U.S. Department of Justice
Civil Rights Division

Deputy Assistant Attorney General

February 8, 1983

Bill:

Per your request.

Chuck

Enclosure

BNA FILE COPY BNA

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

BNA
Date Filed: 1-14-83
Date Received: 1-18

ISHMAEL JAFFREE; JAMAEL AAKKI JAFFREE, MAKEBA GREEN, and CHIOKE SALEEM JAFFREE, infants, by and through their best of friend and father, ISHMAEL JAFFREE,

Plaintiffs,

vs.

THE BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY; DAN C. ALEXANDER, DR. NORMAN BERGER, HIRAM BOSARGE, NORMAN G. COX, RUTH F. DRAGO, and DR. ROBERT GILLIARD, in their official capacities as members of the Board of School Commissioners of Mobile County; DR. ABE L. HAMMONS, in his official capacity as Superintendent of the Board of Education of Mobile County; ANNIE BELL PHILLIPS, individually and in her official capacity as principal of MORNINGSIDE ELEMENTARY SCHOOL; JULIA GREEN, individually and in her official capacity as a teacher at MORNINGSIDE ELEMENTARY SCHOOL; BETTY LEE, individually and in her official capacity as principal of E.R. DICKSON ELEMENTARY SCHOOL; CHARLENE BOYD, individually and in her official capacity as a teacher at E.R. DICKSON ELEMENTARY SCHOOL; EMMA REED, individually and in her official capacity as principal of CRAIGHEAD ELEMENTARY SCHOOL; PIXIE ALEXANDER, individually and in her official capacity as a teacher at CRAIGHEAD ELEMENTARY SCHOOL,

Defendants.

CIVIL ACTION NO. 82-0554-H

MEMORANDUM OPINION

Prelusion

If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.

Farewell Address by
George Washington
reprinted in R. Berger,
Government by Judiciary 299 (1977).

Ishmael Jaffree, on behalf of his three (3) minor children, seeks declaratory and injunctive relief. In the original complaint Mr. Jaffree sought a declaration from the Court that certain prayer activities initiated by his children's public school teachers violated the establishment clause of the first amendment to the United States Constitution. He sought to have these prayer activities enjoined.

A trial was held on the merits on November 15-18, 1982. After hearing the testimony of witnesses, considering the exhibits, discovery, stipulations, pleadings, briefs, and legal arguments of the parties, the Court enters the following findings of fact and conclusions of law.

In this typewritten opinion the Court has opted to place its footnotes at the conclusion of the opinion, but in so doing does not intend to depricate the significance thereof to the opinion rendered. The publisher may or will opt to place the footnotes at the conclusion of each page.

I. Findings of Fact

Ishmael Jaffree is a citizen of the United States, a resident of Mobile County, Alabama, and has three (3) minor children attending public schools in Mobile County, Alabama: Jamael Aakki Jaffree, Makeba Green and Chioke Saleem Jaffree.

Defendants. Annie Bell Phillips (principal) and Julia Green (teacher) are employed at Morningside Elementary School, where Jamael Aakki Jaffree attended school during the 1981-82 school year. Defendants Betty Lee (principal) and Charlene Boyd (teacher) are employed at E.R. Dickson Elementary School where Chioke Saleem Jaffree attended during the 1981-82 school year. Defendants, Emma Reed (principal) and Pixie Alexander (teacher) are employed at Craighead Elementary School where Makeba Green attended school during the 1981-82 school year. Each of these defendants is sued individually and in their official capacity. Each of the schools is part of the system of public education in Mobile County, Alabama.

Dan Alexander, Dr. Norman Berger, Hiram Bosarge, Norman Cox, Ruth F. Drago and Dr. Robert Gilliard are members of the Board of School Commissioners of Mobile County, Alabama. As commissioners, each of these defendants collectively is charged by the laws of the State of Alabama with administering the system of public instruction for Mobile County, Alabama. These defendants are sued only in their official capacity.

Dr. Abe L. Hammons is the Superintendent of Education for Mobile County, Alabama. Defendant Hammons has direct supervisory responsibilities over all principals, teachers and other employees of the Mobile County Public School System. This defendant is sued only in his official capacity.

Defendant Boyd, as early as September 16, 1981, led her class at E.R. Dickson in singing the following phrase:

> God is great, God is good,
> Let us thank him for our food,
> bow our heads we all are fed,
> Give us Lord our daily bread.
> Amen!

The recitation of this phrase continued on a daily basis throughout the 1981-82 school year.

Defendant Boyd was made aware on September 16, 1981 that the minor plaintiff, Chioke Jaffree, did not want to participate in the singing of the phrase referenced above or be exposed to any other type of religious observances. On March 5, 1982, during a parent-teacher conference, Ms. Boyd was told by Chioke's father that he did not want his son exposed to religious activity in his classroom and that, in Mr. Jaffree's opinion, the activity was unlawful. Again, on March 11, 1982, Ms. Boyd received a handwritten letter from Mr. Jaffree which again advised her that leading her class in chanting the referenced phrase was unlawful. This letter further advised Ms. Boyd that if the practice was not discontinued that he would take further administrative and

judicial steps to see that it was. Finally, Ms. Boyd was made aware of the contents of a letter drafted by Mr. Jaffree, dated May 10, 1982, which had been sent to Superintendent Hammons complaining about the prayer activity in Ms. Boyd's classroom. Notwithstanding Mr. Jaffree's protestations, the recitation of the prayer continued.

