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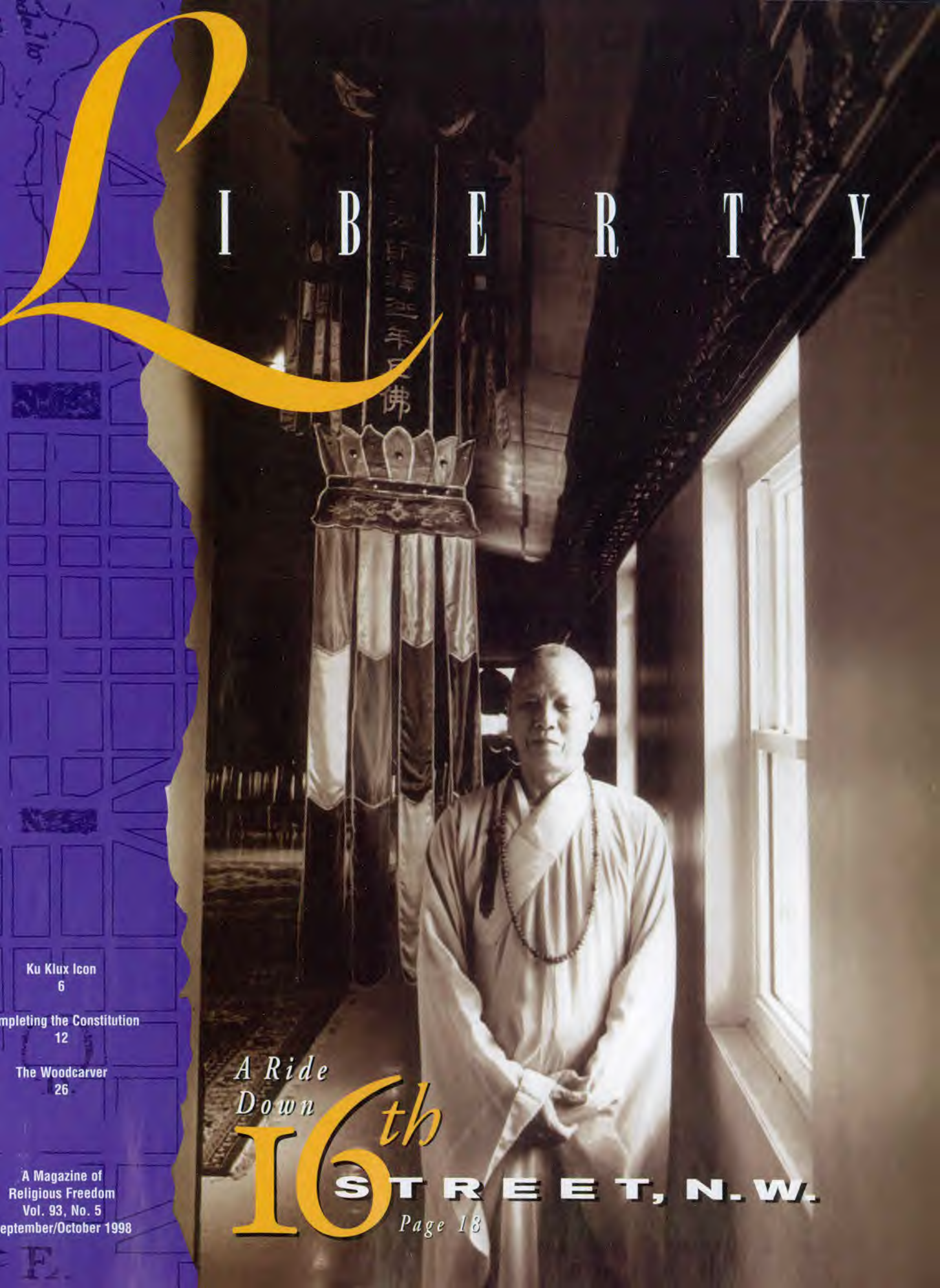

A Ride Down 16th STREET, N.W.

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A Magazine of Religious Freedom
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eptember/October 1998

LIBERTY

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Prayer Warriors

Your May/June issue is very stimulating, interesting, and witty. Since the feature story is "Alabama's Religious War," you can imagine how I immediately focused on that.

Thanks for championing the civil rights issues!

And be sure to give the person or persons who design your covers a special award. I think that your covers are just great, especially the May/June issue, but also the March/April issue and the May/June issue of 1997.

You render an invaluable service to us all.
HAROLD B. KNOX, Pastor
Five Mile Presbyterian Church
Birmingham, Alabama

I am a retired lawyer and judge, a former state legislator in Alabama, a member of the Alabama ACLU and fervently committed to upholding the First Amendment. I almost always read *Liberty* magazine from cover to cover, and your latest issue dealing with religious liberty problems in our state was, in my opinion, "right on."

As I am sure you know, Fob James won the Republican primary. Undoubtedly, the issues raised in your May/June issue are going to be major matters of discussion and demagoguery in the upcoming general election. The Democratic nominee will, I am sure, be under great pressure to move toward Mr. James's position. The same will be true of many candidates for the state legislature. The congressman from this district recently shocked me by voting in favor of the school prayer amendment. Those of us who are opposed to this trend need to be able to attack it in a forceful but simple way, and I am sure that you know better than I do that this is not always easy.
HARTWELL B. LUTZ
Gurley, Alabama

I enjoyed your May/June issue with its focus on the school prayer debate currently unfolding in Alabama. While your position splits the theoretic fine hairs and is undoubtedly the correct one for intellectuals, I tend to agree with the majority of Alabamans who are battling the tryanny of the Courts. Yes, the Supreme Court has defined what is and is not allowed in public schools, but its decisions do not necessarily reflect what is written in the Constitution. Whatever one may say in the debate, and whatever theories are forwarded and espoused, I strongly believe that the Founding Fathers, who wrote the "Godless Constitution," would nevertheless be horrified to discover that the posting of the Ten Commandments is verboten in the classroom or any other public place. Whatever the faults, shortcomings, and potential dangers of allowing some official recognition of religion, those dangers, faults, and shortcomings would have to be severe indeed to surpass the abominable and downright dangerous conditions in our public schools today. It takes no rocket scientist to see that the deterioration of the public school system correlates almost uncannily with the outlawing of official prayer and other religious expression in the public schools.

Even more chilling, in my opinion, is the stationing in Alabama schools of federal "monitors" to ensure that no prayers are spoken in an official manner. I wonder what kind of people those monitors are and what they would do if they actually had to produce something instead of draining our resources. Once again, could the Founding Fathers have envisioned this? Not in their wildest dreams or worst nightmares.

In 1997 I graduated from the Dickinson School of Law in Carlisle, Pennsylvania, which until then was a private school. Since that time, Dickinson has been taken over by and is now a branch of the Pennsylvania State University, which is publicly funded in part. At the graduation ceremony on June 6, 1998, for the first time in anyone's memory, and probably for the first time since its inception in 1834, there was no convocation prayer at the graduation ceremony at the Dickinson School of Law. That is truly a tragedy, but one that would no doubt be explained away and even cheered by the likes of your scholarly journal.
IRA WAGLER
Lancaster, Pennsylvania

Take my name off your mailing list for *Liberty* magazine. I disagree with almost everything you stand for. I am for bringing God and decency back into our national life. If you had ever read history, the First Amendment was intended only to prevent the establishment of a single national church. It did not even refer to the rights of individual states.

If one had to go—the Bible or the Constitution—I would vote for the Constitution.

Your article on the efforts of Christians to bring back prayer in schools in Alabama was especially detestable.

Go to your Saturday non-conformist meetings and leave historic Christianity alone.
Rev. VICTOR H. MORGAN
St. Luke's Church
Blue Ridge, Georgia

Concerning your recent issue on the legislative exploits of Judge Ira DeMent, kudos on your remarkable dexterity in showing, without a dissenting voice, the seamy side of religious expression in the schools.

All who love liberty must know that faith is the one type of speech that has absolutely no right to offend. In any public high school, on any given day, one may encounter personal insult, lewd gestures, disputation, name-calling, derogatory remarks, public display of affection, teasing, blasphemy, provocative attire, sexist language, pornography, occult symbols, historical-revisionist texts, slanderous insinuation, and the advocacy of various philosophies, some of them perverse; but these are not generally jailable offenses. Such assault on conservative sensibilities does not, of course, merit legislative remedy. Only the public exercise of the faith of our fathers calls for penal intimidation—yes, even when student-initiated.

Shame on those who insist on making others uncomfortable by exercising their so-called First Amendment rights! As is well known, Jesus Himself was totally innocuous, never arousing controversy or causing offense; and now, thank God, at least in DeKalb County, Alabama, His teenage followers are compelled, by legislative fiat, to follow His example. Hurrah! We simply cannot allow incitement to reverence. In this day and age, why should some enlightened young soul have to shudder through a "God bless you" from some naive coed? How dare we, in this free land, permit the pride of the pagans to be sullied with the prayers of the pious? How can we sacrifice the religious liberty of some skeptical dissenter by forcing them to overhear a student-led hymn in (horrors!) a classroom otherwise dedicated to the goddess of reason?

My heart was fed with this great steaming bowl of chicken soup for the non-Christian soul. You cannot imagine my surprise and delight to find that you had broken new ground in your journal by condoning the use of force against those who pray! As a vigilant member of the secular thought police, I nominate you to our hall of fame. Please continue to enlighten us regarding the religious despotism which threatens to overwhelm our public schools.
TIM CROSBY
Hagerstown, Maryland

Christian Science, Again

In your May/June issue Christian Science lawyers and public relations managers blandly dismiss the preventable deaths of children in their church and ask the public to do likewise. But these children suffer horribly. Toddler Robyn Twitchell was vomiting his own feces, and even his mother told investigators he was in severe pain. He was so dehydrated that his skin stayed up when pinched. Autopsy photos showed bright red lips and chin, likely because the acid in the vomit had eaten the skin off. Christian Science teaches that you have to believe you are getting a spiritual healing in order to get one, so members feel a heavy moral demand to trivialize and reinterpret symptoms. The Christian Science practitioner even testified at trial that she achieved a complete healing of Robyn and that he ran around happily chasing his kitty cat fifteen minutes before he died. Physicians testified that he would have been nearly comatose throughout the day of his death.

