paved some streets, streams of water had been diverted in the vicinity of Barron's wharf. The water had deposited large amounts of sand around the wharf. The sand deposits made these waters too shallow for ocean-going ships to load and unload cargo at the wharf. Chief Justice John Marshal held that Barron's claim raised no appropriate federal question because the fifth amendment was a constitutional limitation applied only against the federal government.[34]

Another decision of the United States Supreme Court, decided in 1870, recognized that the federal Bill of Rights did not control the states.[35] After much deliberation over the question whether jury findings made in state court were reviewable in federal court, the Supreme Court noted that it was "admitted" that the limitations of the seventh amendment did not apply to the states.[36]

F. Blaine Amendment

The discussion up to this point has focused upon the incorporation of the federal Bill of Rights generally through the fourteenth amendment. Events which postdated the adoption of the fourteenth amendment show that the lawmakers of the Thirty-ninth Congress did not intend that the establishment clause would become binding upon the states with the ratification of the fourteenth amendment. "'[A] conclusive argument against the incorporation theory, at least as respects the religious provisions of the First Amendment, is the "Blaine

Amendment" proposed in 1875.'" McClellan, Christianity and the Common Law, in Joseph Story and the American Constitution 118, 154 (1971) (quoting O'Brien, Justice Reed and the First Amendment, 116 (n.d.)). At the behest of President Grant, James Blaine of Maine introduced a resolution in the Senate in 1885 which read: "No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof." Id. at 154. (emphasis in original). Importantly, the Congress which considered the Blaine Amendment included twenty-three members of the Thirty-ninth Congress, the Congress which passed the fourteenth amendment.

> 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. Congressman Banks, a member of the Thirty-Ninth Congress, observed: "If the Constitution is amended so as to secure the object embraced in the principle part of this proposed amendment, it prohibits the States from exercising a power they now exercise." Senator Frelinghuysen of New Jersey urged the passage of the "House article," which "prohibits the States for the first time, from the establishment of religion, from prohibiting its free exercise." 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." Remarks of Randolph, Christiancy, Kernan, Whyte, Bogy, Easton, and Morton give confirmation to the belief that none of the legislators in 1875 thought the Fourteenth Amendment incorporated the religious provisions of the First.

Id. (quoting O'Brien, Justice Reed and the First Amendment 116-17 (emphasis added)).

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

G. Proper Interpretative Prospective

The interpretation of the Constitution can be approached from two vantages. First, the Court can attempt to ascertain the intent of the adoptors, and after ascertaining that attempt apply the Constitution as the adoptors intended it to be applied. Second, the Court can treat the Constitution as a living document, chameleon-like in its complexion, which changes to suit the needs of the times and the whims of the interpreters. In the opinion of this Court, the only proper approach is to interpret the Constitution as its drafters and adoptors intended. The Constitution is, after all, the supreme law of the land. It contains provisions for amending it; if the country as a whole decided that the

present text of the Constitution no longer satisfied contemporary needs then the only constitutional course is to amend the Constitution by following its formal, mandated procedures. Amendment through judicial fiat is both unconstitutional and illegal. Amendment through judicial fiat breeds disrespect for the law, and it undermines the very basic notion that this country is governed by laws and not by men. See generally Breast, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204 (1980) (discussing various approaches to constitutional interpretation).

Let us have faith in the rightness of our charter and the patience to persevere in adhering to its principles. If we do so then all will have input into change and not just a few.

H. Stare Decisis

What is a court to do when faced with a direct challenge to settled precedent?[37] In most types of cases it is more important that the applicable rule of law be settled than that it be settled right." Burnet v. Coronado Oil & Gas Co., 385 U.S. 393, 406 (1932) (Brandeis, J., dissenting). This general rule holds even where the court is persuaded that it has made a serious error of interpretation in cases involving a statute.[38] However, in cases involving the federal constitution, where correction through legislative action is practically impossible, a court

should be willing to examine earlier precedent and to overrule it if the court is persuaded that the earlier precedent was wrongly decided. Id. at 407. "A judge looking at a constitutional decision may have compulsions to reverse past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it." Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 736 (1949).

Certainty in the law is important. Yet, a rigid adherence to stare decisis "would leave the resolution of every issue in constitutional law permanently at the mercy of the first Court to face the issue, without regard to the possibility that the relevant case was poorly prepared or that the judgment of the Court was simply ill-considered. The danger is particularly great where the court has moved too far in an activist direction; in such a situation, legislative correction of the error is liable to be virtually impossible." Maltz, Commentary: Some Thoughts on the Death of Stare Decisis in Constitutional Law, 1980 Wis. L. Rev. 476, 492 (1980).

> [T]he 'wall of separation between Church and State' that Mr. Jefferson built at the University [of Virginia] which he founded did not exclude religious education from the school. The difference between the generality of his statements on the separation of Church and State and the specificity of his conclusions on education are considerable. A rule of law should not be drawn from a figure of speech.

McCollum v Board of Education, 333 U.S. 203, 247 (1948) (per Reed, J., dissenting).