Defendant Lee learned on March 8, 1982, that Mr. Jaffree had complained about the prayer activities which were being conducted in defendant Boyd's classroom. Ms. Lee directly spoke with Mr. Jaffree on March 11, 1982, and learned from him that he was opposed to the prayer activities in Ms. Boyd's class and that he felt the same to be unconstitutional. On the same day, Ms. Lee called Mr. Larry Newton, Deputy Superintendent, who informed her that the prayer activity in Ms. Boyd's class could continue on a "strictly voluntary basis."

Defendant Pixie Alexander has led her class at Craighead in reciting the following phrase:

> God is great, God is good,
> Let us thank Him for our food.

Further, defendant Pixie Alexander had her class recite the following, which is known as the Lord's Prayer:

> Our Father, which art in heaven, hallowed be Thy name. Thy kingdom come. Thy will be done on earth as it is in heaven. Give us this day our daily bread and forgive us our debts as we forgive our debtors. And lead us not into temptation but deliver us from evil for thine is the kingdom and the power and the glory forever. Amen.

The recitation of these phrases continued on a daily basis throughout the 1981-82 school year.

Defendant Pixie Alexander learned on May 24, 1982, that Mr. Jaffree had complained, through a letter dated May 10, 1982, to defendant Hammons, about her leading her class in the above-referenced prayer activity. After Ms. Alexander learned of Mr. Jaffree's May 10, 1982 letter, she continued to lead her class in reciting the referenced phrases.

Ms. Green admitted that she frequently leads her class in singing the following song:

> For health and strength and daily food,
> we praise Thy name, Oh Lord.

This activity continued throughout the school year, despite the fact that Ms. Green had knowledge that plaintiff did not want his child exposed to the above-mentioned song. See defendant Green's response to plaintiffs' Interrogatories Nos. 21, 22, 50 and 51.

Upon learning of the plaintiffs' concern over prayer activity in their schools, defendants Reed and Phillips consulted with teachers involved, however, neither defendant advised or instructed the defendant teachers to discontinue the complained of activity.

Prior to the 1981-82 school year, defendants Reed, Phillips, Boyd, and to a lesser extent, Green, each knew the Board of School Commissioners of Mobile County had a policy regarding religious

activity in public schools. However, not one of the teachers sought or received advice from the board or the superintendent prior to the plaintiffs' initial complaint regarding whether their classroom prayer activities were consistent with the policy.

The policy on religious instruction adopted by the Board of School Commissioners of Mobile County reads as follows:

> RELIGIOUS INSTRUCTION
>
> Schools shall comply with all existing state and federal laws as these laws pertain to religious practices and the teaching of religion. This policy shall not be intertreted to prohibit teaching about the various religions of the world, the influence of the Judeo-Christian faith on our society, and the values and ideals of the American way of life.

School attendance is compulsory in the State of Alabama. Alabama Code § 16-28-3 (1975).

The complaint in this case was later amended to include allegations against Governor Fob James and various state officials. The claims against the state officials were severed, Fed. R. Civ. P. 21, and they are the subject of a separate order which the Court entered today.

This recitation of the findings of fact is not intended to be an all-inclusive statement of the facts as they were produced in this case. Because of the following opinion the Court is of the impression that the facts above-recited constitute a sufficient recitation for deciding this case. However, in the event there

is a disagreement with the conclusions reached by this Court, the Court does not desire to be precluded from a further recitation of appropriate fact as may be essential to further conclusions in the case. Examples of what the Court alludes to is the factual bases for consideration of the questions of freedom of speech, whether or not secular humanism is in fact a religion, and the propriety of the free exercise of religion.

II. Conclusions of Law

A. Subject-Matter Jurisdiction

This action is brought under 42 U.S.C. § 1983.[1] The complaint alleges that the subject-matter jurisdiction of the Court "is evoked pursuant to Title 28, Sections 1343(3) and (4), and Sections 2201 and 2202 of the United States Code." See Complaint at 2 (filed May 28, 1982). Neither of the two amended complaints add anything to this jurisdictional allegation.[2]

The complaint alleges that rights guaranteed to the plaintiffs under the first and fourteenth amendments have been violated.[3] The subject-matter jurisdiction of a federal court over a claim arising under 42 U.S.C. § 1983 rests upon 28 U.S.C. § 1343(3). While the complaint does not allege that subject-matter jurisdiction is vested in the court under the general, federal-question jurisdictional statute, 28 U.S.C. § 1331, certainly subject-matter jurisdiction is vested under that provision since a federal district court has "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, exclusive of the amount-in-controversy. Thus, the Court concludes that it has subject-matter jurisdiction over the claims alleged by the plaintiffs.[4]

B. School-Prayer Precedent

The United States Supreme Court has previously addressed itself in many cases to the practice of prayer and religious services in the public schools. As courts are wont to say, this court does not write upon a clean slate when it addresses the issue of school prayer.

Viewed historically, three decisions have lately provided general rules for school prayer. In Engel v. Vitale, 370 U.S. 421 (1962), Abington v. Schempp, 374 U.S. 203 (1963), and Murray v. Curlett, 374 U.S. 203 (1963), the Supreme Court established the basic considerations. As stated, the rule is that "[t]he 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." Everson v. Board of Education, 330 U.S. 1, 18 (1947) (per Black, J.).

In Engel v. Vitale parents of public school students filed suit to compel the board of education to discontinue the use of an official prayer in the public schools. The prayer was asserted to be contrary to the beliefs, religions, or religious practices of the complaining parents and their children. In Engel the board of education, acting in its official capacity under state law, directed the principals to cause the following prayer to be said aloud by each class at the beginning of the day in each homeroom: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and

our Country." 370 U.S. at 422. This prayer was adopted by the school board because it believed the prayer would help instill the proper moral and spiritual training needed by the students.