But church officials argue they should be allowed to deprive children of medical care because medicine fails too. The death of Heather O'Rourke from a bowel obstruction excuses Robyn Twitchell's death, they claim. A medically trained person would certainly have to study records for the children before their deaths could be compared.

The church claims that both Christian Science and medical science should have equal legal status as "system[s] of heath care" because Christian Scientists respect the sincerity of physicians and because some scholars are today studying the effect of spirituality on physical health.

Who is being narrow-minded here? It is Christian Science that teaches that you cannot have both God and a doctor. In a briefing to the U.S. Supreme Court, a Christian Science mother stated, "Christian Science provides that no person may become a member of the Church unless he or she is prepared to rely completely on spiritual healing as practiced in Christian Science. Members of the Church believe that attempts to use medical means . . . in combination with spiritual means destroy a Christian Scientist's power to heal through prayer. Thus, spiritual healing is . . . a religious imperative for members of the Church."
RITA SWAN
Children's Healthcare Is a Legal Duty, Inc.
Sioux City, Iowa

DECLARATION OF PRINCIPLES

The God-given right of religious liberty is best exercised when church and state are separate.

Government is God's agency to protect individual rights and to conduct civil affairs; in exercising these responsibilities, officials are entitled to respect and cooperation.

Religious liberty entails freedom of conscience: to worship or not to worship; to profess, practice and promulgate religious beliefs or to change them. In exercising these rights, however, one must respect the equivalent rights of all others.

Attempts to unite church and state are opposed to the interests of each, subversive of human rights and potentially persecuting in character; to oppose union, lawfully and honorably, is not only the citizen's duty but the essence of the Golden Rule–to treat others as one wishes to be treated.

APRES CÁ, LE DELUGE: In what supporters have called a "major psychic boost to the school choice movement," the Wisconsin Supreme Court upheld a voucher program that allows tax money to pay for private religious education. Though a lower court had previously ruled that the Milwaukee Parental Choice Program was unconstitutional (a decision upheld at the appellate level), the state's highest judicial body overturned (4-2) that position, stating that the program simply "places on equal footing options of public and private school choice and vests power in the hands of parents to choose where to direct funds allocated for the children's benefit." Based on the quaint egalitarian notion that poor parents should have the same options in educating their children in private schools as do affluent parents, the Milwaukee plan provides vouchers worth about $5,000 to the children of families near the poverty level. Prior to the June decision, those vouchers were good only at non-religious private schools. Now, however, the money can go toward everything from Catholic to Adventist to Wiccan education. Opponents want to fight all the way to the U.S. Supreme Court, perhaps not the smartest move on their part. After all, even if the High Court will hear the case, long gone are the halcyon days when strict separationists would argue their cases before the likes of Justices Warren, Marshall, Brennan, Black, and so forth. Today they'll stand before Rehnquist, Scalia, Thomas, and Kennedy, which means that more than likely the anti-voucher lobby will get judicially clobbered. If so, then a case that now directly affects only one state could establish principles applicable to all 50. Perhaps, in the interest of their cause, they ought to cut their loses and run.

CORPUS CHRISTI: "Censorship" is such an easy word to invoke these days, especially in America, where it has been pulled, stretched, elongated, and distended to fit so many different positions, sizes, and circumstances that it has hardly retained any meaningful vigor or recognizable shape. Censorship used to mean something important, and often what it meant was the government—with the force of law (everything from fines to gaol)—stopping people from expressing certain views, or punishing those who expressed them. Once fraught with such meaty and weighty moral and political connotations—the term has been so defined down that even free market pressures which could cause someone to not express certain views is suddenly "censorship." In other words, if a publisher decides not to publish a manuscript because it might offend, or might not even sell—this is now covered under the increasingly distended term of "censorship."

An example of how the word has been turned into silly putty is the brouhaha over the play *Corpus Christi* ("Body of Christ"), by three-time Tony Award winner Terrence McNally. In the play, Jesus Christ is portrayed as a homosexual, the Virgin Mary as a drag queen, and the disciples, well . . . guess. "Are thou king of the queers?" Pontius Pilate asks Christ. "Thou sayest," he responds.

Surprise of surprises, but outraged Christians voiced their protests, so loudly and forcefully in fact that the Manhattan Theater Club, where the play was to make its debut, decided to cancel, a move which brought out sanctimonious and self-righteous cries of the nasty C-word from the doyens of the cultural elite. The club, spurred on by this spasm of patriotic fervor, changed its mind and then decided—in the interest of free speech, Lockean natural rights, and the fate of the free world—that the show must go on, and that it wasn't going to be the victim of censorship.

Censorship? The government didn't ban the play. The police didn't close the theater. No one was arrested, or even threatened with arrest. The FBI didn't confiscate the manuscript. The authorities did stop Mr. McNally from writing his trash or harass him for it afterward. Instead, all that happened was that those who found the play offensive expressed their views loudly enough to make the producers think twice. This is nothing but John Stuart Mills' "marketplace of ideas," where people are allowed to produce blasphemous and offensive works just as much as others are allowed to express their outrage at these productions. If this is "censorship," then Jeane Dixon is an astrophysicist.

It was the latter Wittgenstein who talked about "the language game," in which the meaning of words is nothing but subjective cultural constructions and social conventions. If true, then in a society where outrage against blasphemy is now "censorship" (and a play like *Corpus Christi* is "art")—the rules of the game have become so broad and distended that they're no longer rules, and the game is a free-for-all.

WHEN PRAYER IN SCHOOL WORKS: Even without the so-called Religious Equality Amendment (which met its demise in the U.S. House of Representatives), faith is alive and well in America, even in public schools, thank you. Often excoriated as religion-free zones promulgating a militant secular humanism, public schools—for all their faults—are in many places blessed by a growing number of voluntary religious clubs and groups. "Politicians may bicker," said an article in *Time* (April 27, 1998), "about bringing back prayer, but in fact it's already a major presence—thanks to the many after-school prayer clubs." Some estimates say that 1-in-4 public schools in the country have religious clubs, while in some areas the numbers are much higher.

Indeed, despite all the hype and rhetoric about the government and the courts trying to drive religion out of American public schools, this phenomenon of after-school voluntary prayer and religious clubs proves a premise of church-state separationists as far back as Madison and Jefferson, which is that religion works better when voluntary

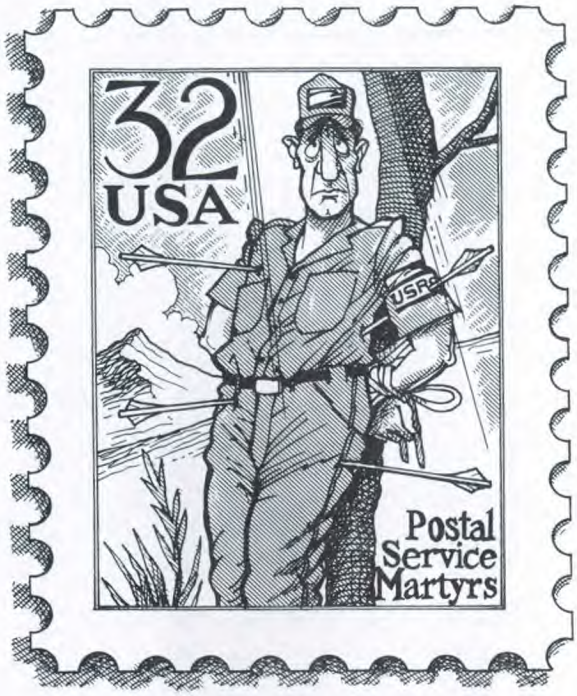

ILLUSTRATION BY RAY DRIVER

and without the coercive power of the state. Unlike teacher-led classroom prayer and religious exercises, where prayer and Bible reading are mandated by decree (like math) and thus worthless (does God really care about prayer and religious exercises required by law?)—what the student groups are doing on their own time, without the power of the state forcing people to attend, is what the First Amendment was designed to do, and that is allow Americans, students included, to exercise their religious rights in a manner that doesn't infringe upon the religious rights of others. Mandated prayer or religious exercises in public schools does infringe upon those rights—after-school, *voluntary* prayer and religious groups, where the only ones there are those who choose to be, doesn't. That's the crucial difference—a difference that the Religious Equality Amendment ignored, which is why Americans should be thankful it died the ignoble death it well deserved.

MODERN MARTYR: Of all the spurious claims by Christians about the persecution, or the denial of their religious freedom in America today—this one deserves an award. It appears that one Paul Samuel Gunning, an employee at the Quail Heights Post Office in Florida, filed suit against Marvin T. Runyon, Postmaster General of the United States Postal Service, in which Brother Gunning alleged that his free speech rights, his free exercise rights, as well as his rights under RFRA (now history) were violated. What Neronian indignity did the post office do to the newest candidate for *Foxe's Book of Martyrs?* It refused to broadcast a Christian radio station over the building loudspeakers though some employees asked for it. After denying the request (other employees had complained about the station), the post office turned off the radio altogether; instead, it allowed employees to wear headsets or have small radios at their work places, in which they could listen to whatever they wanted, from U2 to Pat Boone. Well, Mr. Gunning, not about to allow those pagans in the post office to trample upon his divine right to have Christian radio played over the loudspeaker during work hours, sought judicial remedy. At summary judgment, however, the court threw out the suit, saying that Mr. Gunning's religious and free speech rights were not violated by the refusal to play his favorite Christian station over the office loudspeaker. What's the only solution to this blatant act of judicial anti-religious prejudice? A constitutional amendment forcing the post office to broadcast religious radio over the loudspeaker, what else?

