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THE SUPREME COURT'S EARLIEST CHURCH-STATE CASES: WINDOWS ON RELIGIOUS-CULTURAL-POLITICAL CONFLICT IN THE EARLY REPUBLIC

Michael W. McConnell*

Decisions involving religion and public affairs are now a regular feature of the United States Supreme Court's docket, but it was not always so. The Court's first decision under the Free Exercise Clause did not come until 1879, almost a century after the adoption of the First Amendment,1 and its first decision under the Establishment Clause came twenty years later.2 That does not mean that the Court was silent on church-state issues—just that its voice was far less often heard and that its legal basis for intervention was not the First Amendment. The Supreme Court decided three significant church-state cases in the decades before the Civil War. The first, Terrett v. Taylor,3 along with a similar case argued the same Term,4 involved the transition of the Episcopal Church from established church to private entity. The question, with which the Court grappled, was whether the Church could keep property it had acquired in its prior status. The second, Vidal v. Girard's Executors,5 involved the propriety of anticlerical principles for governance of an orphans' home created by private bequest but administered by a municipality. The third, Permoli v. New Orleans,6 involved a city's intervention in the struggle between a Roman Catholic archbishop and the elected Catholic lay trustees for control over a cathedral church, but turned into a case about the application of the Bill of Rights to the states.

The dramatic facts of these cases, the way in which the legal issues

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3. 13 U.S. 43 (1815).
5. 43 U.S. 127 (1844).
6. 44 U.S. 589 (1845).
were framed by the lawyers, and the Supreme Court's ultimate decisions cast great light on the religious-cultural-political controversies of the early republic, and the way in which those controversies were translated into legal form for adjudication by the High Court. Let us look at those decisions, consider the human dramas that they reflected, the legal questions that they posed, and what they tell us about the issues that troubled the American people in the years before the Civil War.

I. **TERRETT V. TAYLOR**

On its surface, *Terrett* was a dispute over ownership of a 516-acre parcel of undeveloped land in Alexandria, Virginia, then part of the District of Columbia. On one side was the Episcopal church of Alexandria, represented by its trustees, and on the other side were the overseers of the poor in Fairfax County, Virginia. In a broader cultural and political sense, *Terrett* was a conflict between the rising power of Jeffersonian Republicans, backed by Baptists, skeptics, and religious dissenters, against one of the remaining bastions of Federalist privilege. Still more broadly, *Terrett* was a dispute about how to manage the transition of an established church, with all the public privileges that status entailed, into a private entity with protected private property rights. Specifically, should the disestablished church be permitted to keep title to the property it had previously obtained in its prior status?

To understand the conflict—in both its legal and its cultural dimensions—we have to review the history of establishment and disestablishment in Virginia. From its founding at Jamestown to the very eve of the American Revolution, the colony of Virginia maintained perhaps the most rigid and exclusive establishment of religion in America. The Church of England, the predecessor of today's Episcopal Church, was "by law established." It enjoyed numerous official advantages, including grants of land, financial support through mandatory tithes, enforcement of compulsory worship, and prohibition of competitors. More Virginians were indicted between 1720 and 1750 for missing church than any other crime, and cheating on church tithes was almost as common a charge. Until the 1750s, public worship outside the established church was generally not permitted. The Presbyterians first breached the dyke in 1692, but it was not until 1760 that they gained formal permission to form their own churches and select their own ministers. As late as 1775,

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7. Unless otherwise noted, the following summary is based on Sanford H. Cobb, *The Rise of Religious Liberty in America* 74-115 (Rowman & Littlefield Pub., Inc. 1968) (originally published 1902), and Thomas Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 29-83 (Oxford U. Press 1986).


Baptist ministers—the most obstreperous dissenters\textsuperscript{10}—were jailed and sometimes horsewhipped for preaching the gospel. In addition to its formal legal advantages, the established church also enjoyed a position of social prestige. Although only a fourth of the population were adherents to the Anglican Church on the eve of independence, the aristocratic, educated, and politically engaged portion of the population favored the Church in disproportionate numbers.\textsuperscript{11} But establishment had its disadvantages as well. The flip side of government support for the established church was government interference and domination. Lacking a bishop, Anglican churches were controlled by the colonial governor and council, as well as local elected vestries. The government had power to select clergy and to dictate matters of doctrine and practice. The Church of England in Virginia was an arm of the royal government.

Of particular importance to the Terrett case were the "glebe lands" of the church. Glebe lands are lands—generally rented out to private tenants—whose profits belong, by law, to the minister of the church. They were an important aspect of Episcopal Church structure. Indeed, canon law required that a certain endowment of glebe lands be made before a church could be constructed.\textsuperscript{12} Not only did the availability of profits from glebe lands provide financial security for the minister—and thus improve the quality of the ministry—but it undergirded a certain independence. A minister dependent on the collection plate for his salary may be reluctant to offend his parishioners' sensibilities (especially the well-heeled among them) or he might be tempted to engage in inflammatory rhetoric to stimulate contributions. A minister dependent on appropriations from the state may be subject to political manipulation. Thus, Edmund Burke defended the logic of the glebe lands system in these terms:

The people of England think that they have constitutional motives, as well as religious, against any project of turning their independent clergy into ecclesiastical pensioners of state. They tremble for their liberty, from the influence of a clergy dependent on the crown; they tremble for the public tranquility from the disorders of a factious clergy, if it were made to depend upon any other than the crown.\textsuperscript{13}

Most often, glebe lands were granted to the church by royal charter, as part of the initial establishment, though in some cases they were donated or purchased with donated funds. In later years, after disestablishment, the existence of glebe lands constituted an endowment for support of the


\textsuperscript{11} See Cobb, \textit{supra} n. 7, at 483-84.

\textsuperscript{12} Henings Statutes at Large (Virginia) vol. 1, 149 (Samuel Pleasants, Jr. ed. 1809); see generally Town of Pawlet v. Clark, 13 U.S. 292, 330 (1815) (citing authorities).

The Episcopal Church's ministry, which no other religious denomination enjoyed.

The disposition of glebe lands was the clearest illustration of a wider theoretical and practical problem: what to do about remnants of the formerly established church after disestablishment. One alternative was to treat the Episcopal Church in the same way as other churches and private entities, protecting its property and ignoring its prior status as the established church. A second alternative was to try to undo the past—to strip the Episcopal Church of any property or other advantages that it enjoyed as a result of its past status. Obviously, both of these alternatives had their drawbacks. The former would perpetuate the injustice of the past: why should the Episcopal Church have title to property that came from state resources, to which all citizens have an equal right? The latter would require a seemingly brutal attack on a religious institution; seizure of church property by government does not have a happy history. The first act of the French Revolutionaries was to seize the property of the Roman Catholic Church. 14 Moreover, it would be difficult to disentangle what the church owns as a result of governmental favor from what it owns by virtue of the support of its adherents. How much of the church's property should the government take? Finally, once we start down the road of attempting to "equalize" the situations of the established church and its competitors, how long may this special treatment last, and how far will it go? There is serious danger of discriminating against the formerly established church.

The problem is analogous to that faced by the recently de-Communized countries of Eastern Europe or that faced by regimes transforming from an authoritarian, quasi-feudal past. Under the former regimes in such places, political elites had control of substantial pieces of property. Does the new regime allow them to keep the fruits of their illegitimate power? Now that they are mere private citizens, is it possible to divest them of their property without violating current norms of liberal government, including protection of private property? For how many years is their property vulnerable to confiscation?

This difficult situation was compounded by the fact that disestablishment came gradually in Virginia. There was no single point at which one can say the established church was disestablished, and thus no specific point at which we can say that it had become a private institution, with private property rights. In 1776, the Virginia legislature

adopted a Declaration of Rights that permitted all persons to worship in accordance with their own conscience and convictions. This abolished the exclusive features of the religious establishment. But the legislature continued to treat the Episcopal Church as the "Church by Law established" and continued to enact legislation governing its affairs. At this time, the Virginia legislature "confirmed and established" the Episcopal Church's title to the lands held by the former Church of England. It also exempted dissenters from taxes for support of the Church. In 1779, the legislature passed a statute repealing state regulation of the salaries of ministers in the Church. This eliminated a bitter source of controversy and advanced the separation of church and state another step. The following year, the Virginia legislature divested the church of its prior civil responsibility to care for the poor of the parish, creating a new public office of overseer of the poor to carry on these functions. In 1784, over vehement opposition by Presbyterians and Baptists, supporters of the church persuaded the legislature to pass "An Act for Incorporating the Protestant Episcopal Church." This law gave the Episcopal Church a new legal status as a corporation, specifying its form of government in minute detail and granting the corporation authority to have, hold, use, and enjoy the glebes, churches and chapels, cemeteries, books, plate and ornaments, and other property of the former Church of England. This was the last gasp of preferential establishment. It reflected the legislature's view that it had a special relationship with the Episcopal Church, entitling it to regulate that Church's governing structure. In the growing tide of sentiment in opposition to established religion, it did not last long. Two years later, the legislature repealed the 1784 Act, replacing it with a general provision saving to all religious societies the property belonging to them and authorizing each to appoint trustees in accordance with their internal rules for governance.