The parents argued that the school board violated the establishment clause of the first amendment when it directed that this prayer be recited in the public schools. The first amendment provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .." U.S. Const. amend. I. The Supreme Court found "that by using its public school system to encourage recitation of the Regent's prayer, the State of New York ha[d] adopted a practice wholly inconsistent with the Establishment Clause." Id. at 422. The Court found this prayer to be a religious activity. The prayer constituted "a solemn avowal of devine faith and supplication for the blessing of the Almighty. The nature of such prayer has always been religious . . .." Id. at 424-25. The Court noted that "[i]t [wa]s a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America." Id. at 425. Therefore, according to the Court, the prayer "breache[d] the constitutional wall of separation between Church and State." Id.

Citing historical documents, the Court observed that

> [b]y the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the danger of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services . . . . The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support, or influence the kinds of prayer the American people can say -- that the people's religions must not be subjected to the pressures of government or change each time a new political administration is elected to office. Under the Amendment's prohibition against governmental establishment of religion, as reinforced by the prohibitions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.

Id. at 429-30 (emphasis added).

The assertion by the Court that the establishment clause of the first amendment applied to the states was unaccompanied by any citation to authority. This conclusion was reached supposedly upon its examination of historical documents.

In dissent, Mr. Justice Stewart argued that the majority in Engel misinterpreted the first amendment. As Mr. Justice Stewart saw it, an official religion was not established by letting those who wanted to say a prayer say it. To the contrary, Mr. Justice Stewart thought "that to deny the wish of those

school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation." Id. at 445. As Mr. Justice Stewart saw the problem, our country is steeped in a history of religious tradition. That religious tradition is reflected in countless practices common in our institutions and governmental officials. For instance, the United States Supreme Court has always opened each day's session with the prayer "God save the United States and this Honorable Court." Id. at 446. Each President of the United States has, upon assuming office, swore an oath to God to properly execute his presidential duties. Our national anthem, "The Star-Spangled Banner," contains these verses:

> Blest with the victory and peace, may
> the heav'n rescued land
> Praise the Pow'r that hath made
> and preserved us a nation!
>
> Then conquor we must, when our
> cause it is just,
> And this be our motto "In God is
> our Trust."

Id. at 449. The Pledge of Allegiance to the Flag contains the words "one Nation under God, indivisible, with liberty and justice for all." Id. (emphasis in original). Congress added this in 1954. Mr. Justice Stewart believed that the Regent's prayer in New York had done no more than "to recognize and to follow the deeply enriched and highly cherished spiritual traditions of our Nation -- traditions which came down to us from those who almost two hundred years ago avowed their 'firm Reliance on the Protection of devine Providence' when they proclaimed the freedom and independence of this brave new world." Id. at 450.

Following the decision by the Supreme Court in Engel, the Court decided Abington v. Schempp and Murray v. Curlett. In Abington, a state law in Pennsylvania required that

> [a]t least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.

374 U.S. 205. The Schempp family, husband and wife and two of their three children, brought suit to enjoin enforcement of this statute. The Schempps contended that their rights under the fourteenth amendment of the United States Constitution were being violated.

Each morning at the Abington Senior High School between 8:15 a.m. and 8:30 a.m., while students were attending their homerooms, selected students would read ten verses from the Holy Bible. These Bible readings were broadcast to each room in the school building. Following the Bible readings the Lord's Prayer was recited. As with the Bible readings, the Lord's Prayer was broadcast throughout the building. Following the Bible readings and the Lord's Prayer, a flag salute was performed. Participation in the opening exercises, as directed by the Pennsylvania statute, was voluntary.

No prefatory statement, no questions, no comments, and no explanations were made at or during the exercises. Students and

parents were advised that any student could absent himself from the classroom or, should he elect to remain, not participate in the exercises.

In Murray v. Curlett, the Board of School Commissioners of Baltimore City adopted a rule which "provided for the holding of opening exercises in the schools of the city, consisting primarily of 'reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer.'" 374 U.S. at 211. An athiest, Mrs. Madalyn Murray, objected to the Bible reading and the recitation of the Lord's Prayer. After receiving the objection the board specifically provided that the Bible reading and the use of the Lord's Prayer should be conducted without comment and that any child could be excused from participating in the opening exercises or from attending them upon the written request of his parent or guardian.

Because of the similarity of the issues in both the Abington case and the Murray case the Supreme Court consolidated both cases on appeal and decided them together. The Court recognized that "[i]t is true that religion has been closely identified with our history and government. . . . 'The history of man is inseparable from the history of religion. And . . . since the beginning of that history many people have devoutely believed that "More things are wrought by prayer than this world dreams of."'" Abington School District v. Schempp, 374 U.S. at 212-13 (quoting

Zorach v. Clauson, 343 U.S. 306, 313 (1952)). Notwithstanding this recognition by the Court that the early history of this country, together with the history of man, was inseparable from religion the Court found the Bible reading and the recitation of the Lord's Prayer to be an unconstitutional abridgement of the first amendment prohibition that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .." U.S. Const. amend. I.

