

APPLYING THE BILL OF RIGHTS TO THE STATES: A RESPONSE TO WILLIAM P. GRAY, JR.

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I. INTRODUCTION

On February 5, 1997, Alabama Governor Fob James vowed to use the police powers of the state to prevent the removal of the Ten Commandments from their prominent position in the courtroom of Etowah County Circuit Judge Roy Moore.¹ This threat by the Alabama Governor came in response to a decision by Alabama Circuit Judge Charles Price which held that Judge Moore's practice of allowing prayers to be offered in court and displaying the Ten Commandments violates the Establishment Clause of the First Amendment of the U.S. Constitution.² Governor James' threat has proved to be extremely popular with a significant segment of the Alabama population. This reaction has not gone unnoticed by Governor James, who will stand for reelection in 1998.³

The decision by Judge Price is consistent with the prior

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1. John D. Alcorn, *James to Appear on ABC Morning Show*, MONTGOMERY ADVERTISER, Feb. 9, 1997, at 4C.

2. Alabama ex rel. Fob James v. ACLU, No. CV-95-919 (Ala. Cir. Ct. Feb. 10, 1997).

3. Governor James is not the first Alabama governor to appreciate the political value to be gained from criticizing the judiciary. In 1963, George Wallace stood in the schoolhouse door at the University of Alabama to prevent the registration of two black students, James Hood and Vivian Malone. Defying federal court decisions mandating the end of segregated educational facilities, George Wallace took the politically expedient route of arousing public sentiment against these judicial opinions. Governor Wallace was later quoted as wishing to give "a barbed wire enema" to Judge Frank Johnson who thwarted Wallace's segregationist policies. See David M. Alpern, *A Judge for the FBI*, NEWSWEEK, Aug. 29, 1977, at 26. While Governor James has not yet resorted to such name-calling, his announced intention to defy a court order is no less irresponsible.

decisions of the United States Supreme Court which interpret the First Amendment to the United States Constitution.⁴ Aware of the likelihood that the decision by Judge Price will be affirmed on appeal, Governor James and his legal advisor, William Gray, have taken a different tack and now argue that the judiciary as a whole has erred throughout this century by reading the Fourteenth Amendment of the U.S. Constitution⁵ to apply the Bill of Rights, and specifically the Establishment Clause of the First Amendment, so as to limit state action. Mindful of the consistent decisions of the United States Supreme Court, which have taken a broad view of the Establishment Clause and restrict the involvement of the states with religion, Mr. Gray is attempting to make an end run around the metaphorical wall separating church and state. That is, Mr. Gray argues that the Supreme Court got it wrong when it used the Fourteenth Amendment to apply the First Amendment to the states.⁶

Two cases which are presently ongoing have provided the platform for Governor James to contend that the State of Alabama is not encumbered by the restrictions of the First Amendment. In *Chandler v. James*,⁷ United States District Judge Ira DeMent ruled that an Alabama statute attempting to protect voluntary prayer in school violates the First Amendment. Governor James subsequently sought to dismiss this suit by arguing that the Supreme Court erred in applying the Bill of Rights to the states. Similarly, in *State of Alabama ex rel. Fob James v. ACLU*,⁸ Governor James filed a motion with the Alabama Supreme Court asserting that the Bill of Rights does not

4. The First Amendment to the Constitution 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.

5. Section 1 of the Fourteenth Amendment provides:

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

U.S. CONST. amend. XIV, § 1.

6. William P. Gray, Jr., *The Ten Commandments and the Ten Amendments: A Case Study in Religious Freedom in Alabama*, 49 ALA. L. REV. 509, 530-40 (1998).

7. No. CV 96-D-169-N, 1997 WL 736483 (M.D. Ala. Nov. 12, 1997).

8. No. 1960927, 1988 WL 21985 (Ala. Jan. 23, 1998).

apply to the states.⁹ It is revealing that Alabama's Attorney General has filed pleadings confirming that the position of Governor James is not the legal position of the State of Alabama.¹⁰ Thus, the State of Alabama does not contend that it should be removed from the restrictions of the First Amendment.

Mr. Gray's historical arguments are well known, having been made since at least 1949, but have never been accepted by the United States Supreme Court. Moreover, the arguments presented in Mr. Gray's article mirror the opinion of United States District Judge Brevard Hand that was quickly reversed and ultimately appealed to the United States Supreme Court in 1985 in *Wallace v. Jaffree*.¹¹ In that case, the Supreme Court refused to reconsider its long history of using the Fourteenth Amendment to apply the Establishment Clause to the states.¹² Although there has been considerable scholarly discussion regarding the appropriateness of the Supreme Court's incorporation doctrine, especially as to the Establishment Clause of the First Amendment, the debate has remained solely an academic question.¹³ Mr. Gray has not identified even a single member of the Supreme Court from this century who has publicly questioned the use of the Fourteenth Amendment to apply the principles of the Establishment Clause to the states.¹⁴

9. Motion of Plaintiff/Appellant Governor Fob James, Jr., to Dismiss Aspects of Counterclaim of Defendant/Appellee American Civil Liberties Union "ACLU" Asserting Rights Allegedly Grounded Upon the United States Constitution With Memorandum Brief Incorporated Therein, at 2-3.

10. Statement Regarding Position of the Attorney General, *Chandler v. James* 1997 WL 736483 (M.D. Ala. Nov. 12, 1997).

11. 472 U.S. 38 (1985).

12. *Wallace*, 472 U.S. at 48-49.

13. In *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963), Justice Clark, speaking for the Court, stated that questioning the historical basis for applying the Establishment Clause to the states is "entirely untenable and of value only as academic exercises." *Schempp*, 374 U.S. at 217.

14. In his article, Mr. Gray argues that even the "fundamental fairness" approach followed by the Supreme Court in the early part of this century is unsupportable. Gray, *supra* note 6, at 532-36. Even Justice Felix Frankfurter, who argued so strenuously with Justice Hugo Black over the total incorporation doctrine, accepted the fundamental fairness approach of applying the Bill of Rights to the states. See *McGowan v. Maryland*, 366 U.S. 420, 460-61 (1961) (Frankfurter, J., concurring). Also, Charles Fairman, the author of the law review article upon which Mr. Gray relies so heavily, accepted the incorporation of the Bill of Rights against the states as part of the ordered liberty protected by the Due Process Clause of the Fourteenth Amendment. Charles Fairman, *Does the Fourteenth Amendment Incorpo-*

Governor James and Mr. Gray contend that the Establishment Clause of the First Amendment does not prevent states from returning religion to public life, including public schools. Ironically, by taking this position, Mr. Gray is foregoing his conservative roots which ostensibly oppose government intrusion in private life. By arguing that government officials are uniquely qualified to impose religious views on citizens, Mr. Gray is actually taking a liberal, activist position. Mr. Gray, an avowed conservative, who presumably opposes government intrusion into the private lives of citizens, rejects his own philosophy when it comes to the subject of religion. Mr. Gray is suddenly willing to involve public officials in arguably the most personal and private activity reserved for each person and family.

It is surprising that Governor James and Mr. Gray do not appreciate the protection of religious liberty that has resulted from the application of the Bill of Rights, including the Establishment Clause and Free Exercise Clause, to the states. With protection provided by the First Amendment, Americans in every state are free to practice their religion, unfettered by government interference or censure. Since Governor James and Mr. Gray are presumed to value religious liberty, it is difficult to understand why they argue so strenuously in favor of radically changing the understanding of the First and Fourteenth Amendments which have provided such religious freedom.

I disagree with the position of Governor James and Mr. Gray, and this article is an effort to explain the basis for that disagreement. In Part II, I will discuss the history of the Fourteenth Amendment and the subsequent Blaine Amendment. This history shows the broad purpose for the Fourteenth Amendment which justifies the Supreme Court's decisions restricting the states' ability to establish or favor religions. Part III contains a discussion of the Supreme Court's cases which led to the incorporation of the majority of the Bill of Rights. These cases have shown a firm commitment by the Court to the principle that the First Amendment's religion clauses limit state action. Part IV will examine the *Wallace v. Jaffree* case and show that the precise arguments made by Mr. Gray have recently been rejected by the Supreme Court. Part V will review the

analysis followed by the Supreme Court in its Establishment Clause cases and apply that analysis to the Judge Roy Moore case. Finally, Part VI will demonstrate that the Supreme Court's decisions have been sensitive to the protection of religious liberty and have had the beneficial effect of promoting and protecting religion.

II. THE HISTORY SURROUNDING THE FOURTEENTH AMENDMENT SUPPORTS THE APPLICATION OF THE FIRST AMENDMENT TO THE STATES

For a good portion of his article, Mr. Gray presses the point that the First Amendment originally applied only to the federal government. However, there is no serious disagreement with this principle. The plain language of the First Amendment states that "Congress shall make no law . . ." ¹⁵ Thus, on its face, the First Amendment applies to the national government, not the states. In *Barron v. Baltimore*,¹⁶ the Supreme Court settled the issue and held that the Bill of Rights applied only to the federal government.¹⁷ Of course, that all changed after the Civil War with the adoption of the Civil War Amendments. The Thirteenth, Fourteenth, and Fifteenth Amendments were designed to do away with the vestiges of slavery and ensure that the states respected the civil rights of all citizens, just as the Federal government was required to do. The language of the Fourteenth Amendment, which protects "privileges or immunities," "life," "liberty," "due process," and "equal protection," speaks volumes to the broad scope of this Constitutional Amendment.

15. U.S. CONST. amend. I.

16. 32 U.S. (7 Pet.) 243 (1833); see also *Permoli v. New Orleans*, 44 U.S. (3 How.) 589 (1845) (refusing to apply the Free Exercise Clause of the First Amendment to the states).

17. See Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1705 (1992) ("the only consensus among the Framers of the First Amendment about the appropriate relationship between church and state was to allow the states to decide the issue themselves"); see also Stuart D. Poppel, *Federalism, Fundamental Fairness and the Religion Clauses*, 25 CUMB. L. REV. 247, 250-54 (1994-1995).

A. *State Enforcement of Religious Viewpoints had Diminished by the Time of the Adoption of the Fourteenth Amendment*

Mr. Gray is correct when he states that the First Amendment originally reflected a view that the states were free to establish state-supported religions.¹⁸ However, the intent of the drafters of the First Amendment does not resolve the issue of the proper role for states in establishing or favoring religions. Instead, we should look principally to the authors of the Fourteenth Amendment and their understanding of the role of religion and government at the time following the Civil War.

Mr. Gray argues that the Fourteenth Amendment did not alter the ability of states to establish religions or prefer one religion over another.¹⁹ However, what Mr. Gray ignores is that the United States changed considerably between 1791, when the First Amendment was adopted, and 1868, when the Fourteenth Amendment became a part of the Constitution. Our nation's history following the passage of the First Amendment shows a complete abandonment of state established religions. Consequently, by the time the Fourteenth Amendment was adopted, freedom to exercise religion had come to mean that states would not impose religious views on their citizens.

State religious establishments were present, but controversial, around the time of the drafting of the Constitution. At the time of the adoption of the First Amendment, Virginia, Delaware, New Jersey, New York, North Carolina, Pennsylvania, and Rhode Island had enacted policies opposing the establishment of state religions.²⁰ However, the following states continued to have some form of government-established religions: Connecticut, Georgia, Maryland, Massachusetts, New Hampshire, and South Carolina.²¹

18. Gray, *supra* note 6, at 518.

19. Gray, *supra* note 6, at 520-30.

20. David O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1132 (1988).

21. *Id.* Vermont was admitted to the Union after the First Amendment was passed by Congress but prior to ratification by the states. Vermont provided for a state establishment of religion. See LEONARD LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 25-62 (1986); see also Akhil Reed Amar, *Some Notes on the Establishment Clause*, 2 ROGER WILLIAMS U. L. REV. 1 (1986).

The best known example of the debate over state-established religions had previously occurred in Virginia. Prior to passing the Virginia Declaration of Rights in 1776, Virginia levied a compulsory tax on its citizens to support the Anglican church.²² This compulsory tax was abolished for non-members of the Church in 1776 and for members in 1779.²³ But, in 1784, the General Assembly considered a bill authored by Patrick Henry that would have required citizens to pay an annual tax in support of the Christian religion.²⁴ James Madison led the opposition to the proposed tax and wrote his famous *Memorial and Remonstrance Against Religious Assessments*,²⁵ condemning the tax as an abuse of power and a violation of religious liberty. The tax measure was subsequently defeated and, in 1786, the enactment of Thomas Jefferson's Bill for Establishing Religious Freedom effectively ended the Anglican establishment in Virginia.²⁶

Other states followed the lead of Virginia and, by 1793, Delaware, South Carolina, Georgia, and Vermont had removed religious tests from their constitutions.²⁷ By the middle of the nineteenth century, the last state-supported religion had vanished.²⁸ Thus, when the Fourteenth Amendment was written,

22. Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1573 (1989).

23. *Id.*

24. *Id.*

25. James Madison, *Memorial and Remonstrance Against Religious Assessments* (circa June 20, 1785) reprinted in 8 THE PAPERS OF JAMES MADISON 298 (W. Hutchison & W. Rachal eds., 1973).

26. Adams & Emmerich, *supra* note 22, at 1574-75 (1989); see also G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73, 81-82 (1989).

27. Adams & Emmerich, *supra* note 22 at 1578. The United States Constitution explicitly forbade religious test oaths as a prerequisite for holding federal office. See U.S. CONST. art. VI, which provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States". These test oaths had been common throughout the states prior to 1787. Adams & Emmerich, *supra* note 22 at 1576.