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16. Curry, supra n. 7, at 135.
17. Terrett, 13 U.S. at 47 (citing Statute of 1776, ch. 2).
23. Terrett, 13 U.S. at 47 (citing Statute of 1786, ch. 12). The legislature also passed a statute in 1788, of technical import, recognizing the trustees appointed under the 1786 Act as successors of the vestries that formerly had control over the church property. Id. at 48 (citing Statute of 1788, ch. 47). The 1786 Virginia trusteeship statute was intended to be neutral among sects, but it was drafted with Protestant notions of church authority in mind. On the struggles of the Roman Catholic Church against the trusteeship system, see infra nn. 132-38, and accompanying text.
Nonetheless, the Episcopal Church was in an enviable position, not seemingly justified by its dwindling numbers of adherents among the common people. The Church continued to own impressive properties in every parish, and glebe lands furnished Episcopal ministers with a base of financial support without regard to the appeal—or lack thereof—of their message to the people. This was a source of resentment among other religious denominations in Virginia, which had not had the legal capacity to amass property or endowments in the years before independence. The resentment was compounded by political, cultural, and socio-economic divides. The Church of England had been heavily associated with Toryism (support for the crown) during the Revolutionary period; it became especially unpopular with the common people as a result of the Parson's Cause; \(^\text{24}\) in the years after independence, it tended to be associated with aristocratic Federalist elements. It found its supporters in such figures as Edmund Pendleton, John Marshall, George Washington, and (somewhat surprisingly) Patrick Henry, and its opponents in Baptists and other evangelicals in the Jeffersonian party. When the Jeffersonians swept into power in the last half of the Adams administration, they had both political and constitutional motives for attacking the privileged status of the former state church.

As a constitutional matter, the Virginia legislature became convinced that its system of laws had not yet fully achieved disestablishment of religion. Specifically, the Jeffersonian majority concluded that the statutes providing for church incorporation and retention of church property were a violation of the principle of separation. In 1798, the Virginia legislature repealed all statutes that:

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\text{do admit the church established under the regal government to have continued so, subsequently to the constitution; have bestowed property upon that church; have asserted a legislative right to establish any religious sect; and have incorporated religious sects, all of which is inconsistent with the principles of the constitution, and of religious freedom, and manifestly tends to the re-establishment of a national church.} \quad \text{\textsuperscript{25}}
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In accordance with these constitutional judgments, in 1801, after the County of Alexandria had been ceded to the federal government to form part of the District of Columbia, the legislature asserted a right to "all" the property of the Episcopal churches in the state. In a gesture of compromise, however, the legislature directed the sale only of vacant glebe

\textsuperscript{24} In this dispute, clergy sought to force increases in their salaries to compensate for the declining value of the "currency" in which it was paid, namely tobacco. These were economic hard times, and the demand was unpopular. Patrick Henry made his political reputation opposing the clergy demand. See Issac, supra n. 20.

\textsuperscript{25} 1799 Va. Acts. ch. 8. The dates of these enactments were variously reported. Apparently, the statute was passed in 1798, but enrolled as of January 24, 1799.
lands, with the proceeds to go to the overseers for the care of the poor. Defenders of the church sought judicial redress, and they knew where they could find it. It was unlikely that their claims would get a cordial reception in the state courts of Virginia, but the Federalist-dominated federal bench would likely be an ally in this political-cultural-religious struggle. But there was no obvious federal issue in the case (the Takings Clause did not apply to acts of state government), and in any event, federal district courts did not yet have general federal question jurisdiction. The best prospect for obtaining federal jurisdiction, therefore, was to sue in the District of Columbia. That, one may suspect, is why the Terrett litigation was initiated in Alexandria. The suit was filed by trustees of what is now Christ Church in Alexandria against the wardens of the church, to compel them to sell the disputed parcel of land and to devote the proceeds to the religious purposes of the church, and to quiet title. The wardens "defended" on the ground that they did not have clear title. The other defendants were the overseers for the poor for the parish in which the church was located—Fairfax County, Virginia—who allegedly objected to the sale and asserted ownership under the 1801 Act. Insofar as the suit was against the wardens, it was obviously a friendly suit. In light of the implausibility of the claim that the state of Virginia could take land from a District of Columbia church and give it to county officials in Fairfax County, one suspects that the overseers may have been friendly as well. In those days, the courts were not over-scrupulous about case or controversy requirements.

This tactic got the church supporters into federal court and eventually before Justice Joseph Story. Story, though appointed to the Court by Jefferson, was an intellectual pillar of Chief Justice Marshall's Federalist-leaning Court, and his views on the separation of church and state were miles apart from the Jeffersonians. By contriving a federal court suit in the District of Columbia, the defenders of the Episcopal Church thus obtained a favorable forum. However, this litigation tactic had two potential drawbacks. First, the most obvious ground for decision was that Virginia legislation could have no effect in the District of Columbia. If that were the rationale for decision, it would have no effect elsewhere. In a glancing reference in his opinion, Justice Story referred to this as a "further objection," but was not deterred from reaching the broader questions in the case. Second, because the lands in question in Terrett had been acquired by donation, the 1801 statute apparently did

26. 1801-1802 Va. Acts. ch. 8-9. Again, the statute was apparently passed in 1801 and enrolled the following January.
27. Id. at 52.
not apply, and if it did, the statute might have been voided on the ground that the government may not take private property. This could have left undecided the far more important question of the ownership of church property that had originally been granted by the government. Once again, while relying on the private nature of the grant as an alternative holding, Justice Story proceeded to opine on the broader question. On all points, the supporters of the church carried the day.

In light of the District of Columbia problem and the private character of the original grant of land, Terrett may have seemed "absurdly easy to decide," as historian G. Edward White commented in his Holmes Devise volume on this period. But in fact, the underlying issues, which Justice Story took pains to address and resolve, were not so easy, and carry considerable interest even today.

The legislature of Virginia, in 1798, concluded that its earlier statutes incorporating the Protestant Episcopal Church and "bestow[ing]" property upon it violated the constitution of the state. If that legal determination were authoritative, then the statutes under which the corporate structure and property rights of the Episcopal Church had been settled were void. Justice Story, however, did not deem the legislature a proper body to decide a question of that sort. "Whatever weight such a declaration might properly have as the opinion of wise and learned men, as a declaration of what the law has been or is, it can have no decisive authority." In other words, the meaning of the Virginia constitution, being a legal question, must be decided independently by courts, and not by legislatures. Note that this projects a strong view of Marbury v. Madison upon the state constitution of Virginia. That was by no means obvious. At that time, the principle of judicial review even at the federal level was contested, and it might well have been consistent with the Virginia constitution to treat the legislature's determinations regarding constitutionality as authoritative. Since all these were questions of state law, it might have been reasonable for federal judges to treat the state legislature's conclusions with the same deference they would treat precedents of the state's highest court. Not Justice Story. Treating this question as within the federal judicial province, Justice Story had no hesitation in disagreeing with the

28. Id. at 49-50.
30. Terrett, 13 U.S. at 51.
31. 5 U.S. 137 (1803).
32. At this time, before constitutional judicial review was firmly established, legislators often engaged in debates regarding whether their enactments conformed to fundamental sources of law, such as the Declaration of Rights. Their decision to repeal a statute on constitutional grounds, therefore, was not precisely a change of legislative policy, but more in the nature of a constitutional judgment. On the idea of popular constitutionalism, and the ultimate authority of the people—rather than the courts—to determine constitutionality, see Larry-Kramer, The Supreme Court 2000 Term Forward: We the Court, 115 Harv. L. Rev. 4 (2001).
legislature. He wrote that the statute of 1776, confirming the Episcopal Church in the property previously held by the Church of England, and the statutes incorporating the new church "were no infringement of any rights secured or intended to be secured under the constitution, either civil, political, or religious." Once the state constitutional objections to the 1776, 1784, and 1786 Acts were swept aside, Terrett would become a case of private property rights.

Justice Story first tackled the constitutionality of church incorporation. In an era prior to general incorporation statutes, when incorporation was viewed as a special privilege, granted sparingly and only for the achievement of some public purpose, incorporation of a religious denomination might well be viewed as a type of establishment. Four years before Terrett, President James Madison, whose views on establishment of religion are entitled to particular weight, vetoed an Act of Congress purporting to incorporate the Protestant Episcopal Church in Alexandria (presumably the very same church involved in Terrett). That veto might be interpreted as Madison's endorsement of the constitutional ruling by the 1798 Virginia legislature. Madison's reasons for vetoing the federal bill, however, were narrow and should not be interpreted as opposing all incorporations of religious bodies. Madison objected to two features of the federal incorporation Act: first, that it enacted into law "sundry rules and proceedings relative purely to the organization and polity of the church incorporated;" and second, that it vested in the church the authority to provide for the support and education of the poor. The problem with the first is that it interfered with the authority of religious groups to adopt and change their own organizational structure. This was a right later vindicated in several Supreme Court decisions, though not without ambiguity and confusion. The second feature, according to Madison, would be "superfluous, if the provision is to be the result of pious charity" and otherwise "would be a precedent for giving to religious societies, as such, a legal agency in carrying into effect a public and civic duty."

Reasoning of this sort suggests that the 1784 Act would be unconstitutional, because—like the 1811 federal bill—it specified the

33. Terrett, 13 U.S. at 51.
35. 22 Annals of Cong. 982-83 (1811).
36. Id.
37. See Serbian Eastern Orthodox Diocese for the United States of America & Canada v. Milliojevic, 426 U.S. 696 (1976); Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America, 344 U.S. 94 (1952); Watson v. Jones, 80 U.S. 679 (1871). The confusion is created by the so-called "neutral principles" doctrine of Jones v. Wolf, 443 U.S. 595 (1979), which appears to permit state courts to interfere with internal church governing structures if they do so pursuant to "neutral principles." Id. at 603.
38. 22 Annals of Cong. 983 (1811).
internal governing structure of the Episcopal Church. Justice Story declared that the 1784 Act was constitutional, but without offering any reasons for his disagreement with Madison.\(^{39}\) For purposes of Terrett, however, it did not matter whether the 1784 Act was constitutional, because any defect in that Act was cured by the 1786 Act, which allowed all religious societies to appoint trustees for the control of property, in accordance with their own rules. That appears to conform, in substance, to Madison's statement of principle. Indeed, it is hard to see the objection to inclusion of churches in general incorporation statutes. As Justice Story reasoned:

Consistent with the constitution of Virginia the legislature could not create or continue a religious establishment which should have exclusive rights and prerogatives, or compel the citizens to worship under a stipulated form or discipline, or to pay taxes to those whose creed they could not conscientiously believe. But the free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties, or by establishing funds for the support of ministers, or public charities, for the endowment of churches, or for the sepulture of the dead. And that these purposes could be better secured and cherished by corporate powers, cannot be doubted by any person who has attended to the difficulties which surround all voluntary associations.\(^{40}\)

Story thus concluded that the statutes under which the Protestant Episcopal Church was incorporated were not inconsistent with constitutional principles of religious freedom in Virginia.

