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that I believe that the resonant platitudes of Rufus Choate have relevance. Our generation when it speaks of morality has in mind the process of making judgments concerning human purposes, and the means by which the achievement of our ends is best assured. When Holmes' elders spoke of morality the word was laden with philosophical implications which no skeptic could accept. In the first part of his address Holmes, by giving examples, showed how pallid the corpuscles of morality in certain rules of law had become. In the balance of the paper he sought to persuade his audience that the blood of law would become thicker if men concerned themselves with discovering the human ends which they are seeking to achieve through law.

If this suggested reading of the address serves to make it the consistent whole which Holmes must have believed it to be, Professor Hart is not, I believe, justified in cutting the paper into two unrelated segments and showing how vicious are the tendencies in the first portion. The issue, I suspect, comes down to one central problem — that of defining morality. Although Professor Hart seems to charge Holmes with positivistic heresy, I take it that he does not disagree with Holmes in believing that moral principles are human in source and in purpose. Holmes' repudiation of morality was the rejection of an orthodoxy which Professor Hart also seems to renounce. "The deadly bog of behaviorism" may have swallowed many a heretic, but some have discovered that Holmes' path of the law does not any more lead them to destruction than it did the pathmaker.

THE BLAINE AMENDMENT AND THE BILL OF RIGHTS

*Alfred W. Meyer**

THE Supreme Court is not in agreement on the extent of the protection afforded by the Fourteenth Amendment¹ as it relates to the Bill of Rights. The majority of the Court interprets

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¹ U.S. CONST. AMEND, XIV, § 1. ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

the due process clause as embracing those rights found to be "implicit in the concept of ordered liberty," a "selective incorporation" which has in fact not included certain guarantees of the first eight amendments.² The minority view, articulated by Mr. Justice Black, would more drastically limit state activity by including within the scope of the Fourteenth Amendment the entire Bill of Rights.³ While there may well be pragmatic reasons, based on concepts of social utility, tending to favor one view or the other, Mr. Justice Black finds major support for his view in the historical events surrounding the adoption of the Fourteenth Amendment, the congressional debates and the ratification proceedings. In 1949, Professor Fairman of Stanford re-examined the materials upon which Mr. Justice Black relied, and concluded that "the record of history is overwhelmingly against him."⁴ It is the purpose of this Comment to furnish additional evidence, tending to support the views of Professor Fairman; this evidence is drawn from a chapter in the history of constitutional religious protection.

By their terms, the free exercise and disestablishment clauses of the First Amendment apply only to congressional action.⁵ In fact, a proposed amendment to protect the "rights of conscience" from state interference was defeated in the First Congress.⁶ In 1845, the Supreme Court stated: "The Constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws. . . ."⁷ Despite the adoption of the Fourteenth Amendment in 1868, it was not until 1940 that the Court, in *Cantwell v. Connecticut*,⁸ expressly held that the free exercise of religion was

² See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.).

³ See *Adamson v. California*, 332 U.S. 46, 68 (1947) (dissenting opinion). The most thorough exposition of this view is found in FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908), upon which Mr. Justice Black relies. Flack arrived at his conclusion after an analysis of the debates in the Thirty-ninth Congress and the ratification proceedings in the various states.

⁴ See Fairman and Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 139 (1949). Professor Fairman examined the legislative history of the Amendment, and Professor Morrison dealt with the judicial interpretation, *id.* at 140.

⁵ U.S. CONST. AMEND. I, § 1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

⁶ See Warren, *The New "Liberty" under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 433-35 (1926).

⁷ *Permol v. First Municipality*, 3 How. 589, 609 (U.S. 1845).

⁸ 310 U.S. 296 (1940).

protected by the due process clause. And in the *Everson*⁹ and *McCullum*¹⁰ cases, in 1947 and 1948, the religious protection of the First Amendment was made fully applicable to the states by the incorporation of the disestablishment clause.

While constitutional religious protection against state action has thus been accomplished by expanding the concepts of "due process" and "liberty," there were attempts to provide an express prohibition, the most significant being the ill-fated "Blaine Amendment." In his annual message of 1875, President Grant recommended an amendment to the Constitution forbidding the teaching in the public schools of religious tenets and prohibiting the grant of school funds or taxes for the benefit of religious sects.¹¹ Within a week, James G. Blaine, Republican presidential candidate in 1884, introduced the following resolution for a constitutional amendment:¹²

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect or denomination; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

The legislative history of this proposed amendment supports Professor Fairman's view that the Thirty-ninth Congress did not intend to incorporate the Bill of Rights into the Fourteenth Amendment. The significance of the debates¹³ rests upon the following factors: (1) The first clause of this proposal, aside from its applicability to state action, was in the identical words of the First Amendment. (2) The measure was proposed and discussed only seven years after the ratification of the Fourteenth Amendment. (3) It was considered by the Forty-fourth Congress, which included twenty-three members of the Thirty-ninth Congress, two of whom had actively participated in the drafting of the Fourteenth Amendment.¹⁴

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

¹⁰ *McCullum v. Board of Educ.*, 333 U.S. 203 (1948).