28. All state church establishments ended well prior to the passage of the Fourteenth Amendment. Connecticut disestablished in 1818 and New Hampshire in 1819, Massachusetts was the last to disestablish in 1833. Vermont was added as a state after 1787 and did not disestablish until 1807. See ARLAN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* 20 (1990). See Conkle, *supra* note 20, at 1132-33, citing LEONARD LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* app. at 25-62 (1986); John J. Witte, *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371 at 405

the disestablishment of state religion had become the norm. It is easy to understand, therefore, that by 1868, "privileges or immunities," "life," "liberty," and "due process" included the right to worship as one chose, uninhibited by state-imposed religious requirements.

In the 1800s, prior to the Civil War, there were many judicial decisions which addressed religious beliefs that were supported by state law. For example, Sunday closing laws were common in most states prior to the Civil War. But by the 1860s, courts began to justify such laws, not on religious grounds, but as valid civil regulations.²⁹ In one case, the California Supreme Court struck down a Sunday closing law as an unconstitutional violation of religious liberty.³⁰ Although this decision was based on the California state constitution, the Court equated the state constitution's protection against the establishment of religion with that found in the Federal Constitution.³¹ Similarly, state laws against blasphemy were originally designed to protect Protestant religious views. However, the courts moved away from using blasphemy convictions as a means to enforce state-supported religious views; instead, the laws were enforced merely to prevent breaches of the peace.³²

Throughout the 1800s, the immigration of Western Europeans caused the number of Catholics in America to swell dramatically. With the addition of approximately two million Irish immigrants in the 1840s, the Roman Catholic Church had become the largest church in America by 1850.³³ Inevitably, conflicts developed between Catholics and Protestants, often over the role of religion in schools. One case is especially instructive in demonstrating that states, as well as the national government, should

(1996).

29. See *Lindenmuller v. People*, 33 Barb. 548 (N.Y. 1861); see also Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995) (reviewing the development of ideas and judicial decisions addressing state-established religions prior to the adoption of the Fourteenth Amendment).

30. *Ex parte Newman*, 9 Cal. 502 (1858).

31. See Lash, *supra* note 29, at 1109.

32. See *Commonwealth v. Kneeland*, 37 Mass. (20 Pick.) 206 (1838); *Delaware v. Chandler*, 2 Del. (2 Harr.) 553 (1837). See Lash, *supra* note 29, at 1101-05.

33. Lash, *supra* note 29, at 1123, citing TYLER ANBINDER, *NATIVISM AND SLAVERY* at 6-7 (1992).

maintain a "hands off" approach to religion. In *Board of Education v. Minor*,³⁴ the Supreme Court of Ohio addressed a dispute which arose out of complaints by Catholics over religious instruction and Bible reading in Cincinnati's public schools. The Cincinnati School Board had responded by prohibiting further religious activity in school but the trial court ordered the School Board to resume the religious instruction. The Supreme Court of Ohio disagreed, however, and concluded that the Ohio Constitution and principles that were "as old as Madison,"³⁵ required the schools to end their religious instruction:

*Legal Christianity is a solecism, a contradiction of terms. When Christianity asks the aid of government beyond mere impartial protection, it denies itself. Its laws are divine, and not human. Its essential interests lie beyond the reach and range of human governments. United with government, religion never rises above the merest superstition; united with religion, government never rises above the merest despotism; and all history shows us that the more widely and completely they are separated, the better it is for both.*³⁶

The conflicts between Catholics and Protestants, with Protestants seeking to prevent state funds from being used for Catholic schools, and Catholics objecting to Protestant religious instruction in public schools, led to each group preferring a separation of government and religion.³⁷ This separation was based upon protecting each group's ability to hold its own beliefs without interference from the government. Thus, religious liberty was promoted by the disestablishment of religion from government. Finally, the *Board of Education v. Minor* decision demonstrates that the Ohio State Court's view of religion pursuant to that state constitution was coexistent with the First Amendment.³⁸ As Kurt Lash observes:

In this way, the Establishment Clause came to represent a personal freedom. Over time, popular interpretation of the Clause focused not on the principle of federalism, but on the principle of

34. 23 Ohio St. 211 (1872).

35. *Minor*, 23 Ohio St. at 253.

36. *Id.* at 248 (emphasis in original).

37. Lash, *supra* note 29, at 1130.

38. Lash, *supra* note 29, at 1126-31.

"nonestablishment." By Reconstruction, the common interpretation of the Establishment Clause and its "counterparts" in the states was that no government had any legitimate power over religion as religion: the state could neither establish a preferred religion, nor could it visit "disadvantages or penalties" upon disfavored religious beliefs. Citizens by right were immune from such religious-based persecutions.³⁹

B. Legislative History of the Fourteenth Amendment Supports the Application of the Bill of Rights to the States

Mr. Gray claims that the legislative history of the Fourteenth Amendment provides no support for applying the Bill of Rights to the States.⁴⁰ However, there is significant scholarly work which suggests that the authors of the Fourteenth Amendment did have such a goal.⁴¹ Justice Hugo Black and, more recently, Michael Curtis have concluded that the primary evidence of this intent is found in the "Privileges or Immunities" Clause of the Fourteenth Amendment which was effectively a shorthand

39. Lash, *supra* note 29, at 1135.

40. Gray, *supra* note 6 at 521-22. Two writers who argue against the Supreme Court's Fourteenth Amendment jurisprudence have the candor to acknowledge that the history surrounding the Fourteenth Amendment and the incorporation doctrine is inconclusive. See Gary L. McDowell & Judith A. Baer, *The Fourteenth Amendment: Should the Bill of Rights Apply to the States? The Disincorporation Debate 1987* UTAH L. REV. 951, 957 (1987) (the answer to the question is "shrouded in the mists of history. There is simply no clear answer."); see also JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT, 102 (1983); LEONARD W. LEVY, JUDGEMENT: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY, 70 (1972) (stating that "the historical record is not only complex and confusing; it is inconclusive"). Chief Justice Earl Warren also determined that the history surrounding the adoption of the Fourteenth Amendment was "inconclusive." *Brown v. Board of Educ.*, 347 U.S. 483, 489 (1954).

41. MICHAEL CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986). See also Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993) (arguing that Charles Fairman misread the legislative history of the Fourteenth Amendment and that its drafters intended the Amendment to make the Bill of Rights applicable to the states); Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. ON LEGIS. 1 (1968) (arguing that the Privileges or Immunities clause of the Fourteenth Amendment was intended as a reference to the Bill of Rights and reflected an intent to apply the Bill of Rights to the states); William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954).

reference for the protections provided by the Bill of Rights.⁴² John Bingham, who wrote the majority of section 1 of the Fourteenth Amendment, was a member of the Joint Committee on Reconstruction which reported the Amendment and was the principal sponsor of the amendment.⁴³ His statements, both before and after ratification of the Fourteenth Amendment, illustrate his belief that the Fourteenth Amendment was intended to apply the Bill of Rights to the states.⁴⁴

Understanding the statements made by John Bingham and other Republicans who supported passage of the Fourteenth Amendment requires insight into their view of the Constitution. Bingham understood the Privileges and Immunities Clause of Article IV, section 2 of the Constitution to protect rights of national, not state citizenship. This reading of Article IV, section 2, leads to a conclusion that there are substantive national rights which states cannot deny.⁴⁵ Bingham believed that the privileges and immunities of national citizenship included all of the provisions of the first eight amendments of the Bill of Rights.⁴⁶ Bingham further believed that Article IV, section 2 placed a duty on states to protect the privileges and immunities of national citizenship, but this duty had not been accompanied by any enforcement mechanism.⁴⁷ Bingham intended for the Fourteenth Amendment to be the enforcement mechanism which would require the states to abide by the first eight amendments of the Bill of Rights.⁴⁸

42. Justice Hugo Black's view that the Fourteenth Amendment totally incorporates the Bill of Rights against the states is set forth in his dissent in *Adamson v. California*, 332 U.S. 46, 68-123 (1947) and in *Duncan v. Louisiana*, 391 U.S. 145, 168 (1968) (Black, J., concurring). See also CURTIS, *supra* note 41, at 202.

43. CURTIS, *supra* note 41, at 120. Charles Fairman, although a critic of the incorporation doctrine did acknowledge that Bingham was a "key figure" whose views were of "great significance" in studying the meaning of the Fourteenth Amendment. Fairman, *supra* note 14, at 25.

44. In 1866, Congress passed the Civil Rights Act of 1866 over the veto of President Johnson. This Act was passed in response to the *Dred Scott* decision and provided that "all persons born in the United States" are "citizens of the United States." Representative John A. Bingham, however, sought to ensure the enforcement of the guarantees of the Bill of Rights against the states by a constitutional amendment.

45. See Aynes, *supra* note 41, at 70; CURTIS, *supra* note 41, at 63-68.

46. Aynes, *supra* note 41, at 70-71.

47. Aynes, *supra* note 41, at 71.

48. Aynes, *supra* note 41, at 71.

There are many examples of statements made in Congress which provide evidence of the drafters' intent for the Fourteenth Amendment to apply the Bill of Rights to the states. On February 28, 1866, speaking of the prototype of the Fourteenth Amendment, Bingham said that the Amendment would "arm the Congress . . . with the power to enforce the bill of rights as it stands in the Constitution today."⁴⁹ Furthermore, Bingham explicitly stated that the Fourteenth Amendment was necessary to overcome the effects of *Barron v. Baltimore*⁵⁰ and *Livingston v. Moore*,⁵¹ each of which refused to find that the Bill of Rights placed limits on the states.⁵² Bingham argued that "[t]hose who opposed the amendment . . . opposed federal authority to enforce the Bill of Rights" against the states.⁵³

Senator Jacob Howard from Michigan was a member of the Joint Committee and spoke for the committee in presenting the amendment to the Senate.⁵⁴ On May 23, 1866, Senator Howard clearly stated his view that the privileges and immunities protected by the Fourteenth Amendment included the protections of the Bill of Rights. Senator Howard's definition of the "Privileges or Immunities" Clause of the Fourteenth Amendment included "the personal rights guaranteed and secured by the first eight amendments of the Constitution."⁵⁵ Senator Howard also stated

49. CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866).

50. 32 U.S. (7 Pet.) 243 (1833).

51. 32 U.S. (7 Pet.) 469 (1833).

52. CONG. GLOBE, 39th Cong., 1st Sess. 1089-90 (1866).

53. CURTIS, *supra* note 41, at 71; Michael Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 CONN. L. REV. 237, 265-67 (1982); CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866). On May 10, 1866, Bingham spoke in the House of Representatives and again stated his position that the Fourteenth Amendment would make the protections of privileges and immunities applicable to the states:

[B]y express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.

CONG. GLOBE, 39 Cong., 1st Sess., 2542 (1866).

54. CURTIS, *supra* note 41, at 120.

55. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). This speech was reported the following day on the front page of the *New York Times*. *Serenade to the President and Cabinet*, N.Y. TIMES, May 24, 1866, at 1. Additionally, Henry Wilson had previously included the free exercise of religion as one of the "privileges and immunities" violated by slavery. CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864).

that the Fourteenth Amendment would correct the prior court decisions which held that the protections of the Bill of Rights did not apply to the states.⁵⁶ Howard concluded: "The great object of the first section of this amendment is, therefore, to restrain the power of the States and [to] compel them at all times to respect these great fundamental guarantees."⁵⁷

Although Senator Howard and Representative Bingham focused on the "Privileges or Immunities" Clause of the Fourteenth Amendment, their intent was clear: The Fourteenth Amendment was designed to ensure that the states obeyed the Bill of Rights. Mr. Bingham and other Republicans believed that the states had been bound to enforce the protections of the Constitution, despite the Supreme Court's decision in *Barron v. Baltimore*. They understood the Privileges or Immunities Clause of the Fourteenth Amendment to encompass the fundamental rights contained in the Bill of Rights, such as freedom of speech, freedom of religion, and due process of law, all of which the states were now bound to respect. The following statement from John Bingham shows his intent to use the Fourteenth Amendment as the mechanism to protect individual rights from infringement by the states:

The adoption of the proposed amendment will take from the States no rights that belong to the States. They elect their Legislatures; they enact their laws for the punishment of crimes against life, liberty, or property; but in the event of the adoption of this amendment, if they conspire together to enact laws refusing equal protection to life, liberty, or property, the Congress is thereby vested with power to hold them to answer before the bar of the national courts for violation of their oaths and of the rights of their fellow-men. Why should it not be so? That is the question. Why should it not be so? Is the bill of rights to stand in our Constitution hereafter, as in the past five years within eleven States, a mere dead letter? It is absolutely essential to the safety of the

56. CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866); Michael Curtis, *Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89, 96 (1992). See also Michael Curtis, *Still Further Adventures of the Nine-Lived Cat: A Rebuttal to Raoul Berger's Reply on Application of the Bill of Rights to the States*, 62 N.C. L. REV. 517, 522 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1263 (Rep. Broomall); CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864) (Rep. Wilson); CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859) (Rep. Bingham)).

57. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

people that it should be enforced.⁵⁸

In his article, Mr. Gray takes a statement of John Bingham out of context in an attempt to show that Mr. Bingham did not intend for the Fourteenth Amendment to apply the Bill of Rights to the states. Mr. Bingham is quoted by Mr. Gray as saying, "Allow me, Mr. Speaker, in passing, to say that *this amendment takes from no State any right that ever pertained to it.*"⁵⁹ However, Mr. Gray omitted the following sentence which clearly demonstrates Mr. Bingham's belief that the states had failed to abide by the restrictions of Article IV, section 2, of the Constitution.

Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy.⁶⁰

No senator or congressman contradicted the statements of Senator Howard and Representative Bingham that the Fourteenth Amendment would protect the privileges or immunities represented by the Bill of Rights from infringement by the states.⁶¹ Their statements reveal a belief that individual rights are, after passage of the Fourteenth Amendment, to be protected by the federal government. Where the states had failed or refused to protect these liberties, this obligation would now fall on the national government.⁶²

In the spring of 1871, Representative John A. Bingham

58. CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866).

59. Gray, *supra* note 6, at n.62 and accompanying text (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (alteration in original)).

60. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

61. CURTIS, *supra* note 41, at 91. Statements by Representative John A. Bingham and Senator Jacob Howard clearly indicate an intent to apply the Bill of Rights to the States. The response to these statements by critics of the incorporation doctrine is to disparage Bingham and Howard by criticizing them as "muddled" or "inept." However, a review of their speeches in support of the Fourteenth Amendment does not reveal ineptitude. Instead, it shows a consistent intent for the Fourteenth Amendment to require states to recognize and protect individual liberties.

62. See Robert J. Kaczorowski, *Searching for the Intent of the Framers of the Fourteenth Amendment*, 5 CONN. L. REV. 368, 382 (1972-1973).

spoke of his role in drafting the Fourteenth Amendment. Referring to the portion of the Supreme Court's decision in *Barron v. Baltimore* which concluded that the Framers had not intended to apply the Bill of Rights to the states, Bingham stated:

Acting upon this suggestion I did imitate the framers of the original Constitution . . . I prepared the provision of the first section of the fourteenth amendment. . . . Permit me to say that the privileges and immunities . . . are chiefly defined in the first eight amendments to the Constitution of the United States. . . . These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment.⁶³

Also, there is considerable evidence that the drafters of the Fourteenth Amendment were aware of the restrictions on the free exercise of religion which had resulted from slavery. Through the Privileges or Immunities Clause of the Fourteenth Amendment, the drafters understood the Fourteenth Amendment to prohibit states from restricting religious beliefs and practices. Congressman Hart said the Southern states must set up a government where "citizens shall be entitled to all privileges and immunities of other citizens;" where "no law shall be made prohibiting the free exercise of religion."⁶⁴ Henry Dawes later declared that the Fourteenth Amendment had "secured the free exercise of . . . religious belief."⁶⁵ These statements provide additional evidence that the Fourteenth Amendment was intended to prohibit states from restricting religious freedom.

63. CONG. GLOBE, 42nd Cong., 1st Sess. app. at 84 (1871) (statement of Rep. John Bingham). See, e.g., Gary L. McDowell & Judith A. Baer, *The Fourteenth Amendment: Should the Bill of Rights Apply to the States? The Disincorporation Debate*, 1987 UTAH L. REV. 951, 970-71. See also Aynes, *supra* note 41, at 71-74. The opinion of John Bingham that the Fourteenth Amendment applied the Bill of Rights to the States is supported by at least three constitutional law treatises published in 1867 and 1868. Aynes, *supra* note 41, at 83-94.

64. CONG. GLOBE, 39th Cong., 1st Sess. 1629 (1866); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1148 (1994).

65. CONG. GLOBE, 42d Cong., 1st Sess. 475 (1871). See Lash, *supra* note 64, at 1148.

C. *The Blaine Amendment*

On its face, the most appealing argument made by Mr. Gray is based upon the failure by Congress to adopt the Blaine Amendment. This amendment, proposed in 1875, would have prohibited states from making any law "respecting an establishment of religion or prohibiting the free exercise thereof."⁶⁶ Mr. Gray argues that the Blaine Amendment would have been redundant if the Religion Clauses of the First Amendment had previously been understood to be incorporated against the states pursuant to the Fourteenth Amendment.⁶⁷ Moreover, Mr. Gray argues that the ultimate rejection of the Blaine Amendment shows that the American public preferred to leave states free to establish religions, if they pleased.⁶⁸

The latter attitude by members of Congress, questioning whether the Fourteenth Amendment made the Bill of Rights applicable to the states, may have resulted from a narrow reading of the Fourteenth Amendment by the Supreme Court. Between 1868, with the adoption of the Fourteenth Amendment, and 1876, when the Blaine Amendment overwhelmingly passed in the House but failed to obtain the vote of two thirds of the Senate,⁶⁹ the Supreme Court issued the *Slaughter-House Cases* decisions and other decisions which effectively eliminated the Privileges or Immunities Clause from the Fourteenth Amendment.⁷⁰ Also, after 1868, there had been a political change in Congress with an increase in Democrats who read the Fourteenth Amendment more narrowly.⁷¹

66. 4 CONG. REC. 205 (1875).

67. Gray, *supra* note 6, at 528-30.

68. See, e.g., Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939 (1951); F. William O'Brien, *The Blaine Amendment 1875-1876*, 41 U. DET. L. REV. 137 (1963); Lash, *supra* note 64, at 1145-50.

69. The Blaine Amendment passed 180 to 7 in the House but fell two votes short of the required two-thirds majority in the Senate, 28 to 16, with 27 Senators absent. Meyer, *supra* note 68, at n.25. Michael Curtis has observed that intervening judicial decisions make it hazardous to use legislative arguments made in 1876 to shed light on the intent of the drafters of the Fourteenth Amendment in 1868. See CURTIS, *supra* note 41, at 169-70.

70. See *United States v. Cruikshank*, 92 U.S. 542 (1875); *Walker v. Sauvinet*, 92 U.S. 90 (1875); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

71. Michael J. Mannheimer, *Equal Protection Principles and the Establishment Clause: Equal Participation in the Community as the Central Link*, 69 TEMPLE L.

Upon close examination, the Blaine Amendment does not present an impediment to the belief that the Fourteenth Amendment incorporates the Religion Clauses of the First Amendment against the states. For example, there is evidence that the contemporary understanding of the Fourteenth Amendment was that it applied the Religion Clauses of the First Amendment to the states. In the Senate, Democratic Senator Eaton argued that the Blaine Amendment was unnecessary since "no state can pass any law respecting religion or prohibiting the free exercise thereof."⁷² According to the House report, there was disagreement as to the necessity of such an amendment since it appeared to be understood that a state could not establish a religion or prohibit the free exercise of religion.⁷³

Additionally, there is strong evidence that the purpose of the Blaine Amendment was not merely to apply the Religion Clauses of the First Amendment to the states. Instead, the proposed amendment was the result of anti-Catholic feelings and was designed to prevent the use of state funds for Roman Catholic schools.⁷⁴ The language of the proposed Blaine Amendment, after modification in the Senate read as follows:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. No public property, and no public revenue . . . shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect . . . shall be taught. . . . This article shall not be construed to prohibit the reading of the Bible in any school or institution.⁷⁵

The purpose of the Blaine Amendment was not to impose First Amendment values on the states but, rather, to keep funds for public education in the hands of the Protestant public schools and out of the hands of Catholic parochial schools.⁷⁶ At the time

REV. 95, n.68 (1996).

72. 4 CONG. REC. 5592 (1876) (remarks of Senator Eaton).

73. See Lash, *supra* note 64, at n.188 (1994) (citing 4 CONG. REC. 5189 (1875)).

74. See Lash, *supra* note 29, at 1146-50.

75. 4 CONG. REC. 5580 (1875).

76. Lash, *supra* note 29, at 1147. Senator Morton claimed that America was a

of the Blaine Amendment, Protestant religious exercises were still common in public schools. However, as growing numbers of immigrants caused the population of Catholics to increase,⁷⁷ Catholic schools were organized and proposals were made to equally fund public and private schools.⁷⁸ With this background, the language of the Senate version of the Blaine Amendment would have denied funds to Catholic schools but, in effect, would have authorized the use of the Protestant Bible in public schools. Lash observes that the adoption of the Blaine Amendment would have had broad ramifications:

By constitutionalizing the use of the Protestant Bible and prohibiting public funds to "sectarian" institutions, the Blaine Amendment would have significantly amended contemporary First Amendment norms. For the first time, the Constitution would have recognized and protected state power to coercively indoctrinate students in the tenets of a particular religion. Not only were such provisions adopted alongside of compulsory education laws, but the day was not far off where anti-Catholic animus would result in the passage of laws that attempted to shut down private schools and *force* attendance at public school.

...

"Protestant country," and warned of a "large and growing class of people in this country who are utterly opposed to our present system of common schools, and who are opposed to any school that does not teach their religion." Lash, *supra* note 29, at 1149-50. Senator Bogy stated that "The Pope, the old Pope of Rome, is to be the great bull that we are all to attack." 4 CONG. REC. 5589 (1876). Opposing the cynical use of religion by the Republicans to support the Blaine Amendment, Senator Saulsberry stated:

When I listened to-day to the debates upon this question, when I heard the appeals that were made by Senators to the religious prejudices and passions of mankind, I trembled for the future of my country. . . . Have not religious persecutions and appeals to religious prejudices stained the earth with blood and wrung from the hearts of millions the deepest agonies? Yet I see springing up in my own country for the base purpose of party, to promote a presidential election, a disposition to drag down the sacred cross itself and make it subservient to party ends. I appeal to Heaven to thwart the purpose of all such partisans!

4 CONG. REC. 5594 (1876).

77. In 1815 there were 13,000 Catholics in the Diocese of New York, which included the entire state of New York and part of New Jersey. By 1826, the number had grown to 150,000 with 25,000 in New York City. Tarr, *supra* note 26, at 91 (citing J. PRATT, RELIGION, POLITICS, AND DIVERSITY: THE CHURCH-STATE SCHEME IN NEW YORK STATE HISTORY 169-70).

78. Tarr, *supra* note 26, at 92.

Given the Blaine Amendment's anti-Catholic animus, as well as its substantial amendment of contemporary nonestablishment principles, the rejection of the Amendment seems rather weak evidence against incorporation in general and the Establishment Clause in particular. Indeed, it seems the opposite. Both the text and the debates over the Amendment indicate that the Establishment Clause was understood as the substantive equal of the Free Exercise Clause, and that the principle of nonestablishment applied at both a state and federal level.⁷⁹

The combined effect of America's experience of disestablishing state religions following the adoption of the First Amendment, the legislative history of the Fourteenth Amendment, and even the later proposed Blaine Amendment all support the Supreme Court's application of the First Amendment to the states. At the time of our country's founding, the potential power of the federal government was frightening, and the Framers perceived it as the principal potential threat to their liberty. The Civil War and its aftermath proved that state governments could be as much a threat to liberty as the federal government. The effect of the adoption of the Fourteenth Amendment was to alter the federalist balance in America so as to protect citizens from state, as well as federal, infringement of liberties, including religious liberty. At the time of the adoption of the Fourteenth Amendment, religious liberty included the right to be free from state-established religions.

III. THE INCORPORATION DOCTRINE AND THE APPLICATION OF THE FIRST AMENDMENT TO THE STATES

Through what has become known as the incorporation doctrine, the Supreme Court has read the Due Process Clause of the Fourteenth Amendment as requiring states to comply with the majority of the Bill of Rights.⁸⁰ However, as seen from the

79. Lash, *supra* note 29, at 1149-50; *see also* Mannheim, *supra* note 71, at n.68 (stating that "[t]he argument that the defeat of the Blaine Amendment implies something about the meaning of the Fourteenth Amendment is unpersuasive").

80. The Supreme Court has made the following portions of the Bill of Rights applicable against the states: First Amendment: *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Everson v. Board of Ed.*, 330 U.S. 1 (1947); *West Virginia State Board of Ed. v. Barnette*, 319 U.S. 624 (1943). Fourth Amendment: *Kerr v. Califor-*

legislative history of the Fourteenth Amendment, the Supreme Court would have been more true to the intent of Congress if the Court had relied upon the Privileges and Immunities Clause as the vehicle to apply the Bill of Rights to the states. Although the evidence is strong that the Privileges and Immunities Clause of the Fourteenth Amendment was intended as a reference to the protections of the Bill of Rights, which were to be made immune from state infringement, the Supreme Court's 1873 decision in the *Slaughter-House Cases*⁸¹ effectively wrote this section out of the Fourteenth Amendment. In this decision, the Supreme Court read the Privileges and Immunities Clause narrowly so as to limit it to a few rights of national citizenship, as distinct from state citizenship.⁸² For deprivations of most personal and fundamental rights, after the *Slaughter-House Cases* decision, the Fourteenth Amendment was ineffective and the aggrieved party was left to look to the state for relief.⁸³

However, the Fourteenth Amendment's broad purpose and language was later revived against state deprivations of rights.

nia, 374 U.S. 23 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961). Fifth Amendment: *Ashe v. Swenson*, 397 U.S. 436 (1970); *Benton v. Maryland*, 395 U.S. 784 (1969) (double jeopardy provision); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against self-incrimination); *Chicago B & Q R.R. Co. v. Chicago*, 166 U.S. 226 (1897) (taking of property without just compensation). Sixth Amendment: *Duncan v. Louisiana*, 391 U.S. 145 (1968) (jury trial in criminal cases); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (speedy trial); *Washington v. Texas*, 388 U.S. 14 (1967) (compulsory process for obtaining witnesses); *Pointer v. Texas*, 380 U.S. 400 (1965) (confrontation of witnesses); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *In re Oliver*, 333 U.S. 257 (1948) (public trial); *Cole v. Arkansas*, 333 U.S. 196 (1948) (notice of charge). Eighth Amendment: *Schilb v. Kuebel*, 404 U.S. 357 (1971) (excessive bail); *Robinson v. California*, 370 U.S. 660, 667 (1962) (cruel and unusual punishment).

81. 83 U.S. (16 Wall.) 36 (1873). In this case, the Privileges and Immunities Clause, contrary to its broad purpose, was read so narrowly as to make it practically a constitutional "dead letter." See also JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 382 (4th ed. 1991) (stating that the *Slaughter-House Cases* "had the effect of eliminating the provision which was both historically and logically the one most likely to have been intended to include within its protections the guarantees of the Bill of Rights"). Leonard Levy describes the *Slaughter-House Cases* as "one of the most tragically wrong opinions ever given by the Court." LEONARD LEVY, *JUDGMENT ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 69 (1972).

82. *Slaughter House Cases*, 83 U.S. at 76-78.

