

**THE TEN COMMANDMENTS  
AND THE TEN AMENDMENTS:  
A CASE STUDY IN RELIGIOUS FREEDOM  
IN ALABAMA**

*William P. Gray, Jr.\**

**The Ten Commandments:**

- 1) I am the Lord thy God, thou shalt have no other gods before me;
- 2) Thou shalt not make unto thee any graven image;
- 3) Thou shalt not take the name of the Lord thy God in vain;
- 4) Remember the Sabbath day to keep it holy;
- 5) Honor thy father and thy mother;
- 6) Thou shalt not kill;
- 7) Thou shalt not commit adultery;
- 8) Thou shalt not steal;
- 9) Thou shalt not bear false witness;
- 10) Thou shalt not covet.

**The First Amendment Religion Clause:**

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . .

This Article is limited in its scope to the Establishment Clause of the First Amendment and only peripherally discusses the remainder of the Bill of Rights. The sheer volume of materials and decisions on the remainder of the first ten amendments would, and does, far exceed both the space and time available for even a cursory discussion in this Article. Many citizens (including lawyers) in Alabama and the United States are, to some degree, not fully aware of the history and application of the First Amendment, and in particular of its misapplication against the

---

\* Managing partner, Gray & Jauregui, LLP; legal advisor to Governor Fob James, 1995-1998; The University of Alabama School of Law, J.D., 1968, The University of Alabama, B.S., 1965.

states.

My ultimate conclusion—that the Supreme Court's application of the First Amendment against the states through the so-called "selective incorporation doctrine," i.e., via the Due Process Clause of the Fourteenth Amendment, is wrong—is not based on pretense and presupposition, but on lengthy legal research. The First Amendment Establishment Clause clearly was never intended to apply to the states. This is evident from the first word of the First Amendment which defined its scope as "Congress." Instead, it was intended to protect each state's right to determine matters of religion for itself. The Fourteenth Amendment was never intended to apply the First Amendment to the states, and despite United States Supreme Court justices, or ten angels in heaven, swearing that it does, it simply should not and, except for false and erroneous legal conclusions, does not apply the First Amendment to the states. Any plain and truthful examination of the First and Fourteenth Amendments and their respective histories will lead anyone who makes an honest inquiry to that conclusion. Unfortunately, many people have simply accepted the Supreme Court's conclusion that it has jurisdiction over religious issues arising from state law. I do not ask you to agree with me, but merely to honestly consider the evidence. If you will do that, I believe you will also conclude that the United States Supreme Court is wrong on this matter.

## I. INTRODUCTION

The Governor of Alabama is presently a party in two significant cases involving religious freedom—*State v. American Civil Liberties Union of Alabama*<sup>1</sup> (Roy Moore), and *Chandler v. James*.<sup>2</sup> (Although the Moore case is discussed in considerably more detail than the *Chandler* case, both are very important and significant cases.) When he took office, Judge Roy Moore<sup>3</sup> found

---

1. Nos. 1951975, 1960572, 1960839, & 1960927, 1988 WL 21985, *dismissed*, 1998 WL 21985 (Ala. Jan. 23, 1998) [hereinafter ACLU-A].

2. 958 F. Supp. 1550 (M.D. Ala. 1997). The court issued a final order on several of the prayer issues and held that Alabama's prayer statute, ALA. CODE § 16-1-20.3 (1975), was unconstitutional as violative of the Establishment Clause of the First Amendment made applicable to Alabama through the Fourteenth Amendment. *Chandler*, 958 F. Supp. at 1568.

3. Judge Moore graduated from the United States Military Academy at West

in place a decades old practice of commencing jury sessions with prayer in the Circuit Court of Etowah County.<sup>4</sup> He continued the practice. The record shows that Judge Moore does not engage in proselytizing during the course of performing his duties as circuit judge and allows anyone who so desires to leave his courtroom before the prayer.<sup>5</sup> According to reported facts, Judge Moore has never led any prayer himself, and he professes that he does not ever intend to lead the prayers himself.<sup>6</sup> According to Judge Moore and his staff, either the Judge or one of his staff members requests that a member of the *local clergy* lead in prayer.<sup>7</sup> Judge Moore has never *refused* to permit any member of the local clergy to lead the jury organizational sessions in prayer.<sup>8</sup>

Judge Moore also placed an eighteen inch tall, personally hand-carved plaque of the Ten Commandments on the wall in his courtroom above and behind his head.<sup>9</sup> There are artistic renderings of other important documents related to American history on the other walls of his courtroom, including:

- (1) a picture of George Washington;
- (2) a picture of Abraham Lincoln;
- (3) a picture of former Etowah County Circuit Judge Raines;
- (4) a copy of the Declaration of Independence;
- (5) a copy of the Mayflower Compact; and
- (6) the Great Seal of the State of Alabama.<sup>10</sup>

All of these items have been displayed in Judge Moore's courtroom for most of the time Judge Moore has served as a circuit

Point in 1969 and served in Vietnam as a Captain, Company Commander, 188th MP Company.

4. Appellant Moore's First Affidavit ¶ 4; Second Affidavit ¶ 3, *ACLU-A*, 1998 WL 21985. Many counties and circuits in Alabama's state courts, as well as every federal district court in Alabama, begin sessions of court with prayer. It must be noted that no state, county or municipality has any law or ordinance promoting or requiring prayer before such session or sessions.

5. See Appellant Moore's Second Affidavit ¶ 6; State's Complaint for Declaratory Judgment ¶ 15, *ACLU-A* 1988 WL 21985.

6. Defendant's Memorandum in Support of Summary Judgment and Crossclaim at 5, *ACLU-A*, No. 95-919-RR (Montgomery Co. Cir. Nov. 22, 1996).

7. Appellant Moore's Second Affidavit ¶ 5, *ACLU-A*, 1998 WL 21985.

8. See *id.*

9. *Id.*

10. *Id.*

judge.<sup>11</sup>

On June 9, 1993, the ACLU of Alabama (ACLU-A), sent a letter to the Chief Justice of the Alabama Supreme Court, threatening to sue any state judge who allowed courtroom prayers during jury organization sessions.<sup>12</sup> Judge Moore continued his practices and, a year later, on June 20, 1994, the ACLU-A hired a court reporter to record the prayer that opened Judge Moore's jury organization session. That same month, the ACLU-A demanded that the State Judicial Department halt any circuit judge from allowing jury sessions to begin with prayer and threatened litigation if the practice continued.<sup>13</sup>

The State of Alabama, through its Judicial Department, has supervisory authority over its circuit judges and the manner in which they conduct proceedings.<sup>14</sup> However, there is no state policy which either requires or prohibits the opening of court proceedings with prayer, nor is there a state policy which regulates what items may properly be displayed on the walls of state courtrooms.<sup>15</sup>

On March 31, 1995, the Alabama Freethought Association, Gloria Hersheiser, and Barbara and Herb Stappenbeck filed a complaint against Judge Moore in the United States District Court for the Northern District of Alabama.<sup>16</sup> The complaint sought an order prohibiting Judge Moore from having prayer in his courtroom and requiring the removal of the plaque of the Ten Commandments from his courtroom wall.<sup>17</sup> Shortly thereafter, the ACLU-A joined the litigation as a party-plaintiff. On July 7, 1995, the federal district court dismissed the lawsuit, holding that the plaintiffs could show no harm caused by the

---

11. The Ten Commandments and a representation of Jesus Christ also appear in the main capitol building in Harrisburg, Pennsylvania. "[A] large mural directly above the bench where the Chief Justice sits shows a prominent figure holding a hammer and chisel, carving the Ten Commandments on tablets of stone." Reply Brief of the State of Alabama, at 14, *ACLU-A*, 1998 WL 21985. (The Pennsylvania Supreme Court is the oldest appellate court in the United States).

12. *Id.* at \*1.

13. State's Complaint for Declaratory Judgment ¶ 18, *ACLU-A*, 1998 WL 21985.

14. *Id.* ¶ 20.

15. *Id.* ¶ 19.

16. *Alabama Freethought Ass'n v. Moore*, 893 F. Supp. 1522, 1527 n.12 (N.D. Ala. 1995).

17. *See Alabama Freethought Ass'n*, 893 F. Supp. at 1524.

prayers being offered, or by the display of the Ten Commandments.<sup>18</sup>

The State of Alabama, through its Governor and Attorney General, filed a Complaint for Declaratory Judgment in the Circuit Court of Montgomery County, Alabama, against the ACLU-A, the Alabama Freethought Association, Gloria Hersheiser, and Barbara and Herb Stappenbeck asking the Court to find:

that the policy of the State to allow its judges to control the decorum of their courtrooms as they see fit does not violate either the State or Federal Constitution that the display of the Ten Commandments as part of the decorations of a courtroom in Etowah County supervised by an Alabama circuit court judge is not violative of the Alabama Constitution or the United States Constitution; and that the practice of an Alabama circuit judge in commissioning jurors beginning with a prayer is consistent with the Alabama and U.S. Constitutions.<sup>19</sup>

---

18. *See id.*

19. State's Complaint for Declaratory Judgment ¶ 1, *ACLU-A*, 1988 WL 21985. The relevant provisions of the Constitution of Alabama are:

The Preamble:

We, the people of the State of Alabama, in order to establish justice, insure domestic tranquility, and *secure the blessings of liberty* to ourselves and our posterity, *invoking the favor and guidance of Almighty God*, do ordain and establish the following Constitution and form of government for the State of Alabama:

Section 1:

That all men are equally free and independent; that they are *endowed by their Creator* with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.