PRAYER VIGIL: The case of Mildred Rosario proves that advocates of legislated prayer in public schools want more than just, as they say, "voluntary," "non-sectarian" and "non-proselytizing" exercises. Rosario was fired as a teacher in New York after she led her sixth-grade class in prayer and then asked the children "if anyone would like to accept Jesus as their Savior." One would think that the legislated prayer-in-school folk would distance themselves from Rosario, whose action exemplifies the blatant, in-your-face religious promotion that we've been told isn't what they want. Instead, she has become, as the *New Republic* said, "a martyr of the religious right." Gary Bauer of the Family Research Council asserted: "We need countless teachers like this," while House Majority Whip Tom Delay said: "What was wrong with bringing that kind of message to children?" Nothing, really, as long as it's the parents or someone else doing it who doesn't have the power and authority of the state behind them. The attitude toward Rosario proves what critics of the moves toward legislated prayer have been saying all along: the Christian Right wants to use the power of the secular state to do for it what it, in its spiritual poverty, can't do for itself. Kind of ironic, coming from a group who claims as their Leader someone who, for His whole ministry, shunned secular power.

KU·KLU

A U.S. District Judge From Alabama Takes On Justice Hugo Black, Liberty Magazine, and Judicial Activism

By Robert B. Propst

While a student at the University of Alabama in 1952, I interned with a national public accounting firm in Atlanta. On my way to work I sometimes passed what was probably the first "adult" store I had ever seen. I remember a large sign out front with quotes from opinions of U.S. Supreme Court associate justice Hugo L. Black. In recent years my office has been in the Hugo L. Black U.S. Courthouse in Birmingham, Alabama. The foyer walls have bronze plaques, also containing quotes from Justice Black.

I have often wondered what made Justice Black tick. I realize that he is an icon to many in law, the media, and academia,* but my study of his career and his judicial reasoning raises questions about the First Amendment jurisprudence that he is significantly credited with establishing. "Expedience" is a continuous theme in his career.

The Pre-Court Years

After he became a lawyer in Birmingham, Alabama, Black joined the Ku Klux Klan. In the early 1920s he represented a preacher charged with murdering a Catholic priest who had married the defendant's daughter to a Puerto Rican. Black appealed to both the religious and racial prejudices of the jury (he gave the Klan members on the jury the Klan sign), which acquitted the defendant. He had similar success in less notorious but similar cases.

In 1924, when U.S. senator Oscar W. Underwood from Alabama denounced the Ku Klux Klan, he knew that he could not retain his seat in 1926. John F. Kennedy's book *Profiles in Courage* recognizes Underwood's courage. Kennedy's book quotes another writer: "Had Senator Underwood played the game in Alabama in accord with the sound political rule of seeming to say something without doing so, there would have been no real opposition to his remaining in the Senate for the balance of his life." Black did not denounce the Klan, but joined it instead and was given a lifetime membership. He gave a letter of resignation to be disclosed when convenient. The oath he took included a promise to "preserve by any and all justifiable means and methods . . . white supremacy" (Roger K. Newman, *Hugo Black, A Biography,* pp. 91, 92). He made open appeals to its members and received its support when he ran for and was elected to the U.S. Senate, taking Underwood's position in 1926. During the campaign he addressed nearly all the 148 Klan Klaverns in Alabama (*Ibid.,* p. 104). His total votes received closely paralleled the total Alabama Klan membership (*Ibid.,* p. 115). He acknowledged that he owed his victory to the Klan. To a Klan gathering he stated: "I desire to impress upon you as representatives of

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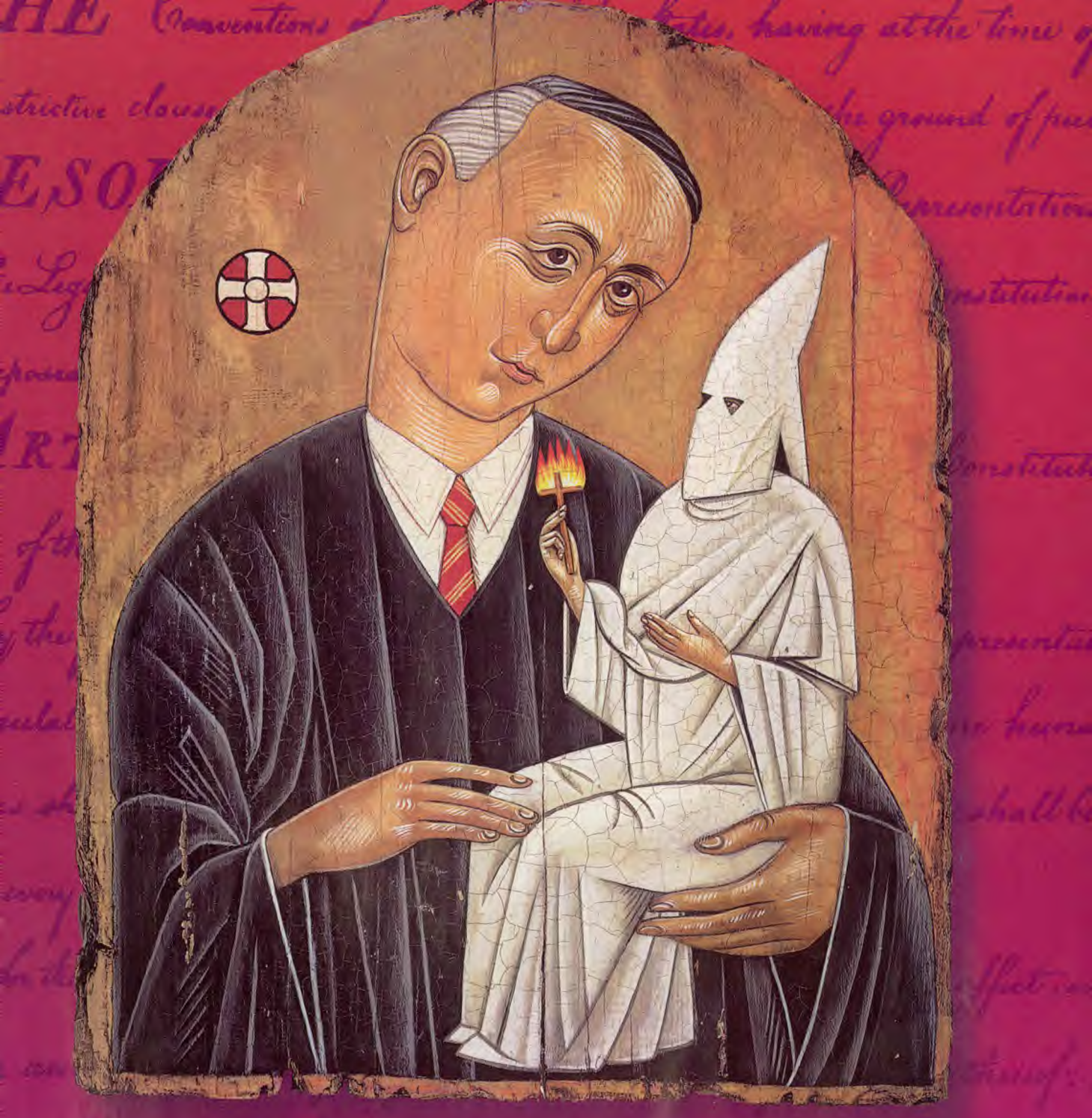
Robert B. Propst is a senior U.S. district judge in Alabama.

ILLUSTRATION BY MARC BURCKHARDT



ICON

the real Anglo-Saxon sentiment that must and will control the destinies of the stars and stripes, that I want your counsel" (*Ibid.*, p. 116). Statements made by him during his campaign would today likely disqualify him from being principal at Wedowee, Alabama, High School.

In 1931 Black told an Alabama audience: "Our country is Christian. . . . The great Webster spoke right when he said that Christianity is the common law of the United States" (*Ibid.*, p. 146). He told another Alabama audience that the real cause of the Civil War was not slavery but states' rights and that the South should be proud of its history (*Ibid.*).

As a U.S. senator, he filibustered against anti-lynching bills proposed in the U.S. Congress (Gerald T. Dunne, *Hugo Black and the Judicial Revolution*, p. 48). Newspapers accused him of ignoring the Fourth Amendment during Senate investigations. He led President Roosevelt's fight to "pack" the Supreme Court. Most constitutional scholars have condemned this effort, which was defeated. Roosevelt recognized his effort by nominating him to the Supreme Court of the United States. He initially denied that he had been a member of the Klan, or evaded the issue, and was confirmed and appointed as a Supreme Court justice. He later justified his Klan membership by saying, "I was joining every organization in sight. . . . I wanted to know as many possible jurors as I could" (*Ibid.*, pp. 97, 98).

Black used the gimmick of carrying a copy of the Constitution while rewriting it.

The Court Years

As a Supreme Court justice, Black voted to uphold the constitutionality of the internment of Japanese citizens, later saying, "They all look alike" (*Ibid.*, p. 318). He voted to uphold the constitutionality of poll taxes and voted to hold Section 5 of the Voting Rights Act of 1965 unconstitutional. He dissented in *Griswold*, precursor of and precedent for *Roe v. Wade*. Rather than decide *Brown v. Board of Education* on an obvious and immediate equal protection basis, he joined in a social engineering decision that led opposing forces to believe that they could continue to deny or delay this clear constitutional entitlement. Ironically, his icon status was enhanced because the very Alabama people whose support he sought in 1926 treated him as a traitor after 1954.

I reference Black's background, his votes in the Senate, and some of his opinions on the Supreme Court to demonstrate that his icon status is primarily attributable to his First Amendment jurisprudence. He is credited by members of the press, the entertainment media, and by his other supporters with leading the fight in this area. That's what my building celebrates.