83. *Id.* See, e.g., Robert J. Kaczorowski, *The Chase Court and Fundamental Rights: A Watershed in American Constitutionalism*, 21 N. KY. L. REV. 151, 174-91 (1993); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 937-38 (1986).

In 1908, the Supreme Court concluded that the Due Process Clause of the Fourteenth Amendment forbids states from infringing upon those rights deemed to be "fundamental."⁸⁴ From this beginning, the Court embarked on a journey of protecting fundamental rights from state infringement. These decisions eventually led to the application of the majority of the Bill of Rights to the states.

Three theories have been advanced to justify the application of the Bill of Rights against the states: "fundamental fairness," "selective incorporation," and "total incorporation." Fundamental fairness is the idea that there are certain rights which are "implicit in the concept of ordered liberty."⁸⁵ Pursuant to the fundamental fairness doctrine, the Court does not necessarily apply the precise language of the Bill of Rights against the states.⁸⁶ "Selective incorporation" means literally taking a portion of the Bill of Rights and applying it, as written, as a restriction on the states.⁸⁷ Finally, "total incorporation" is the concept, most closely identified with Justice Hugo Black, which provides that the intent of the Fourteenth Amendment was to apply all of the Bill of Rights to the states.⁸⁸ Initially, the Supreme Court used the fundamental fairness approach to protect certain individual rights against state action.⁸⁹ Later, the Court adopted the selective incorporation approach and applied the precise language of

84. See *Twining v. New Jersey*, 211 U.S. 78, 99-102 (1908). In *Twining*, the Supreme Court refused to use the Fourteenth Amendment to apply any portion of the Bill of Rights against the states. However, the Court acknowledged that "some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action . . . not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law." *Twining*, 211 U.S. at 99.

85. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). For a good discussion of the development of the fundamental fairness doctrine and its application to religion cases, see Poppel, *supra* note 17, at 272-85.

86. See Poppel, *supra* note 17, at 257, n.145 and accompanying text; GERALD GUNTHER, *CONSTITUTIONAL LAW* 428-29 (12th ed. 1991); Jerold H. Israel, *Selective Incorporation: Revisited*, 71 *GEO. L.J.* 253, 255-65 (1982); Louis Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 *YALE L.J.* 74 (1963).

87. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 10.2, at 340-42.

88. *Id.* at 340.

89. Poppel, *supra* note 17, at 256.

portions of the Bill of Rights against the states.⁹⁰ Finally, although the total incorporation doctrine has never been accepted by a majority of the sitting members of the Court,⁹¹ the historical arguments made in favor of total incorporation provide an intellectual foundation for the application of the majority of the Bill of Rights against the states.

Justice Hugo Black always hoped that the Supreme Court would move beyond the "selective incorporation" of certain portions of the Bill of Rights to the "total incorporation" of the entire Bill of Rights against the states.⁹² In his dissent in *Adamson v. California*,⁹³ which he considered his most important opinion,⁹⁴ and also in *Duncan v. Louisiana*,⁹⁵ Justice Black set forth the historical basis for his view that the Fourteenth Amendment made all of the provisions of the Bill of Rights equally applicable to the states.

Justice Black's dissent in *Adamson* generated a debate on incorporation which continues today.⁹⁶ In 1949, Charles Fairman presented an article in the *Stanford Law Review* which criticized Black's historical record relied upon in *Adamson*.⁹⁷ More recently, Raoul Berger and Michael Curtis have engaged in a long-running debate over the incorporation doctrine and the Fourteenth Amendment. These two authors alone have dedicated three books and numerous law review articles to the subject.⁹⁸ Also, there has been scholarly discussion of the appropri-

90. Poppel, *supra* note 17, at 259-60.

91. Over time, probably six or seven justices accepted the total incorporation theory. However, never more than four Justices sitting at any one time accepted this doctrine. Israel, *supra* note 86, at 257.

92. JAMES F. SIMON, *THE ANTAGONISTS* 246 (1989).

93. 332 U.S. 46, 68-123 (1947).

94. See, e.g., HUGO L. BLACK & ELIZABETH BLACK, *MR. JUSTICE AND MRS. BLACK* 73 (1986) (stating that Justice Black considered the *Adamson* dissent his "most powerful—and the one that had the most effect").

95. 391 U.S. 145, 162-171 (1968) (Black, J., concurring).

96. See, e.g., JACOBUS TEN BROEK, *EQUAL JUSTICE UNDER LAW* (Collier Books 1965) (1951) (concluding that the Fourteenth Amendment intended to apply natural rights to the states, some of which are contained in the Bill of Rights); Howard Jay Graham, *Our "Declaratory" Fourteenth Amendment*, 7 *STAN. L. REV.* 3 (1954) (arguing in favor of selective incorporation of the Bill of Rights).

97. See Fairman, *supra* note 14.

98. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (Liberty Fund 1997) (1977); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS*

ateness of the incorporation of the Establishment Clause of the First Amendment against the States.⁹⁹ However, one commentator has noted that the incorporation of the Establishment Clause against the states is in keeping with the language of the Fourteenth Amendment and the intent of its drafters "to do what the Bill of Rights had not done—to give individual citizens federally enforceable constitutional rights against the states."¹⁰⁰

A. *Fundamental Fairness and Religion*

The fundamental fairness doctrine relies upon the Due Process Clause of the Fourteenth Amendment and prohibits state action which violates an individual's "fundamental" rights. Due process relies upon "principles of liberty and justice"¹⁰¹ that are "implicit in the concept of ordered liberty."¹⁰² Due process has also been described as protecting those rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."¹⁰³ The fundamental fairness doctrine, with its roots extending in our English legal heritage back to the Magna Carta, is a flexible standard of due process that is more concerned with fairness than procedure. Justice Frankfurter described due process as "perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of

(1986); RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989); Michael Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980); Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981); Michael Kent Curtis, *Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89 (1982); Raoul Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response*, 44 OHIO ST. L.J. 1 (1983). See also William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954).

99. See William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191 (1990).

100. Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 415 (1986). For a discussion of returning to the "fundamental fairness" approach as an alternative to the "jot for jot" selective incorporation of the Religion Clauses see Poppel, *supra* note 17, at 276-85.

101. *Hurtado v. California*, 110 U.S. 516, 535 (1884).

102. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

103. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

powerful social standards of a progressive society."¹⁰⁴

The fundamental fairness doctrine was employed by the Supreme Court in its 1884 decision in *Hurtado v. California*.¹⁰⁵ In one of the earliest cases to fully discuss the application of the Fourteenth Amendment's Due Process Clause, the Court rejected Mr. Hurtado's argument that he failed to receive a fair trial because he was prosecuted on the basis of a prosecutor's "information" instead of a grand jury indictment. The majority reasoned that the Due Process Clause protects "not particular forms of procedure, but the very substance of individual rights to life, liberty, and property."¹⁰⁶ The Court's view of "due process" would not be limited by the specific language of the Bill of Rights or even judicial history so long as the government practice preserved the fundamental principles of liberty and justice.¹⁰⁷ Since the prosecution of Mr. Hurtado pursuant to the information, rather than the indictment, met this standard, the Court refused to reverse the conviction. In his dissent, Justice Harlan offered his conclusion that the Bill of Rights is the appropriate place to look to find the fundamental principles of liberty and justice.¹⁰⁸ In cases involving life, liberty or property, Justice Harlan insisted that the Fourteenth Amendment imposed the same restrictions on the states as on the federal government.¹⁰⁹

The Court's fundamental fairness approach is also seen in *Powell v. Alabama*¹¹⁰ where nine young illiterate blacks were tried and convicted of rape, a capital offense. The Supreme Court found that the defendants were denied due process as

104. *Griffin v. Illinois*, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring).

105. 110 U.S. 516 (1884).

106. *Hurtado*, 110 U.S. at 532.

107. *Id.* at 534-35.

108. *Id.* at 546 (Harlan, J., dissenting).

109. *Id.* at 546-58 (Harlan, J., dissenting). In *Hurtado*, the majority supported its position by noting that the Fifth Amendment contains both a Due Process Clause and a specific guaranty of indictment by grand jury in capital or infamous crimes. Therefore, the majority concluded that the Due Process Clause did not include the guaranty of a grand jury indictment since that would make the Grand Jury Clause of the Fifth Amendment superfluous. *Id.* at 534-35. This narrow view of the Due Process Clause was subsequently discarded as the Court began to find that fundamental fairness places limits on states, even where the guaranty of protection is also found to be explicitly provided for in the Bill of Rights.

110. 287 U.S. 45 (1932).

they were unable to secure counsel of their own choice and that the trial judge failed to appoint counsel who would provide effective representation.¹¹¹ The Court's ruling was not based upon a strict reading of the Sixth Amendment, but on the long history of right to counsel in capital cases in America.¹¹² Because the right to counsel was included in the due process requirement of a fair hearing, the defendants' convictions were reversed.¹¹³

Justice Cardozo's 1937 opinion in *Palko v. Connecticut*¹¹⁴ provides the seminal explanation of the Court's view that the Due Process Clause of the Fourteenth Amendment protects certain "fundamental" rights from infringement by the states. In *Palko*, the State of Connecticut successfully appealed after Palko had been convicted of second degree murder. At his second trial on the same charges, Palko was convicted of first degree murder. Before the Supreme Court, Palko argued that the Fifth Amendment's bar against double jeopardy also applied to the state of Connecticut, by virtue of the Fourteenth Amendment. Palko pursued a broad argument that "[w]hatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state."¹¹⁵

Although the Court rejected Palko's suggestion to totally "incorporate" the Bill of Rights against the states, Justice Cardozo articulated the basis for the fundamental fairness doctrine by stating that there are certain categories of rights which reach "the very essence of a scheme of ordered liberty."¹¹⁶ Because of their importance, states may not infringe upon these rights. However, because the Court looked to the totality of the circumstances to determine if the proceedings were fair, the Court upheld the conviction even though a strict reading of the Double Jeopardy Clause of the Fifth Amendment would have required the opposite result.¹¹⁷

111. *Powell*, 287 U.S. at 71.

112. *Id.* at 68-71.

113. *Id.* at 73.

114. 302 U.S. 319 (1937).

115. *Palko*, 302 U.S. at 323.

116. *Id.* at 325.

117. *Id.* at 328. *Palko* was overruled in *Benton v. Maryland*, 395 U.S. 784 (1969), where the Court discarded the "fundamental fairness" test in favor of selective incorporation. The *Benton* court held that where a guaranty of the Bill of Rights was

In his article, Mr. Gray focuses on the Supreme Court's supposed error in applying the Establishment Clause to the States.¹¹⁸ There is a long history, however, of the Supreme Court protecting citizens' rights in the arena of religion from infringement by the States. In 1923, the Supreme Court used a fundamental fairness analysis in recognizing that the Fourteenth Amendment protects a teacher's liberty to teach a language other than English to students who had not yet reached the eighth grade.¹¹⁹ In dicta, the Supreme Court commented that the Fourteenth Amendment's protection of individual liberty prevents the state from infringing upon the right "to worship God according to the dictates of his own conscience."¹²⁰

In 1934, the concept that the states must respect the religious liberty of their citizens was confirmed in *Hamilton v. Regents of the University of California*,¹²¹ where a student challenged a school policy that mandated military drill exercises. Hamilton objected to the policy, claiming that his religious beliefs prevented his participation in the military exercises. His beliefs, he argued, were protected from the state action of the University in light of the First Amendment, as applied to the states by the Fourteenth Amendment. Although ultimately ruling against Hamilton,¹²² the Supreme Court stated that the Fourteenth Amendment's protection of the "liberty" interests of state citizens included "the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections to the order prescribing military training."¹²³

Mr. Gray never addresses the express language of the Fourteenth Amendment which provides that a citizen's "liberty" will not be infringed by the state without due process. Why should

"fundamental to the American scheme of justice' . . . the same constitutional standards apply against both the State and Federal Governments." *Benton*, 395 U.S. at 795 (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)).

118. Gray, *supra* note 6, at 530-40.

119. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

120. *Meyer*, 262 U.S. at 399. See Poppel, *supra* note 17, at 258.

121. 293 U.S. 245 (1934).

122. Because Hamilton voluntarily chose to enroll at the University of California, the Supreme Court held that he was not entitled to an exemption from military training. *Hamilton*, 293 U.S. at 265.

123. *Id.* at 262. See Poppel, *supra* note 17, at 258-59.

liberty not include a person's religious beliefs? As Justice Cardozo stated in *Hamilton*, "I assume for present purposes that the religious liberty protected by the First Amendment against invasion by the nation is protected by the Fourteenth Amendment against invasion by the states."¹²⁴ Thus, even if the Court had never moved beyond its fundamental fairness approach, the states would still be restricted from actions which infringe upon religious liberty.

B. *Selective Incorporation and Religion*

Much of Mr. Gray's attack on the judiciary may be characterized as criticism of judges who impose their personal viewpoints under the pretense of interpreting the Constitution. Justice Hugo Black also opposed free-wheeling judges who could impose their will without restraint from the literal language of the Constitution.¹²⁵ That is why he preferred for the Court to base its rulings on the precise language of the Bill of Rights, rather than the flexible concept of "due process."¹²⁶ While the Supreme Court has never accepted Justice Black's view that the Fourteenth Amendment makes the entire Bill of Rights applicable to the states, the Court has moved from the "fundamental fairness" approach to the "selective incorporation" of portions of the Bill of Rights against the states. This adaptation has the benefit of providing specific language from the Constitution which must be interpreted by the Courts. Although the language of the Bill of Rights is broad, its protections are much more settled than the flexible standard of due process. Additionally, more than two hundred years of constitutional case law prevents judges from issuing rulings based solely upon personal predilections.