Section 2:

That *all political power is inherent in the people*, and all free governments are founded on their authority, and instituted for their benefit; and that, therefore, they have at all times an inalienable and indefeasible right to change their form of government in such manner as they may deem expedient.

Section 3:

That *no religion shall be established by law*; that no preference shall be given by law to any religious sect, society, denomination, or mode of worship; that no one shall be compelled by law to attend any place of worship; nor to pay any tithes, taxes, or other rate for building or repairing any place of worship, or for maintaining any minister or ministry; that no religious test shall be required as a qualification to any office or public trust under this state;

In an order dated November 22, 1996, Circuit Judge Charles Price found that:

the prayers at issue in this case, including those in Judge Moore's Court, in the courts of other Circuit Court judges in Etowah County, and in other Alabama courts where judges or officers of Alabama courts conduct or arrange prayer in court before jurors summoned to jury duty, violate the Constitutions of Alabama and of the United States.<sup>20</sup>

As to the issue of the display of the Ten Commandments, Judge Price stated that "the Court does not find that displaying the Ten Commandments violates the United States or the State of Alabama Constitutions."<sup>21</sup>

At the ACLU-A's urging on its motion to reconsider, Judge Price agreed to visit Judge Moore's courtroom to determine whether the display complied with *Harvey v. Cobb County*.<sup>22</sup> Judge Price ruled that *Harvey* controlled, and the Ten Commandments either had to be removed or be rearranged.<sup>23</sup> The ACLU declared Price's decision a victory for religious rights and liberties in Alabama, to which the editors of *The Birmingham News* responded: "Hogwash. It's a victory for nothing. Such silly court rulings all over the country have warped the so-called "separation of church and state" issue so much it resembles nothing the nation's founders intended."<sup>24</sup>

It is difficult to explain Judge Price's statement that he must submit to *Harvey*. While a district court opinion from Georgia may be persuasive authority, it is not binding on the state courts of Alabama. However, assuming *arguendo* that *Harvey* is controlling, it is equally unintelligible why Judge Price applied its holding as he did. While it is true that *Harvey* held that a display of the Ten Commandments, standing alone in the court-

---

and that the civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles.

ALA. CONST. art. I, §§ 1-3 (emphasis added).

20. *State v. ACLU-A*, No. 95-919-PR, slip op. at 3 (Montgomery Co. Cir. Nov. 22, 1996).

21. *ACLU-A*, No. 95-919-PR at 3.

22. 811 F. Supp. 669 (N.D. Ga. 1993), *aff'd*, 15 F.3d 1097 (11th Cir. 1994).

23. *ACLU-A*, No. 95-919-PR at 3.

24. *Pray for Common Sense*, THE BIRMINGHAM NEWS, Nov. 26, 1996, at 8A.

house, was unconstitutional,<sup>25</sup> it was only in dicta that the court hypothetically considered whether this display could have been saved from violating the Establishment Clause had it been surrounded by other, secular memorabilia.<sup>26</sup> The Alabama Supreme Court stayed Judge Price's rulings on prayer<sup>27</sup> and the Ten Commandments,<sup>28</sup> (February 7, 1997, and February 19, 1997, respectively), but finally dismissed the cases.<sup>29</sup>

Among the issues raised by the plaintiffs in another ongoing religious freedom case, *Chandler v. James*,<sup>30</sup> are: (1) whether the First Amendment Establishment Clause permits voluntary prayer at high school football games and at graduation exercises over the public address system, and (2) whether the Alabama Prayer Statute, Alabama Code § 16-1-20.3, permits non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations and/or benedictions in the public school setting.<sup>31</sup> Judge DeMent held that the prayer statute was unconstitutional, holding that "it unreasonably restrict[ed] the free speech and religion rights of Alabama's public school students."<sup>32</sup> On June 23, 1997, the Governor sent Judge DeMent a personal letter asserting and setting forth the reasons that the federal courts do *not* have jurisdiction over this matter, given that the First Amendment only applies to "laws" passed by "Congress."

## II. HISTORY OF THE FIRST AMENDMENT—

### THE DRAFTERS OF THE FIRST AMENDMENT INTENDED THAT IT APPLY EXCLUSIVELY TO THE FEDERAL GOVERNMENT, AND NOT TO THE STATES

The First Amendment to the United States Constitution was passed by the first Congress and proposed to the state legisla-

---

25. *Harvey*, 811 F. Supp. at 671.

26. *Id.* at 678.

27. Order to Stay Judgment Pending Appeal, *State v. ACLU-A*, No. CV95-919-PR (Ala. Feb. 7, 1997).

28. Order to Stay Pending Appeal, No. CV95-919-PR (Ala. Feb. 19, 1997).

29. *ACLU-A*, 1998 WL 21985 (Ala. Jan. 23, 1998). Chief Justice Hooper, Justices Kennedy and Butts recused themselves from the decision. *Id.* at \*14.

30. 958 F. Supp. 1550 (M.D. Ala. 1997).

31. See *Chandler*, 958 F. Supp. at 1568.

32. *Id.* at 1567.

tures on September 25, 1789.<sup>33</sup> On December 15, 1791, it was ratified by the eleventh state, Virginia, and became law.<sup>34</sup> The First Amendment states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.<sup>35</sup>

The first rule of statutory construction is to read a statute according to its plain meaning. If the meaning of the statute is plain, then there is no need to proceed further.<sup>36</sup> The First Amendment plainly states: "*Congress shall make no law . . .*"<sup>37</sup> The First Amendment is unambiguous with regard to which branch of government it is referring—it clearly refers to the legislative branch. Neither is the First Amendment ambiguous with regard to whether it refers to the federal government or to the state governments. It clearly refers to the federal government. A plain reading of the First Amendment reveals that it only applies to laws passed by the legislative branch of the federal government, "Congress." It does not apply to laws passed by state legislatures, nor to any actions taken by the President, state governors, or state or federal judges.

Furthermore, the First Amendment is the only amendment in the Bill of Rights to specifically single out the federal legislative branch of government. The word "Congress" was specifically chosen to mean Congress! This plain reading of the First Amendment is supported by none other than Chief Justice Rehnquist. In *Wallace v. Jaffree*,<sup>38</sup> then Associate Justice Rehnquist bucked *stare decisis* and openly advocated reversing the Court's errant view of the First Amendment.<sup>39</sup> He stated, "[t]he Framers intended the Establishment Clause to prohibit the designation of any church as a 'national' one. The Clause

---

33. U.S.C.A. CONST. amend. I, historical note, at 6.

34. *Id.*

35. U.S. CONST. amend. I.

36. See *Watt v. Alaska*, 451 U.S. 259, 265 (1981) (noting that the starting point in every case involving construction of a statute is the language itself).

37. U.S. CONST. amend. I (emphasis added).

38. 472 U.S. 38 (1985).

39. *Wallace*, 472 U.S. at 107-13 (Rehnquist, J., dissenting).

was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others.<sup>40</sup>

If the plain meaning of the First Amendment is not proof enough of its intent, one might also look further at the historical context surrounding the proposal and adoption of the First Amendment. Perhaps the two most widely understood and discussed political concepts at the time of the drafting of the First Amendment were "federalism" and "the balance of powers." Federalism is the belief that government functions better under a system whereby the powers of the federal government are enumerated and limited. Under such a system, all of the powers not specifically delegated to the federal government are reserved to the states and the people.<sup>41</sup>

The concept of separation of powers arises, at least partly, from the notion that power corrupts and that absolute power corrupts absolutely.<sup>42</sup> Accordingly, this separation of powers idea is designed to distribute the various responsibilities of government among the three co-equal branches of government—legislative, executive, and judicial—in order to provide increased accountability.

The bedrock principle of federalism is not merely *contained* in the First Amendment but saturates it. The Amendment's drafters chose to limit *only the federal government*, while deliberately leaving the state governments free to make their own respective policies regarding religion, speech, et cetera.<sup>43</sup> His-

40. *Id.* at 113 (Rehnquist, J., dissenting).

41. The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

42. The well known adage: "Power corrupts; absolute power corrupts absolutely," is attributed to nineteenth century British historian, Lord Acton. LORD ACTON, *ES-SAYS AND POWER* (Gertrude Himmelfard ed., The World Publishing Co. 1972).

43. Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700 (1992) ("The Framers intended the Establishment Clause to embody a principle of federalism. That is, the original purpose of the Clause was to prevent Congress from interfering with the variety of church-state relationships that existed in 1791. For this reason, *the Establishment Clause was a uniquely poor candidate for incorporation against the states.*") (emphasis added) [hereinafter *Rethinking Incorporation*].

tory is clear that the First Amendment was intended only to apply against the federal legislative branch. In 1992, the *Harvard Law Review* stated:

[T]he Establishment Clause was enacted to prevent Congress from interfering with the church-state relationships that existed in 1791. Specifically, the Establishment Clause was intended to prevent Congress from interfering with the established state churches and with state efforts to accommodate religion. At the same time, the Clause disabled Congress from interfering with the states that had already disestablished their churches. In other words, *the Establishment Clause was intended to embody a principle of federalism.*<sup>44</sup>

While it may properly be said that the *entire* Bill of Rights is covered with a *vener* of federalism, it might more properly be said that the Establishment Clause is *saturated to the core* with federalism. While the framers of the First Amendment disagreed about the proper wording of the First Amendment, they universally agreed that it should permit the *states* to decide the establishment issue themselves.<sup>45</sup>

Indeed, state establishments of churches were common at the time of the Revolution and the drafting and adoption of the Constitution and the Bill of Rights.<sup>46</sup> There were at least five state establishments in 1787: the Anglican Church was the state church of in Virginia until 1786; the "Christian Protestant Religion"<sup>47</sup> was the state religion in South Carolina until 1790; and the Congregational Church was the state church in Connecticut

---

44. *Id.* at 1703 (emphasis added). This excellent article provides numerous cites to a number of older works that show that the specific purpose of the Establishment Clause was to *preserve state sovereignty over religion*. E.g., WILBER G. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 8-10 (1964); Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3, 14 (1949); Clifton B. Kruse, Jr., *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 WASHBURN L.J. 65, 66 (1962); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 372-73, 406-07.