The Court noted that the first amendment prohibited more than governmental preference of one religion over another. Rather, the first amendment was intended "'to create a complete and permanent separation of the spheres of religious activity in civil authority by comprehensively forbidding every form of public aid or support for religion.'" Id. at 217 (quoting Everson v. Board of Education, 330 U.S. 31-2 (1947)). The Court reviewed several of its precedents which touched on the establishment of religion, and concluded that "'[t]here cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception;

the prohibition is absolute.'" Id. at 219-20 (quoting Zorach v. Clauson, 343 U.S. 306, 312 (1952)). The Court in Abington reasoned from its own precedent rather than independently reviewing the historical foundation of the first and the fourteenth amendments. The Court held that the Bible reading and the recitation of the Lord's Prayer in both cases were religious exercises. The "rights," id. at 224, of the plaintiffs were being violated. The religious character of the Bible reading and the recitation of the Lord's Prayer were not mitigated by the fact that students were allowed to absent themselves from their homerooms upon request of their parents. "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent . . . ." Id. at 225.

The principles enunciated in Engel v. Vitale, Abington v. Schempp, and Murray v. Curlett have been distilled to this. "To pass muster under the Establishment Clause, the governmental activity must, first, reflect a clearly secular governmental purpose; second, have a primary effect that neither advances nor inhibits religion; and third, avoid excessive government entanglement with religion. Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 773, 93 S.Ct. 2955, 2965, 37 L.Ed.2d 948 (1973)." Hall v. Board of School Commissioners, 656 F.2d 999, 1002 (5th Cir. 1981). "If a statute [or official administrative directive] violates any of these three principles, it must be struck down under the

the Establishment Clause." Stone v. Graham, 101 S.Ct. 192, 193 (1980) (holding that a Kentucky statute requiring posting of copy of Ten Commandments on walls of each public school classroom in state had preeminent purpose which was plainly religious in nature, and statute was thus violative of establishment clause and that avowed secular purpose was not sufficient to avoid conflict with first amendment; emphasis added).

Indeed, in this circuit, prayer in public schools is per se unconstitutional. "Prayer is an address of entreaty, supplication, praise, or thanksgiving directed to some sacred or divine spirit, being, or object. That it may contemplate some wholly secular objective cannot alter the inherently religious character of the exercise." Karen B. v. Treen, 653 F.2d 897, 901 (5th Cir. 1981).

In sum, under present rulings the use of officially-authorized prayers or Bible readings for motivational purposes constitutes a direct violation of the establishment clause. Through a series of decisions, the courts have held that the establishment clause was designed to avoid any official sponsorship or approval of religious beliefs. Even though a practice may not be coercive, active support of a particular belief raises the danger, under the rationale of the Court, that state-approved religious views may be eventually established.

Although a given prayer or practice may not favor any one sect, the principle of neutrality in religious matters is violated under these decisions by any program which places tacit government approval upon religious views or practices. While the purpose of the program might be neutral or secular, the effect of the program or practice is to give government aid in support of the advancement of religious beliefs. Thus the programs are held invalid without any consideration as to whether they excessively entangle the state in religious affairs.

In contrast, the Supreme Court has permitted the use of the Bible in a literature course where the literary aspects of the Bible are emphasized over its religious contents. Abington School District v. Schempp, 374 U.S. 203, 225 (1963). So long as the study does not amount to prayer or the advancement of religious beliefs, a teacher may discuss the literary aspects of the Bible in a secular course of study. Finally, the Supreme Court permits religious references in official ceremonies, including some school exercises, on the basis that these references are part of our secularized traditions and thus will not advance religion. Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962).

In the face of this precedent the defendants argue that school prayers as they are employed are constitutional. The historical argument which they advance takes two tacts. First,

the defendants urge that the first amendment to the U. S. Constitution was intended only to prohibit the federal government from establishing a national religion. Read in its proper historical context, the defendants contend that the first amendment has no application to the states. The intent of the drafters and adoptors of the first amendment was to prevent the establishment of a national church or religion, and to prevent any single religious sect or denomination from obtaining a preferred position under the auspices of the federal government.

The corollary of this historical intent, according to the defendants, was to allow the states the freedom to address the establishment of religions as an individual prerogative of each state. Stated differently, the election by a state to establish a religion within its boundaries was intended by the framers of the Constitution to be a power reserved to the several states.

incorporation

Second, the defendants argue that whatever prohibitions were initially placed upon the federal government by the first amendment that those prohibitions were not incorporated against the states when the fourteenth amendment became law on July 19, 1868. The defendants have introduced the Court to a mass of historical documentation which all point to the intent of the Thirty-ninth Congress to narrowly restrict the scope of the fourteenth amendment. In particular, these historical

documents, according to the defendants, clearly demonstrate that the first amendment was never intended to be incorporated through the fourteenth amendment to apply against the states. The Court shall examine each historical argument in turn.

In the alternative, the defendant-intervenors argue that if the first amendment does bar the states from establishing a religion then the Mobile County schools have established or are permitting secular humanism, see infra note 41 (discussion of secular humanism), to be advanced in the curriculum and, being a religion, it must be purged also. Such a purge, maintain the defendant-intervenors, is nigh impossible because such teachings have become so entwined in every phase of the curriculum that it is like a pervasive cancer. If this must continue, say the defendant-intervenors, the only tenable alternative is for the public schools to allow the alternative religious views to be presented so that the students might better make more meaningful choices.