The Supreme Court has explicitly incorporated the two

124. *Hamilton*, 293 U.S. at 265 (Cardozo, J., concurring). Stuart D. Poppel presents a modified incorporation proposal, based upon the fundamental fairness doctrine, which would incorporate the religious freedom interests implicit in the Establishment Clause to the states. Poppel, *supra* note 17, at 285.

125. See *Duncan v. Louisiana*, 391 U.S. 145, 168 (1968) (Black, J., concurring); *Adamson v. California*, 332 U.S. 46, 70 (1947) (Black, J., dissenting).

126. See *Duncan*, 391 U.S. at 168 (Black, J., concurring); *Adamson*, 332 U.S. at 70 (Black, J., dissenting).

religion clauses of the First Amendment against the states by the vehicle of the Due Process Clause of the Fourteenth Amendment.¹²⁷ The Free Exercise Clause was incorporated in *Cantwell v. Connecticut*,¹²⁸ and the Establishment Clause was incorporated in *Everson v. Board of Education*.¹²⁹ In each of these cases, the Court incorporated the clauses from the First Amendment "jot for jot," applying the literal language of the Religion Clauses against the states.¹³⁰

In *Cantwell v. Connecticut*, Newton Cantwell and his two sons were Jehovah's Witnesses. They were arrested in New Haven, Connecticut, and charged with inciting a breach of the peace. The arrest followed their going from house to house in a Catholic neighborhood and playing a phonograph record which included an attack on the Catholic religion. After being convicted, they appealed and argued that the convictions violated the Due Process Clause of the Fourteenth Amendment because they were denied their freedom of speech and prohibited from the free exercise of their religion.

The United States Supreme Court held that the Connecticut statute deprived the Cantwells of their liberty without due process of law in contravention of the Fourteenth Amendment.¹³¹ The Court stated the following:

We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental

127. All state church establishments ended well prior to the passage of the Fourteenth Amendment. Connecticut disestablished in 1818, New Hampshire in 1819, and Massachusetts was the last to disestablish in 1833. Vermont was added as a state after 1787 and did not disestablish until 1807. See ARLAN M. ADAMS & CHARLES M. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* 20 (1990).

128. 310 U.S. 296 (1940).

129. 330 U.S. 1 (1946).

130. See Poppell, *supra* note 17, at 259-60. Similarly, in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), the petitioners were Jehovah's Witnesses who went from door to door distributing literature and soliciting purchases for religious books and pamphlets. Because the petitioners did not obtain a license as required by the City of Jeannette, Pennsylvania, they were convicted and fined for violating the ordinance. The United States Supreme Court, speaking through Justice Douglas, stated that the tax on exercising religious freedom violated "[t]he First Amendment, which the Fourteenth makes applicable to the states." *Murdock*, 319 U.S. at 108.

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

concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the States as incompetent as Congress to enact such laws.¹³²

In *Everson*, Justice Hugo Black, writing for the Court, addressed a challenge to a New Jersey township's policy of reimbursement for bus fares incurred by parents in transporting their children to Catholic schools.¹³³ Although in the five-four decision the Supreme Court rejected the constitutional challenge, all nine Justices agreed upon the broad scope and application of the Establishment Clause.¹³⁴ The Court agreed that the Due Process Clause of the Fourteenth Amendment makes the Establishment Clause applicable to the states and forbids a state from enacting laws that favor religion over non-religion or from providing any state support for religion.¹³⁵

In *Everson*, Justice Black recounted the history leading up to the First Amendment and noted that the early settlers of this country came from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches.¹³⁶ Justice Black stated the following:

The "establishment of religion" clause of the First Amendment means at least this: Neither a State nor the Federal Government

132. *Id.*

133. *Everson*, 330 U.S. at 3.

134. *Id.* at 14-15, 26-63.

135. *Id.* at 14-15.

136. Justice Black noted the abuses which have historically occurred when government has been joined with religion:

With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.

Id. at 8-9.

can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.¹³⁷

Following its decisions in *Cantwell* and *Everson*, the Supreme Court has not wavered from its commitment to the application of the Religion Clauses to the states. In *Illinois ex. rel. McCollum v. Board of Education*,¹³⁸ the Supreme Court addressed a challenge to religious teachers coming into public school buildings during regular school hours to provide religious instruction. Justice Black concluded that students compelled by law to go to school for secular education could not be released from school under the condition that they attend religious classes.¹³⁹ Addressing a challenge to the incorporation of the Establishment Clause, Justice Black, speaking for the Court, refused to overrule the *Everson* decision which incorporated the Establishment Clause against the states.¹⁴⁰

In 1961, the Supreme Court affirmed the constitutional validity of Maryland's criminal statutes commonly known as Sunday Blue Laws.¹⁴¹ Despite his well-known disagreement with Justice Hugo Black's total incorporation theory, Justice Frankfurter's concurring opinion in *McGowan v. Maryland* demonstrates his acceptance of the idea that the Due Process Clause of the Fourteenth Amendment precludes states from infringing upon religious liberty:

The general principles of church-state separation were found to be included in the [Fourteenth] Amendment's Due Process Clause in view of the meaning which the presuppositions of our society infuse into the concept of "liberty" protected by the clause. This is the source of the limitations imposed upon the States. To the ex-

137. *Id.*

138. 333 U.S. 203 (1948).

139. *McCollum*, 333 U.S. at 209-10.

140. *Id.* at 211.

141. *McGowan v. Maryland*, 366 U.S. 420 (1961). The Court concluded that Sunday closing laws had a valid secular purpose, i.e., to provide a uniform day of rest. *McGowan*, 366 U.S. at 452.

tent that those limitations are akin to the restrictions which the First Amendment places upon the action of the central government, it is because—as with the freedom of thought and speech of which Mr. Justice Cardozo spoke in *Palko v. Connecticut*, (citation omitted) it is accurate to say concerning the principle that a government must neither establish nor suppress religious belief, that “With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal.”¹⁴²

In yet another case, the Supreme Court refused to back away from the application of the Religion Clauses to the states. In *Torcaso v. Watkins*,¹⁴³ Torcaso was appointed to the office of notary public by the governor of Maryland but was refused a commission because he would not declare his belief in God. He then brought suit charging that the state’s requirement that he declare this belief violated the First and Fourteenth Amendments to the United States Constitution. In striking down this state requirement, the Court stated the following:

We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person “to profess a belief or disbelief in any religion.” Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.¹⁴⁴

Mr. Gray contends that the Court has never provided a solid rationale for the incorporation of the Religion Clauses against the States.¹⁴⁵ However, Mr. Gray ignores the concurring opinion of Justice Brennan in *Abington School District v. Schempp*¹⁴⁶ where Justice Brennan candidly acknowledged that there is “some support in history” for the position that the First Amendment’s ban against establishment of religion, as originally

142. *Id.* at 460-61 (Frankfurter, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 327 (1937)).

143. 367 U.S. 488 (1961).

144. *Torcaso*, 367 U.S. at 495.

145. Gray, *supra* note 6, at 530-40.

146. 374 U.S. 203 (1963). In this case, the Court held that a public school’s practice of daily Bible reading and prayer violates the Establishment Clause. See also *Engel v. Vitale*, 370 U.S. 421 (1962) (striking down school prayer on the authority of the Establishment Clause as applied to the states by the Fourteenth Amendment).

written, cannot apply to the states.¹⁴⁷ However, Justice Brennan observed that the last of the state-established churches was dissolved more than three decades prior to the Fourteenth Amendment's ratification.¹⁴⁸ Therefore, the protection of state churches from federal encroachment was not a concern of the drafters of the Fourteenth Amendment. Justice Brennan then stated the following:

It has also been suggested that the "liberty" guaranteed by the Fourteenth Amendment logically cannot absorb the Establishment Clause because that clause is not one of the provisions of the Bill of Rights which in turn protects a "freedom" of the individual (citation omitted). The fallacy in this contention, I think, is that it underestimates the role of the Establishment Clause as a co-guarantor, with the Free Exercise Clause, of religious liberty. The Framers did not entrust the liberty of religious beliefs to either clause alone.¹⁴⁹

Mr. Gray's arguments reiterate the statements made by former Attorney General Edwin Meese in 1985. In a well-publicized speech before the American Bar Association, Mr. Meese contended that the Supreme Court's theory of incorporation was contrary to the principle of federalism.¹⁵⁰ Justice Stevens, who authored the Supreme Court's decision in *Wallace v. Jaffree*,¹⁵¹ responded by concluding that Mr. Meese's view of the incorporation doctrine was indefensible. Justice Stevens commented that

147. *Schempp*, 374 U.S. at 254 (Brennan, J., concurring).

148. Justice Brennan noted that more relevant inquiry regarding the incorporation of the First Amendment is the conditions at the time of the drafting of the Fourteenth Amendment. *Id.* at 255, n.20 (citing Note, *State Sunday Laws and the Religious Guarantees of the Federal Constitution*, 73 HARV. L. REV. 729, 739, n.79 (1960)).

149. *Id.* at 256. Justice Brennan also rejected arguments that the proposed and rejected Blaine Amendment demonstrates that the Fourteenth Amendment was never intended to incorporate the Establishment Clause. Justice Brennan stated that even if the draftsmen of the Fourteenth Amendment did not see the immediate connection between the protections against State action infringing personal liberty and the guaranties of the First Amendment, "it is certainly too late in the day to suggest that their assumed inattention to the question dilutes the force of these constitutional guaranties in their application to the States." *Id.* at 256-57.

150. Attorney General Edwin Meese III, speech before the American Bar Association, July 9, 1985, reprinted in THE FEDERALIST SOCIETY, THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 8 (1986).

151. 472 U.S. 38 (1985).

"no Justice who has sat on the Supreme Court in the last 60 years" had questioned the application of the First Amendment to the states through the Due Process Clause of the Fourteenth Amendment.¹⁵²

The Supreme Court's incorporation of the majority of the Bill of Rights to the states, through the selective incorporation approach, has been consistent with the Fourteenth Amendment's goal of restricting the states from infringing upon civil liberties. America's experience from the founding of the United States to the Civil War demonstrates the need to place limits on the power of the states. The Fourteenth Amendment did so.

Regarding the Religion Clauses of the First Amendment, Mr. Gray's primary argument is that the Establishment Clause must be read as a statement of federalism, leaving the states a free hand to dictate on religious matters within the state's boundaries.¹⁵³ However, his argument ignores the Fourteenth Amendment's drastic impact on this federalism balance.¹⁵⁴ Because of the intent of the Fourteenth Amendment to place greater restrictions on the states, the Court has been justified in applying the Establishment Clause to the states.

Finally, Mr. Gray ignores the Free Exercise Clause of the First Amendment. In contrast to the Establishment Clause,

152. Stuart Taylor, Jr., *Administration Trolling for Constitutional Debate*, N.Y. TIMES, Oct. 28, 1985, at A12. Justice William Brennan also criticized Mr. Meese's position that the Supreme Court must strictly interpret the Constitution according to its "original intent." In a speech at Georgetown University, Justice Brennan stated:

There are those who find legitimacy in fidelity to what they call the "intentions of the Framers." In its most doctrinaire incarnation, this view demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them. It is a view that feigns self-effacing deference to the specific judgments of those who forged our . . . social compact. But in truth it is little more than arrogance cloaked in humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions.

Justice William J. Brennan, Jr., speech at Georgetown University, Oct. 12, 1985, reprinted in THE FEDERALIST SOCIETY, THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 14 (1986). For a discussion of the debate over the doctrine of original intent in judicial review and Judge Hand's opinion in *Wallace v. Jaffree*, see Roald Mykkeltvedt & Donald Wagner, *The Contemporary Debate Over the Doctrine of Original Intentions: Origin, Explication, and Commentary By Publius*, 21 CUMB. L. REV. 101 (1990-91).

153. Gray, *supra* note 6, at 517-20.

154. See discussion *supra* Part II.

there is no federalism argument to be made as to the Free Exercise Clause. Instead, the Free Exercise Clause is properly read as guaranteeing a substantive right to believe what one chooses free from infringement by the state.¹⁵⁵ The Free Exercise Clause, in conjunction with the Fourteenth Amendment, logically limits states from taking a position on religious matters which inhibits religious liberty. The Fourteenth Amendment's goal was to bring equal status to members of a minority race. Likewise, the Free Exercise Clause protects minority religious views. In light of the obvious compatibility of purposes between the Free Exercise Clause and the Fourteenth Amendment, Mr. Gray offers no persuasive argument to oppose the incorporation of the Free Exercise Clause against the states.

IV. *WALLACE V. JAFFREE* CONFIRMS THE SUPREME COURT'S COMMITMENT TO APPLYING THE ESTABLISHMENT CLAUSE TO THE STATES

Mr. Gray ignores the Supreme Court's decision in *Wallace v. Jaffree*¹⁵⁶ which refused to question the incorporation of the Establishment Clause to the states. This case presented the Supreme Court with the perfect opportunity to reexamine the incorporation of the Establishment Clause, if the Court had seen any reason to do so. The opportunity arose after the trial court rejected nearly forty years of Supreme Court precedent and concluded that the Establishment Clause was never intended to be applied to the states.¹⁵⁷ Mr. Gray's article, however, omits any discussion of the Supreme Court's decision affirming the Eleventh Circuit's prompt reversal of the district court. In *Wallace v. Jaffree*,¹⁵⁸ not a single Justice on the Supreme Court expressed any desire to reconsider the Supreme Court decisions which have consistently applied the Establishment Clause to the states.

155. Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 711-13 (1997); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1159 (1991).

156. 472 U.S. 38 (1985).

157. *Jaffree v. Board of Sch. Comm'rs*, 554 F. Supp. 1104, 1113 (S.D. Ala. 1983).

158. 472 U.S. 38 (1985).