"[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." Graves v. O'Keefe, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring). "By placing a premium on 'recent cases' rather than the language of the Constitution, the Court makes it dangerously simple for future Courts using the technique of interpretation to operate as a 'continuing Constitutional Convention.'" Coleman v. Alabama, 399 U.S. 1, 22-23 (1970) (Burger, C.J.). "Too much discussion of constitutional law is centered on the Court's decisions, with not enough regard for the text and history of the Constitution itself." R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 296 (1977).[39]

This Court's review of the relevant legislative history surrounding the adoption of both the first amendment and of the fourteenth amendment, together with the plain language of those amendments, leaves no doubt that those amendments were not intended to forbid religious prayers in the schools which the states and their political subdivisions mandate.

I. Summary

"Th[e] mountain of evidence has become so high, one may have lost sight of the few stones and pebbles that made up the theory that the Fourteenth Amendment incorporated Amendments I to VIII." Fairman, supra note 25, at 134. Suffice

it to say that the few stones and pebbles provide precious little historical support for the view that the states were prohibited by the establishment clause of the first amendment from establishing a religion.[40]

More than any other provision of the Constitution, the interpretation by the United States Supreme Court of the establishment clause has been steeped in history. This Court's independent review of the relevant historical documents and its reading of the scholarly analysis convinces it that the United States Supreme Court has erred in its reading of history. Perhaps this opinion will be no more than a voice crying in the wilderness and this attempt to right that which this Court is persuaded is a misreading of history will come to nothing more than blowing in the hurricane, but be that as it may, this Court is persuaded as was Hamilton that "[e]very breach of the fundamental laws, though dictated by necessity impairs the sacred reverence which ought to be maintained in the breast of the rulers towards the constitution." R. Berger, supra note 26, at 299 (quoting Federalist No. 25 at 158).

Because the establishment clause of the first amendment to the United States Constitution does not prohibit the state from establishing a religion, the prayers offered by the teachers in this case are not unconstitutional. Therefore, the Court holds that the complaint fails to state a claim for which relief could be granted.

J. Conclusion

There are pebbles on the beach of history from which scholars and judges might attempt to support the conclusions that they are want to reach. That is what Professors Flack, Crosskey and the more modern scholars have done in attempting to establish a beachhead, as did Justice Black, that there is a basis for their conclusions that Congress and the people intended to alter the direction of the country by incorporating the first eight amendments to the Constitution. However, in arriving at this conclusion, they, and each of them, have had to revise established principles of constitutional interpretation by the judiciary. Whether the judiciary, inadvertently or eagerly, walked into this trap is not for discussion. The result is that the judiciary has, in fact, amended the Constitution to the consternation of the republic. As Washington pointed out in his Farewell Address, see p. i supra, this clearly is the avenue by which our government can, and ultimately will, be destroyed. We think we move in the right direction today, but in so doing we are denying to the people their right to express themselves. It is not what we, the judiciary want, it is what the people want translated into law pursuant to the plan established in the Constitution as the framers intended. This is the bedrock and genius of our republic. The mantle of office gives us no power to fix the moral direction that this nation will take. When we undertake such course we trample upon the law. In such instances

the people have a right to complain. The Court loses its respect and our institution is brought low. This misdirection should be cured now before it is too late. We must give no future generation an excuse to use this same tactic to further their ends which they think proper under the then political climate as for instance as did Adolph Hitler when he used the court system to further his goals.

What is past is prologue. The framers of our Constitution fresh with recent history's teachings, knew full well the propriety of their decision to leave to the peoples of the several states the determination of matters religious. The wisdom of this decision becomes increasingly apparent as the courts wind their way through the maze they have created for themselves by amending the Constitution by judicial fiat to make the first amendment applicable to the states. Consistency no longer exists. Where you cannot recite the Lord's Prayer, you may sing his praises in God Bless America. Where you cannot post the Ten Commandments on the wall for those to read if they do choose, you can require the Pledge of Allegience. Where you cannot acknowledge the authority of the Almighty in the Regent's prayer, you can acknowledge the existence of the Almighty in singing the verses of America and Battle Hymn of the Republic. It is no wonder that the people perceive that justice is myoptic, obtuse, and janus-like.

If the appellate courts disagree with this Court in its examination of history and conclusion of constitutional interpretation thereof, then this Court will look again at the record in this case and reach conclusions which it is not now forced to reach.[41]

III. Order

It is therefore ordered that the complaint in this case be dismissed with prejudice. Costs are taxed against the plaintiffs. Fed. R. Civ. P. 54(d).

DONE this 14th day of January, 1983.

W B Hand
Chief Judge

FOOTNOTES

1. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. Initially, it should be noted that neither 28 U.S.C. §§ 2201 nor 2202 afford any subject-matter jurisdiction to a federal court as the complaint alleges. These sections provide only a remedy.

> The operation of the Declaratory Judgment Act is procedural only. By passage of the Act, Congress enlarged the range of remedies available in the federal courts but it did not extent their subject-matter jurisdiction. Thus there must be an independent basis of jurisdiction, under statutes equally applicable to actions for coercive relief, before a federal court may entertain a declaratory judgment action.