Black became the leading exponent of the doctrine of total "incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment. When he began espousing the total incorporation doctrine, two Stanford University law professors wrote law review articles suggesting that he had manipulated and manufactured history in order to sell the doctrine. They said that he had been "willing to distort history, as well as the language of the framers, in order to read into the Constitution provisions [he thought] ought to be there" (Dunne, p. 263). His view of judicial activism during his Court-packing period was entirely different from his view as a member of the Court.

Black had an "absolutist" free speech philosophy. He early on joined the free-spirited Justice Douglas in a view that even obscenity was protected by the First Amendment (*U.S. v. Roth*). The total Court initially rejected this position, but Black and others gradually eroded the Court's position to the point that "adult" bookstores, magazines, movies, and pornography have grown exponentially. His popularity with the press and entertainment media was firmly established.

One of his biographers stated, "A more formally irreligious man would have been hard to find" (Newman, p. 521). He set out to bring about a *total separation* of religion and government. He was aided in this by his total incorporation theory (as opposed to the earlier "ordered liberty" approach previously taken by the Court). His position on religion was consistent with his anti-Catholic stance taken during his Ku Klux Klan days. It was also consistent with his recommending to others that they read the writings of atheist Bertrand Russell, who felt that all religions are untrue and harmful—whether or not separated from the state.

It was not enough, however, for Black to use only the language of the First Amendment. He laid his groundwork through rhetoric and dicta in *Everson v. Board of Education*. He cited *Reynolds v. United States*, a Supreme Court "free exercise" case, to justify his "establishment" philosophy. He was not able to rely on language, which simply says that "*Congress* shall make no *law* respecting an *establishment* of religion." The Amendment refers to "law" and says nothing about the actions of any governmental officials other than Congress. Everyone understood what was meant by "established" religion. The ratifying states wanted Congress to have nothing to do with the issue of "establishment." Justice Story

and Professor Cooley both recognized that the First Amendment was written in such a fashion as to "exclude from the national government all power to act upon the subject. . . . Thus, the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice, and the State constitutions" (Thomas M. Cooley, *Constitutional Limitations* [1868], p. 470).

The language of the First Amendment not being broad enough for Black, he reached out to an unofficial letter of Thomas Jefferson that made reference to a wall of separation between government and religion. He thus relied on an unofficial letter of a president who was not at the Constitutional Convention (nor was he in Congress when the Bill of Rights was adopted) and who had declined to follow the religious practices of the first president. Black expanded on even Jefferson's wall of separation quote by adding "high and impregnable." (Black could have as well adopted Jefferson's stand on the doctrine of nullification as enunciated in the Virginia and Kentucky Resolutions or his opinions about the dangers of judicial review.) Other writings of Jefferson's made it plain that he felt that state governments did not have the same religious restriction, but Black ignored this. He did not quote from a January 23, 1808, letter from Jefferson to Samuel Miller, where Jefferson stated: "I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserves to the states the powers not delegated to the United States. Certainly, no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government. It must then rest with the states, as far as it can be in any human authority.

"Fasting and prayer are religious exercises; the enjoining them an act of discipline. Every religious society has the right to determine for itself the times for these exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it.

"I am aware that the practice of my predecessors may be quoted. But I have ever believed, that the example of state executives led to the assumption of that authority by the general government, without due examination, which would have discovered that what might be a right in a state government was a violation of that right when assumed by another."

Black used the gimmick of carrying a copy of the Constitution while rewriting it. His course of action succeeded so well that many people now think that the *Constitution* specifically provides for a "high, impregnable wall of separation between church and state." The actual language has succumbed to the substituted language. His supporters, who include many professors and members of the press (including the editors of *Liberty* magazine) because of his absolutist First Amendment philosophy, ridicule all who question his decisions. His supporters look on him as a great savior because he helped "incorporate" the First Amendment and then rewrote it.

In describing Black's method of reaching judicial decisions, Newman metaphorically stated, "Black impatiently rummaged through the whole house and beyond, looking for articles, accessories, props, anything he could find, and added them to the foundation to develop a new structure" (p. 484). Newman also states, "Black was essentially a political being" (p. 329). Also, "he asserted historical episodes that gave sanction to his beliefs as if they were immutable truths. But in no way could history be as irrefutable or as one-sided as Black liked to believe" (p. 507).

Another View

Of course, even the "ordered liberty" approach and/or selective incorporation had given emphasis to First Amendment type rights. They did not, however, create a "high, impregnable wall of separation" or otherwise rewrite the First Amendment. Many of the personal actions of public officials that are now said to be breaches of the high and impregnable wall would not appear to jeopardize "ordered liberty" or to create "a church recognized by law as the official church of a nation [or state]" (see *Webster's New Collegiate Dictionary, Tenth Edition,* defining "established church").

I know that Black could not have changed the law single-handedly, but persistence is recognized as one of his strong characteristics. Newman states, "Above all, he was the driving force behind the constitutional revolution that transformed the nation. 'No justice in our history had a greater impact on our law or on our constitutional jurisprudence,' his colleague William J. Brennan, Jr., later wrote. His impact on the country was greater than that of most presidents" (p. xiii). Thus it is appropriate to consider Black's history in evaluating the effect of his opinions on First Amendment law.

Some of the more scholarly rebuttals of Black's Establishment Clause jurisprudence are found in the dissents of Chief Justice Rehnquist and Justice White in *Wallace v. Jaffree* (472 U.S. 38 [1985]), the dissent of Justice Stewart in *Stewart v. Vitale* (370 U.S. 421 [1962]), and the opinion of Chief Judge Hand in *Jaffree v. The Board of School Commissioners of Mobile County* (554 F. Supp. 1104 [S.D. Ala. 1983]). Readers might at least learn what our founding fathers really stated, and immediately thereafter, practiced. While Chief Judge Hand's opinion may be questioned for not following what appeared to be the "established" law, it clearly demonstrates problems with how that law was "established." If the Constitution is to be amended, it should be pursuant to Article V. It should not be done by the stroke of the judicial pen based upon the personal philosophies of judges or the agendas of others.

In the October 6, 1997, *U.S. News and World Report* issue, John Leo discussed the book *Drawing Life: Surviving*

the Unabomber, by David Gelernter, a Yale computer scientist horribly wounded by the "Unabomber." Gelernter's period of recovery gave him an opportunity to reflect on what could have caused America to so quickly deteriorate "from a stable and orderly world into our current chaos of fatherlessness, illegitimacy, divorce, violence, deviancy, and anything-goes morality." Leo states: "How did we get into this mess? Gelernter has an answer bound to irritate a lot of readers (but reassure many more): The intellectuals did it. He says that anti-bourgeois intellectuals and artists have always been outsiders with a predictable set of attitudes: opposition to "organized religion, the military, social constraints on sexual behavior, traditional sex roles, and family structures, formality or fancy dress or good manners, authority in general." But those attitudes now dominate the popular culture, he says, because the old elite has given way to a new intellectualized elite or intelligentsia that chopped away at tradition and won. The press is part of the problem, he says, because reporters lean liberal and favor the intellectual elite."

I submit that Justice Black, known as an intellectual, became an icon to the intellectual elite, whose agenda he helped establish. In fact, this article was prompted by Professor Schwartz's suggestion that Black was one of the 10 greatest U.S. Supreme Court justices and that the *Jaffree* district court opinion is one of the 10 worst (listed as number 2). It just demonstrates that truth cannot always compete with biased judgment. Perhaps the answer lies in the following quotes from Judge Lawrence Silberman of the United States Court of Appeals for the District of Columbia.

"The answer, as I have foreshadowed, is that the American working press has, to a man and a woman, accepted and embraced the tenets of judicial activism. Unlike the law schools, where one can still find a few professors who assert the virtues of judicial restraint, I have never met a legal reporter who holds to that view.

"The working press covers the federal courts, indeed any American courts, as if judicial decisions were simply the extension of politics by other means. As Justice Scalia has remarked, they seem uninterested in the reasoning of opinions—which should be even more important than the result since it is the reasoning that is really law. And rather obviously they approve of only certain kinds of results.

"Of course, those of us who had been involved in judicial selection watched with great disappointment as judges seemed to change on the bench, or, as the press would say, 'grew.' It was quite frustrating to see those particular jurists come to accept and even relish the temptations of activism. They were rewarded by being described approvingly as 'non-ideological'—deciding each case on its merits—which, as far as I can tell, meant that they were expected to reshape the law each time to conform to a desired outcome. (Ironically, hard-core Warren Court-type activists are never described as ideological.)

"So I understand better today the reason for the evolution of some judges. More often than not it is attributable to their paying close attention to newspaper accounts of their opinions."

Isn't it appropriate to question how it came to be that Larry Flynt is a First Amendment hero and a judge who posts the Ten Commandments is deemed by some to be a kook?

Regardless of how we view the benefits or detriments of the law as it has developed, let's at least be honest as to how law of questionable benefit to American society has developed. Isn't it appropriate to *separate* sophistry from bona fide judicial reasoning? Isn't it appropriate to question how it came to be that Larry Flynt is a First Amendment hero and a judge who posts the Ten Commandments is deemed by some to be a kook? I do not countenance any judge or governor threatening to disobey controlling legal authority. Isn't it ironic, however, that it is arguably unconstitutional for a judge to display the venerable Ten Commandments, but that he arguably has a constitutional right to display a photograph of adult pornography?

Even when the Due Process Clause of the Fourteenth Amendment is considered to have incorporated the First Amendment, it is highly questionable that an individual public official's posting of the Ten Commandments deprives any person of "life, liberty, or property. . . ." Such action does not realistically affect a person's free exercise of his or her own religion, nor does it establish a religion for anyone. Merely being offended is not being deprived. If it is, let us similarly consider the offending nature of television and movie language. Isn't it appropriate to consider whether we are truly protecting fundamental rights and liberties or merely creating divisiveness by nitpicking?