¹¹ 4 CONG. REC. 175 (1875).

¹² 4 CONG. REC. 5580 (1876).

¹³ *Id.* at 5189-92, 5245, 5453-57, 5561-62, 5580-95.

¹⁴ The following were members of the Senate in both Congresses: Anthony, Sherman, Howe, Edmunds, Cragin, and Frelinghuysen. Members of the House in both Congresses were: Randall, Kerr, O'Neill, Kelley, Garfield, Kasson, Banks,

The House debate was rather limited, being largely concerned with the advisability of adding the clause: "This Article shall not vest, enlarge, or diminish legislative power in the Congress."¹⁵ Arguing against the inclusion of this clause, Mr. Lawrence, who had been a member of the Thirty-ninth Congress, stated: "I would rather leave it just where all the first amendments were left; and in that view [only the courts may enforce the First Amendment], if Congress cannot legislate to enforce the new article, this last and added sentence to it would be unnecessary."¹⁶ Another member of the Thirty-ninth Congress, Mr. Banks, said: "If the Constitution is amended so as to secure the object embraced in the principal part of this proposed amendment *it prohibits the States from exercising a power they now exercise.*"¹⁷ Although the Fourteenth Amendment had been in existence for seven years, no Representative mentioned that it had any relation to the objects sought to be accomplished by the Blaine proposal. The House passed the Amendment by the overwhelming vote of 180 to 7.

The Amendment was introduced into the Senate on Aug. 7, 1876, by Senator Frelinghuysen, who had been one of the leaders in the Thirty-ninth Congress and one who had voted for the Fourteenth Amendment. The following excerpts from the speeches of Senators Christiancy and Randolph, respectively, are representative of the effect which the Senate attributed to the proposal: "[I]t is simply imposing on the States what the Constitution already imposes on the United States. . . ."¹⁸ "It is simply an additional inhibition upon the States; no more, no less. It aims to be a conserving power in controlling that which, in most States, exists."¹⁹ Perhaps the most significant remarks were those of Senator Frelinghuysen, a former Attorney General of New Jersey, who stated:²⁰

I call the attention of the Senate to the first alteration the House amendment makes in our Constitution. The first amendment to the Constitution Lawrence, and Ferry. Representatives in the Thirty-ninth who were Senators in the Forty-fourth were: Blaine, Morrill, Dawes, Boutwell, Conkling, Allison, Windom, and Hitchcock. Boutwell and Conkling were the men on the committee which had drafted the Fourteenth Amendment.

¹⁵ 4 CONG. REC. 5189 (1876).

¹⁶ *Id.* at 5191.

¹⁷ *Ibid.* (italics supplied).

¹⁸ *Id.* at 5245.

¹⁹ *Id.* at 5454.

²⁰ *Id.* at 5561 (italics supplied).

tion, enacted shortly after the adoption of the Constitution, provides that — [“]Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.[”] This is an inhibition on Congress, and not on the States. The House article very properly extends the prohibition of the first amendment of the Constitution to the States. [Here, Senator Frelinghuysen urged the addition to the proposal of a clause prohibiting the States from making religious tests a qualification for office.] Thus the article as amended by the Senate prohibits the States, *for the first time*, from the establishment of religion, from prohibiting its free exercise, and from making any religious test a qualification to office.

It is noteworthy that Senator Frelinghuysen made absolutely no reference to the effect of the Fourteenth Amendment but did expressly refer to the fact that the First Amendment was still, in 1876, a restriction on Congress only. Although agreeing with the principles of the proposal, Senator Kernan felt, as did a few others, that it would be an insult to the states to claim that a danger of state interference with freedom of religion existed.²¹ Senator Whyte spoke against the Amendment, saying, “. . . the first amendment to the Constitution prevents the establishment of religion by congressional enactment; it prohibits the interference of Congress with the free exercise thereof, and leaves the whole power for the propagation of it with the States exclusively; and so far as I am concerned I propose to leave it there also.”²² Senator Morton, while making an impassioned appeal for the principles of separation of Church and State and for the passage of the amendment, urged the importance of making constitutional amendments specific. As an example of an amendment which was poorly drafted he cited the Fourteenth.²³ This was the only significant reference made to the Fourteenth Amendment throughout the debates, and here there was clearly no reference as to the impact of the Fourteenth Amendment on freedom of religion.