C. First Amendment as Forbidding Absolute Separation[5]

"'[T]he real object of the [F]irst amendment was not to countenance, much less to advance Mohammedanism, or Judaism, or infidelity, by prostrating Christianity, but to exclude all rivalry among Christian sects and to prevent any national ecclesiastical establishment which would give to an

hierarchy the exclusive patronage of the national government.'"[6] The establishment clause was intended to apply only to the federal government. Indeed when the Constitution was being framed in Philadelphia in 1787 many thought a bill of rights was unnecessary. It was recognized by all that the federal government was the government of enumerated rights. Rights not specifically delegated to the federal government were assumed by all to be reserved to the states. Anti-Federalists, however, insisted upon a Bill of Rights as additional protection against federal encroachment upon the rights of the states and individual liberties. Excerpted testimony of James McClellan at 5-6 (trial testimony).

The federalists, who were the proponents of the Constitution, acceded to the demand of the Anti-Federalists for a Bill of Rights since, in the opinion of all, nothing in the Bill of Rights changed the terms of the original understanding of the federal convention. It was thought by all that the Bill of Rights simply made express what was already understood by the convention: namely, the federal government was a government of limited authority and that authority did not include matters of civil liberty such as freedom of speech, freedom of the press, and freedom of religion. Id. at 8-13.

The prohibition in the first amendment against the establishment of religion gave the states, by implication,

full authority to determine church-state relations within their respective jurisdictions. "Thus the establishment clause actually had a dual purpose: to guarantee to each individual that Congress would not impose a national religion, and to each state that it was free to define the meaning of religious establishment under its own state constitution and laws. The federal government, in other words, simply had no authority over the states respecting the matter of church-state relations."[7]

At the beginning of the Revolution established churches existed in nine of the colonies. Maryland, Virginia, North Carolina, South Carolina, and Georgia all shared Anglicanism as the established religion common to those colonies. See McClellan, supra note 6, at 300. Congregationalism was the established religion in Massachusetts, New Hampshire, and Connecticut. New York, on the other hand, allowed for the establishment of Protestant religions.[8] Three basic patterns of church-state relations dominated in the late eighteenth century. In most of New England there was the quasi-establishment of a specific Protestant sect. Only in Rhode Island and Virginia were all religious sects disestablished. "But all of the states still retained the Christian religion as the foundation stone of their social, civil and political institutions. Not even Rhode Island and Virginia renounced Christianity, and both

states continued to respect and acknowledge the Christian religion in their system of laws."[9] At the time the Constitution was adopted ten of the fourteen states refused to prefer one Protestant sect over another. Nonetheless, these states placed Protestants in a preferred status over Catholics, Jews, and Dissenters.[10]

> The pattern of church-state relations in new states entering the Union after 1789 did not differ substantially from that in the original fourteen. By 1860 -- and the situation did not radically change for the next three quarters of a century -- the quasi-establishment of a specific Protestant sect had everywhere been rejected; quasi-establishment of the Protestant religion was abandoned in most but not all of the states; and the quasi-establishment of the Christian religion still remained in some areas. A new pattern of church-state relations, the miltiple or quasi-establishment of all religions in general, i.e., giving all religious sects a preferred status over disbelievers (the No Preference Doctrine) became widespread throughout most of the Union. Thus at the turn of the century, for example, no person who denied the existence of God could hold office in such states as Arkansas, Mississippi, Texas, North Carolina, or South Carolina.[11]

The first amendment in large part was a guarantee to the states which insured that the states would be able to continue whatever church-state relationship existed in 1791. Excerpted testimony of James McClellan at 13 (from trial).

D. Washington, Madison, Adams, and Jefferson

The drafters of the first amendment understood the first amendment to prohibit the federal government only from establishing a national religion. Anything short of the outright establishment of a national religion was not seen as violative of the first amendment. For example, the federal government was free to promote various Christian religions and expend monies in an effort to see that those religions flourished. This was not seen as violating the establishment clause. R. Cord, Separation of Church and State 15 (1982).

The intent of the framers of the first amendment can be understood by examining the legislative proposals offered contemporaneously with the debate and adoption of the first amendment. For instance, one of the earliest acts of the first House of Representatives was to elect a chaplain. James Madison was a member of the congressional committee who recommended the chaplain system. On May 1, 1789 the House elected as chaplain, the Reverend William Linn. $500.00 was appropriated from the federal treasury to pay his salary. Even though the first amendment did not become part of the Constitution until 1791, had James Madison believed in the absolute separation of Church and State as some historians have attributed to him, James Madison would certainly have

objected on this principle alone to the election of a chaplain.[12] At the Constitutional Convention on June 28, 1787 Dr. Benjamin Franklin suggested that a morning prayer might speed progress during the debates. Franklin told the Convention and its President, George Washington, that he had lived a long time. The longer he lived the more persuaded he was "that God Governs in the affairs of men."[13] Franklin "therefore beg[ged] leave to move -- that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the clergy of this City be requested to officiate in that Service -- "[14] Franklin's motion was not adopted for political reasons. Alexander Hamilton and others thought that the motion might have been proper at the beginning of the convention but that if the motion were adopted during the convention the public might believe that the convention was near failure. For this reason, which was wholly political, the issue was resolved by adjournment without any vote being taken.[15]

Presidential proclamations, endorsed by Congressman James Madison when Washington was President, dealing with Thanksgiving, fasting, and prayer are all important in understanding Madison's views on the proper role between church and state.[16] Congress proposed a joint resolution on September 24, 1789, which was intended to allow the people of the United States an opportunity to thank Almighty God for the many blessings

which he had poured down upon them. The resolution requested that President George Washington recommend to the citizens of the United States a day of public thanksgiving and prayer. Congress intended that the people should thank Almighty God for affording them an opportunity to establish this country.[17] This proclamation was submitted to the President the very day after Congress had voted to recommend to the states the final text of what was to become the first amendment to the United States Constitution.[18] As President, Madison issued four prayer proclamations. Excerpted testimony of James McClellan at 19.