A. *The District Court's Decision*

Mr. Jaffree's original complaint was filed in response to organized religious activities at his children's school in Mobile County, Alabama. Mr. Jaffree sought a declaration that prayers initiated by the public school teachers violated the First Amendment of the United States Constitution. In addition to challenging the offering of prayers in a public school, Mr. Jaffree challenged three Alabama statutes: section 16-1-20, enacted in 1978, which provided for a one minute period of silence "for meditation"; section 16-1-20.1, enacted in 1981, which authorized a period of silence "for meditation or voluntary prayer"; and section 16-1-20.2, enacted in 1982, which authorized teachers to lead "willing students" in a prescribed prayer to "Almighty God . . . the Creator and Supreme Judge of the World."

At the preliminary injunction stage, Chief District Judge Brevard Hand initially held that sections 16-1-20.1 and 16-1-20.2 were invalid because they evidenced a purpose by the State of Alabama to encourage religious activity.¹⁵⁹ At the subsequent trial on the merits, evidence was adduced that teachers led students in a daily blessing and the Lord's Prayer. However, Judge Hand, surprised most observers by reversing course and ruling against Mr. Jaffree.¹⁶⁰ Relying heavily on Charles Fairman's 1949 law review article, Judge Hand decided that the United States Supreme Court had erred in its First Amendment jurisprudence that used the Fourteenth Amendment to apply the First Amendment to the states.¹⁶¹ After outlining the debates surrounding the drafting of the Fourteenth Amendment, its ratification, and the subsequent rejection of the Blaine Amendment, Judge Hand concluded that the Fourteenth Amendment was never intended to apply any of the Bill of Rights to the

159. *Jaffree v. James*, 544 F. Supp. 727, 732 (S.D. Ala. 1982). The Court upheld ALA. CODE § 16-1-20, and Jaffree did not challenge this decision.

160. *Jaffree*, 554 F. Supp. at 1113.

161. *Id.* at 1128-30. Interestingly, Mr. Fairman's article quotes a campaign speech of John Bingham in which Bingham declared that the Fourteenth Amendment included the rights of free speech and religion. Judge Hand did not note this evidence in his opinion. See Fairman, *supra* note 14, at 26. Charles Fairman's work has been criticized by several authors cited herein, including William Crosskey, Michael Curtis, and Richard Aynes.

states.¹⁶² Thus, Judge Hand dismissed Mr. Jaffree's complaint.¹⁶³ Ironically, Charles Fairman, whose article provides the basis for Judge Hand's decision, concluded that the Fourteenth Amendment was intended to protect from state action those rights implicit in the concept of ordered liberty.¹⁶⁴ Thus, Judge Hand's conclusion contradicted the conclusion reached by his primary historical source.¹⁶⁵

Judge Hand's decision was handed down on January 14, 1983. This unusual opinion, which rejected binding Supreme Court precedent, did not stand for long. On February 2, 1983, an application for stay of Judge Hand's opinion was filed and granted by Supreme Court Justice Lewis Powell, pending an opportunity for the parties to fully respond.¹⁶⁶ After receiving complete responses, on February 11, 1983, Justice Powell granted a stay of Judge Hand's opinion.¹⁶⁷ Justice Powell observed that the District Court was bound by the Supreme Court's previous decisions which held that the Establishment Clause, as made applicable to the states by the Fourteenth Amendment, prohibits a state from authorizing prayer in the public schools.¹⁶⁸

B. The Eleventh Circuit Reverses Judge Hand's Decision

On May 12, 1983, the Eleventh Circuit issued its opinion in the *Jaffree* case and reversed Judge Hand's opinion.¹⁶⁹ The Eleventh Circuit agreed with Justice Powell that the Supreme

162. Judge Hand wrote that "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." *Jaffree*, 554 F. Supp. at 1128.

163. *Id.*

164. Fairman, *supra* note 14, at 139.

165. See Michael Kent Curtis, *Judge Hand's History: An Analysis of History and Method in Jaffree v. Board of School Comm'rs of Mobile County*, 86 W. VA. L. REV. 109, 111 (1983).

166. *Jaffree v. Board of Sch. Comm'rs*, 459 U.S. 1314 (1983).

167. *Jaffree*, 459 U.S. at 1314.

168. *Id.* at 1315-16 (citing *Engel v. Vitale*, 370 U.S. 421 (1962); *Murray v. Curlett*, *decided with Abington School Dist. v. Schempp*, 374 U.S. 203 (1963)).

169. *Jaffree v. Wallace*, 705 F.2d 1526, 1536 (11th Cir. 1983). The Eleventh Circuit concluded that both ALA. CODE § 16-1-20.1 and § 16-1-20.2 were unconstitutional. *Jaffree*, 705 F.2d at 1535-36.

Court's Establishment Clause cases were clear and controlling on the facts as presented to Judge Hand.¹⁷⁰ The Eleventh Circuit noted that, on more than one occasion, the Supreme Court had considered the same historical arguments presented by Judge Hand in his opinion, including the argument that the failure to adopt the Blaine Amendment undermines the incorporation doctrine.¹⁷¹ However, time and again, these same arguments had been rejected by the Supreme Court.¹⁷² While acknowledging the extensive scholarly debate over the interplay between the First and Fourteenth Amendments, the Eleventh Circuit stated:

The important point is: *the Supreme Court has considered and decided the historical implications surrounding the establishment clause.* The Supreme Court has concluded that its present interpretation of the first and fourteenth amendments is consistent with the historical evidence.

Under our form of government and long established law and custom, the Supreme Court is the ultimate authority on the interpretation of our Constitution and laws; its interpretations may not be disregarded.¹⁷³

C. The Supreme Court's Decision Confirms the Incorporation of the Establishment Clause as a Restriction on the States

On appeal from the Eleventh Circuit, the United States Supreme Court addressed the Alabama statute which provided for a period of silence "for meditation or voluntary prayer."¹⁷⁴ Striking down the Alabama statute on the authority of the Establishment Clause, the Supreme Court found that there was no

170. *Id.* at 1532-33.

171. *Id.* at 1530-32.

172. *Id.* at 1530-32. The Eleventh Circuit noted that the Supreme Court had considered and rejected arguments that the failure to adopt the Blaine Amendment undercut the incorporation of the First Amendment. *Id.* at 1531 (citing *McCullom v. Illinois*, 333 U.S. 203 (1948) and *McGowan v. Maryland*, 366 U.S. 420 (1961)).

173. *Jaffree*, 705 F.2d at 1532.

174. The Supreme Court already upheld the Eleventh Circuit's decision that ALA. CODE § 16-1-20.2 is unconstitutional in *Wallace v. Jaffree*, 466 U.S. 924 (1984). Thus, the sole issue before the Court was the constitutional validity of section 16-1-20.1.

secular purpose to the statute, and that its clear intent was to endorse prayer activity.¹⁷⁵

Mr. Gray states that the Supreme Court in *Wallace v. Jaffree* "did not address the merits of the district court's opinion wherein it soundly proved that the Fourteenth Amendment was never intended to be applied against the states."¹⁷⁶ Mr. Gray has conspicuously ignored the clear language of the Supreme Court's majority opinion in *Wallace v. Jaffree*, which rejects the rationale for Judge Hand's opinion.¹⁷⁷ Justice Stevens, speaking for the Court, noted that Judge Hand dismissed Jaffree's challenge to the Alabama statute based on his conclusion that the Establishment Clause did not prevent the states from establishing a religion.¹⁷⁸ Justice Stevens then stated:

Our unanimous affirmance of the Court of Appeals' judgment concerning § 16-1-20.2 makes it unnecessary to comment at length on the District Court's remarkable conclusion that the Federal Constitution imposes no obstacle to Alabama's establishment of a state religion. Before analyzing the precise issue that is presented to us, *it is nevertheless appropriate to recall how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States.*

As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience. Until the Fourteenth Amendment was added to the Constitution, the First Amendment's restraints on the exercise of federal power simply did not apply to the States. *But when the Constitution was amended to prohibit any State from depriving any person of liberty without due process of law, that Amendment imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power. This Court has confirmed and endorsed this elementary proposition of law time and time again.*¹⁷⁹

175. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

176. Gray, *supra* note 6, at n.46.

177. *Wallace*, 472 U.S. at 45.

178. *Id.*

179. *Id.* at 48-49 (emphasis added) (footnotes omitted).

In her concurrence, Justice O'Connor stated that the First Amendment, "coupled with the Fourteenth Amendment's guarantee of ordered liberty, precludes both the Nation and the States from making any law respecting an establishment of religion."¹⁸⁰

Three members of the Supreme Court dissented in *Jaffree*. Chief Justice Burger and Justice White made no attempt to challenge the Court's previous decisions applying the Establishment Clause to the states.¹⁸¹ Justice Rehnquist, on the other hand, used his dissenting opinion to undertake a full review of the history of the Establishment Clause.¹⁸² Although he described the incorporation of the First Amendment through the Fourteenth Amendment as "truly remarkable,"¹⁸³ Justice Rehnquist focused his opinion on the proper reading of the Establishment Clause. Instead of the metaphorical "wall of separation" between church and State, Justice Rehnquist concluded that the Founders intended for the Establishment Clause to prevent the federal government from establishing a national church or preferring one religious denomination over another.¹⁸⁴ There is nothing in Justice Rehnquist's opinion to sug-

180. *Id.* at 67. Justice O'Connor, now known as the chief proponent of the "endorsement" test for evaluating Establishment Clause claims, explained the basis for this test. See Brian T. Coolidge, *From Mount Sinai to the Courtroom: Why Courtroom Displays of the Ten Commandments and Other Religious Texts Violate the Establishment Clause*, 39 S. TEX. L. REV. 101, 105 (1997). Under an endorsement test, the "religious liberty" which is protected both by the Establishment Clause and the Fourteenth Amendment is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Justice O'Connor states that government action which endorses religion or a particular religious practice is invalid because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring) (citing *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

181. *See id.* at 84-91.

182. *See id.* at 90-114.

183. *Id.* at 99.

184. *Id.* at 106. In note 109 of his article, Mr. Gray makes a quantum leap by concluding that a single dissent of Justice Scalia implicitly suggests that the Fourteenth Amendment may not apply the Establishment Clause against the states. I will let the reader draw his own conclusion as to Mr. Gray's judgment of Justice Scalia's statement. However, Mr. Gray ignores the Supreme Court's decision authored by Justice Scalia in *Capital Square Review and Advisory Board v. Pinette*,

gest that he had any intention of re-examining the incorporation of the First Amendment against the states. Instead, Justice Rehnquist accepted without challenge the incorporation of the First Amendment and focused his comments on the proper scope of application for the Establishment Clause:

Given the "incorporation" of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson*, States are prohibited as well from establishing a religion or discriminating between sects.¹⁸⁵

In *Jaffree*, the Supreme Court was provided with the perfect opportunity to re-examine the appropriateness of incorporating the Establishment Clause against the states. Chief District Judge Brevard Hand's opinion rested squarely on the conclusion that the Fourteenth Amendment could not apply the Establishment Clause as a limitation on the states. However, not a single Supreme Court Justice accepted the historical arguments made by Judge Hand which are now repeated by Mr. Gray. Given the Supreme Court's recent rejection of these identical arguments, Mr. Gray's insistence on arguing that the Fourteenth Amendment does not apply to the Establishment Clause to the states is an exercise in futility.¹⁸⁶

V. THE SUPREME COURT'S VIEW OF THE ESTABLISHMENT CLAUSE

The Supreme Court has taken a broad separationist view of the Establishment Clause and has interpreted the Establishment Clause to prevent both the state and federal governments

515 U.S. 753 (1995). In *Capital Square*, Justice Scalia, speaking for the Court, began the opinion by stating that "[t]he Establishment Clause of the First Amendment, made binding upon the States through the Fourteenth Amendment, provides that government 'shall make no law respecting an establishment of religion.'" *Capital Square*, 515 U.S. at 757. Contrary to Mr. Gray's implication, Justice Scalia explicitly accepted the application of the First Amendment to the states in *Capital Square*. *Id.*

185. *Wallace*, 472 U.S. at 113 (Rehnquist, J., dissenting). See Conkle, *supra* note 16, at 1131.

186. Even before the Supreme Court's decision in *Wallace v. Jaffree*, one commentator observed that "[i]t is probably much too late to challenge the legitimacy of the application of the religion clauses of the first amendment to the states." Philip B. Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U.L. REV. 1, 4 (1984).

from preferring one religion over another.¹⁸⁷ By rejecting arguments that the Establishment Clause only prevents the formal establishment of a religion, the Court's approach is consistent with the views of Thomas Jefferson and James Madison, that government and religion should operate in separate spheres.¹⁸⁸

In 1971, the Supreme Court established its well-known three part test in *Lemon v. Kurtzman*.¹⁸⁹ Pursuant to this test, the Court will hold unconstitutional a governmental practice which fails any of the prongs of this test: (1) The practice must have a secular legislative purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) the practice must not foster an excessive government entanglement with religion.¹⁹⁰

Justice O'Connor has gained support among members of the Court in an attempt to refine the "purpose" and "effect" prongs of the *Lemon* test. According to Justice O'Connor, the relevant inquiry is whether the challenged government activity has either the purpose or effect of endorsing or disapproving of religion.¹⁹¹ Such an inquiry helps identify those governmental activities which "intentionally or unintentionally . . . make religion relevant, in reality or public perception, to status in the political community."¹⁹² It is these governmental activities that the Establishment Clause intended to strictly prohibit.¹⁹³ Justice O'Connor's "endorsement test" has the salutary goal of preventing the exclusion of any person from the political process because of that person's religious views.¹⁹⁴

187. *Jaffree*, 472 U.S. at 49.

188. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (O'Connor, J., concurring).

189. 403 U.S. 602 (1971).