10 C. Wright and A. Miller, Federal Practice and Procedure § 2766, 841 (1973) (footnotes omitted).

Likewise, 28 U.S.C. § 1343(4) does not afford subject-matter jurisdiction to a federal court over claims brought under 42 U.S.C. § 1983. Section 1343(4) affords subject-matter jurisdiction to the federal court only over those claims which are brought under "any Act of Congress providing for the protection of civil rights . . .." "Standing alone, § 1983 clearly provides no protection for civil rights since . . . § 1983 does not provide any substantive rights at all." Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 618 (1979).

3. In fact, the complaint alleges that "[t]his cause of action arises under the First and Fourteenth Amendments to the United States Constitution . . ." See Complaint at 2. This Court has previously explained that no implied cause of action exists under either the first or fourteenth amendments, at least when the first amendment is applied to persons acting under color of state law. The very purpose for enacting 42 U.S.C. § 1983 was to provide a remedy to vindicate the rights afforded by the federal Bill of Rights when persons acting under color of state law violated those rights. It would be incongruous to imply a remedy where Congress has expressly afforded a remedy. See Strong v. Demopolis City Board of Education, 515 F. Supp. 730, 732 n.1 (S.D. Ala. 1981) (per Hand, J.).

4. "[T]he existence of a claim for relief under § 1983 is 'jurisdictional' for purposes for invoking 28 U.S.C. § 1343, even though the existence of a meritorious constitutional claim is not similarily required in order to invoke jurisdiction under 28 U.S.C. § 1331. See Bell v. Hood, 327 U.S. 678, 682 (1946); Mt. Healthy [City School District v. Doule, 429 U.S. 274, 278-79 (1977).]" Monell v. Department of School Services, 436 U.S. 658, 716 (1978).

5. At the start the Court should acknowledge its indebtedness to several constitutional scholars. If this opinion will accomplish its intent, which is to take us back to our original historical roots, then much of the credit for the vision lies with Professor James McClellan and Professor Robert L. Cord. Their work and the historical sources cited in their work have proven invaluable to the Court in this opinion. See R. Cord, Separation of Church and State: Historical Fact and Current Fiction (1982); P. McGuigan & R. Rader, A Blueprint for Judicial Reform (eds. n.d.); J. McClellan, Joseph Story and the American Constitution, 118-159 (1971) (Christianity and the common law).

6. McClellan, The Making and the Unmaking of the Establishment Clause, in Blueprint for a Judicial Reform 295 (P. McGuigan & R. Rader eds. n.d.) (quoting J. Story, III. Commentaries on the Constitution § 1871 (1833) (emphasis added)).

7. Id.

8. Id. at 300. Professor McClellan documents in great detail the political struggle which raged through the various colonies during the Revolution and afterwards to disestablish certain religions throughout the colonies. The establishment of one religion over another in the respective colonies was purely a political matter. The political strength of the various followers determined which religion was established. Like any other political decision, when the political strength of the minorities reached that of the majority, the state disestablished what had formerly been the majority religion. See e.g., id. at 301-308.

9. Id. at 307.

10. Id.

11. Id. at 311. Professor McClellan cites numerous examples in which the states required adherence to a Christian religion. For instance, witnesses were considered competent to testify only if they affirmed a belief in the existence of a Christian God. Id.

12. R. Cord, supra note 5, at 23.

13. R. Cord, supra note 5, at 24 (quoting Debates in the Federal Convention of 1787 as reported by James Madison, Documents Illustrative of the Formation of the Union of the American States (Washington, D.C.: Government Printing Office, (1927) 295-96 (emphasis in original)).

14. Id. at 24-25.

15. Id.

16. The views of James Madison are often cited by those who insist upon absolute separation between church and state. Madison was one of the drafters of the first amendment. An uncritical, cursory examination of some of Madison's writings would lead one to the conclusion that Madison favored absolute separation between church and state. However, to reach this conclusion is to misunderstand the views of Mr. Madison.

As Professor Cord explains in his book, Madison was concerned only that the federal government should not establish a national religion. Nondiscriminatory aid to religion and support for various Christian religions was not viewed by Madison as unlawful. See R. Cord, supra note 5, at 25-26 (examining drafts of the establishment clause submitted by Madison).

17. Professor Cord explains in great detail the circumstances surrounding this presidential proclamation. See R. Cord, supra note 5, at 27-29.

18. Professor Cord discusses in detail a document which Madison wrote late in his life known as the Detached Memoranda. Some historians have taken the Detached Memoranda as a blanket condemnation of religious proclamations issued by Presidents Jefferson, Madison, and Jackson. From this, some historians argue that James Madison believed that absolute separation was mandated by the establishment clause. The Supreme Court has relied upon the Detached Memoranda to justify its position of absolute separation in Abington School District v. Schempp, 374 U.S. 203, 225 (1963) ("[I]n the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'").

Professor Cord suggests that the Detached Memoranda reflected nothing more than a shift in Madison's views as he grew older. The Detached Memoranda was written long after Madison had left office and long after the first amendment had been drafted. R. Cord, supra note 5, 29-36.