FOOTNOTE

* Most of this article is based upon a reading of three biographies of Justice Black and another book that lists him as one of the 10 greatest Supreme Court justices. All seem to be written by fervent admirers. The books are: Roger K. Newman, *Hugo Black, A Biography* (Pantheon Books, 1994); Gerald T. Dunne, *Hugo Black and the Judicial Revolution* (Simon and Schuster, 1977); Virginia VanderVeer Hamilton, *Hugo Black, The Alabama Years* (University of Alabama Press, 1972); and Bernard Schwartz, *Book of Legal Lists* (Oxford University Press, 1997).

Other Views of JUSTICE BLACK

[His] forte was . . . not so much adaptation of the law to deal with changing conditions as a virtual transformation of the law to meet quantum acceleration in societal change (Bernard Schwartz, *Book of Legal Lists*, p. 17).

The judicial function meant [to him] that the judge was to decide on the basis of his own independent judgment, however much it differed from that of the legislature or prior law on the matter (*Ibid.*, p. 17).

From this point of view, a Frankfurter satiric portrayal of "him" acting as though he were "back in the Senate" contained some truth (*Ibid.*, p. 18).

He could be the self-taught free-thinker dismissing a venerable tradition of law with a stroke of his judicial pen (Dunne, p. 29).

Justice Harlan once wrote, "It's wonderful what Hugo can do with a bum legal position by high-sounding phrases. . . ." (Newman, p. 484).

Justice Blackmun said that Black remained a "canny, lovable manipulator . . . ever the politician, ever the senator still" (*Ibid.*, p. 601).

Justice Douglas, Black's favorite colleague, said, "You have to watch Hugo, he's tricky" (*Ibid.*, p. 367).

Justice Reed said to his clerk, "Black will put something in this opinion that he plans to pull out and use five opinions down the road [see *Everson*]. . . so you better be careful about the future implications of what you see in things that he circulates" (*Ibid.*, p. 367).

The SECULARIZATION HYPOTHESIS

"Religion," The Oxford Companion to the Supreme Court of the United States (Oxford University Press, 1992), pp. 717-719:

"It is clear that the [Establishment Clause] was not intended to do away with religious establishments then existing among the new American states."

"Nineteenth-century Americans understood the Constitution to require a separation of church and state only at the institutional level. This meant that constitutionally prohibited establishments of religion were created when the government coerced funding of or participation in a particular denomination or sect. However, it did not require that government or politics be secular. On the contrary, nineteenth-century Americans generally believed that Protestant values formed an important part of the foundation on which society was built."

"The 1930s also saw elaboration of the 'secularization hypothesis' by intellectuals in both the United States and Europe. Under this hypothesis, progressive secularization of society [not changes in the Constitution] was seen as an inevitable and positive long-term trend that would eventually end in the elimination of religion as a public influence."

"In the twentieth century, religion 'emerged as the preeminent symbol of everything that was bad in human society,' whereas science was inextricably tied up in the minds of most intellectuals with everything that was best in human society."

Completing the Constitution

Original Intent and the Fourteenth

Suppose the Texas legislature, responding to the will of the majority, denied citizens the right to criticize the government? Suppose Marylanders voted to make Roman Catholicism the official religion? Suppose Kentucky required anyone running for public office to profess belief in the Trinity and the deity of Christ? Suppose Oregon outlawed the practice of Judaism within its borders? Suppose Alabama passed a law requiring "separate but equal" public schools for whites and African-Americans?

Of course, any of these laws would be struck down as violations of the U.S. Constitution because the U.S. Supreme Court has ruled that most of the freedoms of the Bill of Rights apply to the states by virtue of the Fourteenth Amendment.

But do they really? Legal historians vociferously debate whether application of the Bill of Rights to the states was what the post-Civil War framers of the Fourteenth Amendment intended. If the Bill of Rights does not apply to the states, then many of the most important modern decisions of the Supreme Court—which have dealt with everything from First Amendment religious freedom and free speech, Fourth Amendment search and seizure, to Fifth Amendment criminal procedure (matters the eighteenth-century Founding Fathers left to the states)—are without constitutional warrant.

Incorporation

The Supreme Court, in a series of cases decided in the twentieth century, held that most, though not all, of the Bill of Rights are binding on the states as a result of the Fourteenth Amendment. This process of "selective incorporation" began in 1925, in *Gitlow v. New York,*[1] when the Supreme Court recognized that the free speech and press guarantees of the First Amendment are "fundamental rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states."[2] In its ruling, however, the Court offered no significant historical analysis of either the First Amendment or the Fourteenth Amendment, or of their relationship to each other.

The religion clauses of the First Amendment were subsequently embraced by the Supreme Court's incorporation doctrine. In *Cantwell v. Connecticut* (1940)[3] the Court invalidated a Connecticut statute requiring a license to be obtained before religious groups could solicit funds door-to-door. The Court held that the Free Exercise Clause is applicable to the states: "The fundamental concept of liberty embodied in the [Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment."[4] The *Cantwell* case was monumental in its effects, ushering in a new era of federal court jurisdiction over religion in America. As in *Gitlow,* however, the Court offered no analysis of why the incorporation doctrine was applicable.

Seven years later, in *Everson v. Board of Education,*[5] the Court extended the incorporation principle to the Establishment Clause, again without a historical or legal rationale.

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Later that year, however, Justice Hugo Black, in a dissenting opinion in *Adamson v. California*,[6] gave an extended exposition of the history of the Fourteenth Amendment, concluding, with fellow justices William O. Douglas, Frank Murphy, and Wiley Rutledge, that one of the chief objects of the Fourteenth Amendment "was to make the Bill of Rights applicable to the

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By
Derek H. Davis

states," thereby casting the protective net of the first eight amendments around persons who were threatened by state action. To support his position, Justice Black appended a 33-page summary of the congressional debates leading to the ratification of the amendment in 1868, quoting chiefly the speeches of its primary author, Republican Representative John Bingham of Ohio. Although the Court majority rejected Black's view that the Fourteenth Amendment incorporates all of the first eight of the Bill of Rights, it reaffirmed its allegiance to "selective incorporation."

The Court majority, affirming past decisions, did not root its decision in the intentions of the framers of the Fourteenth Amendment, but in the principles of "justice" and "ordered liberty."[7] In other words, as Justice Benjamin Cardozo had stated it in an earlier case, certain portions of the Bill of Rights had been absorbed in the Fourteenth Amendment because "neither liberty nor justice would exist if they were sacrificed."[8]

The Fourteenth Amendment

Whether the Bill of Rights applied as much to the states as to the federal government was a question that could arise only because of the Fourteenth Amendment. Before its ratification (in 1868) nothing in the Constitution prevented a state from executing religious heretics, from refusing to grant a criminal defendant a trial by jury, or from conducting a frivolous search of one's home. The Bill of Rights was originally added to the Constitution to appease popular fears of the new federal government. It was to restrict federal power; it was not intended to apply to the states, as affirmed in *Barron v. Baltimore* (1833), where Chief Justice John Marshall held: "Had Congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection for the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language."[9]

Thus any restraints on the states derived from state constitutions and common-law practices, not from the U.S. Constitution. Justice Black's historical analysis in *Adamson* argued that the first section of the Fourteenth Amendment transformed this situation by embracing the Bill of Rights, thereby nationalizing its requirements: what the national government could not do, the various states could not do either.

But whether this was what the framers of the Fourteenth Amendment intended remains heavily debated. After dozens of books and hundreds of articles, scholars still line up on both sides. Said one legal historian: "Historical scholarship on the adoption of the Fourteenth Amendment is now at an impasse."[10]

Evidence for Incorporation

There is, however, clear evidence that the Fourteenth Amendment's framers did, indeed, intend to overrule *Barron v. Baltimore* and make the Bill of Rights applicable to the states. John Bingham, who authored Section 1 of the amendment, repeatedly said (13 times in one day during House arguments) that the amendment would overrule the *Barron* case.[11] Though Bingham's testimony is the most compelling evidence for incorporation, other leaders in the House and Senate shared the same view. Many leading newspapers and magazines reported a similar understanding at that time.

This view comports with the plain meaning of the words of the amendment, as well as the broader historical context. The Southern states, before and during the Civil War, had violated most all of the Bill of Rights in its maintenance of slavery. The whole idea of the Fourteenth Amendment was to end the abuse of Blacks, to be achieved by requiring that they, as well as all other persons, were entitled to the most fundamental catalog of rights and freedoms: the Bill of Rights. This is the broader historical context.

Of course, this view is hotly challenged. Many members of the Thirty-Ninth Congress

expressed contrary opinions. Senator Lyman Trumbull, chairman of the Senate Judiciary Committee, held that "the great fundamental rights set forth in this Bill [are] the right to acquire property, the right to come and go at pleasure, the right to enforce rights in the courts, and to make contracts,"[12] rights not specifically named in the Bill of Rights. And it is true that the Supreme Court adopted the view (until *Gitlow* in 1925) that the Fourteenth Amendment was intended to protect a very limited category of rights.

The original intentions of the framers of the Fourteenth Amendment, much like the original intent of so many provisions of the Constitution, are often elusive. Yet when the constitutional text is unclear, most experts agree that the task of judges and scholars is to determine, as best they can, how the people of the states who ratified the document understood the text. This approach squares with that of James Madison, who said in 1796 that whenever it is necessary to go beyond the words of the Constitution itself to ascertain its meaning, "we must look for it, not in the General Convention which proposed, but in the State Conventions which accepted and ratified the Constitution."[13] Nevertheless, in the case of the Fourteenth Amendment, this task is difficult because, as Supreme Court justice John Harlan noted: "Reports of the debates in the state legislature on the ratification of the Fourteenth Amendment are not generally available."[14] In fact, a complete record of the ratification proceedings are available from only one state, Pennsylvania.

Without clear evidence on either what the Thirty-Ninth Congress or the state ratifying conventions meant, scholars must adopt a somewhat flexible principle of interpretation that would entertain some additional factors beyond original intent as well as examine the broader historical context. This will reveal much evidence that the Fourteenth Amendment was a conscious attempt to "complete" a Constitution that had been "incomplete" from the beginning.