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

191. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

192. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). See also Steven D. Smith, *Symbols, Perception and Doctrinal Illusions: Establishing Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987) (criticizing the endorsement test). Justice Kennedy has proposed that "coercion," rather than endorsement, be the test employed in Establishment Clause cases. For a review of Justice Kennedy's proposal see Elizabeth B. Brandt, *Lee v. Weisman: A New Age for Establishment Clause Jurisprudence?* 23 GOLDEN GATE U. L. REV. 535, 558-62 (1993).

193. *Lynch*, 465 U.S. at 687-88 (O'Connor, J., concurring).

194. Justice O'Connor's interpretation of the Establishment Clause is consistent with the Supreme Court's view of the Free Exercise Clause as it encourages political participation of all citizens, regardless of their religious views. See *Torcaso v.*

A. *Applying the Establishment Clause in State of Alabama v. Judge Roy Moore*

Mr. Gray and Governor James have more than a purely academic interest in the history of the First and Fourteenth Amendments. Mr. Gray's attack on the Supreme Court's Fourteenth Amendment jurisprudence is a back-door effort to reach the result that he believes is proper: that the State of Alabama may endorse and promote religion. However, this result is unlikely because of the Supreme Court decisions which apply the First Amendment to the State of Alabama. It is likely that any appellate court that reviews the Judge Roy Moore case will conclude that his actions violate the Establishment Clause and potentially the Free Exercise Clause of the First Amendment.

The evidence in the record before the Alabama Supreme Court reveals that Judge Moore has allowed only Christian prayers to be offered in his courtroom.¹⁹⁵ No representatives from any other faiths have been allowed to participate in this practice.¹⁹⁶ Additionally, there is a display of the King James version of the Ten Commandments on one wall of Judge Moore's courtroom.¹⁹⁷ Judge Charles Price found that there were no other historical or secular documents placed on the same wall with the Ten Commandments.¹⁹⁸ Judge Price concluded that, based upon the Supreme Court's precedent, the practice of offering prayers and the display of the Ten Commandments violates the Establishment Clause as applied to the State of Alabama by the Fourteenth Amendment.¹⁹⁹

Watkins, 367 U.S. 488, 496 (1961) (noting that religious test for public office is an unconstitutional invasion of "freedom of belief and religion").

195. Brief of Appellees at ix, x, State of Alabama ex rel. Fob James v. ACLU, No. 1960927, 1998 WL 21985 (Ala. Jan. 23, 1998).

196. Brief of Appellees at ix, x, State of Alabama ex rel. Fob James v. ACLU (No. 1960927).

197. *Id.* at xv. There are differing versions of the text of the Ten Commandments. The version displayed in Judge Moore's Courtroom contains the text from the King James Bible. For a discussion on the variations in text in the different versions of the Ten Commandments, see W. GUNTER PLAUT, *THE TORAH, A MODERN COMMENTARY* (1981).

198. State of Alabama ex rel. Fob James v. ACLU, No. CV-95-919, slip op. at 2 (Ala. Cir. Ct. Feb 10, 1997).

199. State of Alabama ex rel. Fob James v. ACLU, No. CV-95-919, slip op. at 2.

1. *Posting the Ten Commandments and Offering Christian Prayers in Court Has No Secular Purpose.*—Under the first prong of the *Lemon* test, the governmental practice must have a secular purpose.²⁰⁰ “In applying the purpose test, it is appropriate to ask ‘whether government’s actual purpose is to endorse or disapprove of religion.’”²⁰¹ The posting of the Ten Commandments has previously been held to violate the first prong of the *Lemon* test.²⁰² In *Stone v. Graham*, the Supreme Court held that a Kentucky statute requiring the posting of the Ten Commandments in public schools was a religious act, lacking a secular purpose.²⁰³ Additionally, the prayers offered by Christian clergy in Judge Moore’s courtroom will likely fail the first prong of the three-part *Lemon* test, since they are inherently religious and lack a secular purpose.

Judge Moore attempts to articulate a secular purpose for these prayers by arguing that they solemnize the proceedings.²⁰⁴ Judge Moore also bases his position on the assumption that 95% of Etowah County citizens are Christians or believe in God.²⁰⁵ Accordingly, Judge Moore believes that his practice encourages a fair administration of justice, impartiality, and acquisition of truth.²⁰⁶

Judge Moore’s articulated secular purpose for the courtroom prayers is not supported by the previous decisions of the Supreme Court which have stated that prayer is not a secular act: “[I]nvocation of God’s blessings . . . is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious.”²⁰⁷ Regard-

200. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

201. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (citing *Lynch v. Donnelly*, 465 U.S. at 690 (O’Connor, J., concurring)).

202. *Stone v. Graham*, 449 U.S. 39 (1980).

203. *Stone*, 449 U.S. at 41-43. See also *Harvey v. Cobb County*, 811 F. Supp. 669 (N.D. Ga.) *aff’d mem.*, 15 F.3d 1097 (11th Cir. 1993) (holding that placing Ten Commandments alone in the Cobb County Courthouse violated the three-part *Lemon* test).

204. Brief of Appellees at xvi, *State of Alabama ex rel. Fob James v. ACLU* (No. 1960927).

205. *Id.* at xiii.

206. *Id.* at xiii-xiv.

207. *Engel v. Vitale*, 370 U.S. 421, 424-25 (1954). (The Supreme Court struck down a briefer and less explicitly Christian prayer than those offered in Judge Moore’s courtroom.) The Eleventh Circuit has previously determined that prayer is

less of whether a majority of the people who enter Judge Moore's courtroom approve of the prayers which are offered, the Establishment Clause and Free Exercise Clause protect minority religious views from the political majority. The longstanding role of the First Amendment, which protects minority religious views, cannot now be brought into question.²⁰⁸

In *North Carolina Civil Liberties Union Legal Foundation v. Constangy*,²⁰⁹ the Fourth Circuit concluded that the practice of a judge offering prayers in court could not meet the three-part *Lemon* test and, therefore, violated the Establishment Clause of the First Amendment. The Fourth Circuit's *Constangy* opinion includes a well-reasoned discussion of the difference between legislative invocations, which may be permitted, and prayer in the courtroom. The Fourth Circuit distinguished *Marsh v. Chambers*,²¹⁰ in which the Supreme Court allowed legislative invocations where the Nebraska Legislature had voted to retain and pay a chaplain. There, the chaplain was offering prayers at the opening of a session before the very legislators who had elected the chaplain. In contrast, a judge offers prayer in a

the "quintessential religious practice" and inherently is not a secular act. *Jaffree v. Wallace*, 705 F.2d 1526, 1534 (11th Cir. 1983) (citing *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981)).

208. See, e.g., E. CHEMERINSKY, *INTERPRETING THE CONSTITUTION* (1987); M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* (1982); Conkle, *supra*, note 20, at 1178; Daniel O. Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond*, 69 MINN. L. REV. 587 (1985); Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981).

209. 947 F.2d 1145, 1147 (4th Cir. 1991).

210. 463 U.S. 783 (1983). The United States Supreme Court has ratified the Fourth Circuit's narrow reading of *Marsh*. In *Marsh*, the United States Supreme Court did not examine the Nebraska Legislative prayer pursuant to the three-part *Lemon* test. Instead, the Court simply deferred to the 200 years of tradition of opening legislative sessions with prayer. *Marsh*, 463 U.S. at 786-95. The *Marsh* decision has not been expanded or applied in other settings by the United States Supreme Court. In *Lee v. Weisman*, 505 U.S. 577 (1992), Justice Kennedy, writing for the Court, found that a school's practice of allowing clergy to offer prayers at graduation from middle and high schools violated the Establishment Clause of the First Amendment. Justice Kennedy did not extend *Marsh* to permit prayer at public school graduations. Instead, Justice Kennedy confirmed the narrowness of *Marsh*: "[t]he atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with [graduation]." *Lee*, 505 U.S. at 597.

courtroom to persons who have no choice but to be before him or her. Because of the inherently coercive nature of a courtroom, as compared to a legislative body, the Fourth Circuit concluded that there is a greater likelihood of an establishment of religion when prayers are offered in a courtroom.²¹¹

Additionally, the Fourth Circuit in *Constangy* reached the obvious conclusion that the judge has an obligation to be neutral since the judge is charged with the responsibility of impartially presiding over the courtroom.²¹² Unlike a judge, however, legislators are elected representatives who are partisan and therefore political. For a neutral judge to appear to be taking sides in favor of one religious viewpoint is a greater danger than the offering of a prayer before a legislative body.²¹³

2. *Posting the Ten Commandments and offering Christian Prayers in Court Advances Religion.*—The second prong of the *Lemon* test requires the court to determine whether the challenged activity has the “principal or primary effect” of advancing or inhibiting religion.²¹⁴ This test is an objective one as a matter of law, and the court must focus on the symbolic impact of the practice on a reasonable person to determine whether it endorses religion. The “effect prong” asks whether, irrespective of the government’s actual purpose, the practice in fact conveys a message of endorsement or disapproval of religion.²¹⁵ Under the second prong of *Lemon*, Judge Moore’s intent is irrelevant, but the focus must be on how the prayer is perceived.

In *Constangy*, the Fourth Circuit concluded that the judge’s act of offering the prayers while wearing a robe and speaking from the bench was official conduct and had the effect of endorsing religion.²¹⁶ Thus, the primary effect of the judge’s prayer was to advance and endorse religion.²¹⁷ Similarly, the only reasonable conclusion to be drawn from the actions of Judge Moore is that the State of Alabama, through its agent and employee, is

211. *Constangy*, 947 F.2d at 1148-49.

212. *Id.* at 1149.

213. *Id.* at 1149.

214. *Lemon*, 403 U.S. at 612.

215. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring).

216. *Constangy*, 947 F.2d at 1151.

217. *Id.*

advancing and endorsing religion. The posting of the Ten Commandments and the offering of prayers by Christian clergy may only be understood by those present in the courtroom as an endorsement of the Christian religion by Judge Moore, and, therefore, the State of Alabama. Moreover, Judge Moore, through the choice of clergy and prayers which are offered, is clearly favoring Christianity over other religions. As the Supreme Court held in *Larsen v. Valente*,²¹⁸ state-sponsored prayers exhibiting a denominational preference are strictly proscribed by the Establishment Clause: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."²¹⁹

3. *Posting the Ten Commandments and Offering Christian Prayers in Court Excessively Entangles Government With Religion.*—Under the third prong of the *Lemon* test, a court must ask whether the challenged practice results in excessive entanglement of government with religion.²²⁰ In *Constangy*, the Fourth Circuit determined that "when a judge prays in court, there is necessarily an excessive entanglement of the court with religion."²²¹ One can hardly imagine a greater entanglement between government and religion than having judges choose religious symbols for a courtroom and selecting prayers for use in the courtroom. By mixing these religious symbols and actions with the judicial act of conducting judicial proceedings, there is an inherent entanglement between government and religion. Moreover, if there are challenges to these governmental actions, other judges will be required to review, monitor, and edit prayers offered by their fellow judges. Given that Judge Moore fully intends to continue to display the Ten Commandments and to offer prayers in his courtroom, and presumably other judges will be encouraged to do so as well, the judiciary will face these issues on numerous occasions. It takes little foresight to imagine the controversies over the content of prayers which the judiciary

218. 456 U.S. 228 (1982).

219. *Larsen*, 456 U.S. at 244.

220. *Lemon*, 403 U.S. at 613.

221. *Costangy*, 947 F.2d at 1151 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) ("[T]he government must pursue a course of complete neutrality toward religion.")).

will be required to adjudicate if this practice is approved. Such entanglement is precisely what the United States Supreme Court in *Lemon* sought to avoid.

4. *Posting the Ten Commandments and Offering Christian Prayers in Court Constitutes an Endorsement of Religion.*—The “endorsement” test, which essentially is a combination of parts one and two of *Lemon*, also leads to the result reached by Judge Charles Price. Justice O’Connor, the primary proponent of the “endorsement” test, recently stated that: [e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.²²²

Under the “endorsement” test, there can be little doubt that jurors, parties, and lawyers who do not ascribe to the faith of the clergy offering prayers in Judge Moore’s courtroom will receive the message that they are outsiders. As the Supreme Court has held on numerous occasions, the government cannot take religious action which has such an effect. To do so is to express an endorsement of religion, which the Establishment Clause prohibits.²²³

222. *Lynch v. Donnelly*, 465 U.S. 668 688 (1984) (O’Connor, J., concurring). See also *County of Allegheny v. ACLU*, 492 U.S. 573, 628 (1989) (O’Connor, J., concurring in part and concurring in judgment) (supporting the endorsement test); *Wallace*, 472 U.S. at 69 (O’Connor, J., concurring) (supporting the endorsement test).

223. Religious leaders have also concluded that the actions by Judge Moore cross the constitutional line and infringe upon the Establishment Clause. The Presbytery of North Alabama Presbyterian Church (U.S.A.) recognized that the biblical command to “do justice” is inconsistent with the promotion of a religious viewpoint by Judge Moore:

Prayer, as Christians understand it, is not a civic function, a formality like shaking hands when entering or leaving a room. Prayer is our awesome privilege as the children of God to talk to our Father. It is an explicitly religious act. Therefore, when a judge in a courtroom uses prayer at the opening of court as a means of “promoting religion,” that judge risks appearing partial toward those who hold his or her religious views. As Christians we believe that such action violate [sic] God’s call to God’s people to “do justice.” We affirm that Christian persons are called by God to allow their faith and the justice of God to permeate all that they do, including interaction with every form of government. However, we cannot affirm government-sponsored religion, for it is contradictory to the constitutional freedoms of all citizens.

Pastoral Letter to the People of Alabama from the Presbytery of North Alabama Presbyterian Church (U.S.A.), HUNTSVILLE TIMES, Sept. 6, 1997, at C8.

VI. THE SUPREME COURT'S BROAD VIEW OF THE RELIGION CLAUSES IS CONSISTENT WITH THE GOALS OF THE FIRST AND FOURTEENTH AMENDMENTS

To accept Mr. Gray's proposition that states are free to establish or favor religions is troublesome, to say the least. Does Mr. Gray favor a state statute, such as was struck down in *Torasco v. Watkins*,²²⁴ which requires all public officials to declare a belief in God? One recalls the strict establishment of religion which was present in Virginia at the time of our country's founding. The State of Virginia taxed members and nonmembers of the Anglican church, imposed a strict requirement of compulsory attendance at Anglican services, punished blasphemy and required religious test oaths for public office holders.²²⁵ Members of other religious sects were discriminated against and Baptist preachers were singled out for arrest and imprisonment for "breach of the peace."²²⁶ Fortunately, by virtue of the Supreme Court's application of the Establishment Clause and the Free Exercise Clause to the states, such an infringement of religious liberty, as once existed in Virginia, can not exist today.

A. *The Supreme Court's View of the Religion Clauses Promotes and Protects Religion*

Mr. Gray goes so far as to imply that the separation of church and state is the result of a communist-inspired plot, perpetuated by the judiciary on the American public.²²⁷ However, Mr. Gray is proceeding on the false assumption that the

224. 367 U.S. 488 (1961).

225. ADAMS & EMRICH, *supra* note 28, at 4-5.

226. Tarr, *supra* note 26, at 81 (citing THOMAS J. CURRY, *THE FIRST FREEDOMS* 134-35 (1986)).

227. Gray, *supra* note 6, at n.119 alleges that the 1947 *Everson* decision was somehow related to the constitution of the Union of Soviet Socialist Republics adopted on December 5, 1936. The alleged connection between the Soviet constitution and the *Everson* decision remains unexplained by Mr. Gray. Mr. Gray also suggests that the cessation of school prayer after the *Everson* decision led to a variety of social ills, including divorce, drops in school test scores, births out of wedlock, teen suicide, DUI and AIDS. This author is unaware of evidence to support a connection between the *Everson* decision and these social problems.

decisions by the Supreme Court constitute an attack on religion. To the contrary, the Supreme Court's Establishment Clause and Free Exercise Clause rulings protect both organized religion and individual religious beliefs. The Court's decisions have allowed organized religion in America to flourish. Additionally, all Americans have the ability to hold religious beliefs without fear of being treated unequally, even if those religious beliefs are held only by a small minority of persons. Contrary to the protestations of Mr. Gray, freedom to express personal religious views is alive and well. Thus, the Court's broad view of the Establishment Clause and the Free Exercise Clause continue to respect the goals of the drafters of both the First and Fourteenth Amendments.

There were at least two purposes for the enactment of the Establishment Clause. "Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion."²²⁸ Second, the framers intended the Establishment Clause to prevent the political persecution of persons holding minority faiths.²²⁹ Complementing the Establishment Clause, but sometimes in tension with it, is the Free Exercise Clause, which provides for complete protection of religious beliefs.²³⁰ The Supreme Court reads the Fourteenth Amendment and these two Clauses as requiring the national and state governments to remain strictly neutral among religions, as well as between religion and non-religion.²³¹ Often ignored by critics of the Supreme Court's de-

228. *Engle v. Vitale*, 370 U.S. 421, 431 (1962).

229. *Engle*, 370 U.S. at 432-33. See *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.").

230. While beliefs are protected by the Free Exercise Clause, actions taken pursuant to those religious beliefs may be restricted. See *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that the use of illegal drugs not protected by Free Exercise Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303-4 (1946) ("[T]he [First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."); *Reynolds v. United States*, 98 U.S. 145 (1878) (holding that polygamy practiced pursuant to religious belief not protected by Free Exercise Clause).

231. *Chandler v. James*, CV 96-D-169-N, 1997 WL 736483 (M.D. Ala. Nov. 12, 1997), at 6-8 (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 590-91 (1989));

cisions, this metaphorical wall between church and state is not an end in itself; it is a means to achieving the goal of religious freedom.²³² Because the historical evil has been that governments have punished people for their religious beliefs, the First Amendment has effectively preserved religious liberty in America.²³³

Contrary to Mr. Gray's pessimistic conclusions, organized religion thrives in America largely because it is free from concern that the government may become entangled in its day-to-day activities. Mr. Gray fails to understand that it is the devout believer who fears the secularization of his religious creeds when they become too involved with and dependent upon the government.²³⁴ Intermingling government with religion tends to degrade religion. For example, "non-denominational" state-sponsored prayers, which attempt to encompass all elements of Christianity and Judaism, are often so bland and inoffensive as to be meaningless. Government support for a "lowest common denominator" approach to religion is actually contrary to promoting genuine and vibrant religion.²³⁵

"[R]eligion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."²³⁶ This truism is not the new-found belief of a "liberal" Supreme Court, but, instead, the belief of James Madison. Religious leaders have long recognized the importance of protecting organized religion from meddling by the state. Roger Williams, founder of the colony of Rhode Island, fervently believed in complete religious freedom, not merely religious toleration that could be denied by the whim of the government. Roger Williams, who understood that the

Jager v. Douglas County Sch. Dist., 862 F.2d 824, 828 (11th Cir. 1989); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 381-82 (1985); Wallace v. Jaffree, 472 U.S. 38, 60 (1985); Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968)).

232. See Adams & Emrich, *supra* note 22, at 1598-99.

233. Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047 (1996).

234. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 259 (1963) (Brennan, J., concurring).

235. See Conkle, *supra* note 20, at 1162-83.

236. See *Engel v. Vitale*, 370 U.S. 421, 432 (1962) (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGION ASSESSMENTS 187 (1785), reprinted in *Everson v. Board of Education*, 330 U.S. 1 (1947) (appendix to dissenting opinion of Rutledge, J.)).

independence and vitality of religious beliefs requires protection from government interference, preferred a wall of separation between church and state 150 years before Thomas Jefferson used this metaphor.²³⁷

Fortunately, the Supreme Court continues to recall the historical reasons for keeping government separate from organized religion as a means to promote religious liberty. In *Lee v. Weisman*,²³⁸ the Court, speaking through Justice Kennedy, stated:

The lessons of the First Amendment are as urgent in the modern world as in the 18th century when it was written. One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.²³⁹

237. See Witte, *supra* note 28, at 181-82 & n.46. The sentiments of Roger Williams were reflected in Thomas Jefferson's letter to the Danbury Baptist Association in 1802. Linking the separation of government and religion with the principle of liberty of conscience, Jefferson stated the following:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State.

Witte, *supra* note 28, at 400 (quoting letter from Thomas Jefferson to Danbury Baptist Association (Jan. 1, 1802), in 8 THE WRITINGS OF THOMAS JEFFERSON 113 (H.A. Washington Ed. 1854)); MARK HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 1-3 (1965).

238. 505 U.S. 577 (1992). Three years after the passage of the Fourteenth Amendment, Justice Bradley expressed his skepticism of a proposed constitutional amendment designed to acknowledge the dependence of the nation upon God and to recognize the Bible as the foundation of its law and the supreme ruler of its conduct:

And it seems to me that our fathers were wise; that the great voluntary system of this country is quite as favorable to the promotion of real religion as the systems of governmental protection and patronage have been in other countries. And whilst I do not understand that the association which you represent desire to invoke any governmental interference, still the amendment sought is a step in that direction which our fathers (quite as good Christians as ourselves) thought it wise not to take. In this country they thought they had settled one thing at least, that it is not the province of government to teach theology.

Abington Sch. Dist. v. Schempp, 374 U.S. 203, 257-58 n.23 (Brennan, J., concurring).

239. *Lee*, 505 U.S. at 592. "[E]xperience witnesseth that ecclesiastical establish-

*B. The Supreme Court's Jurisprudence is Consistent with the
Mandate of the Equal Protection Clause of the Fourteenth
Amendment*

The Supreme Court's religion decisions have the positive effect of promoting inclusion in the political community. These decisions send the message to both adherents and non-adherents of majority religious views that they are equal members of the political community. Justice O'Connor has argued that the Establishment Clause "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."²⁴⁰ To send the message to holders of minority religious views that they are to be excluded from the community is inconsistent with our democratic heritage. Moreover, this policy of inclusion reduces the risk of religiously-motivated disputes which are common in other countries. The "endorsement" test of Justice O'Connor is consistent with the mandate of the Equal Protection Clause of the Fourteenth Amendment. In the arena of race we have seen Jim Crow laws exclude African-American citizens from participating in the life of the community. But in *Brown v. Board of Education*,²⁴¹ the Supreme Court held that it is inherently unequal for state governments to make decisions on the basis of race. Similarly, restricting states from making laws that stigmatize citizens who hold minority religious views is consistent with the mandate of the Equal Protection Clause of the Fourteenth Amendment.²⁴² The participation of all persons in community life, regardless of their religious views, is an important proposition that the Equal Pro-

ments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. *Id.* at 590 (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENT (1785), in 8 PAPERS OF JAMES MADISON, 301 (W. Rachel et al. eds. 1973)); see also Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373 (1992); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996).

240. *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

241. 347 U.S. 483 (1954).

242. See Mannheimer, *supra* note 71, at 116-17; Timothy L. Hall, *Religion, Equality and Difference*, 65 TEMPLE L. REV. 1, 6 (1992) (promoting a view of the Religion Clauses "through the lens of equality").

tection Clause preserves.²⁴³

The Supreme Court's Free Exercise Clause decisions reflect a desire to accommodate minority religious viewpoints. For example, in *Wisconsin v. Yoder*,²⁴⁴ the Supreme Court concluded that the Free Exercise Clause excused an Amish family from compliance with a Wisconsin compulsory education law. Likewise, the Supreme Court has affirmed the rights of conscientious objectors to forego military service on the basis of religious beliefs.²⁴⁵ These cases demonstrate that the combination of the two Religion Clauses of the First Amendment require government neutrality and accommodation of minority religious beliefs.

In his article, Mr. Gray does not address the obvious equal protection problem which will be created if states are allowed unfettered discretion to make decisions on the basis of religion. The incorporation of the Establishment Clause has removed the need for the Supreme Court to undertake an independent equal protection analysis of the treatment of religious minorities by government.²⁴⁶ However, if the day ever arrives where the Supreme Court completely reverses its present position and the Establishment Clause is removed as a restriction on the states, the Fourteenth Amendment's Equal Protection Clause will continue to strictly limit the ability of the states to make distinctions on the basis of religion.²⁴⁷

The effect of the Equal Protection Clause of the Fourteenth Amendment and the Free Exercise Clause may not be much different than the result reached by Court's present Establishment Clause rulings.²⁴⁸ Thus, the states would still be required

243. See Ira C. Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 742-44 (1986).

244. 406 U.S. 205 (1972).

245. See *United States v. Seeger*, 380 U.S. 163 (1965).

246. See Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L. J. 89, 103 (1990).

247. Apparently the Supreme Court considers religious classifications to be suspect under the Equal Protection Clause. See *Burlington Northern R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (finding that state venue rules did not deny equal protection since they did not "classify along suspect lines like race or religion"); *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976) (per curiam) (stating that classifications presumptively invalid if "drawn upon inherently suspect distinctions such as race, religion, or alienage"); *Mannheimer*, *supra* note 71, at 119 & nn.134-36.

248. See Lupu, *supra* note 243, at 743 (arguing that the incorporation of the

to provide equal treatment for all citizens, regardless of their religious views, and also protect the rights of those persons who hold minority religious views. In our multicultural society, with many different religious views represented, the Equal Protection Clause and the Free Exercise Clause should still require state governments to act neutrally in the area of religion. Moreover, any state action that does not adopt a neutral course should be held subject to strict scrutiny.

VII. CONCLUSION

The crux of Mr. Gray's argument is that the Establishment Clause originally expressed a statement of federalism, reserving matters of religion to the states. Further, Mr. Gray sees no evidence that the adoption of the Fourteenth Amendment impacted the balance of power between the national and state governments. I believe that Mr. Gray's position ignores the important changes which took place between the passage of the First Amendment and the Civil War. During that time, all states' religions were disestablished and the courts began moving away from upholding state laws on religious grounds.

The language of the Fourteenth Amendment and the statements of the Congressmen who voted on it evidence a desire to require states to protect the liberties of their citizens. The understanding of many Republicans was that the Fourteenth Amendment would provide the enforcement mechanism to require the states to abide by the restrictions contained in the Bill of Rights. Although the Supreme Court has relied upon the Due Process Clause, as opposed to the Privileges and Immunities Clause as appears to have been originally intended, the result has been the same. The states now must live in accordance with the restrictions of the bulk of the Bill of Rights.

This result seems reasonable to me, and I believe that it has, by and large, served our country well. Americans enjoy greater freedom than any people on this Earth. Our individual

Establishment Clause is unnecessary because the Equal Protection Clause alone prohibits violation of religious liberty by the states). Theoretically, the application of the Equal Protection and Free Exercise Clauses could make the controversy over the incorporation of the Establishment Clause moot.

rights are protected from infringement by both the Federal and State governments. These broad protections provided by the Bill of Rights, and especially the Religion Clauses of the First Amendment, allow us to hold mainstream or unorthodox religious beliefs, or no religious beliefs at all. Our ability to exercise our religious views, whether individually or through organized religion, is unmatched. The Supreme Court decisions which have attempted to require government neutrality in this often complicated and controversial field have promoted the religious liberty which is enjoyed and practiced by most Americans. This result is consistent with the mandate of both the First Amendment and the Fourteenth Amendment.

Governor James and Mr. Gray should recall that the principles of Roger Williams and Thomas Jefferson, as written into the First Amendment, have promoted, not hampered, religion in America. By keeping government within its own sphere of operation, religion can be vibrant and free. If the government is allowed to encroach into the sphere of operation which has been reserved for religion, that independence will be lost forever.