The explanation of Professor Cord that Madison is an old man, no longer in office, who regreted some of his past actions, is, to the Court, reasonable. Not all historical facts can easily be squared. Professor Cord emphasizes his point by analogizing to something which former President Nixon might write upon reflecting on his tenure as president. It would be odd, hypothesizes Professor Cord, if Mr. Nixon were to publish a book in his later years which concluded that taping conversations, without all parties being aware of the recording, is morally wrong and clearly a flagrant violation of the constitutional right to privacy. It would be nonsense, in the view of Professor Cord, for a Nixon biographer to conclude that Richard Nixon believed that the surreptitious tapings of conversations in the Oval Office were immoral and unconstitutional. R. Cord, supra note 5, at 36. Similarily, it is faulty to judge what Madison believed to be the scope of the establishment clause at the time he drafted the clause by looking to views expressed late in his life when there are numerous expressions of his intent contemporaneous with the period in which the establishment clause was drafted.

19. R. Cord, supra note 5, at 37-39.

20. R. Cord, supra note 5, at 40 (quoting Letter to a Presbyterian Clergyman (1808)).

21. Professor Cord chronicles the federal support provided to the Moravian Brethren at Bethlehem in Pennsylvania. The function of the Brethren was to civilize the Indians and to promote Christianity. First passed on July 27, 1787, the resolution supporting the Brethren was supported by every President, including Thomas Jefferson. The legislation supporting the Brethren was sectarian in character. Professor Cord reads this history to conclude that had this sort of interaction between church and state been thought to be unconstitutional then certainly the early Congresses and presidents would not have authorized expenditure of federal money. R. Cord, supra note 5, at 39-46.

22. R. Cord, supra note 5, at 47.

23. Id.

24. Since the states were historically free to establish a religion it follows that some irritation by non-believers or those in the religious minority was a necessary consequence of establishment. The complaint alleges that "[a]ll of the minor Plaintiffs are exposed to ostracism from their peer group class members if they do not participate in these daily devotional activities." Complaint at 5. The children "all have suffered and continue to suffer severe emotional distress from being forced to participate, via peer group pressure, in devotional observances orchestrated by the defendants." Id. at 7. This psychological pressure naturally flows anytime a state takes an official position on an issue. It does not make an establishment unconstitutional. For example, laissez-faire industrialists feel coerced when a state adopts tough environmental laws. Unemployed workers feel pressure from peer groups when the unemployed worker takes advantage of a state labor law which allows him to cross a union picket line to break a strike. Someone, somewhere feels coerced or pressured anytime the state takes a position. The Constitution, however, does not protect people from feeling uncomfortable. A member of a religious minority will have to develop a thicker skin if a state establishment offends him. Tender years are no exception.

25. Fairman, does the Fourteenth Amendment Incorporate the Bill of Rights? 2 Stan. L. Rev. 5 (1949).

26. Mr. Justice Black spent nearly twenty years mulling over the criticisms leveled by Professor Charles Fairman. Finally, he had this to say:

> What I wrote [in Adamson v. California, 332 U.S. 46, 47 (1947),] in 1947 was the product of years of study and research. My appraisal of the legislative history [which surrounded the adoption of the fourteenth amendmend and upon which Mr. Fairman relied so heavily] followed 10 years of legislative experience as a Senator of the United States, not a bad way, I suspect, to learn the value of what is said in legislative debates, committee discussions, committee reports, and various other steps taken in the course of passage of bills, resolutions, and proposed constitutional amendments. My Brother Harlan's objections to my Adamson dissent history, like that of most of the objectors, relies most heavily on a criticism written by Professor Charles Fairman and published in the Stanford Law Review. 2 Stan. L. Rev. 5 (1949). I have read and studied this article extensively, including the historical references, and am compelled to add that in my view it has completely failed to refute the inferences and arguments that I suggested in my Adamson dissent. Professor Fairman's "history" relied very heavily what was "not" said in the state legislatures that passed on the Fourteenth Amendment. Instead of relying on this kind of negative pregnant, my legislative experience has convinced me that it is far wiser to rely on what "was" said, and most importantly, said by the men who actually sponsored the Amendment in the Congress. I know from my years in the United States Senate that it is to men like Congressman Bingham, who steered the amendment through the House, and Senator Howard, who introduced it in the Senate, that members of Congress look when they seek the real meaning of what is being offered. And they vote for or against a bill based on what the sponsors of that bill and those who oppose it tell them it means. The historical appendix to my "Adamson" dissent leave no doubt in my mind that both its sponsors and those who opposed it believed the Fourteenth Amendment made the first eight amendments of the Constitution (the Bill of Rights) applicable to the states.

Duncan v. Louisiana, 391 U.S. 145, 165-66 (1968) (Black, J., dissenting).

Charles Fhairman "conclusively disproved Black's contention, at least, such as the weight of the opinion among disinterested observers." A. Bickel, The Least Dangerous Branch 102 (1962). Along with Alexander Bickel, Professor Raoul Berger agrees that Charles Fairman's analysis was right on the mark. R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment, 137 n.11 (1977).

27. For example, Professor Raoul Berger cites several cases which recite this common principle of construction. See e.g., Wright v. Vinton Branch, 300 U.S. 440, 463 (1937); Wisconsin Railroad Commission v. C. B. &. Q. RR. Co., 257 U.S. 563, 589 (1922). See R. Berger, supra note 26, at 136-37 & 137 n.13.