Constitutional Interpretation

In interpreting the Constitution, one should not approach the intent of the framers as being so fixed that it prevents some freedom in determining the meaning of the text. The American Constitution, as amended, could not have survived for more than 200 years if it were not flexible. While its provisions are sufficiently detailed to provide a necessary element of stability to government, the Constitution is broad and general enough to allow for steady growth in order to meet the altered requirements of an ever-changing society. So while the American Constitution would someday lose all of its meaning if its primary guardians, the justices of the United States Supreme Court, were not committed to its original meanings, the Constitution is also a "living document." Thus while original intent is always an important starting place, it is not the end of the inquiry.

It is also appropriate, as former Supreme Court justice William Brennan frequently advocated, to look for "fundamental aspirations" in the Constitution. Brennan once wrote that "the Constitution embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being. . . . We are an aspiring people, a people with faith in progress. Our amended Constitution is the lodestar for our aspirations."[15] Moreover, Brennan frequently found justification for the fundamental aspirations approach in the ambiguity of certain provisions of the Constitution. According to Brennan, the "majestic generalities and ennobling pronouncements [of the Constitution] are both luminous and obscure. The ambiguity of course calls forth interpretation, the interpretation of reader and text."[16]

Thus, according to Brennan, we are free to consult original beliefs, but also free to search for the ideals and aspirations behind certain provisions. It is a process of being true to the original text, but acknowledging room for play in the joints in order to keep the Constitution "up-to-date" and reflective of modern values. Constitutional scholar Alexander Bickel has summarized the key factor in looking beyond original intent: "As time passes, fewer and fewer relevantly decisive choices are to be divined out of the tradition of our founding. Our problems have grown radically different from those known to the Framers, and we have had to make value choices that are effectively new, while maintaining continuity with tradition."[17]

If the precise meaning of the Fourteenth Amendment cannot be divined, its fundamental aspirations can be. While terms like "privilege and immunities"; "due process"; "life, liberty, and property"; and "equal protection" are not altogether clear, scholars do know that major changes—some would say a "constitutional revolution"—were intended as a result of

the Fourteenth Amendment. Clearly, the Fourteenth Amendment sought to reduce state sovereignty substantially in order to prevent another Southern secession from the Union. The amendment added power to the national government, facilitating a supremacy over all the states. This seemed the prudent course because the North no longer trusted the South with the duty to secure basic civil rights. In the years leading up to the Civil War, southern states essentially ignored the idea of a free press, making it a crime to criticize slavery. Slaves were prevented from bearing arms; slave states freely used dragnet search policies, hunting for weapons owned by blacks. Slaves were denied jury trials, the right to counsel, freedom of religion, the right to assemble, and other basic rights. There were even laws that forbade teaching blacks how to read or write. The aim of the framers of the Fourteenth Amendment was to prevent a recurrence of these violations, and the simplest method was to make the Bill of Rights binding on the states.

This was the "fundamental aspiration" behind the adoption and ratification of the Fourteenth Amendment. In Representative Bingham's words, the purpose of the proposed Fourteenth Amendment was "to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the Bill of Rights as it stands in the Constitution. It hath that extent—no more."[18]

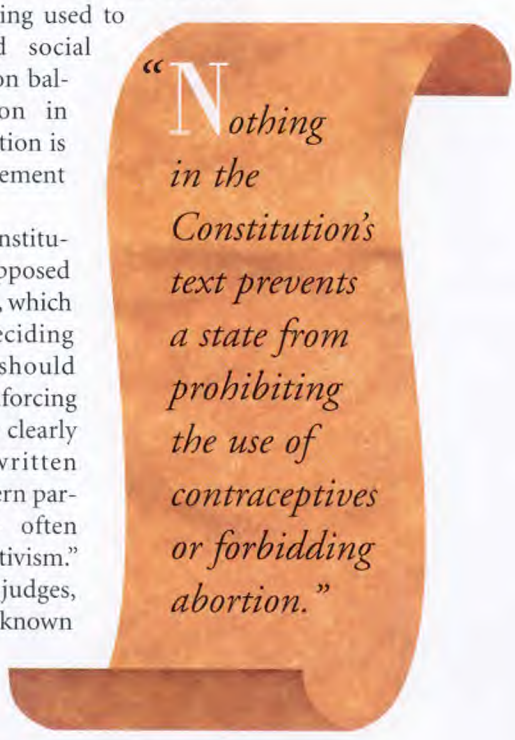
Based on other evidence, however, in all probability, there were additionally a small group of rights, not identified in the Bill of Rights, that the framers conceivably intended to make binding on the states by the Fourteenth Amendment, but for which the evidence is not clear or extensive. What is clear, though, at least from Bingham's perspective, was the goal of making the Bill of Rights binding on the states.

Modern Jurisprudence

By applying the Bill of Right to the states (using the Due Process Clause as its vehicle), the U.S. Supreme Court has correctly identified and implemented the basic goals of the Fourteenth Amendment's framers. To deny the Court the right to permit the Constitution to evolve over time is to deny the Court the right to interpret the Constitution, which virtually everyone understands to be the Court's primary duty. If the Constitution is to protect fundamental values and unify society, the Supreme Court should have substantial discretion in determining the meaning of specific constitutional provisions.

This discretion should not be unlimited, however. The fundamental aspiration that a judge perceives in a particular provision of the Constitution should not merely be his or her own, but those of the framers. If judges can give a provision almost any meaning, why have a constitution at all? Accordingly, any judicial interpretation must retain this linkage to the constitutional text.

Discretion, of course, does not guarantee good results, and thus there always exists a risk of judicial discretion being used to frustrate political and social progress. Nonetheless, on balance, judicial discretion in constitutional interpretation is essential to the advancement of society.



This approach to constitutional interpretation is opposed to strict constructionism, which holds that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution."[19] In modern parlance, this model is often referred to as "interpretivism." Among contemporary judges, Robert Bork is the best known interpretivist; among scholars, Raoul Berger is.[20] Strict constructionism, or interpretivism, was spurred in recent times by the wave of liberal decisions of the Warren Court in the 1950s and 1960s.

That Court operated on anything but an interpretivist methodology. For example, the ambiguous language of the Equal Protection Clause did not compel the Court to end desegregation in *Brown v. Board of Education*.[21] State-sanctioned prayers in public schools and financial aid to sectarian schools are not explicitly forbidden by the First Amendment.[22] Nothing in the Constitution's text prevents a state from prohibiting the use of contraceptives or forbidding abortion.[23] The Supreme Court's authority to invalidate legislative acts is not explicitly in the Constitution, yet it has been accepted as a wise and necessary check on legislative acts.[24] And, of course, the Constitution does not say

that the Bill of Rights must apply to the states; this requirement was implemented based on what the Court deems to be the core values reflected in the Constitution.

An analogy from biblical interpretation might be helpful here. Christians, Jews, and Muslims, to one degree or another, consider the Bible to be the authoritative Word of God. The Bible clearly countenances the building of houses of worship—temples, synagogues, perhaps even churches. But what about building seminaries? No text authorizes that. The strict constructionist could not conscientiously countenance the building and operation of seminaries, since the biblical text does not explicitly allow for it. Yet who takes such a position?

The more flexible approach, however, sees in the text the fundamental aspiration of propagating the Word of God, which requires the training of experts. Building seminaries would be embraced by this aspiration and, therefore, biblically permissible. The Supreme Court used precisely this approach when it interpreted the Fourteenth Amendment to "selectively incorporate" the Bill of Rights.

"The Civil War is perhaps the best evidence that Madison had properly diagnosed the Constitution's main weakness: its inability to control the states."

"Completing" the Constitution

The Supreme Court's decision to make the Bill of Rights binding on the states also makes sense if examined from the perspective of the "Father of the Constitution," James Madison. Madison was the architect of the main outlines and chief principles of the Constitution. The Convention of 1787 did not accept everything he proposed. But while many of Madison's ideas were preserved in the Constitution, he was particularly concerned about one missing element: the failure of the Constitution to grant Congress a power to veto any law made by a state. As a student of history, Madison believed that all previous federal unions had failed because the member states tended to encroach on the powers of the central government or on the power of the other member states. He contended that a veto power would allow the Congress, acting as a caring agent of all member states, to review all state legislation.[25] Without this element, he informed his friend Thomas Jefferson by letter, the Union would not last long.[26]

Presciently, Madison saw the states regularly oppressing minorities, and felt the veto power would enable Congress to promote justice and stability within the states, ultimately protecting the states from themselves. The veto power he proposed was strictly negative; it was not a positive legislative power. Thus, he remained committed to federalism.

As Madison had feared, without that provision the Union did not last long. The Civil War is perhaps the best evidence that Madison had properly diagnosed the Constitution's main weakness: its inability to control the states. The Southern states had abused the slave minority, denying them all manner of rights, even the status of citizens, an atrocity sanctioned by the *Dred Scott* case in 1857. Pure and simple, black people had no rights that whites were legally obligated to respect.

These abuses were the result of an incomplete Constitution. As legal scholar Michael Zuckert notes, "Madison wanted a constitutional order in which there was a clear commitment . . . to the idea that a common principle of political rights pervaded the union and ruled within each state."[27] Congress would have the ability, only if necessary, to force states to respect the basic rights of all persons to life, liberty, and the pursuit of happiness, as provided in the Declaration of Independence, rights believed to be embodied in the Bill of Rights. As an additional means of checking state power, Madison—in proposing the First Amendment at the First Congress—urged its extension to the states (i.e., incorporation), because "the State governments are as liable to attack these invaluable privileges as the General Government is, and therefore ought to be cautiously guarded against."[28] The proposal failed, however; the majority of his colleagues believed that they should "leave the State Governments to themselves."[29]

Seen in this broader perspective, the Fourteenth Amendment's framers were seeking merely to complete the Constitution along the lines envisioned by Madison. Even if the mechanism was not quite the same (making binding on the states the Bill of Rights rather than simply giving to Congress a veto power over state enactments)—the result was essentially the same: the states must respect the basic rights of all human beings. *Barron v. Baltimore* perpetuated the incompleteness of the Constitution; the Fourteenth Amendment completed it.

