all voted against the bill of rights because of it.

In contrast, Grover wanted the constitution to "declare a complete divorce of church and state,"[111] Deady believed that "the theory of our government" was that "the government shall be separated from churches, and the maintenance and administration of religion [and] that religious duties shall be no function of the government,"[112] Chadwick favored "no connection of church and state,"[113] and Waymire believed that government "had no right to compel by law the support of any [religion] from the pockets of all [people]."[114] These delegates were on the prevailing side of the debate, and they all voted in favor of the bill of rights because of it. Although the delegates had rejected the prohibition on "the compensation of any religious services" (probably because there were enough delegates who agreed with Boise that paying for chaplains in the prisons would serve the cause of reformation, which the delegates had declared, in article I, section 15, to be the foundational purpose of all of Oregon's criminal laws), they had included a prohibition on the payment of public money for religious services in the legislature. The majority thus did what Grover had urged them to do: "to take the step farther" than any previous constitution had gone in guaranteeing "a more distinct separation of church and state."[115]

This history shows that a majority of the members of the constitutional convention favored a more explicit separation of church and state than could be found in any other state constitution of the time. The "declarations of rights" in the constitutions of the original thirteen states often did nothing to "separate" church from state; indeed, some states had "persisted" long after the Revolution "in imposing restraints upon the free exercise of

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[108] *Id.* at 298.
[109] *Id.* at 299.
[110] *Id.* at 299-300.
[111] *Id.* at 302-03.
[112] *Id.* at 300.
[113] *Id.* at 305.
[114] *Id.* at 301.
[115] *Id.* at 302-03.

religion and in discriminating against particular religious groups."[116] The North Carolina Constitution, for example, "forbade officeholders to 'deny . . . the truth of the Protestant religion,'" and "Maryland permitted taxation for support of the Christian religion and limited civil office to Christians until 1818."[117] The Massachusetts Constitution declared that it was "the duty of all men . . . to worship the SUPREME BEING,"[118] and direct public support of religion did not end in that state until 1833.[119]

The delegates to the Oregon constitutional convention completely rejected those older patterns of constitutionally authorized (and even mandated) public support for religion. "Many changes have taken place since our fathers first formed constitutions," Delazon Smith told the convention,[120] and the evangelical revivals and sectarian strife along the frontier in the first half of the nineteenth century were part of those changes. By the time the delegates gathered in Salem in August 1857, there was a strong feeling that the people needed *more* protection against the incursion of religious and sectarian bodies into the fabric of state government than had been the case in 1791. The delegates were very much aware of the diversity of religious opinion in Oregon, and it was clear that they meant to prevent state government from interfering with it.

This history demonstrates that the court in *Eugene Sand & Gravel* erred in adopting the *Lemon* test as the "appropriate" test for determining the meaning of the religion clauses of the Oregon Constitution. It may be subject to debate, in any given case, whether the expenditure of public money in support of a religious cause violates the First Amendment, for the "primary effect" of a particular expenditure (to take just one of the three prongs of the *Lemon* test as an example) is often in the eyes of the beholder. However, there can be no such debate under article I, sections 2, 3, and 5: those sections "permanently secure[d] the . . . religious rights of the citizen generally, [and left] the rights of conscience untouched" (that is, untouched by the hand of government), as Smith put it on the last day of the conven-

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116 Everson v. Bd. of Educ., 330 U.S. 1, 14 (1947).

117 *Id.* at 14 n.17.

118 Colo v. Treasurer & Receiver Gen., 392 N.E.2d 1195, 1196 n.4 (Mass. 1979) (quoting MASS. CONST. pt. I, art. II).

119 *See id.* at 1199 n.10.

120 THE OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 52, at 101.

tion.[121] The bill of rights, he said, "leaves religion to achieve its conquests under the voluntary system"[122]—that is, without the "benefit" of governmental support. Sections 2 and 3 were thus intended to bar government from interfering in *any* way with the citizens' rights of conscience, and section 5 was intended to be a flat prohibition on the expenditure of *any* public funds for the benefit of any religious or theological institution. "No money" means "no money," and by using that language, the authors of section 5 carried out what La Fayette Grover proposed: "a complete divorce of church and state."[123]

Conclusion

In *Lowe v. City of Eugene*, the Oregon Supreme Court concluded that taxpayer support of the symbol of a particular religion constitutes a "benefit" to a religious "institution," within the meaning of article I, section 5. That conclusion was correct, for it would be disingenuous to conclude that the State could appropriate money from the public treasury to erect symbols of particular religious faiths without violating article I, section 5 simply because no specific "institution," in the narrow sense of the word, was benefited. Erection of Latin crosses at ten-mile intervals along Oregon's highways by the department of transportation would "benefit" the religious "institution" of Christianity, even though it would be impossible to trace any particular financial benefit to any particular church flowing from such state-sponsored crosses. Similarly, the legislature would violate article I, section 5 if it appropriated money to erect a billboard on state capitol grounds, or anywhere else, containing the unadorned message "Believe in God," or indeed the even simpler message, "Have Faith."

Article I, section 5 was intended to prohibit the State from favoring religion over non-religion, and from favoring non-religion over religion; the State would violate that section if it spent money to encourage people to "Have Faith" just as it would if it spent money to encourage people to "Reject Supernatural Beliefs: Embrace Rationality."

In *Dickman*, the Oregon Supreme Court said that "the wall of separation in this state must . . . be kept 'high and impregnable'

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[121] *Id.* at 387.
[122] *Id*. at 387-88.
[123] *Id*. at 303.

to meet the demands of Article I, § 5."[124] In *Cooper*, the court said:

> The religion clauses of Oregon's Bill of Rights, Article I, sections 2, 3, 4, 5, 6 and 7, are more than a code. They are specifications of a larger vision of freedom for a diversity of religious beliefs and modes of worship and freedom from state-supported official faiths or modes of worship. The cumulation of guarantees, more numerous and more concrete than the opening clause of the First Amendment, reinforces the significance of the separate guarantees.[125]

The court's opinion in *Eugene Sand & Gravel* stands in stark contrast to those cases, and to the consistently strict interpretation of article I, section 5 that has characterized the court's opinions. Oregon has seen much less of the sectarian strife that has marked the history of many other states in the Union; that is one reason that the Oregon Supreme Court has apparently had only one opportunity since *Eugene Sand & Gravel* to revisit its holding in that case.[126] But when the next opportunity comes along to review *Eugene Sand & Gravel* and the interpretation of section 5, the Oregon Supreme Court should take it, and continue the state constitutional revolution by providing *Eugene Sand & Gravel*, as Justice Stevens recently urged with respect to an earlier U.S. Supreme Court decision, "with a decent burial in a grave adjacent to"[127] other discarded vestiges of prerevolutionary days.

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[124] Dickman v. Sch. Dist. No. 62C, 232 Or. 238, 259, 366 P.2d 533, 544 (1961).

[125] Cooper v. Eugene Sch. Dist. No. 4J, 301 Or. 358, 371, 723 P.2d 298, 307 (1986).

[126] *See* Powell v. Bunn, 185 Or. App. 334, 59 P.3d 559 (2002)*, review denied*, 336 Or. 60, 77 P.3d 635 (2003) (table).

[127] Marshall v. Marshall, 126 S. Ct. 1735, 1752 (2006) (Stevens, J., concurring) (referring to his desire to see the "probate exception" to federal court jurisdiction put to rest).