28. Professor Fairman has quoted exhaustively from the Congressional Globe. The various speeches of Congressman Bingham made in support of the fourteenth amendment are quoted in detail. See Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 Stan. L. Rev. 5, 24-25 (1949).

The analysis of Professor Fairman is attacked vigorously by William Crosskey, then a professor of law at the University of Chicago Law School. Crosskey, Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority 22 U. Chi. L. Rev. 1 (1954). Crosskey quotes at length from the Bingham article and from the Congressional Globe in an effort to discredit the explanation offered the historical facts by Professor Bingham.

The debate between the two scholars was pitched. Much of Crosskey's analysis consisted of little more than ad homineum attacks on Professor Fairman. The attacks were answered in a reply article written by Professor Fairman. Fairman, A Reply to Professor Crosskey, 222 U. Chi. L. Rev. 144 (1954). After reading the original articles of both Fairman and Crosskey, the rebuttal of Fairman, and many other articles on the question, the Court is persuaded that the weight of the disinterested scholars supports the analysis of Professor Fairman. The work of Professor Crosskey impresses the Court as being designed to reach a result. Namely, Crosskey was interested in providing a constitutional basis to support the desegregation decision of the United States Supreme Court in Brown v. Board of Education, 347 U.S. 483 (1954). For instance, in an effort to explain a serious ambiguity in a Bingham speech, Professor Corsskey explains that the speech would make perfect sense if one assumes that Bingham had been reading directly from a text of the Constitution, that he had a copy of the document in his hand and that he was waving the copy while he spoke in Congress. "You're fudging, Professor Crosskey!

You don't know that Bingham had been reading from the Constitution." Fairman, A Reply to Professor Crosskey, 22 U. Chi. L. Rev. 144, 152 (1949).

One scholar, Michael Kent Curtis, argues that Professor Raoul Berger has improperly analyzed the incorporation question by blindly following the lead of Charles Fairman and ignoring the work of William Crosskey. Curtis, The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger, 16 Wake Forest L. Rev. 45 (1980). No lesser a light than Henry M. Hart, Jr., then a professor of law at Harvard Law School, remarked that "[t]he Don Quixote of Chicago breaks far too many lances in his on-slaughts upon the windmills of constitutional history to permit detailed review of each adventure." Hart, Book Review, 67 Harv. L. Rev. 1456 (1954). While the comment was, strictly speaking, directed to a recently released book by Professor Crosskey, the thrust of the comment holds true for the scholarship of Professor Crosskey. Professor Henry Hart had little use for the typical analytical method employed by Professor Crosskey: slanderous, ad homineum attacks on those historical actors who supported views contrary to those which Professor Crosskey expected to find in a historical record. Professor Hart compared Professor Crosskey to Senator Joseph McCarthy from Wisconsin. Id. at 1475 ("In the true hit-and-run style popularized by the Senator from the adjacent state to the north, [Wisconsin being north of Illinois] Professor Crosskey, having made th[e] ugly charge [that James Madison deliberately, not inadvertently, falsified some of his notes in 1836 to suit his own purposes at that time], promises to consider in a later volume whether it is true.") Professor Hart is of the general opinion that the scholarship of Professor Corsskey amounted to little more than "a confident tone, nice printing, and an abundance of notes and appendices referring to obscure documents and esoteric word meanings." Id. at 1486.

29. R. Berger, supra note 26, at 147 (footnotes omitted).

30. R. Berger, supra note 26, at 147-48 (quoting Congressional Globe 2764-65).

31. Crosskey, Charles Fairman, "'Legislative History'" and the Constitutional Limitations on State Authority, 22 U. Chi. L. Rev. 1 (1954). In particular, Professor Crosskey is critical of the newspaper examination conducted by Professor Fairman. By Crosskey's count, Fairman and Flack together examined ten newspapers. Id. at 100-101. Crosskey points out that there were nearly 5,000 newspapers in circulation in 1870. Thus, if Flack and Fairman examined only ten of these newspapers then, concludes Crosskey, the two ignored a substantial source of evidence in their inquiry. Certainly, at the least, according to Crosskey, neither Flack nor Fairman are entitled to make any conclusions about what the newspapers of the day reflected as the popular understanding of the effect of the fourteenth amendment.

The Court has studied the Crosskey criticism of Professor Fairman and rejects it. The work of the two scholars serves as the cornerstone for both camps in the debate vel non whether the fourteenth amendment was intended to incorporate the federal Bill of Rights. Compare R. Berger, supra note 26, 134-156 (rejecting incorporation of the federal Bill of Rights) with Curtis, The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger, 16 Wake Forest L. Rev. 45 (1980) (following Crosskey).

32. C. Fairman, supra note 25 at 86 (quoting N.H. Const. art. 6 (1793)).

33. It is always difficult to wade through the mass of historical research which has been done on both sides of the issue. For instance, while the defendant-intervenors introduced Professor Robert L. Cord's book, Separation of Church and State: Historical Fact and Current Fiction in support of the historical record upon which they are relying, Professor Cord concludes, in part, that a) the fourteenth amendment did incorporate the establishment clause against the states, id. at 101, and b) the Lord's Prayer, being distinctly Christian in character, or any other prayer which is readily identified with one religion rather than another is impermissible under the establishment clause, id. at 162-65.