45. See Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1132-35 (1988).

46. See ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES, 427-46 (1950).

47. The "Christian Protestant Religion" was not a denomination in the traditional sense but represented the various denominations that fell under that broad heading. See *id.* at 51 (listing Protestant denominations).

until 1818, in New Hampshire until 1819, and in Massachusetts until 1833.<sup>48</sup> Massachusetts was the last state to disestablish its state church, and did not do so until forty-four years *after* the Establishment Clause was drafted by Congress.<sup>49</sup>

No informed constitutional attorney or historian would argue that the First Amendment in its *original* form applied to anything more than "laws" passed by "Congress." Even Justice Hugo Black, a proponent of the "incorporation theory," which would apply the First Amendment to the states, admitted that "[p]rior to the adoption of the Fourteenth Amendment, *the First Amendment did not apply as a restraint against the states.*"<sup>50</sup> Moreover, Justice Brennan, arguably the Court's most liberal justice of all time, concedes that the Court's interpretation of the Constitution, and in particular the Establishment Clause, must reflect the historical understanding of the Clause.<sup>51</sup> However, these and later decisions of the Court have professed allegiance to the text of the Constitution while engaging in what even Justice Brennan later admitted was tantamount to unilateral judicial amendment of the Constitution: "[O]bviously we Americans must accept that . . . upon judges, and particularly Justices of the Supreme Court, rests a great share of the delicate responsibility of deciding *what must be preserved and what must be changed*, what we shall protect and what we shall abandon."<sup>52</sup>

Underlying Justice Brennan's comments is the notion that judges, especially Supreme Court justices, are wiser and better able to make these *policy* decisions than the legislatures and ordinary citizens. His philosophy would later prove to be the fulfillment of the sober prophecy issued by President George Washington in his second farewell address: "Let there be no change [in our Constitution] by usurpation; for though this in one instance, may be the instrument of good, it is the customary

48. STOKES, *supra* note 46, at 427-46.

49. STOKES, *supra* note 46, at 418.

50. *Everson v. Board of Educ.*, 330 U.S. 1, 13 (1947) (emphasis added). A full discussion of the Fourteenth Amendment's improper application of the First Amendment against the states is made in section II, *infra*.

51. *See School Dist. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring).

52. William Brennan, Address at Park School, Baltimore, Maryland (Nov. 21, 1982) (transcript available at United States Supreme Court) (emphasis added).

weapon by which free governments are destroyed."<sup>53</sup> Thomas Jefferson echoed the same concerns:

You seem . . . to consider the judges as the ultimate arbiters of all constitutional questions; a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. . . . The Constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments co-equal and co-sovereign . . .<sup>54</sup>

Contrary to the view of Justice Brennan and his friends, the Constitution does not change, evolve, or otherwise undergo periodic metamorphoses. The Constitution and the original Bill of Rights are the same today as they were in the Eighteenth Century. The only thing that has changed is the policy preferences of the Supreme Court.

### III. THE HISTORY OF THE ADOPTION OF THE FOURTEENTH AMENDMENT

The Thirty-ninth Congress drafted and proposed the Fourteenth Amendment on June 13, 1866.<sup>55</sup> It was ratified by three-fourths of the states on July 21, 1868.<sup>56</sup> However, the states that ratified it did not intend for it to incorporate the First Amendment against the states. Section 1 of the Fourteenth Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection

---

53. George Washington, Transcription of the Final Manuscript of Washington's Second Farewell Address (visited Mar. 19, 1998) <<http://www.virginia.edu/gwpapers/farewell/fwatran.html>>.

54. Letter from Thomas Jefferson to William C. Jarvis (Sept. 28, 1820) in *THE WRITINGS OF THOMAS JEFFERSON* 227 (Andrew A. Lipscomb & Albert Bergh eds. 1904) [hereinafter *THE WRITINGS OF THOMAS JEFFERSON*].

55. CONG. GLOBE, 39th Cong., 1st Sess. 3144 (June 13, 1866).

56. CONG. GLOBE, 40th Cong., 2d Sess. 4295-96 (1868).

of the laws.

There is a tremendous amount of evidence that conclusively proves that the Congress that proposed, and the states that ratified the Fourteenth Amendment never intended for it to incorporate the Bill of Rights against the states.

*A. The Congressional Debates over the Fourteenth Amendment Show that Congress Did Not Intend to Use the Fourteenth Amendment to Apply the Bill of Rights or the Establishment Clause Against the States*

The paramount consideration in interpreting the meaning of a statute, aside from its plain meaning, is to ascertain the intent of the legislative body that drafted and passed it. Justice Black, in constructing his argument that the Fourteenth Amendment rendered the Bill of Rights applicable against the states, relied on two congressmen, Representative John Bingham of Ohio and Senator Jacob Howard of Michigan.<sup>57</sup> The credibility of the evidence supposedly presented through the testimony of these two Congressmen is examined in depth in a lengthy law review article published by Professor Charles Fairman in 1950.<sup>58</sup> In that article, Fairman concluded:

First, Representative Bingham, author of Section I, had much to say about "the immortal bill of rights," and referred once to "cruel and unusual punishments." Never in the reported debate on the passage of the Amendment did he refer specifically to Amendments I to VIII. On the hustings he included the right to teach of the eternal life.

Next, Senator Howard, who introduced the measure in the Senate, said that the new privileges and immunities clause included "the personal rights guaranteed and secured by the first eight amendments." That seems clear enough—and yet one can hardly believe that the Senator from Michigan ever thought that the Amendment expressing the congressional policy on reconstruction would require his own state to abandon its practice of

---

57. See *Adamson v. California*, 332 U.S. 46, 72-74, 92-123 (1947) (Black, J., dissenting).

58. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1950).

prosecuting upon information.<sup>60</sup>

However, the credibility of these two congressmen has been called into question by other statements they made. For example, five years after the adoption of the Fourteenth Amendment, Bingham argued in another congressional debate that the first eight amendments applied to the states through the Fourteenth Amendment.<sup>60</sup> Representative Storm of Pennsylvania replied:

Sir, if the views now announced by gentlemen on the other side of the House had then [during debates on the Fourteenth Amendment] been promulgated, that amendment would never have been ratified. If the monstrous doctrine now set up as resulting from the provisions of that Fourteenth Amendment had then been hinted at, that amendment would have received an emphatic rejection at the hands of the people.<sup>61</sup>

However, Bingham's 1871 view was not the same as his 1866 view when the Fourteenth Amendment was adopted. He stated near the conclusion of those debates: "Allow me, Mr. Speaker, in passing, to say that *this amendment takes from no State any right that ever pertained to it.*"<sup>62</sup> Justice Black's writings never referenced the above statement by Bingham. Moreover, given the most charitable construction, Justice Black and the Supreme Court of his day apparently were unaware of much of the evidence that contradicted their view that the Fourteenth Amendment was meant to apply certain provisions of the Bill of Rights against the states.

*B. None of the Members of Congress Indicated in Their  
Subsequent Campaign Speeches that  
the Fourteenth Amendment Was Intended to  
Incorporate the Bill of Rights Against the States*

The Fourteenth Amendment was submitted to the states on June 16, 1866, and shortly thereafter, many congressmen began campaigning in those states for re-election. In *Jaffree*, the Court

---

59. *Id.* at 134.

60. See *Adamson v. California*, 332 U.S. 46, 110-11 (1947) (appendix).

61. CONG. GLOBE, 42d Cong., 1st Sess., app. at 84 (1871).

62. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (emphasis added).

stated: "The statements which the members of Congress made during their campaign speeches are certainly relevant in ascertaining the intent of the Thirty-ninth Congress with regard to the scope and effect of the fourteenth amendment."<sup>63</sup>

In his article, Charles Fairman supplies numerous explanations of the meaning of the Fourteenth Amendment by the congressmen who drafted and proposed it.<sup>64</sup> In all of Fairman's research, he was unable to find one instance where a congressman stated that the Fourteenth Amendment was intended to apply the entire Bill of Rights against the states.<sup>65</sup> Fairman concludes:

There seems to be no reason to suppose that further evidence would be more than corroborative. We have quoted five Senators, who presumably heard Senator Howard's speech of May 23. Not one mentioned the Bill of Rights in his comment upon Section I. We have quoted five Representatives, including the Speaker of the House and the author of Section I. Not one said that the privileges and immunities clause would impose Amendments I to VIII upon the states.<sup>66</sup>

The district court in *Jaffree* concluded the same:

None of the members of Congress indicated in their campaign speeches that the fourteenth amendment was intended to incorporate the federal Bill of Rights against the states. The general consensus with regard to the effect of the fourteenth amendment was that it covered the same ground as the Civil Rights Act of 1866.<sup>67</sup>

Clearly, the Congressmen who drafted and proposed the Fourteenth Amendment did not intend for it to apply the First Amendment to the states. However, Congressional action and approval was only the first step in the amendment process. The second step was taken by the states because three-fourths of the

63. *Jaffree v. Board of Sch. Comm'rs*, 554 F. Supp. 1104, 1123 (S.D. Ala. 1983), *rev'd sub nom. Wallace v. Jaffree*, 472 U.S. 38 (1985).