In opposition to the proposed amendment, Senator Stevenson relied upon the views of Thomas Jefferson:²⁴

²¹ *Id.* at 5581. Senator Eaton expressed a similar view: “. . . I am opposed to any State prohibiting the free exercise of any religion; and I do not require the Senate or the Congress of the United States to assist me in taking care of the State of Connecticut in that regard.” *Id.* at 5592.

²² *Id.* at 5583.

²³ *Id.* at 5585. It is somewhat ironic that Senator Morton’s criticism was directed at the amendment which is now used to guarantee the freedom he so ardently defended.

²⁴ *Id.* at 5589. No doubt Senator Stevenson would have agreed with that por-

Friend as he [Jefferson] was of religious freedom, he would never have consented that the States, which brought the Constitution into existence, upon whose sovereignty this instrument rests, which keep it within its expressly limited powers, should be degraded and that the Government of the United States, a Government of limited authority, the mere agent of the States with prescribed powers, should undertake to take possession of their schools and of their religion. . . .

Although the amendment received a majority of favorable votes, it lacked by two the necessary two-thirds majority which would have resulted in its submission to the states.²⁵ The defeat has been attributed to three principal grounds: (1) State constitutions afforded adequate protection.²⁶ (2) As has been shown in the above discussions, there was a jealous regard for states' rights. (3) The Senate vote was purely partisan in character.²⁷

The agitation for a religious amendment to the Constitution did not die with the defeat of the Blaine Amendment. William Blakely, referring to the proposal, has said: ²⁸

The Amendment should have been adopted. Since then the tide has set in the other way, as witnessed in the great revival of Sunday legislation throughout the States, hundreds of thousands of dollars contributed by the Government to schools under sectarian control, and Congress besieged with petitions and bills for Sunday legislation and a religious amendment to the Constitution.

And in 1929, one writer reported that it had been reintroduced twenty times.²⁹ In fact, an organization, The National League

tion of Mr. Justice Reed's dissent in *McCullum v. Board of Educ.*, 333 U.S. 203, 238 (1948), in which he objected to the majority's reliance upon Jefferson's "wall of separation," saying, ". . . the 'wall of separation between Church and State' that Mr. Jefferson built at the University which he founded did not exclude religious education from that school." *Id.* at 247.

²⁵ The vote was 28 to 16 in favor of the proposal with 27 Senators absent.

²⁶ Mr. Justice Frankfurter, concurring in *McCullum v. Board of Educ.*, 333 U.S. 203, 212 (1948), carefully traced out the history of religious education in this country. In referring to the Blaine Amendment, he suggests that its failure was due in part to this factor. *Id.* at 218 n.6.

²⁷ See ZOLLMAN, *AMERICAN CHURCH LAW* 76 (1933). The record shows, however, that one McDonald, an Indiana Republican, registered a negative vote. 4 CONG. REC. 5595 (1876). Perhaps one of the reasons for the display of partisanship was the fact that the Senate vote was taken during the height of the Tilden-Hayes presidential campaign.

²⁸ BLAKELY, *AMERICAN STATE PAPERS ON FREEDOM OF RELIGION* 240 (3d rev. ed. 1943).

²⁹ See MUSMANNO, *PROPOSED AMENDMENTS TO THE CONSTITUTION* 182 (1929). The most recent attempt to make the religious provisions binding upon the

for the Protection of American Institutions, had been formed for the purpose of inducing Congress to pass such an amendment. A law review note in 1892 opposed this organization's efforts by arguing that the national organic law should only prohibit invasions of fundamental rights, such as "laws depriving the people of life, liberty or property without what is termed due process of law, and denying to them the equal protection of the laws."³⁰ The due process concept as used by this writer clearly excludes the religious freedoms.

Thus, the debates on the Blaine Amendment and the later attempts to make the religious provisions of the First Amendment binding upon the states point up the historical inaccuracy of concluding that the Fourteenth Amendment was intended to incorporate these provisions. To the extent that Mr. Justice Black relies upon historical evidence rather than a judgment based on current needs, his view, favoring incorporation of the entire Bill of Rights, is accordingly weakened.

states was by Senator Borah in 1937. Apparently disturbed by the substantive due process interpretation given to the Fourteenth Amendment by the Supreme Court, he proposed an amendment, the first section of which repealed the Fourteenth Amendment. The second section was in the identical language of the Fourteenth Amendment except that the phrase, "due process of law," was qualified so as to "have reference only to the procedure of executive administration or judicial bodies charged with execution and enforcement of the law." The third section gave specific guarantees against state action: "No State shall make or enforce any law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the State or the Government for a redress of grievances." S.J. Res. 92, 75th Cong., 1st Sess. (1937).

³⁰ See Note, 26 *AM. L. REV.* 427-28 (1892). For a reply to this argument, see Correspondence, 26 *AM. L. REV.* 789 (1892).