Thomas Jefferson is often cited along with James Madison as a person who was absolutely committed to the separation of church and state. The historical record, however, does not bear out this conclusion.

While Jefferson undoubtedly believed that the church and the state should be separate, his actions in public life demonstrate that he did not espouse the absolute separation evidenced in the modern decisions by the United States Supreme Court. For example, on October 31, 1803, President Jefferson proposed to the United States Senate a treaty with the Kaskaskia Indians which provided that federal money was to be used to support a Catholic priest and to build a church for the ministry of the Kaskaskia Indians. The treaty was

ratified on December 23, 1803. As Professor Cord points out in his book,[19] President Jefferson could have avoided the explicit appropriation of funds to support a Catholic priest and a Catholic church by simply leaving a lump sum in the Kaskaskia treaty which could have been used for that purpose. However, President Jefferson was not at all reluctant -- for ought that appears on the historical record -- to specifically appropriate money for a Catholic mission.

Unlike Presidents Washington, Madison, and Adams, when Jefferson was President he broke with the tradition of issuing executive religious proclamations. In Jefferson's view the establishment clause and the federal division of power between the national government and the states foreclosed executive religious proclamations. While refusing to issue executive religious proclamations, President Jefferson recognized that "no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government. It must then rest with the States, as far as it can be in any human authority."[20] Thus, of the first four Presidents, all of whom were close to the adoption of the Federal Constitution and the first amendment, only President Jefferson did not issue executive religious proclamations, and only President Jefferson thought that executive religious proclamations were notconstitutional.

But even President Jefferson signed into law bills which provided federal funds for the propagation of the gospel among the Indians.[21] Based upon this historical record Professor Cord concludes that Jefferson, even as President, did not interpret the establishment clause to require complete independence from religion in government.

In sum, while both Madison and Jefferson led the fight in Virginia for the separation of church and state, both believed that the first amendment only forbade the establishment of a state religion by the national government. "Jefferson was neither at the Constitutional Convention nor in the House of Representatives that framed the First Amendment. The two Presidents who were at the Convention, Washington and Madison, and the President who framed the initial draft of the First Amendment in the House of Representatives, James Madison, issued Thanksgiving Proclamations."[22] The Court agrees with the studied conclusions of Dr. Cord that "it should be clear that the traditional interpretation of Madison and Jefferson is historically faulty if not virtually unfounded . . . ."[23]

One thing which becomes abundantly clear after reviewing the historical record is that the founding fathers of this country and the framers of what became the first amendment never intended the establishment clause to erect an absolute wall of separation between the federal government and religion.

Through the chaplain system, the money appropriated for the education of indians, and the Thanksgiving proclamations, the federal government participated in secular Christian activities. From the beginning of our country, the high and impregnable wall which Mr. Justice Black referred to in Everson v. Board of Education, 330 U.S. 1, 18 (1947), was not as high and impregnable as Justice Black's revisionary literary flourish would lead one to believe.

Yet, despite all of this historical evidence, only last month the Supreme Court wrote that the purpose of the first amendment is

> twofold: to foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion familiar in other Eighteenth Century systems. Religion and government, each insulated from the other, could then coexist. Jefferson's idea of a "wall," see Reynolds v. United States, 98 U.S. (8 Otto) 145, 164 (1878), quoting Reply from Thomas Jefferson to an address by a committee of the Danbury Baptist Association (January 1, 1802), reprinted in 8 Works of Thomas Jefferson 113 (Washington ed. 1861), was a useful figurative illustration to emphasize the concept of separateness. Some limited and incidental entanglement between church and state authority is inevitable in a complex modern society, see, e.g., Lemon v. Kurtzman, 403 U.S. 602, 614 (1971); Walz v. Tax Commission, 397 U.S. 664, 670 (1970), but the concept of a "wall" of separation is a signpost.

Larkin v. Grendel's Den, Inc., 51 U.S.L.W. 4025, 4027 (U.S. Dec. 13, 1982) (No. 81-878) (emphasis added). Enough is enough. Figurative illustrations should not serve as a basis for deciding constitutional issues.

For this Court, Professor Robert Cord, see supra note 5, irrefutably establishes that Thomas Jefferson's address to the Danbury Baptist Association cannot be relied upon to support the conclusion that Jefferson believed in a wall between church and state. "By this phrase Jefferson could only have meant that the 'wall of separation' was erected 'between Church and State' in regard to possible federal action such as a law establishing a national religion or prohibiting the free exercise of worship." Id. at 115. Overall the conduct of Thomas Jefferson was consistent with the conclusion that he believed, like all the other drafters of the Constitution and the Bill of Rights, that the states were free to establish religions as they saw fit.[24]

E. First Amendment as Applied to the States

As has been seen up to this point the establishment clause, as ratified in 1791, was intended only to prohibit the federal government from establishing a national religion. The function of the establishment clause was two fold. First, it guaranteed to each individual that Congress would not impose a national religion. Second, the establishment clause guaranteed to each state that the states were free to define the meaning of religious establishment under their own constitutions and laws.