64. See Fairman, *supra* note 58, at 24-68.

65. See generally Fairman, *supra* note 58, at 78 (noting, after examining the legislative history of the Fourteenth Amendment, that at the time of its enactment, it was not understood to incorporate the first eight amendments as against the states).

66. Fairman, *supra* note 58, at 78.

67. *Jaffree*, 554 F. Supp. at 1123.

states were required to ratify the proposed amendment before it could become part of the Constitution.<sup>68</sup>

*C. The Debates in the State Legislatures  
Ratifying the Fourteenth Amendment Show that the  
Establishment Clause and the First Eight Amendments Were  
Not Made Applicable to the States*

Charles Fairman conducted extensive research on the ratification of the Fourteenth Amendment by the states. He researched the records of legislative debate and newspaper articles in the several states that considered adopting the Fourteenth Amendment, and he could not find one instance where a legislator or citizen understood the Fourteenth Amendment as applying the First Amendment against the states.<sup>69</sup> Horace Flack, on whose book Justice Black relied in his dissent in *Adamson v. California*,<sup>70</sup> admitted:

[T]he general opinion held in the North . . . was that the Amendment embodied the Civil Rights Bill. . . . There does not seem to have been any statement at all as to whether the first eight amendments were to be made applicable to the States or not, whether the privileges guaranteed by those amendments were to be considered as privileges secured by the Amendment. . . .<sup>71</sup>

Certainly, if the Fourteenth Amendment was intended to abolish the states' abilities to make their own policies with regard to the subject matter covered in the first eight amendments, then surely, at the very least, the states would have voiced some concern over the abolition of their power. History, however, contains no expressions of concern by the states. The Court's selective incorporation theory defies known logic. It is inconceivable that the people of the several states would have remained silent in the face of the Fourteenth Amendment's purported draconian usurpation of the states' policy making

---

68. U.S. CONST. art. V.

69. Fairman, *supra* note 58, at 81-132.

70. 332 U.S. 46 (1947).

71. HORACE FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 153 (1908) (noting, however, such a result could be "inferred").

power.

Had the fourteenth amendment been understood to incorporate the federal Bill of Rights against the states in many instances states would have been required to make radical changes. For instance, it was frequent in many states for people to be prosecuted for felonies without an indictment from a grand jury. It was equally common for a jury of less than twelve people to sit in judgment in a felony prosecution. Some states failed to preserve the right to a jury trial and suits at common law where the amount in controversy exceeded \$20.00.<sup>72</sup>

The district court in *Jaffree* went on to conclude:

The historical record shows without equivocation that none of the states envisioned the fourteenth amendment as applying the federal Bill of Rights against them through the fourteenth amendment. It is sufficient for purposes of this case for the Court to recognize, and the Court does so recognize, that the fourteenth amendment did not incorporate the establishment clause of the first amendment against the states.<sup>73</sup>

The State of New Hampshire ratified the Fourteenth Amendment on July 7, 1866, despite the fact that its state constitution conflicted with portions of the Bill of Rights. The New Hampshire Constitution provided:

[T]he people of this State have a right to empower, and do hereby fully empower the legislature to authorize, from time to time, the several towns, parishes, bodies corporate or religious societies, within this State, to make adequate provision, at their own expense, for the support and maintenance of public Protestant teachers of piety, religion and morality.<sup>74</sup>

Similar situations existed in North Carolina and Tennessee. North Carolina ratified the Fourteenth Amendment on July 4,

72. *Jaffree*, 554 F. Supp. at 1123. The Supreme Court quoted the Court of Appeals from *Jaffree v. Wallace*, 705 F.2d 1526, 1533 n.26 (11th Cir. 1983), stating that: "Federal district courts and circuit courts are bound to adhere to the controlling decisions of the Supreme Court, [and] only this Court may overrule one of its precedents." *Wallace*, 472 U.S. at 47 (citations omitted). However, the Court did not address the merits of the district court's opinion wherein it soundly proved that the Fourteenth Amendment was never intended to be applied against the states.

73. *Jaffree*, 554 F. Supp. at 1124.

74. N.H. CONST. art. VI (1784).

1868, despite the fact that its state constitution prohibited persons "who shall deny the being of Almighty God" from holding public office.<sup>75</sup> Tennessee ratified the Fourteenth Amendment on July 19, 1866, even though its constitution prohibited office holding by "[any] person who denies the being of God, or a future state of rewards and punishments. . . ."<sup>76</sup> If the Fourteenth Amendment had been understood to apply the Establishment Clause against the states, then it seems likely that the people of these states would have expressed some concern as to the invalidation of their state constitution.

*D. The Proposed Blaine Amendment Proves that Congress Never Intended for the Fourteenth Amendment to Apply the Establishment Clause Against the States*

Seven years after the Fourteenth Amendment was ratified, Senator James G. Blaine, at the request of President Grant, proposed an amendment to the United States Constitution which would have prohibited states from establishing a religion.<sup>77</sup> This proposed amendment was a response to the movement to fund parochial schools with state tax dollars and contained language identical to the religion clauses of the First Amendment. If the drafters of the Fourteenth Amendment had intended to make the Establishment Clause of the First Amendment applicable against the states, then the Blaine Amendment would have been, not only unnecessary, but redundant. The members of the Forty-fourth Congress who drafted, debated, and proposed that Blaine Amendment were undoubtedly aware of the purpose of the Fourteenth Amendment; twenty-three of them (including Blaine) were members of the Thirty-Ninth Con-

---

75. N.C. CONST. art. VI, § 5 (1868).

76. TENN. CONST. art. IX, § 2 (1843).

77. The Blaine Amendment read in full:

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

H.R. Res. I, 44th Cong., 1st Sess. (1875).

gress that passed the Fourteenth Amendment; two served on the committee that drafted the Fourteenth Amendment;<sup>78</sup> and at least fifty members of the Forty-fourth Congress served in the legislatures of the states that considered the Fourteenth Amendment in 1867 and 1868.<sup>79</sup> Furthermore, since the Blaine Amendment was debated only seven years after the ratification of the Fourteenth Amendment, its mere introduction casts considerable doubt on the proposition that the Fourteenth Amendment was intended to incorporate the Establishment Clause.<sup>80</sup>

Of the twenty-three members of Congress who debated both the Fourteenth Amendment and the Blaine Amendment, not one objected to the Blaine Amendment on the grounds that the Fourteenth Amendment had already prohibited the establishment of state religions.<sup>81</sup> However, had the Fourteenth Amendment already applied the religion clauses against the states, the Blaine Amendment would have been superfluous.

Not one of the several Representatives and Senators who spoke on the proposal even suggested that its provisions were implicit in the amendment ratified just seven years earlier. . . . Senator Stevenson, in opposing the proposed amendment, referred to Thomas Jefferson: "Friend as he [Jefferson] was of religious freedom, he would never have consented that the States . . . should be degraded and that the Government of the United States, a Government of limited authority, a mere agent of the States with prescribed powers, should undertake to take possession of their schools and of their religion."<sup>82</sup>

According to Senator Stevenson, after the adoption of the Fourteenth Amendment, states were still constitutionally permitted to adopt their own policies regarding establishments of religion. Moreover, the Senator's remarks indicate that Thomas Jefferson, the alleged founder and chief purveyor of the doctrine of separa-

---

78. Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939, 941 & n.14 (1951).

79. F. William O'Brien, *The States and No Establishment: Proposed Amendments to the Constitution Since 1789*, 4 WASHBURN L.J. 183, 208 n.105 (1965).

80. *Rethinking Incorporation*, *supra* note 43, at 1713.

81. See *Jaffree v. Board of Sch. Comm'rs*, 554 F. Supp. 1104, 1125-26 (S.D. Ala. 1983), *rev'd sub nom. Wallace v. Jaffree*, 472 U.S. 39 (1985).

82. JAMES McCLELLAN, *JOSEPH STORY AND THE AMERICAN CONSTITUTION* 154 (1971) (emphasis in original).

tion of church and state, believed that it was proper to permit states to make their own policy with regard to religious establishments.

Clearly, if the Fourteenth Amendment had applied the Establishment Clause against the states, thus prohibiting states from establishing state religions, President Grant and Senator Blaine would have seen no need to pass an additional amendment to the United States Constitution to prohibit the same thing. The district court opinion in *Jaffree* states:

The Blaine Amendment, which failed in passage, is stark testimony to the fact that *the adopters of the fourteenth amendment never intended to incorporate the establishment clause of the first amendment against the states*, a fact which [Justice] Black ignored. This was understood by nearly all involved with the Thirty-ninth Congress to be the effect of the fourteenth amendment.<sup>83</sup>

In his law review article exposing the lack of historical proof supporting the notion that the Fourteenth Amendment was intended to apply the First Amendment against the states, Raoul Berger states:

Randolph, Christiancy, Kernan, Whyte, Bogy, and Eaton were Democrats who spoke *ten years after* the fourteenth amendment debates. Four of them opposed the Blaine Amendment, and several of them suggested that it would violate states rights to require the states to obey the religious guarantees of the first amendment.