In all probability, the Thirty-Ninth Congress intended for the Privileges and Immunities Clause, not the Due Process Clause, to achieve the incorporation of the Bill of Rights. In Senate deliberations, Jacob Howard called the Privileges and Immunities Clause the most important feature of Section 1 of the Fourteenth Amendment, and he specifically stated that the rights enumerated in the Bill of Rights were privileges and immunities of United States citizens.[30] But this line of interpretation was foreclosed when in the *Slaughter House Cases* (1873),[31] the Supreme Court held that the Amendment's draftsmen could not possibly have intended such an interpretation because it would destroy the basic plan of the Constitution, a plan designed to maintain strong reserved power in the states, while granting only limited power to the federal government. It took another half century before the Court corrected its own misinterpretation concerning the intentions of the Fourteenth Amendment's framers. For the *Gitlow* Court of 1925, making binding on the states the speech and press guarantees had less to do with expanding the power of the federal government than ensuring that all states recognized the entitlement of all persons to fundamental rights. That the Court adopted the Due Process Clause, rather than the Privileges and Immunities Clause, as the mechanism to make real the aims of the Fourteenth Amendment's framers is historically inconsequential.

Conclusion

Religious liberty in the United States is closely linked to the incorporation of the Establishment and Free Exercise Clauses, thus making them binding on the states. While state and local governments are not to be automatically distrusted in the advancement of religious liberty, time has proved that parochial attitudes often develop that are insensitive to the religious conscience of some citizens. And though our present system does not eliminate state sovereignty on all matters of religion, on the major questions, good policy dictates that the Supreme Court establish and uphold uniform laws binding on all Americans. In so doing, the Court helps the country live out its motto, "E Pluribus Unum" ("Out of Many, One"), which accords with the intent of the framers of the Fourteenth Amendment, whose paramount goal was a united citizenry whose common and equal rights would be respected.

FOOTNOTES

[1] 268 U.S. 652 (1925).

[2] *Ibid.*, p. 666.

[3] 310 U.S. 296 (1940).

[4] *Ibid.*, p. 303.

[5] 330 U.S. 1 (1947).

[6] 332 U.S. 46 (1947).

[7] See *Palko v. Connecticut*, 302 U.S. 319 (1925), p. 325.

[8] *Ibid.*

[9] *Barron v. Baltimore*, 32 U.S. (7 Peters) 243 (1833), p. 250.

[10] William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge, Mass.: Harvard University Press, 1988), p. 4.

[11] *Congressional Globe*, Thirty-ninth Congress, First Session, 1088-1094 (1866).

[12] *Ibid.*, p. 475.

[13] Gaillard Hunt, ed., *Writings of James Madison* (New York, 1900-1910), vol. 4, p. 272.

[14] *Reynolds v. Sims*, 377 U.S. 533 (1964), p. 602 (Harlan dissenting).

[15] William J. Brennan, "The Constitution of the United States: Contemporary Ratification," *South Texas Law Review* 27 (1986): 434.

[16] *Ibid.*

[17] Alexander Bickel, *The Least Dangerous Branch* (Indianapolis, Ind.: Bobbs-Merrill, 1982), p. 39.

[18] *Congressional Globe*, Thirty-ninth Congress, First Session, 1088 (1866).

[19] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980), p. 1.

[20] See Robert H. Bork, "Original Intent and the Constitution," *Humanities* (February 1986); and Raoul Berger, *The Fourteenth Amendment and the Bill of Rights* (Norman, Okla.: University of Oklahoma Press, 1989).

[21] 347 U.S. 483 (1954).

[22] *Engel v. Vitale*, 370 U.S. 421 (1962); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[23] See *Griswold v. Connecticut*, 38 U.S. 479 (1965), holding that the right to privacy includes a married couple's use of contraceptives; and *Roe v. Wade*, 410 U.S. 413 (1973), holding that the right to privacy includes a woman's right to terminate an abortion.

[24] *Marbury v. Madison*, 1 CR 138 (1803).

[25] Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven, Conn.: Yale University Press, 1966), vol. 1, p. 356.

[26] Madison to Jefferson, September 6, 1787, *The Papers of Thomas Jefferson*, ed., Julian P. Boyd (Princeton, NJ: Princeton University Press, 1950-1973), vol. 24, p. 102.

[27] Michael P. Zuckert, "Completing the Constitution: The Fourteenth Amendment and Constitutional Rights," *Publius: The Journal of Federalism* 22 (Spring 1992): 76.

[28] 1 *Annals of Congress* (Gales and Seaton, 1834), p. 441.

[29] *Ibid.*, p. 755.

[30] *Congressional Globe*, Thirty-ninth Congress, First Session, 2765-2766 (1866).

[31] 83 U.S. (16 Wall.) 36 (1873).

A RIDE DOWN 16th

Any nation can erect monuments to its own greatness, ideals, and freedoms. Many do.

Like North Korea. Like the former Soviet Union. Like the United States of America.

Yet monuments are mere symbols, and symbols can poorly correspond to reality, even mock it.

Some monuments, however, are not facades of freedom, but the face of it; not distortions of ideals, but their embodiment; not expressions of greatness, but its very manifestation.

And nowhere is the face of America's freedoms and the manifestation of the greatness of its ideals better revealed than along Sixteenth Street, N.W., in Washington, D.C.

Not in the White House, at Sixteenth and Pennsylvania Avenue, or in the statues of Lafayette Park across the street. It begins, rather, on the next corner, with St. John's Protestant-Episcopal Church.

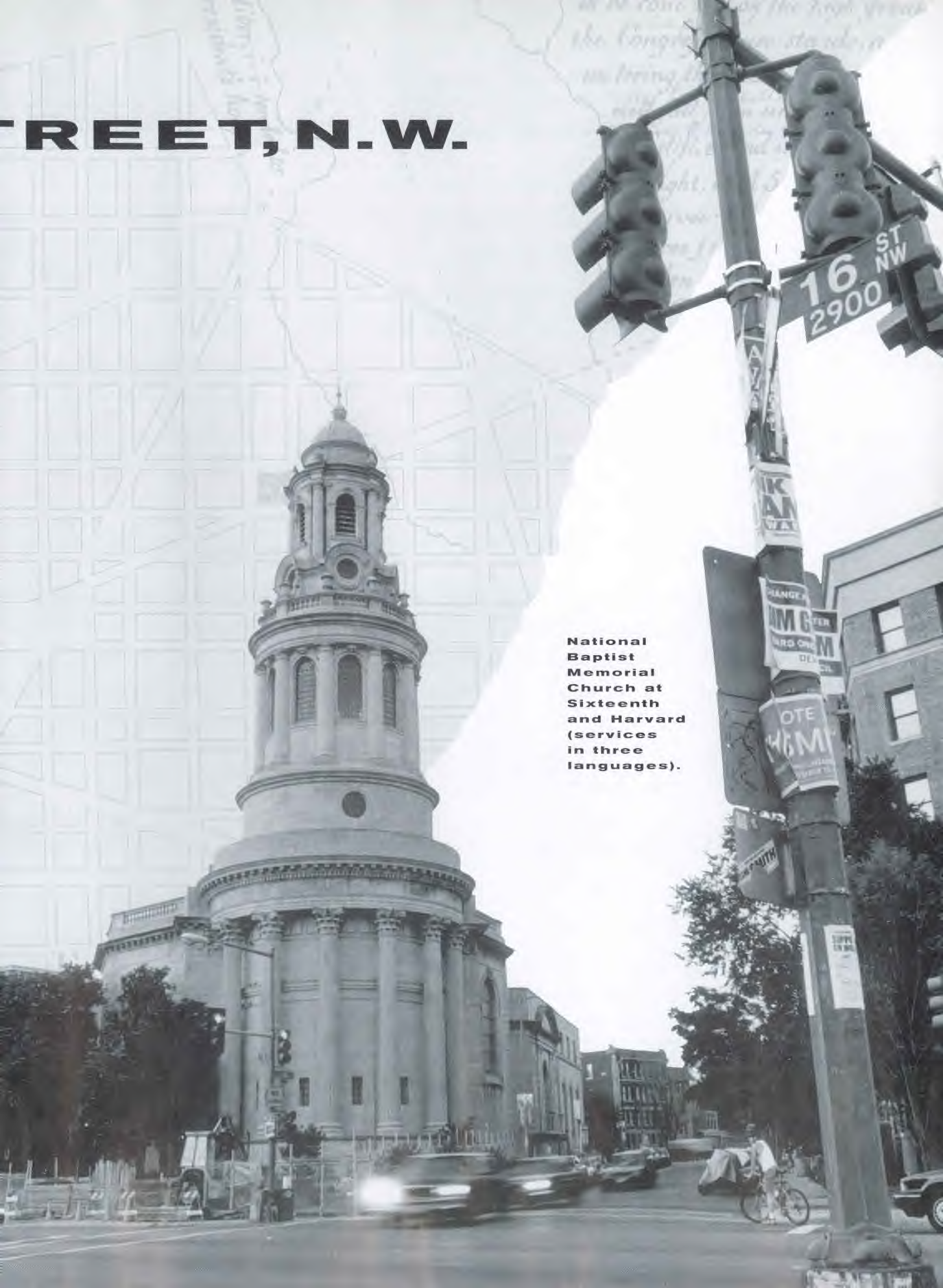
But that's only the beginning. A few blocks up Sixteenth Street—past (on the right side) the Carlton Hotel, American Airlines, and Air Nippon—is the Jewish Community Center. How telling that, scattered and persecuted for centuries, the Jews have a home a few blocks from the center of power in the United States, a land in which they enjoy more religious freedom than in Israel.