The historical record clearly establishes that when the fourteenth amendment was ratified in 1868 that its ratification did not incorporate the first amendment against the states. The debates in Congress at the time the fourteenth amendment was being drafted, the re-election speeches of the various members of Congress shortly after the passage by Congress of the fourteenth amendment, the contemporaneous newspaper stories reporting the effect and substance of the fourteenth amendment, and the legislative debates in the various state legislatures when they considered ratification of the fourteenth amendment indicate that the amendment was not intended to apply the establishment clause against the states because the fourteenth amendment was not intended to incorporate the federal Bill of Rights (the first eight amendments) against the states.

At the beginning the Court should acknowledge its indebtedness to Professor Charles Fairman, then a professor of law in Political Science at Stanford University, for the scholarly article which he published in 1949.[25] Professor Fairman examined in detail the historical evidence which Mr. Justice Black relied upon in Adamson v. California, 332 U.S. 46, 47 (1947), where Mr. Justice Black concluded that the historical events that culminated in the adoption of the fourteenth amendment demonstrated persuasively that one of the chief objects of the fourteenth amendment was to make the Bill of Rights applicable to the states.[26]

1. Debates

The paramount consideration in defining the scope of any constitutional provision or legislative enactment is to ascertain the intent of the legislature. The intention of the legislature may be evidenced by statements of the leading proponents.[27] If statements of the leading proponents are found, those statements are to be regarded as good as if they were written into the enactment. "The intention of the lawmaker is the law." Hawaii v. Mankichi, 190 U.S. 197, 212 (1903).

> Looking back, what evidence [i]s there . . . to sustain the view that Section 1 was intended to incorporate Amendments I to VIII? [C]ongressman Bingham . . . did a good deal of talking about "immortal bill of rights" and one spoke of "cruel and unusual punishments." Senator Howard, explaining the new privileges and immunities clause, said that it included the priviliges and immunities of Article IV, Section 2 -- "whatever they may be" -- and also "the personal rights guarantied [sic] and secured by the first eight amendments . . . ." That is all. The rest of the evidence bore in the opposite direction, or was indifferent. Yet one reads in Justice Black's footnotes that, [Adamson v. California, 332 U.S. 46, 72 n.5 (1947)],
>
> > A comprehensive analysis of the historical origins of the Fourteenth Amendment, Flack, The Adoption of the Fourteenth Amendment (1908), 94, concludes that "Congress, the House and the Senate, had the following objects and motives in view for submitting the first section of the Fourteenth Amendment to the States for ratification:

> 1. To make the Bill of Rights (the first eight Amendments) binding upon, or applicable to, the States.
>
> 2. To give validity to the Civil Rights Bill.
>
> 3. To declare who were citizens of the United States.
>
> We have been examining the same materials as did Flack, and have quoted far more extensively than he. How can he on that record reach the conclusion that Congress proposed by Section 1 to incorporate Amendments I to VIII?

Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights, 2 Stan. L. Rev. at 65-66 (1949). Professor Flack explained that the incorporation was based upon remarks of Congressman Bingham and Senator Howard at the time the Thirty-ninth Congress voted upon the fourteenth amendment. Only those two said anything which could be construed as suggesting the result reached by Justice Black and the modern Supreme Court decisions.

Throughout the debates in the House over the meaning of the fourteenth amendment Professor Fairman shows convincingly that Congressman Bingham had no clear concept of what exactly would be accomplished by the passage of the fourteenth amendment. The explanations offered by Congressman Bingham to his colleagues were inconsistent and contradictory.[28]

Together with Congressman Bingham's statements which suggested incorporation were remarks by Senator Howard. Senator Howard spoke with more preciseness than Congressman Bingham. Thus, his interpretation carries much greater weight than that of Congressman Bingham. Yet, because of the circumstances under which he spoke, his statements are subject to question when held out as representative of the majority viewpoint. By sheer chance Senator Howard acted as spokesman for the joint committee when explaining the purpose of the fourteenth amendment to the Senate. The joint committee had been chaired by Senator Fessenden. Chairman Fessenden became sick suddenly and Senator Howard thus became the spokesman for the Joint Committee. "Up to this point [Senator Howard's] participation in the debates on the Civil Rights Bill and the several aspects of the Amendment had been negligable. Poles removed from Chairman Fessenden, who 'abhorred' extreme radicals, Howard . . . was 'one of the most . . . reckless of the radicals,' who had 'served consistently in the vanguard of the extreme Negrophiles.'" Professor Rauol Berger notes with some sarcasm that it is odd that a radical such as Senator Howard should be taken as speaking authoriatively for a committee in which the conservatives outnumbered the radicals and where there was a strong difference of opinion between the radicals and the conservatives. R. Berger, supra note 26, at 147.

On May 23, 1866, Senator Howard rose in the Senate, referred to the illness of Fessenden, and stated that he would "present 'the views and the motives which influenced the committee, so far as I understand [them].' After reading the privileges and immunities listed in Corfield v. Coryell, [6 Fed. Cas. 546, No. 3230 (C.C.E.D. Pa. 1823),] he said, 'to these privileges and immunities . . . should be added the personal rights guaranteed and secured by the first eight amendments.' That is the sum and substance of Howard's contribution to the 'incorporation' issue."[30]

Raoul Berger notes in his analysis of the incorporation question that the remark of Senator Howard was tucked away in the middle of a long speech, that Howard was a last minute substitution for the majority chairman, that Howard was in the minority on the committee, and that after Howard was through speaking Senator Poland stated that the fourteenth amendment secured nothing beyond what was intended in the original privileges and immunities clause of Article IV Section 2. R. Berger, supra note 26, 148-49. Senator Doolittle followed Senator Poland with some additional remarks which were designed to reassure those whose votes had already been won in favor of passage of the fourteenth amendment that indeed the amendment was limited to known objectives, which objectives were not intended to encompass the federal Bill of Rights.