The "several" states rights advocates confirm Blaine's reason for submitting the amendment: the fourteenth amendment did not forbid states to establish official churches. Blaine was among 23 members of the 1875 Congress who had been members of the 39th Congress, and their actions and testimony wash out what little weight may attach to the remarks of Bingham and Howard, on which Justice Black built his "incorporation" theory.<sup>84</sup>

Berger also notes the remarks of Senator Frelinghuysen, an 1866 framer of the Fourteenth Amendment: "[t]he House article [Blaine Amendment] very properly extends the prohibition of the

---

83. *Jaffree*, 554 F. Supp. at 1126 (emphasis added).

84. Raoul Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response*, 44 OHIO ST. L.J. 1, 16-17 (1983) (citations omitted) (emphasis in original).

first amendment . . . to the States,<sup>85</sup> and the remarks of Senator Bogy, who stated, "I am opposed to this amendment because . . . it takes from the State that which belongs to it . . . [the right to establish its own religion]."<sup>86</sup> Berger summarizes the evidence:

Not one member, so far as I could find, affirmed that the matter was already covered by the fourteenth amendment. One and all, in one form or another, considered that it was not.

...

[In conclusion,] [r]egarding our central issue—does the fourteenth amendment incorporate an establishment of religion clause—the Blaine Amendment postulated that it did not and proposed to fill the gap. . . . [H]istory unmistakably discloses that the people, the House all but unanimously, and the Senate, by an almost two to one vote, considered that the fourteenth amendment did not comprehend the first.<sup>87</sup>

If, as the Supreme Court has held, the intent of the framers, proposers, and ratifiers of the Fourteenth Amendment was to apply the First Amendment against the states, then the congressmen who proposed the Blaine Amendment were ignorant of the meaning of the Fourteenth Amendment. Such is not the case; the congressmen of the 1860s and 1870s were not ignorant of the Fourteenth Amendment; in fact, many of them had voted on it just seven years earlier. Clearly, the congressmen of the 1860s and 1870s were better acquainted with their intentions in proposing the Fourteenth Amendment than were the Supreme Court Justices of a century and a half later.

The Court based its selective incorporation theory on the comments of two congressmen. However, the great weight of evidence regarding the Fourteenth Amendment—the comments of numerous other congressmen made during debates on it, the subsequent campaign speeches of its drafters and proposers, its intent as understood by the states that ratified it, and the proposal of the Blaine Amendment—confirms that the Fourteenth Amendment did *not* apply the First Amendment against the

---

85. *Id.* at 17 (citing 4 CONG. REC. 5561, 44th Cong., 1st Sess. (1876)) (first alteration in original, other emphasis omitted).

86. *Id.* at 18 (citing 4 CONG. REC. 5591, 44th Cong., 1st Sess. (1876)).

87. *Id.*

States.<sup>88</sup> After the Blaine Amendment failed, similar proposals were introduced another nineteen times between 1875 and 1930.<sup>89</sup> Each time they failed. Year after year, attempts to apply the Religion Clauses against the states were rejected by the Congress. Shortly after the last Blainesque Amendment failed in 1930, the Court, through its holdings in *Cantwell*<sup>90</sup> and *Everson*,<sup>91</sup> drafted and judicially adopted and ratified its own "Blaine Amendment" through its "theory" of selective incorporation. This unilateral judicial amendment of the Constitution is even more egregious when viewed in light of the fact that the people of the United States and the members of Congress repeatedly rejected this draconian departure from the meaning of the Constitution.

Logic compels the conclusion that the Supreme Court has erred, and continues to err, in holding that the states are bound by the First Amendment.

#### IV. THE SUPREME COURT'S MIS-INCORPORATION OF THE FIRST AMENDMENT THROUGH THE FOURTEENTH AMENDMENT

##### A. *Current Scholarship Exposes the Court's Mis-Incorporation*<sup>92</sup>

Attempting to incorporate the First Amendment against the states can be likened to attempting to incorporate the Tenth Amendment<sup>93</sup> against the states.

In short, not only is it impossible for the Establishment Clause to

---

88. The Blaine Amendment had enough support in the House, but lacked the two-thirds necessary in the Senate for submission to the states. See O'Brien, *supra* note 79, at 191-92.

89. *Id.* at 203-07.

90. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

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

92. Many of the authorities in this section were brought to the author's attention by the Honorable Frank "Trippy" McGuire, Judge, District Court of Covington County, to whom due recognition and appreciation is given.

93. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

be incorporated while accurately reflecting its original federalist purpose, but it also cannot be incorporated without eviscerating its *raison d'être*.

Trying to incorporate the Establishment Clause is therefore analogous to trying to incorporate the Tenth Amendment, which reserves to the states those powers neither delegated to the federal government nor forbidden to the states. The intent of the Tenth Amendment is to reaffirm that the states possess all power not delegated to the federal government by the Constitution. Incorporation of the Tenth Amendment would require that the states be stripped of all powers not specifically delegated to them thereby completely inverting the Amendment's purpose. To the extent that the Establishment Clause is similar to the Tenth Amendment, its incorporation is similarly incoherent.<sup>94</sup>

Both the First and Tenth Amendments embody the basic principles of federalism. It is impossible to apply them against the states without simultaneously stripping them of their meanings. Nevertheless, that is precisely what the Court has done.

F. LaGard Smith, Professor of Law at Pepperdine University, observed:

Articles and notes in one respected law review after another are making the same point. "The Clause's incorporation is logically incoherent. . . ."

...

If the Court wants a way out of the morass of church-state cases, there is a clear path. It must simply go back to square one, and frankly acknowledge that the incorporation of the Establishment Clause was a terrible call. Unfortunately, anything short of that will leave the Court *forever lost in the wilderness*.<sup>95</sup>

Yale Law Professor Akhil Reed Amar agrees: "[T]o apply the clause against a state government is precisely to eliminate its right to choose whether to establish a religion—a right explicitly confirmed by the establishment clause itself!"<sup>96</sup> Scholars from Harvard, Stanford, Pepperdine, Yale, and various other prestigious, if lesser known, scholars agree: it is impossible to

94. *Rethinking Incorporation*, *supra* note 43, at 1709 (footnotes omitted) (emphasis added).

95. F. LAGARD SMITH, *ACLU: THE DEVIL'S ADVOCATE* 173 (1996) (citations omitted) (emphasis added).

96. *Id.*

incorporate the First Amendment against the states without losing its entire meaning.<sup>97</sup> The Constitution provides that only the Congress and the people of the states may amend the Constitution. If the people choose to amend the First Amendment, the Constitution provides the mechanism to do so. However, the Court would have us believe that Congress and the people did so by adopting of the Fourteenth Amendment. The facts prove otherwise.

### B. *The History of the Court's Mis-Application*

The Fourteenth Amendment was ratified on July 21, 1868.<sup>98</sup> Prior to its ratification, the Bill of Rights was clearly not applicable to the activities of state and local governments.<sup>99</sup> According to the Supreme Court's decisions of the 19th and early 20th centuries, this inapplicability remained the controlling view even *after* the ratification of the Fourteenth Amendment.

Less than a year after the Fourteenth Amendment was ratified, in *Twitchell v. Pennsylvania*,<sup>100</sup> the United States Supreme Court rejected the notion that the Fifth and Sixth Amendments of the United States Constitution applied against the states.<sup>101</sup> Since the Fourteenth Amendment was part of the Constitution in 1869, the Supreme Court had the chance to hold the Bill of Rights applicable against the state in *Twitchell*. It did not.

One year after *Twitchell*, in *The Justices v. Murray*,<sup>102</sup> the Supreme Court admitted:

[T]he ten amendments proposed by Congress, and adopted by the States, are limitations upon the powers of the Federal government, and not upon the States; and we are referred to the cases of *Barron v. The Mayor and City Council of Baltimore*; *Lessee of Livingston v. Moore*, and others; *Twitchell v. The Commonwealth*,

---

97. See *Rethinking Incorporation*, *supra* note 43; Fairman, *supra* note 58; SMITH, *supra* note 95; William K. Lietzan, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191 (1990).

98. CONG. GLOBE, 40th Cong., 2d Sess. 4295-96 (1868).

99. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833).

100. 74 U.S. 321 (1869).

101. *Twitchell*, 74 U.S. at 325-27.

102. 76 U.S. 274 (1869).

as authorities for the position. This is admitted, and it follows that the seventh amendment could not be invoked in a State court to prohibit it from re-examining, on a writ of error, facts that had been tried by a jury in the court below.<sup>103</sup>

In *Chicago, Burlington & Quincy R.R. Co. v. Chicago*,<sup>104</sup> the Supreme Court held that state and local governments are required to pay just compensation when exercising their powers of eminent domain to take an individual's property for public use.<sup>105</sup> However, the Court employed the traditional view that the freedom to own property was expressly provided for in the text of the Fourteenth Amendment's protection of "property." The Court refused to adopt its present position—that the Just Compensation Clause of the Fifth Amendment is applied against the states through the Due Process Clause of the Fourteenth Amendment.<sup>106</sup>

The Court's understanding of the intent of the First and Fourteenth Amendments failed in 1925 with its opinion in *Gitlow v. New York*.<sup>107</sup> In *Gitlow*, the Supreme Court was asked whether a state statute restricting speech violated the liberty clause of the Fourteenth Amendment. The Court held that it did not; however, in so doing, the Court concluded for the first time that the First Amendment had been incorporated against the states through the Fourteenth Amendment. The Court stated:

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States. We do not regard the incidental statement in *Prudential Ins. Co. v. Cheek*, that the Fourteenth Amendment imposes no restrictions

103. *Murray*, 76 U.S. at 278 (citations omitted).