The Court rejects the conclusion of Professor Cord that the fourteenth amendment incorporated the establishment clause against the states. Professor Cord uncritically adopted the analysis of the United States Supreme Court in reaching his conclusion. In only a footnote does Professor Cord refer to the scholarship of Professor Charles Fairman; then only does Professor Cord note that there has been some "controversy" surrounding the incorporation issue.

Assuming arguendo that the establishment clause had been incorporated against the states then Professor Cord would be correct in his conclusion that any activity which is religiously identifiable would be barred. See infra note 41 for the Court's discussion regarding secular humanism.

34. In Barron v. City of Baltimore the Court noted:

> But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government -- not aginst those of the local governments.
>
> In compliance with a sentiment thus generally expressed, the quiet fears were thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the States. These amendments contained no expression indicating an intention to apply them to the state governments. This court cannot so apply them.

Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243, 250 (1883) (emphasis added).

35. Justices of the Supreme Court of New York v. United States, 65 U.S. (9 Wall.) 274 (1870).

36. In part the seventh amendment provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

37. Abraham Lincoln once said, "'Stand with anybody that stands right. Stand with him while he is right and part with him when he does wrong.'" Jaffa, In Defense of Political Philosophy, 34 National Review 36 (1982) (emphasis in original).

38. While stare decisis has more force in cases which determine the meaning of statutes as opposed to interpretating the Constitution, the Supreme Court has frequently reversed itself where it thinks an earlier decision involving the construction of a statute is in error. In Monell v. Department of Social Services, 436 U.S. 658 (1978), the Supreme Court identified four factors which it considers when faced with the question whether to overrule a prior decision which involves a statute. The factors are: 1) whether the decisions in question misconstrued the meaning of the statute as revealed in its legislative history; 2) whether overruling the decisions would be inconsistent with more recent expressions of congressional intent; 3) whether the decisions in question constituted a departure from prior decisions; and 4) whether overruling these decisions would frustrate legislative reliance on there holdings. Id. at 695-701.

39. Mr. Justice Stevens recently addressed the problem whether a court should follow authority which it believes to have been incorrectly decided. In a case which involved the construction of a statute parents of Negro school children sued under the Civil Rights Act of 1866 (now 42 U.S.C. § 1982) for alleged discriminatory admission to private schools, which discrimination was based solely upon race. Runyon v. McCrary, 427 U.S. 160 (1976). The statute upon which the suit was based, 42 U.S.C. § 1981, was passed prior to the adoption of the fourteenth amendment. It provides in part that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . as enjoyed by white citizens . . . ." In Runyon two children were denied admission to private schools in Virginia solely because they were Negro. The Supreme Court held that section 1981 prohibits private, commercially-operated, nonsectarian

schools from denying admission to prospective students solely because of race. Mr. Justice Stevens concurred in the opinion of the Court, but his thoughts on stare decisis are noteworthy.

Mr. Justice Stevens felt compelled to join the opinion of the Court based upon a prior decision of the Court, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). However, the language of the Civil Rights Act of 1866 and its historical setting left "no doubt in [Mr. Justice Stevens'] mind that the construction of [42 U.S.C. § 1982] would have amazed the legislators who voted for it." Runyon v. McCrary, 427 U.S. at 189. Given a clean slate Mr. Justice Stevens would have allowed private, commercially-operated, nonsectarian schools the right to deny admission to prospective students solely because of race. He would have reached this result not because he thought that it was socially preferable to the result reached by the Supreme Court, but simply because the intent of Congress and the legislative history surrounding the adoption of 42 U.S.C. § 1981 mandated such a result.

Where Mr. Justice Stevens was unwilling to dissent from his bretheren in a case involving statutory construction, this Court feels a stronger tug from the Constitution which it has sworn to support and to defend.

40. Professor Fairman has summarized concisely in several pages all of the stones and pebbles which could conceivably be relied upon to support the conclusion that the fourteenth amendment intended to incorporate the federal Bill of Rights against the states. See Fairman, supra note 25, 134-35.

41. One of the first of these considerations is whether the teachers and those students who desire to express the simple prayers have any rights to freedom of speech. Compare what the Court observed in the order which granted the preliminary injunction in the companion case, 82-0792-H, against the state on the first amendment right of students to pray at school. 544 F. Supp. at 732-33. The evidence in the case demonstrates that the school board took no active part in any decision made by the teachers to utilize the simple prayer that they have. The school board nor any of the official body of the school administration encouraged or discouraged these teachers from exercising their own will in the matter. Nor does the evidence indicate that those students who opted for this type of exercise were coerced into participating or not participating.

In dealing with matters religious the exercise of first amendment rights are highly circumscribed. The same does not appear to be true in dealing with first amendment rights in expressing one's opinions in all other matters whether they be expressions of moral concern or immoral concern.