The scholarly analysis of Professors Fairman and Berger persuasively show that Mr. Justice Black misread the congressional debate surrounding the passage of the fourteenth amendment when he concluded that Congress intended to incorporate the federal Bill of Rights against the states. See infra p. 42-44 (discussion of Blaine Amendment). So far as Congress was concerned, after the passage of the fourtetnth amendment the states were free to establish one Christian religion over another in the exercise of their prerogative to control the establishment of religions.

2. Popular Understanding

An examination of popular sentiment across the country reveals that the nation as a whole did not understand the adoption of the fourteenth amendment to incorporate the federal Bill of Rights against the states. Inferentially, that is to say that the people understood that each state was free to continue to support one Christian religion over another as the people of that state saw fit to do. The leading constitutional scholar upon whom Justice Black relied in Adamson v. California,

> Mr. Flack[,] examined a considerable number of Northern newspapers and reported (an admission against the thesis he was defending) the following observation: "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 . . .."

> Presumably this excluded the press reports of May 24 on Senator Howard's speech of the 23d: for the New York Herald and the New York Times, which Mr. Flack had before him, did quote in full the passage where it said that the personal rights guaranteed by the first eight amendments were among the "privileges and immunities."
>
> Other newspaper files have been examined in preparing the [article of Professor Fairman] and no instance has been found to vary what has been set out above.

Fairman, supra note 25, at 68 (footnotes omitted).[31]

Charles Fairman quotes at length from the campaign speeches of five senators who, presumably, heard Senator Howard's speech of May 23, 1866. Not one of the senators mentioned anything about the Bill of Rights when commenting to the electorate about Section 1. Likewise, the five Republicans, including Congressman Bingham, never mentioned that the privileges and immunities clause would impose the federal Bill of Rights upon the states. Along with Professor Fairman, the Court takes the historical record to conclusively show that the general understanding of the nation at large, as illustrated by contemporaneous newspaper reports, demonstrates that the people of this country did not understand the fourteenth amendment to incorporate the establishment clause of the first amendment against the states.

3. Campaign Speeches

After the submission of the fourteenth amendment to the states on June 16, 1866 the members of the Thirty-ninth Congress began to busy themselves with the prospect of re-election in the fall. 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. All of these speeches were contemporaneous expressions of the intent of Congress. Professor Fairman provides many instances of speeches made on the campaign hustings. See generally, Fairman, supra note 25, at 68-78. 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. Id. at 72 (remarks of Senator Lyman Trumbull, the sponsor of the Civil Rights Bill).

4. State-Legislative Debates

The fourteenth amendment was submitted to the states for their ratification on June 16, 1866. By June, 1867, twelve legislatures had ratified the amendment. By July 28, 1868 the fourteenth amendment had been promulgated.

Professor Fairman combed the relevant legislative materials to see exactly what each state legislature thought the effect of the fourteenth amendment would be. Along with Fairman, the Court finds it important to note not only what was said but what was not said. 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.

The Court will not repeat Professor Fairman's analysis in each state. Only a few states need to be highlighted to convey the popular understanding of the effect of the fourteenth amendment upon the right of states to establish a religion. In New Hampshire, only five months after the promulgation of the fourteenth amendment -- in December, 1868 -- the Supreme Court of New Hampshire had occasion to interpret a provision of the state constitution which provided that the legislature could "authorize towns, parishes, and religious societies 'to make adequate provision . . . for the support and maintenance

of public Protestant teachers of piety, religion, and morality.'"[32] Moreover, Article VI of the Bill of Rights from the New Hampshire Constitution encouraged "the public worship of the diety . . .." The question before the Supreme Court of New Hampshire was whether certain parishioners of the First Unitarian Society of Christians in Dover could fire the preacher. The preacher had begun using text from Emerson interchangably with text from the Bible. While Wardens of the church supported the preacher, certain pew owners were outraged. The pew owners sought an injunction restraining the preacher from occupying the meeting house. The trial court granted relief.

On appeal, in a 276-page report neither the opinion of the court nor the dissent made a single reference to the fourteenth amendment. Both opinions, however, had much to say about New Hampshire's policy in ecclesiastical matters. The opinion of the court referred to the first amendment and quoted Story's Commentaries:

> [T]he whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions . . ..
>
> Probably at the time of the adoption of the constitution of the amendment to it now under consideration, the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as not incompatible with the private rights of conscience and the freedom of religious worship.

Fairman, supra note 25, 87 (citations omitted).

As Professor Fairman notes: "[I]n December 1868 -- five months after the promulgation of the Fourteenth Amendment -- the New Hampshire court regarded the matter of an establishment of religion as being still 'left exclusively to the State governments.'" Id.

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.[33]

5. Supreme Court Decisions

Decisions by the United States Supreme Court rendered contemporaneously with the ratification of the fourteenth amendment indicate that the Court did not perceive the fourteenth amendment to incorporate the federal Bill of Rights against the states. In Twitchell v. Pennsylvania, 74 U.S. (7 Wall.) 321 (U.S. 1869), the Supreme Court held that the fifth and sixth amendments of the Constitution do not apply to the states. This holding was consistent with the earlier, well-known holding in Barron v. Baltimore, 32 U.S. (7 Peters) 243 (1833).

In Barron v. Baltimore the question presented to the court was whether the City of Baltimore was required to compensate Barron under the fifth amendment for the taking of his property for public purposes. When the City of Baltimore