104. 166 U.S. 226 (1897).

105. *Chicago, Burlington & Quincy R. Co.*, 166 U.S. at 226.

106. The Court's "present position" is seen in the following statement by John E. Nowak in his hornbook on constitutional law: "Today we phrase the issue as whether the provisions of the Bill of Rights are 'incorporated' into the meaning of the word 'liberty' so as to be protected by the due process clause of the fourteenth amendment and applied to the states." JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 384 (1991).

107. 268 U.S. 652 (1925).

on the States concerning freedom of speech, as determinative of this question.<sup>108</sup>

This new idea was stated in dictum in *Gitlow* and admittedly disregarded stare decisis as the Court dismissed and reversed its prior holding in *Prudential*.

In his second farewell address, President George Washington warned the young nation against the dangers of judicial overreaching that the Supreme Court perpetrated in *Gitlow*.<sup>109</sup> In *Gitlow*, the Court's change of our Constitution by usurpation was not overtly used as an instrument for good nor for evil; it was essentially an instrument for neutrality because the outcome of the case did not depend on that portion of the opinion. Perhaps the fact that judicial usurpation of the states' rights to make policy with regard to the Bill of Rights came first, not as an instrument of evil, but rather masquerading as harmless dictum, explains why the usurpation was not opposed. For whatever reason, the other branches of government, the states, and the people did nothing to correct the Court's gratuitous misreading of the Fourteenth Amendment.

In 1940, the Supreme Court took its scheme of judicial usurpation beyond the realm of mere dictum.<sup>110</sup> However, the Court was careful to use the scheme as a perceived instrument of good.

---

108. *Gitlow*, 268 U.S. at 666.

109. See text accompanying note 54, *supra*.

110. Scholars correctly point out that the theory of "selective incorporation" was officially birthed in *Palko v. Connecticut*, 302 U.S. 319 (1937), overruled by *Benton v. Maryland*, 395 U.S. 784 (1969), wherein the Court rejected Justice Black's total incorporation theory. See *Adamson v. California*, 332 U.S. 46 (1947). However, the Court still held that certain "selective" portions of the Bill of Rights were incorporated against the states through the Due Process Clause of the Fourteenth Amendment. *Palko*, 302 U.S. at 324-25.

However, since *Palko* involved a state murder charge, not the Religion Clauses of the First Amendment, it is not as helpful to this argument as is *Cantwell*. In *Palko*, Justice Benjamin Cardozo stated for the Court, "specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states." *Id.* (footnote omitted) (emphasis added). Cardozo also created the federal judicial wild-card when he provided that also protected against state action would be those rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 325 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). Implicit in Cardozo's creation is that only the Court is anointed with the ability to determine which rights are and are not "fundamental."

In *Cantwell v. Connecticut*,<sup>111</sup> the Court was asked whether a state statute prohibiting the solicitation of contributions to any alleged religious, charitable, or philanthropic cause without the approval of the secretary of the public welfare council violated the Free Exercise Clause of the First Amendment as applied through the Liberty Clause of the Fourteenth Amendment. Seventy-two years after the Fourteenth Amendment was ratified, and despite contrary precedent, the Supreme Court stated: "First. We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment."<sup>112</sup> The Court "reasoned" that the Liberty Clause of the Fourteenth Amendment was intended to apply the unenumerated fundamental rights in the Bill of Rights against the states. Since there are no "fundamental rights" enumerated in the Bill of Rights, the Court granted itself the authority to not only invent and determine which rights are fundamental, but to compel states to abide by the Supreme Court's policies with regard to those "rights."<sup>113</sup> The *Cantwell* Court explained:

The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment.

...

The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.<sup>114</sup>

Seven years later, Justice Black wrote in his dissent in *Adams v. California*:

My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provi-

111. 310 U.S. 296 (1940).

112. *Cantwell*, 310 U.S. at 303.

113. Mr. Justice William O. Douglas described this "due process" power grab with the following statement: "Due process, to use the vernacular, is the wild card that can be put to such use as the Judges choose." William Ray Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A. J. 1212, 1213 (1977).

114. *Cantwell*, 310 U.S. at 296, 303.

sions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states. With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced. This historical purpose has never received full consideration or exposition in any opinion of this Court interpreting the Amendment.<sup>115</sup>

As Washington predicted, the instrument of good in *Cantwell* was soon to become the "weapon by which free governments are destroyed."<sup>116</sup>

In the landmark decision of *Everson v. Board of Education*,<sup>117</sup> the Court reached the proper result, but, did so with flawed reasoning. The Court was asked whether the transportation of parochial school children to private religious schools on public school buses violated the Establishment Clause of the First Amendment to the United States Constitution. A New Jersey statute authorized its local school districts to make rules and contracts for the transportation of children to and from schools. Acting pursuant to this statute, the Ewing Board of Education authorized reimbursement to parents for money expended by them for the transportation of children on buses operated by the public transportation system. Some of this money was used for the payment of transportation of some children in the community to Catholic parochial schools. These church schools gave students instruction in both religious and secular curricula. *Everson* complained that the statute amounted to a law respecting an establishment of religion. However, the United States Supreme Court found no establishment problem, stating:

It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more

---

115. *Adamson v. California*, 332 U.S. 46, 71-72 (1947). Justice Black's view of "total incorporation"—that the Fourteenth Amendment was meant to incorporate *all* of the Bill of Rights and not just "selective" portions of the Bill of Rights—has never been endorsed by a majority of the Court. Rather, the Court has opted for Justice Cardozo's "selective incorporation" theory in *Palko*.

116. Washington, *supra* note 53.

117. 330 U.S. 1 (1947).

than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.<sup>118</sup>

The Court in *Everson* improperly applied the First Amendment Religion Clauses against the states through the Due Process Clause of the Fourteenth Amendment. Only this time, the Court was not acting without precedent. It had already overruled the principle of law that the First Amendment, according to its plain language, applied only to *Congress*. Writing for the Court, Mr. Justice Black stated: "The First Amendment, as made applicable to the states by the Fourteenth, *Murdock v. Pennsylvania*, commands that a state 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .'"<sup>119</sup> In *Everson*, the Court also penned the infamous phrase that has been used to pervert the meaning of the Religion Clauses: "The First Amendment has erected a *wall between church and state*. That wall must be kept high and impregnable. We could not approve the slightest breach."<sup>120</sup> It is surprising how many citizens, including lawyers, believe that the phrase "wall of separation between church and state" is in the text of our Constitution.<sup>121</sup> Despite the Court's activism,

118. *Everson*, 330 U.S. at 18.

119. *Id.* at 8 (citation omitted).

120. *Id.* at 18 (emphasis added). While neither the words nor the concept of "separation of church and state" appears in our Constitution, those words and ideas do appear in the Constitutions of the former communist Soviet regimes. See U.S.S.R. CONST. adopted July 10, 1918, art. Two, ch. 5, § 13 "For the purpose of securing to the workers real freedom of conscience, *the church is to be separated from the state and the school from the church*, and the right of religious and antireligious propaganda is accorded to every citizen." (emphasis added); and U.S.S.R. CONST. adopted Dec. 5, 1936, ch. 10, art. 124 ("In order to ensure to citizens freedom of conscience, *the church in the U.S.S.R. is separated from the state, and the school from the church*. Freedom of religious worship and freedom of anti-religious propaganda are recognized for all citizens." (emphasis added)). Eleven years after the U.S.S.R. Constitution of 1936 wrote the "separation of church and state" into the text of the Soviet Constitution, the United States Supreme Court held that our Constitution commanded the same philosophy and then wrote that phrase on the minds of the American people. See *Everson*, 330 U.S. at 18.

121. The words "separation between church and state" appear in a private letter from Thomas Jefferson to the Danbury Baptist Association. The Danbury Baptists were concerned that the federal government might officially merge with one denomination of Christianity, much in the same way that the English government had merged with the Church of England. Jefferson responded by stating that there was

neither the other branches of the federal government nor the states took serious issue with the Supreme Court's continued misapplication of the First Amendment against the states.

*Engel v. Vitale*<sup>122</sup> was the first case in which both the ends and the means were improper. In *Engel*, the Court was asked whether a local education board's policy in New York which required teachers to lead willing students in prayer at the beginning of each school day violated the United States Constitution. The prayer read, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."<sup>123</sup> The Court reasoned:

Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from *the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment . . .*<sup>124</sup>

and found that: "by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause."<sup>125</sup>

Less than a year after *Engel*, the Supreme Court reiterated its "authority" to apply the Religious Clauses of the First Amendment against the states in *Abington School District v.*

---

a wall of separation which was intended to keep the legislature from delving into the affairs of the church. Letter from Thomas Jefferson to A Committee of the Danbury Baptist Association (Jan. 1, 1802), in 16 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 54, at 281-82.

Moreover, it would indeed be a disservice to this great man, Jefferson, to view his life and his writings through this one distortion. For it was also Jefferson who penned his own legacy with an epithet, the words of which now appear on the Jefferson Memorial in Washington, D.C.: "Can the liberties of a nation bethought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God?" Thomas Jefferson's Notes on Virginia, in 2 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 54, at 227.