That brings us to the harder arguments, regarding property ownership. Justice Story began by conceding that "upon a change in government" the legislature has authority to abolish "such exclusive privileges attached to a private corporation as are inconsistent with the new government."\(^{41}\) Thus, "it was competent to the people and to the legislature to deprive the Episcopal Church "of its superiority over other religious sects, and to withhold from it any support by public taxation."\(^{42}\) Moreover, Justice Story conceded that in respect to "public corporations which exist only for public purposes, such as counties, towns, cities, &c.," the legislature "may, under proper limitations, have a right to change, modify, enlarge or restrain them, securing however, the property for the uses of those for whom and at whose expense it was originally purchased."\(^{43}\) It is not clear why those concessions were not directly pertinent to the issue. If the glebe properties were "exclusive privileges"

\(^{39}\) Terrett, 13 U.S. at 51.
\(^{40}\) Id. at 49.
\(^{41}\) Id. at 51-52.
\(^{42}\) Id. at 48.
\(^{43}\) Id. at 52.
attached to the former established church, why could not the Virginia legislature, after the Revolution, “abolish” them? And why should the established church not be treated as a “public corporation”? And where did Justice Story derive the notion that the property of a public corporation must be reserved “for the uses of those for whom . . . it was originally purchased?” We receive no direct answer. Instead, the argument proceeds by means of the word “but.”

But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine.44

Justice Story did not trouble to identify which principles of justice, fundamental laws, provisions of the United States constitution, or decisions of respectable judicial tribunals he was referring to. Because Terrett was not a federal question case, the court was free to interpret state law and to apply principles of general jurisprudence not inconsistent with state law. We can recognize in this passage the same “vested rights” doctrine that the Court championed in such cases as Fletcher v. Peck45 and Trustees of Dartmouth College v. Woodward.46

Justice Story acknowledged that there might be an issue with regard to property that had been “originally granted by the state or king.” That, of course, is the more interesting question. But the particular piece of property at issue in Terrett had been purchased by parishioners and donated to the church. It thus stood on the same basis as any other title to property:

The title thereto was indefeasibly vested in the churches, or rather in their legal agents. It was not in the power of the crown to seize or assume it; nor of the parliament itself to destroy the grants, unless by the exercise of a power the most arbitrary, oppressive, and unjust, and endured only because it could not be resisted.48

The Revolution did not affect this, any more than it affected the “property

44. Id.
45. 10 U.S. 87 (1810).
46. 17 U.S. 518 (1819). Indeed, in Dartmouth College, the Court cited Terrett as directly on point. Id. at 664-65. In Dartmouth College, however, the holding rested on the Contracts Clause, a federal constitutional principle, and not—as in Terrett—on state law or general principles of jurisprudence. Id. at 654.
47. Terrett, 13 U.S. at 49.
48. Id. at 49-50.
of any other corporation created by the royal bounty or established by the legislature." 49

All this sounds reasonable, at least to ears accustomed to the idea that churches are private entities. But it was in fact a difficult issue, for much the reason that Dartmouth College was difficult: how do we know that a church or a college created by the state for state purposes under a preliberal regime should now be treated as "private"? If the Church of England was an arm of the state before the Revolution, and its property was subject to state control on account of being a state agency, when and why did it become "private" as a result of Independence and disestablishment? Since the property at issue in Terrett was acquired from private donation, the problem was easily overlooked. But what of the more interesting case, where the property was originally a grant from the crown, made specifically on account of the church status as "by law established"?

That issue was squarely presented in a second glebe lands case arising in the same Term as Terrett, involving a similar controversy in the State of Vermont. This case, Town of Pawlet v. Clark, 50 involved a dispute between the Town and the Episcopal Church in Pawlet over ownership of glebe lands that had been set aside by the crown in the original charter of the colony of New Hampshire. As in Virginia, the legislature in the years immediately following Independence passed statutes confirming the right of Episcopal churches to the property previously owned by the Church of England. In 1805, however, the Vermont legislature changed course, enacting a statute on the premise: "Whereas the several glebe rights granted by the British government to the church of England as by the law established, are in the nature of public reservations, and as such became vested by the revolution in the sovereignty of this state..." The statute granted those lands to the towns in which they lay, the profits to be used for purposes of public schools. 51

49. Id. at 50. It bears mention that when a similar issue arose some seventy-five years later, the Supreme Court reached the opposite conclusion. In Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1980), the Court upheld a statute dissolving a church corporation and seizing most its property. The LDS Church had enjoyed de facto status prior to creation of the Utah territory, and its legal status was confirmed by territorial legislation in 1851 and again in 1855. This would seem parallel to the acts confirming the legal status and property of the Episcopal Church, at issue in Terrett. Yet the Court held: "From the time of these confirmatory acts, therefore, the said corporation had a legal existence under its charter. But it is too plain for argument that this charter or enactment was subject to revocation and repeal by congress whenever it should see fit to exercise its power for that purpose." Id. at 45. Moreover, rather than conclude, as in Terrett, that upon dissolution of the corporation the property must be devoted to its original purpose, the Late Church Court held that "when a [public or charitable] corporation is dissolved, its personal property... ceases to be the subject of private ownership, and becomes subject to the disposal of the sovereign authority." Id. at 47. Terrett was not cited.
50. 13 U.S. 292 (1815).
51. Id. at 294-95.
In litigation similar to Terrett, the church resisted these confiscations. As in Terrett, the particular locale that was the subject of litigation was atypical. In Town of Pawlet, there had been no Church of England in pre-revolutionary times, and an Episcopal congregation was formed only in 1802. This enabled Justice Story to write an opinion that confirmed the right of most Episcopal churches in Vermont to their glebe lands, while deciding the particular case in favor of the town. In so doing, he provided an answer to the unanswered question in Terrett: what is the proper disposition of glebe lands that were originally granted to the church by the crown?

Justice Story reasoned that the statute passed after Independence—much like the statute in Fletcher v. Peck—created vested rights, which "could not afterwards be repealed by the legislature so as to divest the right."52 But, he reasoned, this was true only where an Episcopal church then existed, which was the recipient of the vested rights. As to any lands "which had not been previously appropriated by the regular and legal erection of an Episcopal church within the particular town," those lands could be taken by the state.53 Because the Pawlet Episcopal church had not been founded until 1802, it could not have been the recipient of any vested rights. Thus, the town won the battle, but the rest of the Episcopal Churches in Vermont won the war. It is difficult to resist the thought that Justice Story found it convenient to decide the broad principle in a case in which it did not apply, thus deflecting potential criticism.

Justice Story provided two reasons for treating royal grants to the church as private property. First, he appealed to an interpretation of the common law, under which the crown could not take back lands granted to the church even during the age of establishment. According to Story, it would not be "in the power of the crown, after such a grant executed in the parson, to resume it at its pleasure. It would become a perpetual inheritance of the church, not liable, even during a vacancy, to be divested."54 If that is accurate, then the Church of England was not truly an arm of the government, not truly a public corporation, but was independent in at least one important sense from the crown. Presumably, those independent, quasi-private, rights survived into the era of disestablishment, for the same reason they survived in Dartmouth College. Note that this answer was not based on general principles of establishment and disestablishment, but on a specific (and far from ineluctable) feature of the positive law of church and state in England.

Justice Story's second reason was that the Vermont legislature confirmed the church in its property after the Revolution. This was a feature common to both Vermont and Virginia. It presents an interesting

52. Id. at 336.
53. Id.
54. Id. at 329.
third answer to the theoretical question of the status of an established church's property in the transition to disestablishment. As noted above, the two most obvious solutions—to confirm the church in its property and to take it away—are unsatisfactory as a general theoretical and practical matter. Story's approach might be interpreted this way: the legislature can adopt whatever policy it wishes, but having once done so, the property rights vested in the church become "private" and constitutionally protected. During the transition to a liberal regime, sometimes the principle of repose takes precedence over the righting of old wrongs. In Virginia and Vermont, the anti-church forces did not take over the reins of government until several decades after Independence. That was too late.

II. Vidal v. Girard's Executors

In 1831, the richest man in America died. He left the great bulk of his fortune to the City of Philadelphia, in trust, to establish and maintain an institution for "poor male white orphan children." This event would be comparable, in our time, to Bill Gates dying and leaving his many billions to create an AIDS hospital in Seattle. It caused quite a stir. Stephen Girard, a motherless child from France, had gone to sea at age fourteen, arrived in America in 1776 when his ship was chased into the port of Philadelphia by a blockading British fleet, and established a worldwide trading and financial empire. Among his successful enterprises were banking, finance, smuggling, bribery, privateering, opium running, and trading in mislabeled goods. He cheated his brother in a business deal, and cheated his fellow Philadephians by selling cheap French wine as expensive port, explaining to an associate that they could not tell the difference. He was largely responsible for arranging the financing that enabled the United States to support the War of 1812. He was also a businessman of genius, known for his hard work, extensive knowledge, and meticulous attention to detail. He spoke only broken English, relying mostly on his native French. His family life was unhappy. He despised his relatives, whom he considered shiftless ne'er-do-wells. He married a penniless orphan servant, whom historians tell us was a nymphomaniac. She bore him no children, and soon went insane. Twice Girard approached the Pennsylvania legislature to obtain a divorce, but for all his money, he could not throw off the marital traces, until Mrs. Girard passed away in an insane asylum.

