may thus prevent the free exercise of religion, the Constitutional guaranty exists only in name.

And this, we submit, is so, especially since the adoption of the XIVth Article of Amendment to the Constitution.

But whatever may be the right of State in this regard, the same right does not attach to the legislature of a territory, and for the reason, that the powers of a Territorial legislature are derived from Congress, and it can exercise no power that Congress could not itself exercise.

III.

The Idaho Statute Violates Article of the Constitution of the United States.

No religious test shall ever be required as a qualification to any office or public trust under the United States—Constitution, Article VI.

This constitutional provision was designed to exclude all consideration of religion, or religious opinion, in fixing the political rights of the citizen. Whatever else may be done or considered in fixing his political status, or in according or withholding political rights, his religious opinion cannot be considered.

That this is so cannot be more clearly expressed than in this provision, by which a religious test to hold office is, with such emphasis, forbidden.

This being forbidden everything incident to it is forbidden. It would be a strange anomaly, when the Constitution so prohibits a religious test as a qualification to an office, and thereby makes a man of any religious faith, or of no religious faith, eligible to hold the office of President, if it could be enacted by any legislative body that he must be of some particular faith, or must not be of some specified faith, or he should not vote at an election for the office which the Constitution says he is eligible to hold. Such an inconsistency would be hostile to the spirit of our government and the constitutional provision; the one is the concomitant of the other, and no religious test can be applied to the one that does not directly or indirectly affect the other, and what cannot be done directly cannot be done indirectly (4 Wall., 125). There must be harmony and consistency in such a matter as this, and the application of the principle must extend to the Territories of the United States.

Holding office and selecting persons to hold office are inseparable parts of our system. They are associated together, and when a religious test is forbidden to be applied to the one, it is equally forbidden to be applied to the other.

That this statute requires a religious test is apparent upon its face. The ground of disfranchisement is membership in an organization which encourages its members to commit bigamy or polygamy "*as a duty resulting from membership,*" or which *practices* bigamy or polygamy, or celestial marriage, "*as a doctrinal rite of such order.*" Simple encouragement to commit crime by an organization of which the citizen is a member does not disqualify him from voting, because, by the language of the act, the encouragement must be offered upon the ground of duty, or religious obligation arising from membership in the organization, or the latter must teach the commission of these acts from religious motives, otherwise the exclusion does not operate. And so also the practice must be "as a doctrinal rite," or the member is not excluded. In other words, the practice must be as a tenet of faith, sanctified by a religious ceremony; and the language of the statute does not admit of such an interpretation as will disfranchise the members of an organization existing solely for the promotion of crime, however heinous their acts may be, even though the primary and sole object of the organization be to commit murder, theft, arson, rape, and other crimes which are *malum in se*, unless their acts are the promptings of duty, or are performed "as doctrinal rites" or religious ceremonies, the members are not disqualified by this statute from voting or holding office.

Mr. Webster defines a "rite" as:

"The act of performing divine or solemn service, as established by law, precept, or custom: formal act of religion, or other solemn duty; a religious ceremony of usage."

The object of this legislation was not only to deprive citizens of the elective franchise because of their membership in a religious organization, the Mormon Church, but to confine the exclusion provided for to members of that religious organization.

IV.

The Idaho Statute is Void Because Congress has Exercised its Power on the same Subject.

While denying the right of both Congress and the legislative assembly of Idaho to prescribe the test it has, as a qualification for voting and holding office, if in error as to the power of Congress in this regard, we still maintain that the Territorial legislature could not prescribe it, for the reason that Congress had already legislated upon the subject, and its action is "the supreme law of the land."

Undoubtedly Congress has the right to legislate for the Territories, and the most that can be said for the Territorial legislature is that it may legislate upon the same subjects if Congress has not already legislated thereon, and in that respect it stands in the same attitude towards Congress as a State, which may legislate if Congress does not, but if Congress does legislate a State cannot, or if the State has legislated and Congress afterwards does so, the State legislation is superseded.

The authorities on this subject are numerous and familiar.

It is now settled that when powers are exercised by Congress, the concurrent power in the inferior legislature ceases or is in abeyance; that the two legislative wills cannot be exercised at the same time upon the same subject-matter, and that of Congress, within its sphere, is "the supreme law of the land."

After citing numerous authorities on this point, including several decisions of the U. S. Supreme Court, and quoting Section 8 of the Edmunds Act, the brief says:

Congress provided that no bigamist or polygamist shall be entitled to vote. This was legislation upon the subject of disfranchisement, as connected with the offenses of bigamy and polygamy. This is as far as Congress ventured to go; but the Idaho legislature undertakes to add to what Congress has not seen fit to do, another disqualification, namely, membership in the Mormon Church. Such additional legislation is unconstitutional and void.

THE MORMON CHURCH NOT A CRIMINAL ORGANIZATION.

We have already anticipated that the attempted answer to what we have been discussing will be that the exclusion which we resist is not because of religious opinion or belief, but only because of membership in a church which inculcates as a doctrine bigamy and polygamy, and if there is any answer to our contention it must be found in what we have just stated. We have already partially considered this point, and now offer the following additional suggestions in support of our contention that it is no answer to our propositions. If it is an answer to every other objection that we have made, it is no answer to the one which rests upon the proposition that Congress, having legislated upon the subject of disfranchisement, the Territorial legislature could not legislate further on that subject; but we submit that it is not an answer to any of the other propositions we have presented, because it rests entirely upon the mere fact of membership in such a church. It involves of necessity an inquiry into the doctrines of this Church and the religious belief of its members. It of necessity involves a condemnation of opinion and undertakes to control individual association because of opinion or belief. It virtually says that men who entertain the opinion that polygamy is sanctioned by divine law shall not associate themselves together as a church and exercise religion, so that this attempted answer is bottomed in, and rests upon exclusion from the elective franchise because of opinion.

The reply to this position, that it is exclusion because of membership, and not because of opinion, must be looked for in a careful consideration and application of those general principles of constitutional law which lie at the foundation of all elective governments.

That a citizen, who is entitled to vote according to the general principles and the fundamental scheme of his government, cannot be deprived of that right by the mere caprice or arbitrary act of the legislature—such act not being founded upon some recognized principle of reason looking to the welfare of the State—is one of those general and well settled maxims of constitutional law which are of universal recognition.

According to this constitutional principle, a statute which attempted