122. 370 U.S. 421 (1962).

123. *Engle*, 370 U.S. at 422.

124. *Id.* at 430 (emphasis added).

125. *Id.* at 424.

*Schempp*,<sup>126</sup> and its companion case, *Murray v. Curlett*.<sup>127</sup>  
The *Schempp* Court stated:

First, this Court has decisively settled that the First Amendment's mandate that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" has been made wholly applicable to the States by the Fourteenth Amendment. Twenty-three years ago in *Cantwell v. Connecticut*, this Court, through Mr. Justice Roberts, said:

The fundamental concept of liberty embodied in that [Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws . . . .<sup>128</sup>

A footnote at the conclusion of the above statement reads:

Application to the states of other clauses of the First Amendment obtained even before *Cantwell*. Almost 40 years ago in the opinion of the Court in *Gitlow v. New York*, Mr. Justice Sanford said: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."<sup>129</sup>

In only thirty-eight years, the seemingly innocent notion in *Gitlow* that "fundamental personal rights and 'liberties' [are] protected by the due process clause of the Fourteenth Amendment from impairment by the States"<sup>130</sup> became the weapon that destroyed the states' freedom to protect religious liberty in *Schempp*.

Today, modern liberalism criticizes all who argue that the Fourteenth Amendment should not be used to apply the First

126. 374 U.S. 203 (1963) (challenge of a Pennsylvania statute providing for Bible reading in public schools).

127. *Id.*

128. *Schempp*, 374 U.S. at 215-16 (alteration in original) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)) (citation omitted).

129. *Id.* at 216 n.8 (citation omitted).

130. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

Amendment and other purported "fundamental rights" against the states, an effect that legal and historical scholarship reveals the drafters, proposers, and ratifiers of the Fourteenth Amendment never intended.

#### V. THE FEDERAL COURTS' DESTRUCTION OF FREEDOM FROM *ENGEL* THROUGH *FLORES*

With rare exception, since *Schempp*, the federal courts have held, in case after case,<sup>131</sup> that states, state actors, and even individual citizens in states have violated the Constitution's prohibition that "Congress shall make no law respecting an establishment of religion."<sup>132</sup> In 1971, *Lemon v. Kurtzman*<sup>133</sup> was decided by the United States Supreme Court. This case established a three prong test, which has become the test which the courts have used to determine whether a governmental action violates the Establishment Clause. Although this test is highly subjective and capable of manipulation, it has never been overruled. Very simply, under the *Lemon* test, in order for a governmental action to be valid, it must: 1) have a secular legislative purpose; 2) neither advance nor inhibit religion as its principal or primary effect; and 3) not foster an excessive government entanglement with religion.<sup>134</sup>

In *Stone v. Graham*, the Supreme Court held that a Kentucky statute requiring the posting of a copy of the Ten Commandments on walls of each public school classroom in the state had a pre-eminent purpose which was plainly religious and violated the Establishment Clause.<sup>135</sup> The Court also seemed to gain the divine ability to discern the disguised religious motivations of the drafters of the Kentucky statute when it discounted the statute's avowed secular purpose in favor of a religious purpose. The Court stated:

---

131. See, e.g., *Lemon v. Kurtz*, 403 U.S. 602 (1971); *Stone v. Graham*, 449 U.S. 39 (1980); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Wallace v. Jaffree*, 472 U.S. 38 (1985).

132. U.S. CONST. amend. I.

133. 403 U.S. 602 (1971).

134. *Lemon*, 403 U.S. at 612-13.

135. 449 U.S. 39 (1980).

If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments, [and concluded that such] is not a permissible state objective under the Establishment Clause.

...  
[T]he mere posting of the copies, . . . the Establishment Clause prohibits.<sup>136</sup>

In *Marsh v. Chambers*,<sup>137</sup> the Supreme Court considered a dispute involving a challenge to the Nebraska Legislature's practice of beginning each of its sessions with a prayer offered by a chaplain, who is chosen biennially by the Executive Board of the Legislative Council and who is paid with public funds. The Court found no violation of the Establishment Clause, holding that the practice of opening sessions of Congress with prayer had continued uninterrupted since the First Congress drafted the First Amendment almost two hundred years before.<sup>138</sup> The Court ruled that, while historical patterns alone cannot justify contemporary violations of constitutional guarantees, historical evidence in that case shed light not only on what the drafters of the First Amendment intended the Establishment Clause to mean, but also on how they thought the clause applied to the chaplaincy practice authorized by that Congress. The Court found that the practice had become part of the fabric of our society and that it was clear that invoking divine guidance on a public body entrusted with making law was not a violation of the Establishment Clause, but "simply a tolerable acknowledgment of beliefs widely held among the people of this country."<sup>139</sup> The Court also ruled that against this background, the fact that a clergyman representing only one denomination was selected by the Nebraska Legislature to offer this prayer, that he was paid with public funds, and that the prayers being offered were singularly and exclusively Christian did not invalidate the practice.<sup>140</sup>

---

136. *Stone*, 449 U.S. at 42.

137. 463 U.S. 783 (1983).

138. *Chambers*, 463 U.S. at 795.

139. *Id.* at 783.

140. *Id.* at 783-84.

Also in 1983, the debate over prayer in schools came to Alabama when Governor James, who was then serving his first term as Governor, was made a defendant in a case challenging Alabama's three school prayer statutes. In that case, which was originally styled *Jaffree v. James*,<sup>141</sup> and was later concluded as *Wallace v. Jaffree*,<sup>142</sup> the United States Supreme Court held that the Alabama statutes providing for a period of silent meditation or authorizing teachers to lead willing students in a prayer drafted by the Alabama Legislature violated the Establishment Clause and were, therefore, unconstitutional.<sup>143</sup>

In *County of Allegheny v. American Civil Liberties Union*,<sup>144</sup> the Supreme Court was asked whether the Establishment Clause prohibited a state from displaying a creche<sup>145</sup> in a state courthouse and a Chanukah menorah outside the city-county buildings. The Court said that the Establishment Clause prohibited the creche display but permitted the menorah display

141. 554 F. Supp. 1130 (S.D. Ala. 1983).

142. 472 U.S. 38 (1985).

143. *Wallace*, 472 U.S. at 61. In his dissent in *Wallace*, Justice Rehnquist, concluded:

There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*.

...

But the greatest injury of the "wall" notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. . . . [N]o amount of repetition of historical errors in judicial opinions can make the errors true. The "wall of separation between church and State" is a metaphor based on bad history. . . . It should be frankly and explicitly abandoned.

...

Our perception has been clouded not by the Constitution but by the mists of an unnecessary metaphor.

...

It would come as much of a shock to those who drafted the Bill of Rights, as it will to a large number of thoughtful Americans today to learn that the Constitution, as construed by the majority, prohibits the Alabama Legislature from "endorsing" prayer. George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God." *History must judge whether it was the Father of his Country in 1789, or a majority of the Court today, which has strayed from the meaning of the Establishment Clause.* *Id.* at 106-07, 112-14 (Rehnquist, J., dissenting) (emphasis added).

144. 492 U.S. 573 (1989).

145. A "creche" is the traditional Christmas manger display of the baby Jesus.

because the menorah was next to a "secular" Christmas tree.<sup>146</sup> The Court's reasoning was as unintelligible as its holding. It stated: "The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"<sup>147</sup> The facts do not support the Court's conclusion that the Establishment Clause prevents one's religion from being relevant to his standing in the political community. Since forty-nine of the fifty states—all but Rhode Island—had religious tests for office when the Establishment Clause was adopted by the people of those states,<sup>148</sup> the Court's reasoning can only be described as either uninformed or an intentional disregard of history.

In *Lee v. Weisman*,<sup>149</sup> the Supreme Court revisited the issue of prayer in the public school context. The Court was asked whether the Establishment Clause prohibited a local rabbi from offering a nonsectarian, nonproselytizing prayer at a public high school graduation ceremony. The Court focused on several facts, including the fact that the rabbi was chosen by the administration, he was given a booklet outlining the types of prayers that should be given, and he was told that the prayers should be nonsectarian. The Court held that the prayers were unconstitutional because the atmosphere in which they were offered "coerced" unwilling bystanders to participate.<sup>150</sup>

Although the lower courts had based their decisions on the three-prong *Lemon* test, the Supreme Court ignored *Lemon* and developed a new test, which has been dubbed "the coercion test."<sup>151</sup> This new test seeks to identify when there is an unconstitutional coercion of a person to submit to the religious activities of another. The Court did not expressly enunciate how the test was to be administered or the specific elements of the test. However, it appears that coercion occurs when the govern-

146. *Allegheny*, 492 U.S. at 579.

147. *Id.* at 593-94 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

148. See SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 380 (1972).

149. 505 U.S. 577 (1992).

150. *Lee*, 505 U.S. at 587.