A skinflint and a miser in his early years, Girard became more

56. The historical details about Girard, which are outside the record in the case, come from John Keats, Legacy of Stephen Girard, 29 Am. Heritage 39 (June/July 1978).
philanthropic and civic-minded as he grew older. Much of Girard's late-blooming philanthropy was directed to orphaned youths. It is reported that on his daily walk from the city to his suburban estate, he would carry a collection of children's shoes in different sizes, strung from a pole, so that he could provide footwear to barefoot urchins he would encounter on his route. This was obviously a strange mix of a man.

When Girard died at the age of eighty-one, wifeless, childless, and on bad terms with his more distant relatives, he directed his fortune to the welfare of orphans. "I have long been impressed," he wrote in his will, "with the importance of educating the poor, and of placing them, by the early cultivation of their minds and the developments of their moral principles, above the many temptations to which, through poverty and ignorance, they are exposed." He thus decided to provide for at least 300 "poor male white orphan children...a better education, as well as a more comfortable maintenance, than they usually receive from the application of public funds." He left the bulk of his estate for that purpose.

Understandably, the relatives were peeved, and sought legal redress. That was not surprising. But the terms of Girard's will were surprising, even shocking. Indeed, even the distinguished lawyer who drafted the will doubted that it would hold up in court.

In some respects, the will was merely eccentric. Stephen Girard had been accustomed to dictating even the minutest details of operation of his far-flung business enterprises, and he was no less determined to dictate how his orphanage would be run. He determined the size of the buildings and rooms, the size and placement of the windows, the heights of the ceilings, the material to be used in construction of the buildings, and even the dimensions of the wall that would encircle the property. He prescribed an eight-year curriculum of study for his charges. With the pragmatic spirit often characteristic of self-educated men of business, he stated in his will that he would have the orphans "taught facts and things, rather than words or signs." He prescribed the teaching of French and Spanish, and stated that he did "not forbid, but I do not recommend, the Greek and Latin languages." He demanded that "all the instructors and teachers in the college shall take pains to instill into the minds of the scholars the purest principles of morality, so that, on their entrance into active life they may, from inclination and habit, evince benevolence towards their fellow creatures, and a love of truth, sobriety and industry."

58. Id. at 129 (quoting Stephen Girard's will).
59. Id.
60. See Keats, supra n. 56, at 42 (quoting William J. Duane to that effect).
61. Id.
62. Vidal, 43 U.S. at 132 (quoting Stephen Girard's will).
63. Id. at 133 (quoting Stephen Girard's will).
But then came the shocking provision: he "enjoin[ed] and require[d] that no ecclesiastic missionary or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever, in the said college, nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises."\(^64\) By this prohibition, Girard hoped to ensure that the boys' minds would be "free from the excitement which clashing doctrines... are so apt to produce,"\(^65\) and that the lack of religious indoctrination during their youth would leave them free when they were grown to "adopt[...] such religious tenets as their matured reason may enable them to prefer."\(^66\) He had no such compunctions about premature indoctrination in political principles. Rather, he expressed his intention that "by every proper means a pure attachment to our republican institutions, and to the sacred rights of conscience, as guaranteed by our happy constitutions, shall be formed and fostered in the minds of the scholars."\(^67\)

It would probably be stretching a point to suggest that Girard's relatives, most of them French, were seriously aggrieved at this lack of piety. Any ground of challenge would do for them. But for most Americans of that day, in the midst of the efflorescence of institutional religiosity called by historians the Second Great Awakening, Girard's contemptuous attitude toward the clergy, and indifference—nay, hostility—toward the religious education of vulnerable youth, was an affront to decency and an offense against educational orthodoxy. At that time, virtually all educators, whether in public or nonpublic schools, were men of the cloth,\(^68\) and education and piety were inextricably combined in the minds of most Americans. In the words of the Northwest Ordinance, "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."\(^69\)

Girard's will, with its references to the "sacred rights of conscience" but its hostility to organized religion and insistence that freedom of religion is best attained by prohibiting religious education during the susceptible years of youth, reflects one side in a deep disagreement over the character of disestablishment. The predominant American view, reflected in such documents as Madison's *Memorial and Remonstrance* and in the support for disestablishment of religion among the most fervent

\(^{64.}\) Id.
\(^{65.}\) Id.
\(^{66.}\) Id.
\(^{67.}\) Id. at 132.
\(^{69.}\) Act to Provide for the Government of the Territory Northwest of the River Ohio, Ch. 8, 1 Stat. 50, 52 n. [a] (1789).
evangelical sects, was that disestablishment was essential to liberate religion from government control. This may be understood as freedom of religion. Americans at the time were inclined to view religion—and they principally had in mind Protestant Christianity—as an essential support for republican government. The alternative view, reflected in Girard's will and more closely associated with the French disestablishment, was to be suspicious of organized religion as a source of superstition and lack of republican freethinking. It was more concerned with freedom from than freedom of religion. To the extent that religion is constitutionally valued under this perspective, it is solely as a matter of individual conscience, with no public relevance.

These philosophical and theological issues were easily translated into legal questions, and used by the French relatives to challenge the validity of the will. Both sides hired the best lawyers in the land. The relatives engaged Daniel Webster, reportedly at the eye-popping fee of $50,000 if he were successful in breaking the will. The ensuing arguments attracted enormous public attention, with daily newspaper reports and editorials. Oral argument in the Supreme Court occupied ten days, and the courtroom was thronged with legal and society observers, fascinated with the explosive mix of money, religion, and oratory. Webster obliged the crowd with histrionics that, according to one historian, caused "tears to pour from the eyes of sentimental observers [while] hardened reporters smirked about the 'Gospel according to Webster.'" It is said that he hoped to ride the wave of publicity to the White House. His opposing counsel, Horace Binney and John Sergeant, expounded for days on intricacies of the English common law of trusts. It is said that their arguments could still serve as treatises on the subject. Indeed, they performed so ably that President John Tyler offered each a seat on the Supreme Court. Both declined.

Webster and his co-counsel first challenged the will on the technical legal grounds that the description of the orphan beneficiaries was too indefinite to permit a trust on their behalf, and that City of Philadelphia was not authorized by its charter to administer the trust. These arguments would have permitted the Court to decide in their clients' favor without addressing the politically controversial and constitutionally challenging issue of the exclusion of clergy from the college. But the Court did not take that avenue.

70. See de Tocqueville, supra n. 68, at 293 ("I do not know if all Americans have faith in their religion—for who can read the secrets of the hearts?—but I am sure that they think it necessary to the maintenance of republican institutions.").
71. Charles Warren, The Supreme Court in United States History vol. 2, 130 (Little, Brown & Co. 1928) (John Quincy Adams is the source regarding the fee.).
72. Id.
73. Id. at 124.
74. Vidal, 43 U.S. at 143 (argument of counsel).
The real focus of the case was on the relatives' claim that the trust was void "because the plan of education proposed is antichristian, and therefore repugnant to the law of Pennsylvania, and is also opposed to the provision of Article IX. Section iii of the Constitution of Pennsylvania, that 'no human authority can in any case whatever control or interfere with the rights of conscience.'\textsuperscript{75} To deny orphans—who have no family to provide alternative outlets for religious education or worship—any contact with clergy would effectively foreclose the exercise of religion. The argument is roughly analogous to the rationale for chaplains in the military today: if there were no chaplains, American military personnel cut off from the ordinary private opportunities for worship would be denied the free exercise of religion.\textsuperscript{76} Of course, counsel put the argument more colorfully. The exclusion of clergy from the college, Webster's co-counsel Jones argued, "would make it a curse to any civilized land; it is a cruel experiment upon poor orphan boys to shut them up and make them the victims of a philosophical speculation."\textsuperscript{77} These lawyers cleverly relied on the doctrine that Christianity is part of the common law—a doctrine that Justice Story had asserted in a lecture at Harvard Law School and that Jefferson had denied in a famous essay.\textsuperscript{78} In sum, they were arguing that it was "contrary to the public law and policy of Pennsylvania" for the City of Philadelphia, a public institution, to administer a college on principles of hostility to religion.\textsuperscript{79}

Lawyers for the City also led with a technical argument: that even if the terms of the trust were set aside, Girard's relatives still would not have the right to inherit. Horace Binney argued caustically that "[i]f zeal for the promotion of religion were the motive of the complainants, it would have been better to have joined with us in asking the state to cut off the obnoxious clause than to use the plea in stealing away the bread of orphans."\textsuperscript{80} Despite the obvious force of this argument, the Court did not reach it, concluding instead that the trust was valid.

Justice Story's opinion for the Court was an odd mixture of two different principles: the right of testators to decide for themselves the objects of their charity, and a soft reading of Girard's intentions that

\textsuperscript{75} Id. at 143-44.

\textsuperscript{76} See Katcoff v. Marsh, 755 F.2d 223, 234 (2d Cir. 1985) ("It is readily apparent that [the Free Exercise] Clause, like the Establishment Clause, obligated Congress, upon creating an Army, to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them."); H.R. Rpt. 171 (1850) (concluding that Congress has an obligation to provide military chaplains).

\textsuperscript{77} Id. at 146.


\textsuperscript{79} Vidal, 43 U.S. at 173 (argument of counsel).

\textsuperscript{80} Id. at 146 (argument of counsel).
rendered the will not inhospitable to Christian teaching.

Story first disposed of the argument that Christianity is part of the common law by affirming that proposition only with "its appropriate qualifications," which are to be found in the Pennsylvania Constitution's articles of religious freedom. Referring to those articles, he stated: "Language more comprehensive for the complete protection of every variety of religious opinion could scarcely be used; and it must have been intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels." The core of the common law's recognition of the Christian religion, according to Story, amounted to the proposition that "its divine origin and truth are admitted, and therefore it is not to be maliciously reviled and blasphemed against . . . ." Nothing in Girard's will seemed to offend that narrow principle.

With that minor qualification, much of Justice Story's opinion was based on the right of individuals to pursue charitable objectives in their own way. Story expressed a reluctance to interpret "public policy" so as to interfere with the objectives of a private donor or testator in other than the clearest cases. The question—what is contrary to public policy?—is one of "great vagueness and uncertainty, . . . ." he noted, "upon which men may and will complexionally differ," and will be found to "involve discussion which scarcely comes within the range of judicial duty and functions." In particular, he noted, "in a country composed of such a variety of religious sects as our country," any attempt to define what is contrary to public policy "would be attended with almost insuperable difficulties, and involve differences of opinion almost endless in their variety." He declared that "[w]e disclaim any right to enter upon such examinations, beyond what the state constitutions, and laws, and decisions necessarily bring before us." These liberal sentiments might lead to the conclusion that an atheist or agnostic, as Girard probably was, is as entitled to create an institution devoted to the teaching of his religious principles as any orthodox Christian would be. But Story held back from such a conclusion. It is "unnecessary" for the Court to "consider what would be the legal effect of a

81. Id. at 198.
82. Id.
83. Id.
84. Id. at 198.
85. Id.
86. This resembles the problem faced in Bob Jones U. v. U.S., 461 U.S. 574 (1983), where the Court had to decide whether a private religious university's rule against interracial dating violated "public policy," in the absence of any directly relevant constitutional, statutory, or even regulatory guidance (the IRS rules on the subject having been abrogated). In that case, unlike Vidal, the Court did not hesitate to enforce an understanding of public policy at odds with that of the private institution. The real (but unaddressed) question in both cases was the placement of the public-private line.
devise in Pennsylvania for the propagation of Judaism or Deism, or any other form of infidelity. Such a case is not to be presumed to exist in a Christian country; and therefore it must be made out by clear and indisputable proof.\footnote{Id. at 198-99.} He declared himself unwilling to deal with hypotheticals based on "\textit{[r]emote inferences, or possible results, or speculative tendencies.}\footnote{Id. at 199.} The opinion thus fell short of a ringing endorsement of the proposition that testators of all religious persuasions were equally free to promote their views.

The question thus came down to one of fact, and of degree. Ultimately, the Supreme Court upheld the provisions of Girard's will on the basis that "there is nothing in the devise . . . which \[i\]s inconsistent with the Christian religion."\footnote{Id. at 201.} Although, under the terms of the will, ministers were excluded from the college, that did not prevent laypersons on the staff from teaching the tenets of Christianity, or from using the Bible for moral instruction. Accordingly, the provision was not derogatory to Christianity, and thus not unlawful under the public policy of the state.

This line of reasoning is highly unsatisfactory. It seems to concede the principle that charitable trusts must be consistent with the Christian religion, while relying on a dubious reading of the testator's intentions to avoid application of the principle to the case. To be sure, Stephen Girard did not explicitly forbid laymen in the college from teaching the precepts of the Christian faith, or of the Bible. But his will made clear that the purpose of the clergy exclusion was to prevent sectarian disputation, and to leave the orphan boys free to consider and adopt religious views when they were adults. Those intentions would seem to preclude lay religious instruction and Biblical teaching, as much as they would instruction by ecclesiastics. Story's interpretation reduced Girard's studied objection to the inculcation of religion in the youth to mere anticlericalism. His will was upheld at the expense of his intention.\footnote{Story may have been influenced in his interpretation by a report prepared by his friend Professor Francis Lieber, one of the foremost public intellectuals of the day. \textit{See} Francis Lieber, \textit{Introduction to a Report on an Organization Proposed for Girard College for Orphans}, in \textit{Francis Lieber. Miscellaneous Writings} vol. 2, 497 (1880).}

Moreover, the opinion failed to come to grips with the serious question of the relation between religion and education. At that juncture in our history, common school reformers were starting to urge the creation of common schools, governed by the state and devoted to "nonsectarianism" in education. Their critics claimed that this formula amounted to Protestantism in disguise.\footnote{\textit{See} Michael W. McConnell, \textit{Education Disestablishment: Why Democratic Values Are Ill-Served By Democratic Control of Schooling}, 43 N\textit{OMOS} (forthcoming 2001); Jorgenson, \textit{supra} n. 68, at 20-30, 111-45; Charles Glenn, \textit{The Myth of the Common School} (U. Mass. Press 1987); David Tyack, \textit{Onward Christian Soldiers: Religion in the American...}
public support for schools maintained by religious minorities—especially Catholics—while allowing public schools to inculcate piety and morality through "nonsectarian" means such as the King James Bible, recitation of the Lord's Prayer, and the McGuffy Readers. Girard's pedagogical principles, as interpreted by Justice Story, were a version of this formula. Story's opinion failed to confront the hypocrisy and internal contradictions in this position. Indeed, it was not until after World War II that the Court would revisit the question of how to conduct public education in a religiously pluralistic regime. 92

Finally, and most perplexingly, Justice Story's analysis of the legal problem seemed oblivious to the crucial distinction, lurking in the case, between public and private. The logic of such decisions as Dartmouth College and Terrett was that the nature of constitutional principles is quite different with respect to public and private institutions. A logical application of that insight might have suggested that a private charity is free to adopt a point of view—even hostility to Christianity—that would be impermissible in a public institution. The key point here is that Stephen Girard did not rely on private means to accomplish his objectives. He gave his money to the City of Philadelphia, and demanded that the City administer his college on his terms. It would seem sensible to hold that a private trust is permitted to take whatever view it likes of religion, but that state institutions, even if created by private bequests, are obliged to comply with public constitutional norms, such as neutrality toward religion.

The Court's failure to address the public-private distinction in the context of Girard's will planted the seed for future controversy. So munificent was Girard's endowment, and so successful his institution, that it remained an important source of assistance to orphan boys at the turn of the civil rights revolution. 93 By 1954, the time of Brown v. Board of Education, 94 Stephen Girard's legacy had become controversial for reasons quite divorced from his hostility to institutional religion—namely, his decision to limit his benevolence to poor "white" orphan boys. Why not poor black orphan boys as well?

Once again, some of the finest lawyers in America devoted their attention to breaking the terms of Girard's will. This time, the challengers were black children who wished to share in the Girard legacy, rather than relatives who wished to destroy it. Daniel Webster's role as leader of the

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The challengers' legal team was played this time by William T. Coleman, whose career at the bar was almost as distinguished as that of Webster. Coleman, the first African-American editor of the Harvard Law Review and law clerk to Justice Felix Frankfurter, had assisted Thurgood Marshall in the Brown litigation and had become a leader of the Philadelphia bar. Later, he would serve as a member of the Warren Commission, investigating the assassination of John F. Kennedy, as President of the NAACP Legal Defense Fund, and as Secretary of Transportation under President Gerald Ford.

This time, the Girard legacy litigation focused directly on the very issue neglected by Justice Story: on the difference between constitutional principles applied to public and private institutions. Coleman argued that whatever freedom a testator may have to choose the objects of his charity, no publicly administered institution may discriminate on the basis of race. The Pennsylvania Supreme Court upheld the terms of Girard's will, emphasizing the fact that "the beneficiaries of the charity of Stephen Girard are not being determined by the State of Pennsylvania, nor by the City of Philadelphia, not by this Court, but solely by Girard himself."95 The Pennsylvania court also invoked with greater clarity and consistency the principle with which Justice Story had only flirted: "it is one of our most fundamental legal principles that an individual has the right to dispose of his own property ... as he sees fit."96

The United States Supreme Court unanimously disagreed.97 The Court ruled that the "Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit [African-American boys] to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment."98

On remand, the Philadelphia Orphans Court interpreted the Supreme Court's holding as limited to the proposition that the City of Philadelphia could not constitutionally administer the trust in accordance with its original terms.99 Reasoning that a charitable trust must not be allowed to fail for want of a trustee, the court appointed a new set of private trustees, who could carry on the original trust in accordance with the original bequest.100 The Pennsylvania Supreme Court affirmed, again emphasizing that the "real issue" was the "right of a private individual to bequeath his property for a lawful charitable use and have his testamentary disposition judicially respected and enforced."101 This time,

96. Id. at 290.
98. Id. at 231.
100. Id. at 557-58.
the United States Supreme Court denied certiorari, and the Girard estate was administered for the benefit of white children only for another nine years.

In 1966, in an unrelated case, the United States Supreme Court ruled that it was unconstitutional to allow a public park willed to a city by a private testator under terms requiring racial segregation to continue to be administered on a segregated basis by new private trustees. Armed with this precedent, William Coleman went back to court, representing a new set of black male orphan plaintiffs—this time in federal court. These plaintiffs prevailed first in district court and then in the Third Circuit, and certiorari was denied. Thus, some 124 years after the terms of Stephen Girard's will were approved by the United States Supreme Court, Girard's legacy was held unconstitutional, and black male orphans were admitted to the College. Now, the College admits girls as well as boys, and motherless as well as fatherless children.

Are the modern decisions affecting Girard College consistent with the original case? Justice Story's 1844 decision relied on a unstable mix of the proposition that philanthropists have great latitude in directing the objects of their charity, and the claim that Girard's will did not discriminate—at least, not too heavily—against religion. The first half of that reasoning is flatly inconsistent with the 1968 *Girard College* decision. Whatever freedom private philanthropists may have to depart from public policy in their bequests, they do not have the right to involve public institutions, like the City of Philadelphia, in schemes that would be unconstitutional or contrary to public policy.