The second major area that this Court must concern itself with should this judgment be reversed is that raised by the evidence produced by the intervenors dealing with other religious teachings now conducted in the public schools to which no attention has apparently been directed and to which objection has been lodged by the intervenors.

There are many religious efforts abounding in this country. Those who came to these shores to establish this present nation were principally governed by the Christian ethic. Other religions followed as the population grew and the ethnic backgrounds were difused. By and large, however, the Christian ethic is the predominent ethic in this nation today unless it has been supplanted by secular humanism. Delos McKown, witness for the plaintiff, expressed himself as believing that secular humanism has been more predominent through the years than we have imagined and indeed was more akin to the beliefs of George Washington, Thomas Jefferson, Benjamin Franklin, and others of that era. Delos McKown also testified that secular humanism is not a religion, though he ultimately waffled on this point. The reason that this can be important to the decision of this Court is that case law deals generally with removing the teachings of the Christian ethic from the scholastic effort but totally ignores the teaching of the secular humanist ethic. It was pointed out in the testimony that the curriculum in the public schools of Mobile County is rife with efforts at teaching or encouraging secular humanism -- all without opposition from any other ethic -- to such an extent that it becomes a brainwashing effort. If this Court is compelled to purge "God is great, God is good, we thank Him for our daily food" from the classroom, then this Court must also purge from the classroom those things that serve to teach that salvation is through one's self rather than through a diety. Indeed, the Supreme Court in Abington School District v. Schempp, 374 U.S. 203, 225 (1963) (quoting Zorach v. Clauson, 343 U.S. 305, 314) (1952), noted that "the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to a religion, thus preferring those who believe in no religion over those who do believe."

That secular humanism is a religion within the definition of that term which the "high wall" must exclude is supported by the finding in Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961), which recognized that secular humanism is a religion in the traditional sense of the word and also in the statement of the 276 intellectuals who advocate the doctrine of secular religion as delineated in the Humanist Manifesto I and II. (Defendant-intervenors exhibit #10).

Textbooks which were admitted into evidence demonstrated many examples in the way this theory of religion is advanced. The intervenors maintain that their children are being so taught and that this Court must preclude the Mobile County School Board from continuing to advance such a religion or in the alternative to allow instruction in the schools that would give a child an opportunity to compare the ethics of each religion so as to make their own credibility or value choices. To this extent, this Court is impressed that the advocacy of the intervenors on the point of necessity makes them parties plaintiff and to this extent they should be realigned as such inasmuch as both object to the teaching of certain religions.

This Court is confronted with these two additional problems that must be resolved if the appellate courts adhere to their present course of interpretating history as did Mr. Justice Black. Should this happen then this Court will hunker down to the task required by the appellate decisions. A blind adherence to Justice Black's absolutism will result in an engulfing flood of other cases addressed to the same point raised by intervenors. The Court will be called upon to determine whether each book or any statement therein advances secular humanism in a religious sense, a never-ending task. Already the involvement of this Court with determining state activities in such things as prison cases, occupies one-third of its docket. This Court can anticipate no less of a burgeoning docket brought about by this incursion into what is legitimately a state concern.

The founding fathers were far wiser than we. They were content to allow the peoples of the various states to handle these matters as they saw fit and were patient in permitting the processes of change to develop orderly by established procedure. They were not impatient to bring about a change because we think today that it is the proper course or to set about to justify by misinterpretation the original intent of the framers of the Constitution. We must remember that "He, who reigns within Himself, and rules passions, desires, and fears, is more a king" Milton, Paradise Regained. If we,

who today rule, do not follow the teachings of history then surely the very weight of what we are about will bring down the house upon our head, and the public having rightly lost respect in the integrity of the institution, will ultimately bring about its change or even its demise.

End of Footnotes

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

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

J U D G M E N T

This action came on for trial before the Court, the Honorable W. B. Hand, Chief Judge, presiding, and the issues having been duly tried and a final decision having been duly rendered,

It is Ordered and Adjudged

that the plaintiffs take nothing, that the action be dismissed on the merits and that the defendants recover their costs of action.

DONE this 14th day of January, 1983.

W B Hand

Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

ISHMAEL JAFFREE, et al.,)

Plaintiffs,)

vs.)

FOB JAMES, in his official capacities as Governor of the State of Alabama and ex officio member of the State Board of Education; CHARLES GRADDICK, in his official capacity as Attorney General for the State of Alabama; JOHN TYSON, JR., RON CREEL, S. A. CHERRY, RALPH HIGGINBOTHAM, VICTOR P. POOLE, HAROLD C. MARTIN, JAMES B. ALLEN, JR., and ROSCOE ROBERTS, JR., in their official capacities as members of the Alabama State Board of Education,) CIVIL ACTION NO. 82-0792-H

Defendants.

O R D E R

The complaint in this case challenges Senate Bill 8, Alabama Act 82-735, popularly known as "the Prayer Law", Senate Bill 61 (1982), Ala. Code § 16-1-20 (silent meditation), and Ala. Code § 16-1-22.1.

I. The Allegations

Complaint in this case alleges that Senate Bill 61 (1982), Senate Bill 8 (1982) and Ala. Code § 16-1-20.1 violate the rights of the plaintiffs to be free from the state endorsement and establishment of any religion.