151. See *id.* at 644 (Scalia, J., dissenting).

ment directs a formal religious exercise in such a way as to oblige the participation of objectors.<sup>152</sup>

Still another of the Court's egregious usurpations of political power came last year in a case that did not directly involve religion, *Romer v. Evans*.<sup>153</sup> In *Romer*, the Court considered a challenge to Amendment 2, a state constitutional provision which had been approved by Colorado voters in a statewide referendum which prohibited the extension of *special* rights to homosexuals based upon their homosexual lifestyle. The Colorado amendment did *not* remove any protections from homosexual citizens. Instead, it merely prohibited the extension of *special* rights to them based solely on their consensual homosexual behavior. The Supreme Court (the majority was composed of six justices) struck down the clearly expressed will of millions of Coloradans, and held that Colorado's amendment violated the Equal Protection Clause of the federal constitution.<sup>154</sup> Former Reagan nominee to the Supreme Court, Robert Bork observed that:

*Romer* is a prime instance of "constitutional law" made by sentiment having nothing to do with the Constitution. What can explain the Court majority's decision? Only the newly faddish ap-

---

152. Justice Scalia, joined by Chief Justice Rehnquist, Justice White, and Justice Thomas, wrote a vigorous dissent in *Lee*, and came, perhaps, as close as any modern justice to exposing the Court's improper application of the First Amendment against the states through the Fourteenth Amendment. Justice Scalia stated:

In addition to this general tradition of prayer at public ceremonies, there exists a more specific tradition of invocations and benedictions at public school graduation exercises. By one account, the first public high school graduation ceremony took place in Connecticut in July 1868—the very month, as it happens, that the Fourteenth Amendment (the vehicle by which the Establishment Clause has been applied against the States) was ratified—when 15 seniors from the Norwich Free Academy marched in their best Sunday suits and dresses into a church hall and waited through majestic music and long prayers.

*Id.* at 635 (Scalia, J., dissenting) (emphasis added). Implicit in Justice Scalia's statement is the suggestion that the Fourteenth Amendment did not apply the Establishment Clause against the states.

If the other three justices who joined in Scalia's dissent agree—and *stare decisis* presumes that they do—with Scalia's assessment of the Fourteenth Amendment, then perhaps there are at least three justices on the present Court who might admit that "selective incorporation" is a farce. (Justice White concurred in Scalia's dissent, but he is no longer a member of the Court.)

153. 116 S. Ct. 1620 (1996).

154. *Romer*, 116 S. Ct. at 1622.

proval of homosexual conduct among the elite classes from which the Justices come and to which most of them respond. We are on our way to the approval of homosexual conduct, despite the moral objections of most Americans, because the Court views such moral disapproval as nothing more than redneck bigotry.<sup>155</sup>

The majority's error in *Romer* did not escape the criticism of Justice Antonin Scalia. In a dissenting opinion, he stated:

The Court has mistaken a Kulturkampf [or cultural dispute] for a fit of spite. The constitutional amendment before us here is not the manifestation of a "bare . . . desire to harm" homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. That objective, and the means chosen to achieve it, are not only unimpeachable under any constitutional doctrine hitherto pronounced (hence the opinion's heavy reliance upon principles of righteousness rather than judicial holdings); they have been specifically approved by the Congress of the United States and by this Court . . .

...  
This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that "animosity" toward homosexuality is evil. I vigorously dissent . . . .

...  
[T]he principle underlying the Court's opinion is that one who is accorded equal treatment under the laws, but cannot as readily as others obtain *preferential* treatment under the laws, has been denied equal protection of the laws. . . . [When holdings such as the one present in this case become accepted,] our constitutional jurisprudence has achieved terminal silliness. . . .

...  
The world has never heard of such a principle, which is why the Court's opinion is so long on emotive utterance and so short on relevant legal citation. And it seems to me most unlikely that any multilevel democracy can function under such a principle. . . .<sup>156</sup>

---

155. Robert Bork, *The End of Democracy: Our Judicial Oligarchy*, FIRST THINGS Nov. 1996 at 21-22.

156. *Romer*, 116 S. Ct. at 1629-30 (Scalia, J., dissenting).

And finally, in *City of Boerne v. Flores*,<sup>157</sup> the Court struck down the Religious Freedom Restoration Act (RFRA) under the reasoning that by adopting it, Congress had fraudulently amended the Constitution.<sup>158</sup> Unfortunately, the Court's recognition that the Constitution should be protected against attempts to fraudulently amend it, did not extend its ruling to include itself.

From a brief sampling of the cases listed above, it is clear that in that last few decades, the Court has drastically departed from the meaning of the First Amendment.<sup>159</sup>

#### VI. THE EFFECTS OF THE COURT'S IMPROPER DIVORCE OF RELIGIOUS PRINCIPLES FROM CIVIL GOVERNMENT: CONSEQUENCES OR COINCIDENCE?

In 1947, in *Everson*, the United States Supreme Court created the American myth of the "separation of church and state," and in 1962, in *Engel*, they foisted it upon the American people. It is interesting to note that since the Court stopped permitting schoolchildren to pray in 1962, statistical evidence proves that

---

157. 117 S. Ct. 2157 (1997).

158. *Flores*, 117 S. Ct. at 2172.

159. In all fairness to the Court, in recent years, it has seen fit to loosen its strict view of "separation of church and state" in certain cases. See *Agostini v. Felton*, 117 S. Ct. 1997, 2016 (1997) (holding that the Establishment Clause of the First Amendment does not bar the City of New York from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a congressionally mandated program and overruling portions of the Supreme Court's holdings from twelve years ago in *Aguilar v. Felton*, 473 U.S. 402 (1985), and its companion case, *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995) (holding that the Establishment Clause does not bar a state university from providing funds to a Christian campus organization for the purpose of producing a magazine when those funds are made available to other campus groups); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (permitting deaf student to bring his state-employed sign-language interpreter with him to his Roman Catholic high school even though the interpreter would necessarily interpret sectarian religious doctrine under the Establishment Clause); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (denying a church access to public school facilities solely because the church was a religious organization constituted viewpoint discrimination in violation of free speech; such access would not violate the Establishment Clause); *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481 (1986) (Establishment Clause does not bar a State from issuing a vocational tuition grant to a blind person who wished to use the grant to attend a Christian college and become a pastor, missionary, or youth director).

social problems have increased dramatically.

Since 1962, crime in Alabama has increased by 632%; Alabama's divorce rate has doubled; Alabama schoolchildren's test scores on the Scholastic Aptitude Test have dropped by over sixty points; out of wedlock births have more than tripled; and the number of teenagers committing suicide has increased by 938%.<sup>160</sup> Are these statistics meaningless coincidences or the consequences of the Court's actions which have turned this state and nation from its Godly heritage?<sup>161</sup>

If those who were there for the drafting and adoption of the Constitution were correct, then perhaps there is a relationship between the increase in social problems and the removal of religion and morality from the public square.

George Washington, the father our country, stated in his farewell address from the presidency:

Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. . . . And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds . . . reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle.<sup>162</sup>

Our second president, John Adams stated: "[W]e have no government armed with power capable of contending with human passions unbridled by morality and religion . . . Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."<sup>163</sup>

---

160. JOHN HAY, THE ALABAMA INDEX OF LEADING CULTURAL INDICATORS (Alabama Family Alliance 1995).

161. These social problems do not just leave their mark on the souls of the individuals who experience them, they also impact all of society since the price of poor behavior is paid for by the taxpayers. "The costs related to drug abuse—prevention, treatment related crime, violence, death, property destruction, and lost productivity—in 1988 was over \$100 billion. Taxpayers paid over \$21.55 in welfare outlay—Aid to Families with Dependant Children, food stamp, Medicaid—to teen mothers. Federal spending on AIDS was \$4.9 billion in 1994." Telephone interview with Liz McClendon, research assistant, Specialty Research Assoc. (Feb. 26, 1998).

162. Washington, *supra* note 53.

163. THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES, Vol. IX, 229 (Charles Francis Adams, ed. 1854).

## VII. CONCLUSION

Several decades after our nation was established, French historian Alexis de Toqueville traveled throughout America with the hope of discovering the secret to our prosperity. After visiting America's churches, Toqueville reportedly concluded and commented: "America is great because she is good; and if America ever ceases to be good, she will cease to be great."<sup>164</sup> Toqueville discovered through weeks of observation and reasoning, what Washington, Adams, and the rest of the founders had known from the beginning. The American system is designed only for a "good" people, and when the goodness of the people is no longer permitted in public, the result has been a loss of the goodness of her people and the greatness of our land.

Unquestionably, America has lost some of her goodness. It is as our founders planned it. Our system of government works only for a moral and religious people. When we drift from those cornerstone principles, our government will fail—by design!

A review of the history of America's origins and the events surrounding the enactment and ratification of the First and Fourteenth Amendments makes the drafters' intentions clear. The Court's departure from these well settled and documented true meanings, reminds one of hearing a clock striking thirteen; not only is the clock's present announcement called into question, but so are its previous twelve.

Children's author Hans Christian Andersen tells the story of "The Emperor's New Clothes"<sup>165</sup> in which an entire kingdom is socially bullied into denying the obvious—that the emperor's new clothes do not exist. At the end of Andersen's tale, as the king and his "wise" counselors are parading down main street wearing nothing but their "clothes," one small boy exclaims the obvious, but previously unspoken: "the emperor has no clothes!" The king and his counselors pause for a moment, but then continue on with their parade.

Whether clothed in the imaginary "golden threads" of deceit-

---

164. Alexis de Toqueville, quoted in E. BENSON, *GOD, FAMILY, COUNTRY: OUR THREE GREAT LOYALTIES* 360 (1975).

165. HANS CHRISTIAN ANDERSEN, *THE LITTLE MERMAID AND OTHER FAIRY TALES* (1963).

ful friends, or in the imaginary fabric of the incorporation doctrine of the Fourteenth Amendment to the United States Constitution, it is time that we say firmly and without equivocation: "The emperor has no clothes!"