That leaves the second part of Story's reasoning. This, too, appears doubtful. Can an institution, like an orphan's home, shield its residents from opportunities for worship or professional religious instruction? Can a public institution exclude all persons professionally affiliated with religion, when it admits those of every other sort of attachment or philosophy? Might this not be deemed viewpoint discrimination under modern First Amendment law? In his argument in defense of Girard's will in 1844, Horace Binney relied heavily on the precedent of laws excluding clergy from public office: "the Constitution of New York excludes clergymen from offices, civil or military. If the situation of a schoolmaster is an office, then a clergyman cannot be a public teacher." But in 1978, the Supreme Court held it unconstitutional to exclude clergy, as such, from public office.

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has been held unconstitutional, it would seem to be an argument for the opposite side.

To be sure, public schools now are held constitutionally obliged to avoid the teaching of religion in their curriculum; Girard probably would have liked that. But Girard's will went well beyond insistence on a secular curriculum; it excluded all clergy from the premises, even as casual visitors. And remember, Justice Story upheld the will on the ground that it did not reject religious teaching, but only religious personnel.107 Modern constitutional decisions seem to hold the opposite: that public schools may (indeed must) refrain from religious teaching, but cannot reject religious personnel. They cannot assume—as Girard did—that because a person is a member of the clergy, he is incapable of complying with public policy in matters of religion.108

Just last year, the Court held that public schools cannot exclude religious groups, including clergy, from providing extracurricular religious instruction on terms equal to nonreligious groups.109 The policy in that case is somewhat reminiscent of Girard's will: the school district permitted groups like the Boy Scouts or 4-H to use classrooms outside of regular school hours to inculcate morality and character in the young, and even permitted such activities to be conducted with a certain religious perspective. But actual "religious instruction" was forbidden. That is similar to Girard's insistence that the orphans in his college be given moral instruction, but shielded from the "clashing doctrines" of professional ecclesiastics, who were barred from entry onto the premises.

Should Girard's relatives' case be revived at this late date, and reargued under modern precedents? Might Daniel Webster have been correct after all, that the "unchristian" character of Girard's will rendered it contrary to public policy?

III. PERMOLI V. MUNICIPALITY NO. 1 OF THE CITY OF NEW ORLEANS

On November 9, 1842, Father Bernard Permoli officiated at an open casket funeral in the church of St. Augustin in the French Quarter of New Orleans. He blessed the body and offered the prayers specified by the doctrines and forms of the Roman Catholic Church. For this performance of the priestly function, he was prosecuted by the City and fined $50. The ceremony violated a city ordinance passed ten days earlier, which prohibited open casket funerals at any "Catholic churches" within the city, other than a designated mortuary chapel on the outskirts of town. The Ordinance should be quoted in full:

107. See supra nn. 89-90.
Sitting of Monday, October, 31st, 1842.—Resolved, that from and after the promulgation of the present ordinance, it shall be unlawful to carry to, and expose in, any of the Catholic churches of this municipality, any corpse, under the penalty of a fine of fifty dollars, to be recovered for the use of this municipality, against any person who may have carried into or exposed in any of the aforesaid churches any corpse, and under penalty of a similar fine of fifty dollars against any priest who may celebrate any funeral at any of the aforesaid churches; and that all the corpses shall be brought to the obituary chapel, situated in Rampart street, wherein all funeral rites shall be performed as heretofore.\(^\text{110}\)

A week later, the city council amended the Ordinance, as follows:

Sitting of November 7th, 1842.—Resolved, that the resolution passed on the 31st October last, concerning the exposition of corpses in the Catholic churches, be so amended as to annul in said resolution the fine imposed against all persons who should transport and expose, or cause to be transported or exposed, any corpses in said churches.

Be it further resolved, that the said fine shall be imposed on any priest who shall officiate at any funerals made in any other church than the obituary chapel.\(^\text{111}\)

Father Permoli filed an answer to the complaint, claiming the protection of the Free Exercise Clause of the First Amendment.\(^\text{112}\) Thus began a case that went all the way to the United States Supreme Court, and established the proposition that the Free Exercise Clause of the First Amendment does not apply to the acts of state and local governments.

The arguments and counter-arguments in the case tell us a great deal about the state of free exercise jurisprudence during that period. In the United States Supreme Court, Permoli's counsel argued that the funeral ordinances were unconstitutional for several reasons. First, they applied only to "one denomination of worshippers"—Roman Catholics—and thus violated the principal of "equality before the law."\(^\text{113}\) Second, the ordinances "legislate for the priest as priest, and only as priest; not as a person transporting and exposing, or causing to be transported or exposed, any corpse in the interdicted churches."\(^\text{114}\) Third, even if the Ordinance were viewed "as a measure of quarantine precaution," it could not be sustained, because "such prohibitory legislation infringes rights more precious than mere animal health."\(^\text{115}\) Father Permoli's counsel hinted that the public health justification was pretextual, since the legislators "have expressly waived the penalty against all concerned in

\(^{110}\) Permoli v. Municipality No. 1 of the City of New Orleans, 44 U.S. 589, 590 (1845).

\(^{111}\) Id.

\(^{112}\) Id. at 591.

\(^{113}\) Id. at 597 (argument of counsel).

\(^{114}\) Id. at 597-98.

\(^{115}\) Id. at 600.
exposing, or causing them to be exposed, and directed their vengeance exclusively against the priestly function."  

Counsel for the City argued primarily that the Ordinance had a legitimate public health purpose. "New Orleans is visited annually with the yellow fever, in either the sporadic or epidemic form, and strong sanitary measures are deemed indispensable there to check the range and prevalence of the pestilence when it comes." Counsel denied that the Ordinance discriminated against Catholics, pointing out that most Protestants lived outside the old city, and that Methodists, who were the only Protestants with a church in the French Quarter, performed funeral services at the graveside rather than in the church. The Ordinance thus applied to everyone who conducted funerals in the City. More to the point, counsel observed that "the great part" (and sometimes all) of the city council is made up of Catholics, which makes it unlikely that they were discriminating against the Catholic religion. "If Catholics are wronged," he said, "Catholics have wronged them." Next, he argued that free exercise rights could not have been violated, because the testimony showed that the performance of funeral rites in the church was not a matter of Catholic dogma, but only of "discipline." "The place, then, for the mortuary ceremonials not being sacramental, how is the faith or conscience of Catholics assailed, by designating a few places in which they could not be performed?"

These are essentially the same issues that would be contested in a Free Exercise case today. How can we tell whether legislation is neutral and generally applicable? Does it matter? Is it necessarily unconstitutional for a law to mention a particular religious denomination by name, if it is the only one to which the law could apply? How strong a governmental justification is required to override free exercise rights? Does the existence of major exceptions, or of substantial

117. *Id.* It is now known that yellow fever is spread by mosquitoes—and not funerals—but they did not know that then. Even then, however, the theory that yellow fever was spread by corpses was not widely held. The most commonly believed causes were heat, moisture, and filth—especially human waste and dead animals. Margaret Humphreys, *Yellow Fever and the South* 19 (Rutgers U. Press 1992).
118. *Permoli*, 44 U.S. at 600-01 (argument of counsel). This was an issue of disputed fact: one witness testified that he had seen a funeral take place inside a Methodist church in Kentucky. *Id.* at 593. Other sources report the existence of an Episcopal and a French Evangelical church in the city during the time, but they were not mentioned at trial. Henry Rightor, *Standard History of New Orleans, Louisiana* 495-69 (Lewis Publishing Co. 1900).
119. *Id.* at 602.
120. *Id.* at 603.
underenforcement, rebut the government’s claim of a compelling interest?  

125 Can the courts question whether the foundation of the government’s asserted interest is empirically valid?  

126 Does free exercise protect religiously motivated conduct, or only conduct compelled by religious doctrine?  

127 It is remarkable how many issues of continuing controversy today were raised by the lawyers in Pernoli. If the Supreme Court had reached the merits, it could have resolved most of our current doctrinal controversies, way back in 1845.  

But it did not. The Court unanimously concluded, in a few paragraphs, that there was no federal jurisdiction in the case. “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: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states.”  

The case thus concluded with none of the interesting doctrinal issues resolved. Not until 1940, in Cantwell v. Connecticut, 129 would the Court hold that the Free Exercise Clause applies to the states through the medium of the Due Process Clause of the Fourteenth Amendment, and not until Braunfeld v. Brown 130 and Sherbert v. Verner, 131 in the early 1960s, would the Court begin to grapple seriously with the doctrinal questions left unanswered in Pernoli.  

But let us return to the actual controversy in Pernoli. Why was this legislation addressed only to Catholic priests? Why did the city council wish to confine funerals to the mortuary chapel on Rampart Street? Why did Father Pernoli risk criminal punishment rather than conduct services in the mortuary chapel? As a public health measure, the Ordinance raises more questions than it answers. What was really going on? The affair takes on quite a different light as an episode in religious politics—especially as a skirmish in a civil war among Roman Catholics regarding how their hierarchical Church should be organized in this new democratic society.  

Centrifugal and centripetal forces have always been in tension within the Roman Catholic Church. As a worldwide—a “catholic”—church,
under the leadership of a single supreme pontiff, acting through bishops who in turn control the clergy and churches within their local dioceses, the Catholic Church is theoretically transnational, unified, and hierarchical. But throughout its history, this unified, transnational ideal has come into conflict with local centers of power, which wished to place a stamp of national identity on the church within their borders. The Investiture Controversy is probably the most famous instance of this conflict.133 Sometimes one side prevailed; sometimes the other; usually the result was some sort of pragmatic compromise. In Europe, the Pope’s principal competitors for power were kings and nobles. In America, as might be expected, the controversy took a democratic turn.

In the early days of the American republic, Catholics were so few in number and so distrusted by the wider population that issues of internal organization could be overlooked. At the time of the Revolution, there were only about 30,000 Catholics in the country—barely one percent of the population,134 with only one bishop, in Baltimore. It was primarily a non-English immigrant church. As Catholics swarmed into the United States from Germany, France, and especially Ireland in the early part of the nineteenth century, they did not wait for central church authorities to establish churches for them. They did so for themselves. In so doing, they understandably borrowed the legal frameworks available to churches in their states, which were based on the Protestant model, in which the temporal affairs of the church and often the powers of appointment of clergy are vested in a board of lay persons elected by the congregation, called variously a board of elders, wardens, trustees, or vestry. This pattern of church planting was partly a response to necessity, since the American church hierarchy was too thin and undeveloped to take control of these events.135 But it was partly due to the legal and cultural environment. Groups tend to adapt to their cultural surroundings. In Protestant, democratic, and voluntaristic America, it seemed natural for American Catholics to found their own congregations, elect their own leaders, and run their own affairs.

As the American Catholic governing structure became more developed, and as the authority of trustees began to conflict with the authority of priests and bishops, the hierarchy asserted—or reasserted—its traditional authority, in accordance with canon law. Local church leaders, however, often were reluctant to relinquish power over institutions that they had created and paid for. Bitter conflicts erupted

over this issue in a number of American cities, notably New York, Philadelphia, Baltimore, Norfolk, Charleston, New Orleans, and Buffalo.\footnote{136. See Carey, supra n. 132, at 2.} This set of conflicts is known as the “Trusteeship Controversy.”

Trusteeism—as we may call the position taken by the supporters of the lay boards—was “a form of ecclesiastical democracy that asserted the rights of an American National church vis-à-vis the Roman church, a separation of spiritual and temporal roles within the church itself, ultimate lay control over ecclesiastical temporalities, lay participation in the selection of the clergy, the rights of the local clergy to due process in the church, and the establishment of some written constitutional instrument that would define and limit the relative prerogatives and duties of all individuals within the ecclesiastical community.”\footnote{137. Id. at 18.} In large part, it was an attempt to refashion the Catholic Church in accordance with the democratic mores of the American culture, but it also had deep roots in European traditions of resistance to the centralizing tendencies of Rome. Trustees thus appealed not only to American laws and values, but also to Old World precedents of lay and localized management and patronage.

American constitutionalism had something to offer both sides in the conflict. Advocates of the trustees liked to invoke notions of republicanism and democracy in church governance, but the separation of church and state in the United States enabled the hierarchy to assert its authority without governmental interference. As one scholar has explained:

Unlike the European Catholic Church, which had lost its freedom because of the involvement of state governments in ecclesiastical affairs and because Rome had reluctantly and unwisely accepted these conditions through various concordats, the American Catholic Church was free to assert ecclesiastical authority and discipline unencumbered by governmental or lay restraints.\footnote{138. Id. at 197.}

As a cultural matter, Americanism may have strengthened the trustees’ hand, but as a legal matter, the separation of church and state meant that the Catholic Church could be as hierarchical and un-republican as it pleased.

As a former French and Spanish colony, New Orleans, where our story unfolds, was the only part of the United States in which the Catholic Church was predominant. New Orleans thus had a different history, but the trusteeship controversy erupted just the same.

New Orleans was originally settled by France, and was ceded to Spain in 1763. It was part of the Diocese of Havana, Cuba. In 1793, the city had become sufficiently populous and important that it was made the

\footnote{136. See Carey, supra n. 132, at 2.}
\footnote{137. Id. at 18.}
\footnote{138. Id. at 197.}
See of a new Diocese of New Orleans.\textsuperscript{139} The Church of St. Louis, which became the cathedral church, had been built on the main square in what is now called the French Quarter, across from the \textit{Place d'Armes}, at the expense of private donors.\textsuperscript{140} Under French law, the right of patronage—that is, the right to nominate clergy, known in English common law as "advowson"—was vested in the donor or owner of the property.\textsuperscript{141} Under Spanish law, the right to name the bishops, priests, and prelates of Catholic churches in the New World was vested in the King, subject to the authority of the Pope to reject any who might not have the qualifications prescribed by canon law.\textsuperscript{142} This right of patronage was understood in the common law as a property right.

The vast Louisiana territory was ceded by Spain back to France in 1800, and sold to the United States by Napoleon in 1803. These developments seriously disrupted the life of the Church in New Orleans. The Catholic, French-speaking population were generally hostile to the American annexation, and feared for survival in English-speaking, Protestant America. The bishop, a Spaniard, departed when the Spanish government withdrew, along with all but four of the twenty-six clergy in the province.\textsuperscript{143} The vicar of the Church of St. Louis, Father Antonio Sedella, usually called by his French name "Pere Antoine," was suspected of openly intriguing against the government of the United States.\textsuperscript{144} No one knew who was in charge. The Archiepiscopal See of Santo Domingo, to which the New Orleans Diocese had belonged, was vacant, and the bishops of the Spanish provinces refused to exercise any authority in New Orleans. In the meantime, a dispute broke out between the wardens of the Church of St. Louis—called in Creole French the "marguillliers"—and the vicar general. The wardens asserted the power to reappoint Pere Antoine to the position of curate of the church. The vicar general refused to recognize their authority to do so.\textsuperscript{145} In return, the wardens claimed that the vicar general had no authority while the bishopric was vacant.\textsuperscript{146}

The crisis was resolved when the vicar general died and the province of Louisiana was placed under the authority of John Carroll, Bishop of Baltimore. Interestingly, Carroll's first move was to write to James Madison, in his capacity as Secretary of State, regarding the situation of the church in New Orleans and recommending several candidates for appointment as bishop. Madison responded that he could not intervene,
the matter being purely ecclesiastical. Carroll then appointed a new vicar general, who—like his predecessor—clashed with Pere Antoine, who continued to perform the duties of curate in the church. Not until after the end of the War of 1812 did the Diocese receive a new bishop.

After Pere Antoine's death in 1827, peace came to the parish of St. Louis. The wardens swallowed their objection to episcopal appointment of the curate when the Bishop nominated a candidate of whom they approved: Father Jean Aloysuis. During this period, the wardens caused to be constructed a mortuary chapel dedicated to St. Anthony of Padua. It is now the Church of Our Lady of Guadalupe, the oldest church building in New Orleans. Conveniently situated near Cemetery No. 2, the chapel was used exclusively for funerals for perhaps a decade, and later for marriages and baptisms as well. Like the Church of St. Louis, the title to the property of the mortuary chapel was held by the wardens.

In 1835, Father Antoine Blanc was appointed and consecrated as Bishop of New Orleans. Born near Lyons, in France, he was one of the first ecclesiastical students to begin studies after the restoration of the Catholic Church in France. He volunteered for the American mission, and came to the United States the year after his ordination. It is likely that this background contributed to his hostility toward the pretensions of the wardens. The French Revolution forced a number of French Catholic clerics to immigrate to the United States, where they often nursed a hatred for democracy, which they associated with the Terror. These French clerics stiffened the spine of hierarchical resistance to the democratization implied by trusteeism.

By this time, there was a flood of new immigrants to the area, including Germans and Anglo-Americans, and most numerous of all, Irish Catholics. They represented a serious threat to the Creole establishment's

147. Points, supra n. 139. Not directly relevant to the trusteeship battle in New Orleans, but interesting nonetheless, was a letter sent by the Ursuline Sisters of New Orleans to President Thomas Jefferson on March 21, 1804, asking for a guarantee of their property and rights. Jefferson responded: The principles of the Constitution of the United States are a sure guaranty to you that it will be preserved to you sacred and inviolate, and that your institution will be permitted to govern itself according to its own voluntary rules without interference from the civil authority. Whatever diversity of shades may appear in the religious opinions of our fellow citizens, the charitable objects of your Institution cannot be of indifference to any and its furtherance of the wholesome purpose by training up its young members in the way they should go cannot fail to insure the patronage of the government it is under. Be assured that it will meet with all the protection my office can give it.

Id. The penultimate sentence suggests that Jefferson saw no constitutional obstacle to government "patronage" of a religious school.


151. Carey, supra n. 132, at 17-18; Miller, supra n. 135, at 28.
resistance to Americanization and attempt to maintain a distinctive, French-speaking culture. The nonliturgical portions of the services at the Church of St. Louis, the only Catholic Church in the City, were conducted in French, which the Irish could not understand. This led to a desire for new parishes, outside of Creole control. The conflict was sharpened by economic, social, and theological differences. The Creole population was relatively wealthy; the Irish were poor. The Creoles were anti-authoritarian in their religious attitudes. The president of the wardens was even a Grand Master of a lodge of Freemasons. The Irish tended toward Tridentine strictness in their religious observance, and berated the Creoles for their laxness in religious matters. Unlike their fellow countrymen in Norfolk and Charleston, and partly in response to the anticlericalism of the Creole establishment, the Irish of New Orleans made a special point of accepting ecclesiastical authority.

In 1833, the Irish people of New Orleans took matters into their own hands, purchased a property in the City, and constructed a small frame church, which they named St. Patrick's. The Bishop obliged by appointing Irish priests to serve the new church. This became the first English speaking parish in New Orleans. German Catholics also succeeded in building their own churches. The wardens of St. Louis strongly opposed the creation of new parishes, which diminished the population and influence of their own church, and freed the Irish, German, and Anglo-American congregations from Creole control. Bishop Blanc sided with the immigrants, and planned the erection of new parishes in the city. Bishop Blanc also founded the Sisters of the Holy Family, a order with the mission of taking care of the "colored" orphans of the city. It is an odd coincidence that the principal figure in two of the first three church-state cases in the Supreme Court were immigrants from France who founded institutions for the care of orphans of a single race.

Money was also an issue. Bishop Blanc insisted that in addition to the salary paid to him by the wardens from the revenues of the Church of St. Louis, he was entitled to what was known as the Cuarta Episcopal—one fourth of the perquisites (casual) of the church. This was important not only because of the sum, but because it would be a source of income independent of the wardens' control. The wardens refused, and in retaliation, reduced Bishop Blanc's salary, claiming that he never preached in the cathedral church and thus did not render services commensurate with his pay.