Senate Bill 61 (1982) provides:

> To prescribe a period of time in the public schools, not to exceed fifteen minutes, for the study of the formal procedures followed by the United States Congress which study shall include the reading verbatum of one of the opening prayers given by either the House or the Senate Chaplain at the beginning of the meeting of the United States House or Senate.
>
> BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:
>
> Section I At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which said class is held shall, for a period of time not exceeding fifteen minutes, instruct the class in the formal procedure followed by the United States Congress. The study shall include, but not be limited to, the reading verbatum of one of the opening prayers given by either the House or the Senate Chaplain at the beginning of the meeting of the House or Senate. Any student may select an opening House or Senate prayer from the Congressional Record for use by the class.

Senate Bill 8 (1982) provides as follows:

> To provide for a prayer that may be given in the public schools and educational institutions of this state.
>
> BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:
>
> Section I. From henceforth, any teacher or professor in any public educational institution within the State of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may lead the willing students in the following prayer to God:
>
> Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sancity of our homes and in the classrooms of our schools. In the name of our Lord. Amen.

Ala. Code Section 16-1-20.1 provides:

> At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activity shall be engaged in.

II. Claims for Relief

The state laws are challenged under two separate theories. First, the laws are attacked as being violative of the first amendment to the United States Constitution. The first amendment provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the

free exercise thereof . . . ." U.S. Const. Amend. I.

The second basis for attacking the laws rests upon a pendent, state-law claim. The amended complaint alleges that the laws in question violate the guarantee of religious freedom found in the Alabama State Constitution. The relevant section provides:

> 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 minestry; that no religious test shall be required as a qualification to any office or public trust under this state; 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, § 3.

Today in the companion case, Ishmael Jaffree v. Board of School Commissioners of Mobile County, Civil No. 82-0554-H, the Court holds that the establishment clause of the first amendment to the United States Constitution does not bar the states from establishing a religion. In light of the reasoning in that opinion the Court holds that the claims in this case fail to state any claim for which relief could be granted under the federal Constitution.

However, in this case, in addition to the claims for relief under the federal Constitution the plaintiffs have alleged claims

under the Alabama State Constitution. Ordinarily, these claims would be within the pendent jurisdiction of the court. Pendent jurisdiction is discretionary. The usual rule is that a federal court should decide any state-law claims which arise from a common nucleus of operative facts and which could ordinarily be expected to be brought in the same action. One well-recognized exception to the exercise of pendent jurisdiction lies where the federal claim is dismissed short of trial. Here this case is being dismissed short of trial, and the Court holds that the better exercise of discretion which is consistent with the limited subject-matter jurisdiction of a federal court mandates that the claims in this case be dismissed.

III. Order

It is hereby ordered that the claims for relief under the federal Constitution be dismissed for failure to state a claim. It is further ordered that the pendent, state-law claims be dismissed.

The injunction which this Court previously entered is dissolved.

Costs are taxed against the plaintiffs.

DONE this 14th day of January, 1983.

W B Hand

Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

ISHMAEL JAFFREE, et al.,)

Plaintiff,)

vs.)

FOB JAMES, in his official capacities as Governor of the State of Alabama and ex officio member of the State Board of Eduction; CHARLES GRADDICK, in his official capacity as Attorney General for the State of Alabama; JOHN TYSON, JR., RON CREEL, S. A. CHERRY, RALPH HIGGINBOTHAM, VICTOR P. POOLE, HAROLD C. MARTIN, JAMES B. ALLEN, JR., and ROSCOE ROBERTS, JR., in their official capacities as members of the Alabama State Board of Education,) CIVIL ACTION NO. 82-0792-H

Defendants.

J U D G M E N T

This action came on for decision before the Court, Honorable W. B. Hand, Chief Judge, presiding, and the issues having been duly decided and a final decision having been duly rendered,

It is Ordered and Adjudged

that the plaintiffs take nothing, that the action be dismissed on the merits, and that the defendants recover from the plaintiffs their costs of action.

DONE this 14th day of January, 1983.

W B Hand

Chief Judge

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PLAINTIFFS

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

DEFENDANTS

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY; DAN C. ALEXANDER; DR. NORMAN BERGER; HIRAM BOSARGE; NORMAN G. COX; RUTH F. DRAGO; DR. ROBERT GILLIARD, ETC.; ANNIE BELL PHILLIPS JULIA GREEN; BETTY LEE; CHARLENE BOYD; EMMA REED, and PIXIE ALEXANDER
ABE HAMMONS
FOB JAMES
CHARLES GRADDICK
JOHN TYSON, JR.
RON CREEL
S. A. CHERRY
RALPH HIGGINBOTHAM
VICTOR P. POOLE
HAROLD C. MARTIN

(SEE CONTINUATION SHEET for defendants.....

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

Action to enjoin defendants from use of instructional materials designed to encourage belief in religion. 42:1983, 1988; 1st Amendment.

LPS

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CLOSED

CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
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	5/28/82	#63523 (Ms. Ronnie L. Williams)		JS-5	
				JS-6	

UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev.