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A Different Drummer

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A DIFFERENT DRUMMER†

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INTRODUCTION

At the core of our existence lies our dignity as humans: our thoughts as individuals and the liberty to express our thoughts and pursue our desires as we see fit. At the core of our Constitution lies the governance of our nation: entrusted to the people, the individuals who make up the governed, the diverse array of thoughts, ideals, beliefs, and convictions that buoy our freedom and enhance our liberty to pursue our own lifestyle, our own definition of freedom. As we march along bound by individual liberty, the fact remains that our different personalities often hear entirely different drummers keeping time and marking out the beat in our parade of life. The security provided by our Constitution lies in its guarantee to each individual, that no matter how abstruse the beat or how strange the syncopation, the ability to choose and follow any drummer one may hear remains with the individual, and that such a choice will never be made by the government. Over the recent decades the expression of liberty inherent to our freedom has bent back upon itself, threatening to form each of us into a single, faceless band, devoid of individual expression, marching to the beat of a solitary drummer.

The problem does not arise because people march to the same drummer, but because they do not choose, as individuals, to march to the beat they are forced to follow. It is not uncommon for us to misunderstand the drummer others may hear. Nor is it uncommon for us to try and influence others to follow our drummer. In fact, this constant give and take, this ongoing comparison of drumbeats, patterns and styles, molds our own thoughts, causes us to question our beliefs, and strengthens our convictions as we focus our minds and grow to maturity. This wrestling of ideas between individuals of differing backgrounds, both environmental and educational, affects our march cadence as we course our allotted

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time. Recognizing that our fellow man may hear an entirely different drummer, we must not criticize the step as out of sequence, but rather we must appreciate the sound of the different tune and realize the intellectual vitality stimulated by a discourse of ideas.

Particularly in the educational arena, where the formation of young minds requires a full experience to stimulate the search for eternal truths, the tendency to criticize the different tunes must be set aside for a complete educational experience to emerge. By contrasting our own ideas with the provocative beats of other drummers, we strengthen our minds; we add vitality to our intellectual endeavors by rising to the challenge posed by opposing viewpoints. In our modern pluralistic society, the wealth of individual ideas guides our liberty and freedom by stimulating intellectual strength.

Recent Supreme Court decisions, however, particularly in the area of the religion clauses, threaten our intellectual strength by stifling our educational achievement. By drowning out the sounds of the different drummers, the federal judiciary has taken the decision away from the individual and instead decides for the individual which drummer he might follow.

I. THE PRESENT STATE OF PUBLIC EDUCATION IN THE UNITED STATES

Recent testimony from a number of highly regarded educational experts, who testified before me in *Smith v. Board of School Commissioners*[1] outlined the direction of modern education. Their conclusion is that its effect today is directed toward social man *vis-á-vis* the individual. Society today is better served, so says this philosophy, when the process turns out consensus minds, for they are more easily steered in the "right" direction; in other words, round pegs for round holes. Put another way, we will all march to the same drum beat. This is what has been described as the "dumbing down" process you may have heard discussed lately and to what Dr. Bloom alluded when he wrote that the modern student is encouraged to maintain such an open mind for all things that he ends up with no mind at all.[2] All of this, so the testimony revealed, began as a result of the influence of John Dewey and his progeny, starting soon after the turn of the century.

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1. 655 F. Supp. 939 (S.D. Ala. 1987).
2. *See* A. BLOOM, THE CLOSING OF THE AMERICAN MIND (1987).

Rather than stimulating minds to intellectual heights by prodding students to question their beliefs, and thereby firming their convictions, modern education too often produces students who complacently accept what is fed to them during their formative years. Rather than stimulating minds to individual thought and encouraging students to question authority in order to determine its boundaries, modern education promotes blind acceptance of authority and instills apathy in our youth when it comes to the future. Our students do not choose to follow such a domineering drummer who won't allow them to question the beat, but our educational system has evolved to produce young minds that fail to discern the need to question the direction authority takes. I firmly believe that the basic test of the efficacy of education is whether the student becomes as a thermostat rather than as a thermometer; whether one works to control his environment or whether one merely reflects his environment as it changes. Especially in matters concerning the type of political system under which we will continue to live and function, students of today must grow to control the environment and shape the boundaries of authority within which the government must operate.

II. The Current Debate Over Incorporation

Presently a storm is swirling around the debate over the doctrine of incorporation and the Supreme Court's position relative thereto. This debate occurs mainly in the halls of academe and the courts, with some spillover into the legal profession and, to a modest degree, the body politic. Those engaged in it are sometimes referred to as intentionalists and nonintentionalists or interpretivists and noninterpretivists. An example of the heat that this discourse has generated was quite apparent in the recent confirmation hearings in regard to the nomination of Judge Robert Bork to the Supreme Court. Indeed, it is a debate in which we are vitally interested and in which we must, at some point, take part. For the resolution of this debate will greatly impact on the future of this nation. Because this is so, we simply cannot afford to be a thermometer.

A. *The Noninterpretivist's View of the Constitution*

There are those in contemporary society that believe that our Constitution simply embodies the aspiration to social

justice, brotherhood, and human dignity that brought this nation into being; that the instruments of birth solemnly committed the United States to be a country where the dignity and rights of all persons are equal before all authority. The instrument of the Constitution itself, "[l]ike every text worth reading, it is not crystalline. . . . Its majestic generalities and ennobling pronouncements are both luminous and obscure"[3] and, as a result, "calls forth interpretation."[4] "The Constitution is fundamentally a public text"[5] involving the most fundamental issues confronting our democracy, and the main burden of drawing meaning from the text, in order to resolve public controversies, resides in the Supreme Court. The desired principle to be applied by the Supreme Court, the final arbiter of the Constitution in interpreting that text, is "account for the existence of these substantive value choices, and . . . accept the ambiguity inherent in the effort to apply them to modern circumstances."[6] The "acceptance of [these] fundamental principles has not and should not bind [the Court] to those precise, at times anachronistic contours."[7]

This theory espouses that each generation has the choice to overrule or add to the fundamental principles expressed by the Framers and to translate the majestic generalities of the Bill of Rights into concrete restraints on official dealings as they appear in the twentieth century. It is stated that

> the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be their measure to the vision of their time.[8]

Summing up, this proposition translates to the fact that the Constitution is a sublime oration on the dignity of man. This philosophy concludes that though the Constitution may be amended, such requires immense effort on the part of the

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3. Brennan, *The Constitution of the United States: Contemporary Ratification*, 19 U.C. DAVIS L. REV. 2, 2 (1985).
4. *Id.*
5. *Id.* at 3.
6. *Id.* at 6.
7. *Id.*
8. *Id.* at 7.

people as a whole; and if the overarching theory of the worth and dignity of the human is kept in view, then the Constitution itself may expand and grow to fit these needs of any given time by considering the principle that it is the foremost duty of the Court to do this in the preservation of individual rights.

B. *The Interpretivist's View of the Constitution*

Opposed to the position just expressed, there are those who adhere to the proposition, as stated by Professor Raoul Berger, that "[t]he Constitution represents fundamental choices that have been made by the people, and the task of the Courts is to effectuate them, 'not [to] construct new rights.' When the judiciary substitutes its own value choices for those of the people it subverts the Constitution by usurpation of power."[9] In effect, "[s]ubstitution by the Court of its own value choices for those embodied in the Constitution violates the basic principle of government by consent of the governed."[10] Thus, "the Supreme Court has no authority to substitute an 'unwritten Constitution' for the written Constitution the Founders gave us and the people ratified."[11]

This position also has been stated in this fashion: a safe republican government depends upon a constitution that should be venerated by the people as fundamental and paramount. To secure the stability sought, the Framers recognized that the Constitution itself would have to be a written document that would have textural permanence. Such a writing would assist in keeping this agreement a limited one because these founders had determined from experience that you could not trust the good intentions of those who wielded power. The entire point of a written constitution in clear, common language is to serve as a stumbling block to keep those in power from imposing their independent will on the society as a whole. It was stated thusly:

> The disposition of mankind, whether as rulers or as fellow citizens, to impose their own opinions and inclinations as a rule of conduct upon others, is so energetically supported by some of the best and some of the worst feelings incident

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9. R. BERGER, GOVERNMENT BY JUDICIARY 291-92 (1977) (footnote omitted).

10. *Id.* at 296.

11. *Id.* at 297-98.

to human nature, that it is hardly ever kept under restraint by anything but want of power.[12]

Speaking to the point of view expressed by noninterpretivists, Judge Bork noted:

> Leading authors who seemed to gravitate to this view apparently are agreed that a valid area of constitutional adjudication—if one is possible; some deny even that—ought not, and perhaps cannot, be rooted in the intentions of those who wrote, proposed, and ratified the document and its various amendments for to deny the written Constitution as having the force of law is essential to giving the judges the powers that are needed, for any limits contained therein would have to be transgressed by them. As the argument goes, it is noted, that since the Constitution is not Law, it does not bind the judges, and judges are free to, and indeed must, derive their rulings from sources, such as moral philosophy, conventional morality, natural law, impulses to political reform, and so on.[13]

Those who adhere to strict construction of the Constitution as written law do not agree with this theory. They admit that while

> there is, perhaps, something ennobling about [moral certainty and judicial power], it is ennobling but wrong. [Their] logic assumes a truly philosophic disposition on the part of the judge; not simply to know, *strictly know*, those moral rights, but more important, to be able and willing to distinguish those moral certainties from his own prejudices and ideological inclinations. . . . The tendency of all mankind is a tendency to confuse *justice* with one's *perception of justice*. The defects of the human economy being what they are, we should at least doubt anyone's ability to distill their undefective reason from the swirling confusion of their opinions, passions and interests. To assert . . . that judges above all other mortals are capable of such virtue, is a case of the wish being the father to the thought.[14]

Judge Learned Hand put the proposition this way:

> Legal philosophers have disputed for more than two thousand years about what law means . . . . It is the conduct

12. J. S. Mill, *On Liberty* in 43 GREAT BOOKS OF THE WESTERN WORLD 273 (R. Hutchins ed. 1952).

13. Bork, *Foreword* to G. MCDOWELL, THE CONSTITUTION AND CONTEMPORARY THEORY at v (1985).

14. G. MCDOWELL, THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY 7 (1985).

> which the government, whether it is a king, or a popular assembly, will compel individuals to conform to, or to which it will at least provide forcible means to secure conformity . . . . The law is the command of government, and it must be ascertainable in some form if it is to be in enforced at all . . . .[15]
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> . . . .
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> Men of common sense are always needed, and judges are by no means always men of common sense. They are quite like the rest of us. But it is also easy to go wrong, if one gives them too much latitude. The other school would give them almost complete latitude. They argue that a judge should not regard the law, that this has never really been done in the past, and that to attempt even to do it is an illusion. He must conform his decisions to what honest men would think right, and it is better for him to look into his own heart to find out what that is. As I have already said, in a small way some such process is inevitable when one is interpreting any written words. When a judge tries to find out what the government would have intended which it did not say, he puts into its mouth things which he thinks it ought to have said, and that is very close to substituting what he himself thinks is right . . . .[16]
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> . . . .
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> But the judge must always remember that he should go no further than he is sure the government would have gone . . . . If he is in doubt, he must stop, for he cannot tell that the conflicting interests in society for which he speaks would have come to a just result, even though he is sure that he knows what the just result should be. He is not to substitute even his juster will for theirs; otherwise it would not be the common will which prevails, and to that extent the people would not govern.[17]

One could spend a great deal of time articulating the divergent opinions and the justifications for them. It is not the purpose of this paper to labor that oar. I will simply note that for the first 150 years or so of this Republic, the interpretivist's view carried the day. (It is interesting to note that the change to a noninterpretivist approach has some remarkable

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15. L. HAND, THE SPIRIT OF LIBERTY 104 (1960).
16. *Id.* at 107-08.
17. *Id.* at 109.

parallel with the changing philosophy of education instituted by the acceptance of the John Dewey theories.) Where I acknowledge that the noninterpretivist view is the apparent prevailing view on our present Supreme Court, and in a number of the teaching institutions of the day, I would strongly question whether it is appropriate to dismiss the view of interpretivists, as does Justice Brennan when he noted:

> [D]emands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention . . . is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But in truth it is little more than arrogance cloaked as 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.[18]

This is so because "[t]ypically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions"[19] and, "[i]ndeed, it is far from clear whose intention is relevant . . . or even whether the idea of an original intention is a coherent way of thinking . . . ."[20] If this is so, then the courts have wasted time in the past in those instances where they have sought to ascertain, through legislative history, the intent of the legislature when passing on various acts that were the subjects of litigation before them. Likewise, it would appear just as vain and self-effacing to look to determine what the framers of the fourteenth amendment had in mind when it was adopted.

C. *The History of the Interpretivist's Viewpoint in Constitutional Adjudication: The Religion Clauses*

Thus stated, what I would have you focus upon, for our purposes, is the net effect of the noninterpretivist theory as it has impacted upon the first amendment and in particular the religion clauses. Up until approximately forty years ago the Supreme Court's attitude toward these religion clauses generally remained that which had existed from the beginning of the Republic. This resulted from those determinations made

18. Brennan, *supra* note 3, at 4.
19. *Id.*
20. *Id.* at 4-5.

by the Justices of the Court from what was perceived as being their obligation when called upon to determine the meaning of the Constitution. As Justice Story put it:

> In construing the Constitution of the United States, we are in the first instance to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole and also viewed in its component parts. Where its words are plain, clear and determinate, they require no interpretation . . . . Where the words admit of two senses, each of which is conformable to general usage, that sense is to be adopted, which without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design of the instrument.[21]

In regard to the Bill of Rights, the adopters all agreed that it would act as a curb on the national power, an attitude accepted and acknowledged by the Supreme Court in the case of *Barron v. Baltimore*.[22] There, Chief Justice Marshall stated that the Constitution said what it meant and meant what it said, that neither political expediency nor political desire were sufficient to change the clear import of the language of the Constitution, and that the Bill of Rights did not apply to the states.

I suppose that such a point of view came from our inheritance of the English common law system. Dr. Samuel Johnson defined *interpret* as: "To explain; to translate; to decipher; to give solution; to clear by exposition; to expound."[23] Note that conspicuously missing from this definition is the power to alter the meaning. Lord Coke had found that acts of Parliament were to be construed according to the intent and meaning of the makers of them, thus the original intent and meaning was to be observed.[24] Chancellor Hatten in 1677 wrote, "When the intent is proved, that must be followed."[25] In 1736 Matthew Bacon wrote that "[s]uch a construction ought to be put upon a statute, as may best answer the intention which the makers had in view . . . . A thing

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21. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 405 (Cooley ed. 1873).

22. 32 U.S. (7 Peters) 243 (1833).

23. S. JOHNSON, JOHNSON'S ENGLISH DICTIONARY 305 (1755).

24. Magdalen College Case, 11 Co. Rep. 66, 73, 77 Eng. Rep. 1235 (K.B. 1615).

25. C. HATTEN, A TREATISE CONCERNING STATUTES OR ACTS OF PARLIAMENT AND THE EXPOSITION THEREOF 14-15 (1677).

which is within the letter of a statute, is not within such statute, unless it be not within the intention of the makers."[26]

The role of the judiciary as interpreter of the Constitution was buttressed also by the fact that at the time of the framing of the Constitution the conventioneers determined to exclude justices from a proposed council of revision that would share the president's veto of legislation, correctly considering that the power of making ought to be kept distinct from the power of expounding.

A final historical point is reflected by the comments of Chief Justice Marshall in *Marbury v. Madison*[27] in which he said:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained.[28]

He went on to note that if constitutions are alterable at the pleasure of the legislature or the courts, "then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable."[29]

Thus, it was clearly the law of the land that the first amendment's proscription against the establishment of a religion and the requirement that the people be given the free exercise of their religious beliefs was a proscription against the federal government only. Not until *Everson v. Board of Education*[30] and *Reynolds v. United States*[31] did the United States Supreme Court take upon its shoulders the duty of incorporating this proscription of the Bill of Rights to the states. Now I do not imply that the Court had not from time to time touched on the issue of religion in the United States, but it wasn't until later in our history that the Court reversed itself and decreed that the Constitution was thus amended so as to incorporate; and what a quagmire they have jumped into.

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26. 7 M. BACON, A NEW ABRIDGEMENT OF THE LAWS OF ENGLAND 457-58 (7th ed. London 1832).
27. 5 U.S. (1 Cranch) 137 (1803).
28. *Id.* at 166.
29. *Id.*
30. 330 U.S. 1 (1947)
31. 98 U.S. 145 (1879).

D. *The Effect of the Noninterpretivist Viewpoint on Constitutional Adjudication: The Religion Clauses*

Instead of leaving it as it was, reposing in the good judgment of the people to resolve the religious problems, if any—a wisdom understood and appreciated by the Founders which the passage of time and the lack of persecutions has dimmed for us—our High Court, in its infinite wisdom, has determined that, in light of our pluralistic society today, it must take upon its shoulders the onerous burden of carving out the appropriate niche in which theistic, atheistic, agnostic, and all other belief systems should properly reside. From my point of view the result is that we are trampling upon the soul of man. It is an area that has produced great wars, many revolutions, and no divined universal solution. It wasn't necessary; it isn't necessary; and, it will not be resolved by such efforts.

Consider briefly some of the results. In *Stone v. Graham*,[32] the majority of the Supreme Court concluded that the State of Kentucky had no articulable secular purpose in posting the Ten Commandments in the public school rooms, finding instead that the purpose was "plainly religious in nature" and this was so because "the Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."[33] However, in *Florey v. Sioux Falls School District*,[34] the court of appeals permitted the public school observance of the religious elements of Christmas stating that it promoted the articulated secular purpose of " 'advanc[ing] the students' knowledge and appreciation of the role that our religious heritage has played in the social, cultural and historical developments of civilization.' "[35] In *Lynch v. Donnelly*,[36] the Court upheld the constitutionality of including a nativity scene in a municipality's annual Christmas display on the grounds that the display "depicts the historical origins of this traditional [religious] event recognized as a National Holiday"[37] and therefore had a legitimate secular purpose. In *Ed-*

32. 449 U.S. 39 (1980) (per curiam), *reh'g denied*, 449 U.S. 1104 (1981).
33. *Id.* at 42.
34. 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980).
35. *Id.* at 1314.
36. 465 U.S. 668 (1984).
37. *Id.* at 680 (citations omitted).

wards v. Aguillard,[38] the Court struck down a Louisiana act that dealt with the teaching of creationism because it found the primary purpose of that act was to endorse a particular religious doctrine and thus ran afoul of the three-prong test established in the case of *Lemon v. Kurtzman*.[39] This was so even though the legislature articulated the "secular purpose" it had in mind in passing the act.

In an effort to find some order out of the chaotic situation resulting from its involvement in this quagmire, the Supreme Court did set forth the *Lemon* test which it said should be applied in determining whether the first amendment had been fouled. The application of this test has not provided the solution or guidance that its adopters had hoped that it would. As Justice Rehnquist commented in his dissent in *Wallace v. Jaffree*,[40] the so-called purpose prong of the test has proven mercurial in application because it has never been fully defined, and the Court has never fully stated how the test is to operate. As he noted, "If the purpose prong is intended to void those aids to sectarian institutions accompanied by a stated legislative purpose to aid religion, the prong will condemn nothing so long as the legislature utters a secular purpose and says nothing about aiding religion."[41] He concludes that what the legislators put into their legislative history and, more importantly, what they leave out, may determine the outcome of the piece of legislation under the test. He also noted that if this purpose prong is aimed to void all statutes enacted with the intent to aid sectarian institutions, whether stated in the legislative history or not, then most statutes providing any aid, such as textbooks or bus rides for sectarian school children, will fail, and this would be an anomaly because the Court has already afforded relief in certain of these type cases.

Justice Brennan promptly noted in the *Aguillard* case that the primary purpose of the act in question in that case violated the establishment clause because it was obvious that it was the intent of the legislature in adopting the statute to advance a religious cause, notwithstanding the fact as noted by Justice Scalia, that the legislature stated otherwise. Justice Scalia observed:

> Although the record contains abundant evidence of sincerity of that purpose, (*the only issue pertinent to the case*), the

38. 107 S. Ct. 2573 (1987).
39. 403 U.S. 602 (1971).
40. 472 U.S. 38 (1985).
41. *Id.* at 108 (Rehnquist, J., dissenting).

> Court today holds, essentially on the basis of its "visceral knowledge regarding what *must* have motivated the legislators," . . . that members of the Louisiana Legislature knowingly violated their oaths and then lied about it.[42]

Justice Scalia noted further some of the confusion that has arisen as a result of prior rulings of the Supreme Court in this vein. In his dissent, he makes this comment:

> We have said essentially the following: government may not act with the purpose of advancing religion, except when forced to do so by the free exercise clause (which is now and then); or when eliminating existing governmental hostility to religion (which exists sometimes); or even when merely accommodating governmentally uninhibited religious practices, except that at some point (it is unclear where) intentional accommodation results in the fostering of religion, which of course is unconstitutional.[43]

III. The Effect of the Noninterpretists Viewpoint on Constitutional Adjudication: Segregation of Church and State

Before examining the impact of Supreme Court decisions on public education, I should comment on the framers' views with respect to the relationship that would exist between the national government and religion. James Madison rose and reminded the House that the time which had been promised for consideration of the religion clauses had come.[44] In regard to these clauses, several proposals were made and reported in the *Annals of Congress*. For instance, Peter Sylvester of New York disliked a particular revision because he felt it had "a tendency to abolish religion altogether."[45] Roger Sherman of Connecticut did not feel that such a clause ought to be included because, under the existing Constitution, Congress had no delegated authority to make any decisions relative to religion in any event. Benjamin Huntington felt that the language being advanced might be taken in such latitude as to be extremely hurting to the

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42. Edwards v. Aguillard, 107 S. Ct. at 2591 (Scalia, J., dissenting) (first emphasis added; second emphasis added by Court) (citation omitted).
43. *Id.* at 2591-92.
44. 1 Annals of Cong. 424 (J. Gales ed. 1789).
45. *Id.* at 729.

cause of religion and was afraid that others might put another construction to it that would be harmful. Huntington, too, was from Connecticut and was concerned that the New England states, which had established religions, might find themselves in the federal courts entertaining claims based upon an obligation in regard to religious organizations where they had no right to be.

In his dissent in *Jafree*, Justice Rehnquist noted, among other things, that where it was true that Madison participated with Jefferson in adopting the Virginia Statute of Religious Liberty, nowhere does it appear that he, speaking as an advocate of sensible legislative compromise, intended to incorporate the Virginia statute into the Constitution. He noted it is more clear that it was Madison's intention to work a compromise that would insure to the people those things that they desired in regard to religious liberty. The original language he suggested was as follows: " 'Nor shall any national religion be established.' "[46] This does not conform to any wall of separation between church and state, an idea which latter-day commentators have ascribed to him. Indeed, as the Justice stated, had this been Madison's desire, the Northwest Ordinance, in its existing language, would not have been adopted, nor would we have Thanksgiving Day proclamations, chaplains, or other expressions of gratitude to the Almighty.

This wall of separation was not contemplated by, nor did it become a part of the history of, that amendment, nor did Thomas Jefferson ever so consider it. The rubric arose out of the *Reynolds*[47] and *Everson*[48] decisions, cases involving the free exercise clause issue. As the now Chief Justice stated, "It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years."[49] He goes on to say that neither does the repetition of this error by the court make it any sounder historically, and where "*stare decisis* may bind courts to matters of law, . . . it cannot bind them as to matters of history."[50] He further observed that the greatest injury of this wall notion was its mischievous

46. Wallace v. Jaffree, 472 U.S. 38, 94 (1985) (Rehnquist, J., dissenting) (citation omitted).

47. 98 U.S. 145 at 164 (1879).

48. 330 U.S. 1 (1947).

49. Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

50. *Id.* at 99 (Rehnquist, J., dissenting).

diversion of judges from the actual intentions of the drafters of the Bill of Rights. At this point I must question the cadence being set by the drummer, for the government seems to have overstepped its boundaries of authority; even though the so-called "wall of separation" has grown to the equivalency of the great wall of China, it is engrafted on our Constitution, if at all, by judicial fiat, and not as the result of any amendment by "We, the People."

IV. The Impact of the Noninterpretist Theory on Public Education

Another area where it is evident that the Court is bogging down in the quagmire associated with the doctrine of incorporation is in connection with its determinations of what can and cannot be taught in the public schools where religion is implicated. Justice Brennan stated in his opinion in the *Aguillard* case, " '[T]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools. . . .' "[51] However, as Justice Powell noted:

> As a matter of history, school children can and should properly be informed of all aspects of this Nation's religious heritage. I would see no constitutional problem if school children were taught the nature of the Founding Fathers' religious beliefs and how these beliefs affected the attitudes of the times and the structure of our government. Courses in comparative religion of course are customary and constitutionally appropriate. In fact, since religion permeates our history, a familiarity with the nature of religious beliefs is necessary to understand many historical as well as contemporary events. In addition, it is worth noting that the Establishment Clause does not prohibit *per se* the educational use of religious documents in public school education. Although this Court recognized that the Bible is "an instrument of religion," . . . it also has made clear that the Bible "may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." . . . The book is, in fact, "the world's all-time best seller" with undoubted literary and historic value apart from its religious content. The Establishment Clause is

51. Edwards v. Aguillard, 107 S. Ct. 2573, 2577-78 (1987) (citation omitted).

> properly understood to prohibit the use of the Bible and other religious documents in public school education only when the purpose of the use is to advance a particular religious belief.[52]

It is obvious that theistic religions have come to be defined as such divisive force to which Justice Brennan alludes. If you think not, search the annals of the case law and count the number of cases that you find where this is not so.

Frederick Edwords, Executive Director of the Humanist Association, observed that "[t]he courts in Arkansas have ruled that the state . . . must pay nearly $400,000 to the ACLU for . . . court costs in fighting the creationism law there. This heavy bill will serve as a deterrent to states tempted to pass future . . . legislation . . . ."[53] of a similar vein. As long as the courts remain involved in the issue, what Justice Powell observed as permissible simply will not occur as a result of sheer economics.

As testified to in *Smith*,[54] the problem is further compounded by the fact that secularism, humanism, atheism, agnosticism, and a whole host of other belief systems are advanced by and in the public education effort today because they fall within the rubric of secular endeavor. This is so even though the humanists openly advocate, in a militant way, that the public schools must be converted into the new church for the advancement of secular humanism. I quote from an article that appeared in a 1983 issue of *The Humanist* magazine:

> I am convinced that the battle for humankind's future must be waged and won in the public school classroom by teachers who correctly perceive their role as the proselytizers of a new faith: a religion of humanity . . . . These teachers must . . . be ministers of another sort, utilizing a classroom instead of a pulpit to convey humanist values in whatever subject they teach, regardless of the educational level . . . .[55]

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52. *Id.* at 2589-90 (Powell, J., concurring) (footnotes and citations omitted).

53. Edwords, *The Turning Tide*, THE HUMANIST, July-Aug. 1984, at 35.

54. Smith v. Board of School Comm'rs, 655 F. Supp. 939 (S.D. Ala. 1987).

55. Dunphy, *A Religion for a New Age*, THE HUMANIST, Jan.-Feb. 1983, at 26.

As found by Judge Danny Boggs of the Sixth Circuit Court of Appeals in *Mozert v. Hawkins County Board of Education*,[56] the state has the right to say to parents of children who are compelled to attend public schools, "My way or the highway,"[57] when determining what educational information is to be imparted. School boards can and do, so testified the *Smith* experts, advance a religion of humanism with impunity because they are reluctant to take up the expensive fights that ensue if there is anything at all related to theistic religion in the curriculum. So we have as a result manufacturers or producers of textbooks removing any and all such references in order to be able to sell texts to the school systems. Such gutting of moral base for learning results in state-programmed souls that march to a beat unknown to the Founders of our freedoms.

Justice Brennan said that the amendment process incorporated in the Constitution requires an immense effort by the people as a whole and need not be strictly adhered to if the overarching theory of the worth and dignity of the human is kept in view. Thus, he concludes, the Constitution may be expanded to fit the needs of the times by considering the principle that it is the foremost duty of the Court to do this in preservation of individual rights. Has the amendment by the Supreme Court incorporating the first amendment to the states accomplished this goal articulated by Justice Brennan?

V. The Doctrine of Incorporation: Public Education and the Decline of Federalism

As Russell Kirk notes:

> From history, as from humane letters, every generation acquires its sense of the human condition; its acquaintance with the possibilities and the limitations of human action; its awareness that we, the living, are involved in what Bert called 'the contract of eternal society,' which joins us with those who have preceded us in time, and with those who will follow us in time. The historical consciousness shows men and women that they are part of the great continuity and essence, possessed of duties and rights — something better than naked apes, something higher than the beasts that perish . . . . The eagerness for true learning seems to be much diminished in our age, in that intellectual and

56. 827 F.2d 1058 (6th Cir. 1987).
57. *Id.* at 1074 (Boggs, J., concurring).

> moral results of schooling seem inferior, at every level of society . . . . Perhaps because, as Manning wrote, all differences of opinion are theological at bottom. The Americans of two centuries ago shared, nearly all of them, certain assumptions about human nature; and those assumptions were founded upon religious doctrines . . . . It may be said of the Americans of 1786 that in general they believed in the existence of a transcendent order governing the universe; in the teaching that man is made for eternity, in the dogma that human beings have a proclivity toward the sinful, in the concept of the community of souls and the community of this earth, with the duties that communities require . . . . When . . . those fundamental beliefs are denied or gradually atrophy, the traditions that have lent generations to generation begin to wither. Outward forms may remain, but they are sapless.[58]

By virtue of our courts' incorporating the first amendment to the states, our schools no longer feel free to permit the discussion of ultimate questions and they become dull forms for tribal disputes. As C.S. Lewis put it:

> We continue to clamor for those very qualities we are rendering impossible . . . in a sort of ghastly simplicity we remove the organ and demand the function. We make men without chests and expect virtue and enterprise. We laugh at honor and are shocked to find traitors in our midst. We castrate and bid the gelding to be fruitful.[59]

Thomas Flemming wrote in *Tyranny and a Good Cause*:

> Ours was once a limited government with a delicate system of checks and balances. More than the balance of powers between the three branches of the central government, the federalists' distribution among the various levels of government was an insurance against tyranny. For some time now we have elevated a number of principles above the federal arrangement: social and economic justice, equality, individual liberty—in a word democracy. The result has been tyranny in a good cause, but tyranny nonetheless. As Americans contemplate their Constitution and its legacy, they

58. R. Kirk, Speech entitled "Content, Character and Choice in Schooling: Public Policy and Research Implications" (April 24, 1986) (available at the National Council on Educational Research in Washington, D.C.).

59. C.S. LEWIS, ABOLITION OF MAN 16 (1947).

> would do well to remember that it was federalism—not democracy—that guaranteed their liberties and that it is federalism that needs to be restored.[60]

As part of this federalism, John Witherspoon, an influential mentor of many of the nation's Founders, said: "[T]he right of a person to judge for himself or herself 'in all matters of religion' [is] an 'unalienable right.' God-given, this right could not be given or taken away by any ecclesiastical or civil power."[61]

By incorporation, thus depriving the peoples of the determination of how they will perform and provide moral education, the federal courts are now the only ones who may probe intentions, be they pre-enactment legislative intentions or others, whenever a communities' moral requirements are debated. This impinges upon inalienable rights and is an area that is insoluble even if undertaken. No court would ever be in a position to conclusively determine just what motivated the final passage by a legislature of any piece of legislation. So why, in the name of preserving individual rights, do we deny the wisdom of abstaining decreed by our Founders?

The beat that I hear from my drummer is one that Richard John Neuhaus must likewise hear for he states: "The exclusion of religiously-based judgment from [public] debate . . . must now be seen as an unnatural and failed experiment in our public life. In law, in political theory, in education, and in the sciences it is increasingly recognized that few judgments of consequence are value neutral."[62] For the courts to try or continue to try to legally legislate in this area is a failed undertaking and will ever continue thus.

Gary Leedes observed: "The First Amendment is given a perverse spin when the United States Supreme Court inhibits religious freedom by excluding bible-based moral judgments from the sphere of legitimate legislative activity."[63] He strongly admonishes that it is unrealistic and objectionable to expect people to distinguish between their interwoven religious and secular beliefs when they are psychologically una-

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60. Flemming, *Tyranny in a Good Cause*, CHRONICLES MAG. AM. CULTURE, Dec. 1987, at 10.

61. J. SMYLIE, JAMES MADISON, RELIGION, AND THE CONSTITUTION 9 (1986).

62. R. J. Neuhaus, Speech delivered to the American Jewish Committee's National Convention, Washington, D.C., May 16, 1986.

63. Leedes, *Taking the Bible Seriously*, 1 AM. B. FOUND. RES. J. 311, 313 (1987).

ble to isolate isomorphic statements fused in their mentality. He says the Supreme Court should eschew any role that requires judges to uncover the real foundations of legislative action in order to accomplish a social transformation, for he concludes that this is exactly what the Supreme Court was doing in *Everson v. Board of Education*[64] and in *Stone v. Graham*.[65] What finally prompts a legislator to vote for a bill can be quite different from the question of whether there are good reasons that connect that vote with traditional views of morality. So, when you pursue this to its logical conclusion, you not only engage in trying to devise a strict separation between church and state, but you actually engage in separating reality and the law. Leedes went on to comment that Thomas Jefferson recognized that the foundation of morals lies in sentiment, not in science, and where many scholars today argue that because of our pluralistic assumptions of a democratic republic this automatically disqualifies the Bible as a source of sentiment and valid law. The irony is that these assumptions discriminate invidiously against a set of time-tested ideas that have universal appeal to devout Jews, Christians, and many nonbelievers. Genuine pluralism, Leedes notes, invokes competition in ideas held by different groups of people, and authentic nondiscriminatory pluralism is broad enough to support laws inspired by communal values with a biblical pedigree. In this he supports Chief Justice Rehnquist in his statement: " 'The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin.' "[66]

CONCLUSION

Whether it is proper in our schools to teach the morality of the Judeo-Christian faith, or any other, to me is a decision to be made by the people and their legislators as contemplated by the Constitution. It is not one for the courts so long as the federal government makes no law concerning the establishment of a religion. There is no evidence that judges are better equipped to define what is best in this undertaking than are the peoples themselves. If, as stated by the Sixth

64. 330 U.S. 1 (1947).

65. 449 U.S. 39 (1980) (per curiam), *reh'g denied*, 449 U.S. 1104 (1981).

66. Leedes, *supra* note 64, at 315 (quoting Justice Rehnquist in Stone v. Graham).

Circuit, the state can say, "My way or the highway,"[67] and if, as stated by the Supreme Court, "The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny,"[68] then why is it that the federal courts have determined that only they can lay out the course of instruction in this sensitive field of religion and morality?

Our real freedom rings only in the tones of the bell as it is cast. It is a fragile thing, and our right to possess or exercise it depends in large measure on our conceptions of what it should be. But regardless of how you cast it, freedom and liberty are emotions that presuppose the existence of and reside within the soul of man. To this end, Judge Learned Hand once said:

> Liberty lies in the hearts of men and women; when it dies there, no Constitution, no law, no court can save it; no Constitution, no law, no court can even do much to help it. While it lies there it needs no Constitution, no law, no court to save it. And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few; as we have learned to our sorrow.
>
> What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which it not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interest alongside its own without bias; the spirit of liberty remembers that even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who, nearly 2,000 years ago, taught mankind that lesson it has never learned, but has never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest.[69]

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67. Mozert v. Hawkins, 827 F.2d 1058, 1074 (6th Cir. 1987) (Boggs, J., concurring).

68. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 231 (1948).

69. L. HAND, THE SPIRIT OF LIBERTY 190 (1960).

Control of access to ideas and teachings from which value judgments are drawn and truths secured does not sustain the rights of the citizen and protect him from an overbearing government, but, on the contrary, effectively creates a state mind and a programmed soul without his actually realizing it. The deafening beat of the drummer that I hear pounds out a tune that sings that it will do no violence to the rule of law to look backward to the wisdom of other times to discover the propriety of insulating the people in the exercise of their first amendment rights from the restrictions that have been imposed upon them by virtue of the incorporation principle, a condition as to which they have had no say. The people today can preserve these rights for themselves given that chance, and I am eternally grateful that our forefathers agreed.