152. Dignan, supra n. 132, at 172.
153. Carey, supra n. 132, at 111, 141.
154. Miller, supra n. 135, at 33.
155. Id.
156. Points, supra n. 139; Miller, supra n. 135, at 37.
Matters came to a boil upon the death of Abbe Moni in August, 1842. Bishop Blanc appointed Father Etienne Rousselon, with whom he had worked in the founding of the Sisters of the Holy Family, to the St. Louis curacy. The wardens, again asserting the power to nominate their pastor, selected Father M.B. Anduze. Not only did they object to the Bishop's claim of authority to appoint the curate, but they also complained that Abbe Rousselon was Bishop Blanc's "personal friend—a foreigner, a priest unknown to the wardens, and who had no claim on their confidence." After charges and counter-charges, and threats by the bishop to excommunicate the wardens, a temporary compromise was reached through the appointment of a new curate, Father Constantius Maenhaut, with the consent of the wardens. But Father Maenhaut quickly showed his colors as a supporter of episcopal authority, and the wardens withdrew their consent. Bishop Blanc tried again the following year, with the appointment of Father Bach, but he too proved unsatisfactory to the wardens.

The dispute over the curacy of St. Louis raged for almost three years, during which Bishop Blanc twice appealed to Rome for support, and the wardens lobbied the state legislature to enact a law that would confirm their power of patronage. In this dispute, the wardens apparently enjoyed the support of most of their parishioners. In the parish election of 1842, the wardens' slate won by a margin of two to one over the Bishops' slate, with nearly three times the ordinary turnout of electors.

It was time to raise the stakes. On November 2, 1842, Bishop Blanc ordered all priests (except one) to leave the Church of St. Louis. Not only did this leave the parishioners bereft of the holy sacrament (unless they were willing to attend a church under episcopal control), but it deprived the wardens of the revenues from religious services.

The wardens sued Bishop Blanc in state court. They alleged that their right to nominate a curate to the church was a protected property right, enforceable in law, and that the Bishop's attempt to frustrate that right by blocking religious services in the church had injured them to the extent of $20,000 in damages. They also sued for libel, on account of the Bishop having called them "schismatics." They claimed the right of appointment on several interrelated grounds: as incidental to their ownership of the church, as successors to the right of patronage under

160. Carey, supra n. 132, at 270.
161. Id. at 123.
162. Blanc, 1844 WL at *21. If that was libel, it would get worse. In the United States Supreme Court they would be called "notorious schismatics." Permoli, 44 U.S. at 599 (argument for counsel).
French and Spanish law, and by virtue of thirty years of uninterrupted possession. Their best argument, made on petition for rehearing, was that at the time the church was constructed, their predecessors had a legally enforceable property right to nominate the curate, and that to take this away would violate the “vested rights” doctrine of Dartmouth College. They did not—but could have—cited Terrett.

The Supreme Court of Louisiana dismissed the suit in an impressive and eloquent opinion, based on the principle that a civil court has no authority to intermeddle in ecclesiastical affairs. The court held that the Spanish ecclesiastical laws regarding church governance “have ceased to exist, by their absolute repugnance to the fundamental principles of our American governments.” The court had no basis in civil law to determine how a church should be organized: “By what standard are we to ascertain the orthodoxy of the corporation, or of the bishop?” The court ruled that the entire matter was one to be resolved by the church itself:

The Legislature have not, and could not in our opinion, authorize the wardens to interfere in matters of mere church discipline and doctrine. It could not constitutionally declare, what shall constitute a curate in the Catholic acceptation of the word, without interfering in matters of religious faith and worship, and taking a first step towards a church establishment by law.

All this agrees with modern constitutional doctrine, as well as with the legal position espoused by Bishop Blanc in the litigation. But it did not leave the wardens without leverage in their dispute with the Bishop:

The charter does not give to the [wardens] a right to appoint, in the theological sense of the word, a curate, but only to provide for his salary; and we do not doubt their perfect right to withhold all salary from any person whatever, and even to prevent any person claiming to be curate, to enter the church belonging to the corporation.

In other words, they could refuse to pay Father Maenhaut’s salary, and even the salary of the Bishop, and they could lock the Bishop’s men out of the church. The court would not lift a hand to help the wardens, but it would not help the Bishop either.

The parties thus returned to ecclesiastical battle without judicial

163. They argued that upon annexation of the territory by the United States, the Spanish King’s right of patronage was not transmitted “to any functionary of the United States,” but “reverted to those persons in which the same was vested by the Spanish laws existing prior to the laws establishing the royal patronage.” Blanc, 1844 WL at *2. As representatives of the Catholic people of the parish and holders of legal title to the church property, they claimed to be the owners and proper successors to the donors.
164. Blanc, 1844 WL at *25 n. *
165. Id. at *23.
166. Id. at *21.
167. Id. at *20.
168. Id.
succor. The Church of St. Louis was closed (other than one low mass on Sunday morning), and services—including funerals—were conducted at other churches in the city. The wardens refused to pay Father Maenhaut's salary, and because of the church closure, the wardens were starved of revenue.

The wardens turned to local politics. As representatives of the dominant Creole majority, the wardens and their allies held effective control over government of the First Municipality—the jurisdiction that encompassed the French Quarter. Indeed, one member of the board of wardens was also on the city council. He obtained passage of the ordinances, quoted at the beginning of this section, prohibiting the conduct of funerals in churches other than the mortuary chapel, and imposing substantial fines on priests—and priests only—who officiated at funerals elsewhere in the city. This was a clever move, because it drew upon the precedent of legislation passed in 1827, which had prohibited funerals in the Church of St. Louis and required that they be conducted in the mortuary chapel. The ostensible purpose, then as later, was to protect against yellow fever. But the earlier statute had been enacted at the behest of the Bishop, at a time when the mortuary chapel was under his control. Now the mortuary chapel was under the control of the wardens, and if it were the venue for all funerals in the City, would constitute a significant source of revenue for them. Consequently, the Bishop forbade any priest to conduct funerals in "a building in the possession of notorious schismatics, who might tax them to virtual prohibition, or apply the proceeds, at their own discretion, to the subversion of religion itself."

That is why Father Bernard Permoli, on that fateful day in November, 1842, defied the law and performed funeral services in the Church of St. Augustin, and why he was prosecuted for doing so. It explains why this seemingly trivial affair was appealed all the way to the Supreme Court, and argued so passionately as an instance of religious "tyrann[y]." It explains why it was no answer to the charge of intentional religious discrimination that "[i]f Catholics are wronged, Catholics have wronged them."

As already explained, the United States Supreme Court declined jurisdiction. The First Amendment does not apply to the states, and so there was no federal issue. Father Permoli's fine was upheld, and the underlying dispute continued, until at the end of 1844 the wardens

169. Carey, supra n. 132, at 137-38.
170. Points, supra n. 139.
171. Permoli, 44 U.S. at 602 (argument of counsel). See History of Our Lady of Guadalupe Church, supra n. 149.
172. Id. at 599.
173. Id. at 597.
174. Id. at 602.
relented, and recognized the Bishop's right of appointment. All over the United States, trusteeism was defeated, and the authority of bishops confirmed. In New Orleans, by the 1850s, the Irish comprised more than half the Catholic population, \textsuperscript{175} parish churches proliferated, and the old system of Creole control, represented by the wardens, became history.

IV. CONCLUSION

If cases that reach the Supreme Court are any indication, the predominant church-state concern in the antebellum period had to do with the organization and control of church institutions. The key to resolving those controversies was to define a private sphere, protected against state interference by the vested rights doctrine and the separation of church and state. This required a narrow view of state action. The former status of established churches, whether in Virginia, Vermont, or New Orleans, had to be ignored, and their corporate structures after independence or annexation treated as a purely private affair. This, it seems to me, was a necessary turn if the nation was to disestablish religion without becoming hostile to it.

As the later history of the Girard College case illustrates, the civil rights era inaugurated by \textit{Brown} had a different constitutional need. Now, it was desirable to expand the concept of "state action" so as to bring powerful institutions in the society into conformity with the pressing norm of racial nondiscrimination. That expansive understanding of "state action" played havoc with the jurisprudence of the Religion Clauses. If government must be nonreligious, and if the needs of the civil rights movement drive us to define more and more arguably private activity as "public," the combination will reduce the scope for religious pluralism in the society as a whole. If Girard College is categorized as "private," then it can be as hostile—or as favorable—toward Christianity as the donor wishes. If it is categorized as "public," then it must operate under the strictures of constitutional neutrality.

The United States is now on the far side of the civil rights era. The constitutional norm of racial nondiscrimination has been generally assimilated by the culture (whatever our current disagreements about matters of detail), and the need to bring powerful institutions with racist heritage to conformity with that norm has lost its edge. Moreover, the political victory of the civil rights movement produced legislation that now enforces the norm of racial nondiscrimination even in the private sphere, without the need for expansive interpretations of state action.

And so we see a new movement in constitutional jurisprudence, one designed to allow individuals, even when operating within the public sphere, to choose for themselves what religious (and other) values to

\textsuperscript{175} Miller, supra n. 135, at 36-37.
express—whether the skepticism of a Stephen Girard or the religiosity of a Bishop Blanc. Those developments are still in flux. But there is a deep similarity between the current idea that individual religious activity remains private and protected, even when it benefits from neutral and generally available government benefits, such as classroom space or computers and library books, and the idea that church organization, corporate status, and property needed protection from the heavy hand of government in the early Republic. The specific issues and concerns have changed, but the underlying theme of protection for religious diversity through recognition of a protected sphere of private religious judgment, continues to inform the law.