Paces away, on the same side, is the Church of the Holy City. The marquee reads "National Swedenborgian Church, founded 1894."

BY CLIFFORD GOLDSTEIN

Photography by Jeff Wright

TREET, N.W.



National Baptist Memorial Church at Sixteenth and Harvard (services in three languages).

Next, at 1733 Sixteenth Street, N.W., like a temple rising out of the sands of Pharaoh's Egypt, looms the Scottish Rite of Freemasonry "SVPREME COVNCIL 33° MVSEVM/LIBRARY," where two stolid sphinx guard the mysteries within.

Up the block, at Harvard and Sixteenth, is the All Souls Unitarian Church (on Saturdays rented out to Spanish Seventh-day Adventists). On the other side of Harvard is the National Baptist Memorial Church (Sunday services in English, Hispanic, and Haitian). What do Unitarians and Baptists share besides an intersection? Once severely persecuted overseas, both have untrammeled religious freedom in America.

Later, at 3211, sits the Shrine of the Sacred Heart Catholic Church (parish founded in 1899), where Vietnamese, Haitian, and Hispanic Catholics worship in their native tongues.

Not far away is the Trinity A.M.E. Zion Church, the Rev. Joseph E. Lamb, Sr., pastor.

Next is the Saints Constantine and Helen Greek Orthodox Church ("EN TOUTΩ NIKA"), while right after is the St. George Antiochian Orthodox Christian Church. Which one is truly "orthodox"? This is America, the question's irrelevant.

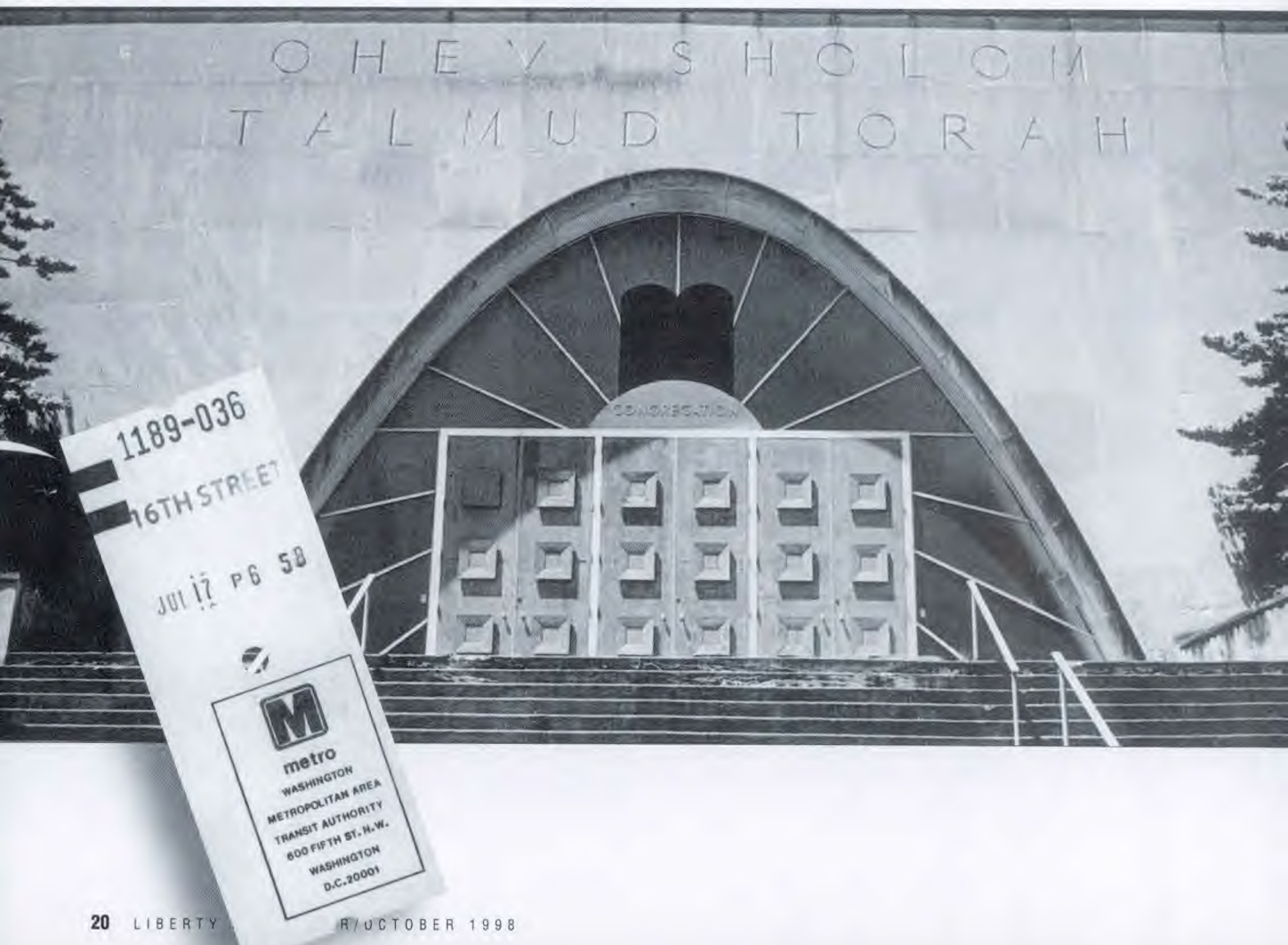
Sharing the intersection with St. George is the First Church of the Nazarene, on the same block as the *Iglesia De Dios Pentecostal Emmanuel.*

Down the road, buttressed by a big sprawling lawn, sits the Simpson-Hamline United Methodist Church. One sign reads "The Fear of the Lord Is the Beginning of Wisdom"; another, "Keep Off the Grass." One more should read "Once Persecuted in the Old World, We Have Found Freedom in the New."

Next is the Church of Christ (*Iglesia de Christo*). Then, with a statue of Mary

Detail from the stone front of the Grace Lutheran Church.

Synagogue on Sixteenth Street.



Head Monk Thich Thanh Dam at the Buddhist Congregational Church: His card calls him "Reverend."

Buddha image on the same street as the White House.

For whom the bells toll: They toll for worshipers at the Third Christian Science Church.

Chinese ancestor worship along Sixteenth Street, N.W. in Washington, D.C.

Vietnamese Cowboy at Buddhist Church in America.

Detail from marquee of Greek Orthodox Church.

Buddhist woman ringing prayer bell: Do the sounds carry to the White House?

Christian America? One of the sights on the most famous street in the U.S.

on the front lawn, is St. Dominic's Monastery (a *monastery!)* on Sixteenth Street, N.W., Washington, D.C.?

Then, in what looks like a private house, sits a Buddhist Vihara. After the Vihara is the Christ Lutheran Church. Up the block, like something from Hermann Hesse's *Siddharta,* is the Buddhist Congregational Church of America. A *Buddhist* congregational *Church?* Of course. This is America, and a reminder that it is sits just one house away—the Sixth Presbyterian Church on the corner of Kennedy and Sixteenth.

Next is the Baha'i Faith Center. Here's a people who know, even now, the ravages of persecution, as their faith is being systematically eradicated in Iran. All looks quite peaceful, though, at 5713.

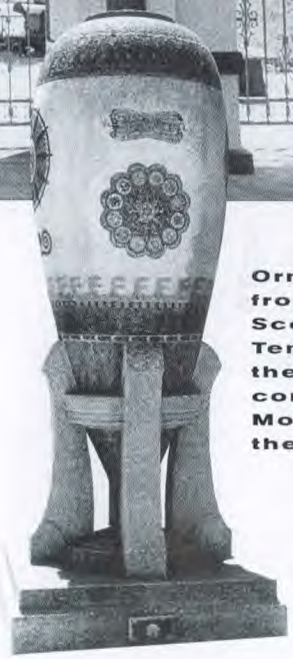
Then there is another Orthodox church (St. Luke's Serbian), down from Tereth Israel Congregation, not far from the First United Church of Jesus Christ, the last religious body on Sixteenth Street, N.W., Washington, D.C.

But that's just one side of the road.

On the other, a few blocks before the Maryland state line, is the Washington Ethical Society ("A Humanist Community"), proof that in America unbelief is protected along with belief, a freedom much of the Old World didn't protect.

On the next block (in the direction back to the White House) is the Ohev Shalom Talmud Torah Orthodox Synagogue, followed by the Fourth Church of Christ, Scientist.

On the same side, comes the *Iglesia Adventista Del 7 Dia De La Capital,* followed by the Washington Seventh Day Baptist Church. By keeping Sabbath, both groups have faced persecution, here and overseas. Fortunately, for now, Sunday closing laws in America have all but gone the way of racially segregated toilets, so



Ornament in front of the Scottish Rite Temple on the same corner as the Moonies and the Baptists.

Greek Orthodox Church: Next door is the Antiochian Orthodox Christian Church.

these Christians—without fear of either economic or criminal penalties—keep the same Sabbath day as Abraham, Moses, and Jesus.

Next comes the Ninth Street Baptist Church, the Grace Lutheran Church, the National Memorial Church of God From Anderson, Indiana ("Aerobic Classes Twice a Week. For Information Call 202-829-4200"), the Canaan Baptist Church, and the Meridian Hill Baptist Church.

The next house of worship belongs to the Unification Church, the Moonies. Once despised and feared as a dangerous cult, the Moonies—despite radically aberrant theology—now enjoy all the respect money can buy. Next to the Unification Church, at the same corner, is another imposing Masonic edifice, the Scottish Rite Temple, and both structures share the intersection with the All Souls Unitarian Church and the National Baptist Memorial Church across the street. Though all these groups originated in other lands—an intersection that houses Moonies, Masons, Unitarians, and Baptists could be made only in America.

Next on Sixteenth Street is the Unitarian Universalist Memorial Church, followed by the Foundry Methodist-Episcopal Church, followed by the First Baptist Church, celebrating its 196th year.

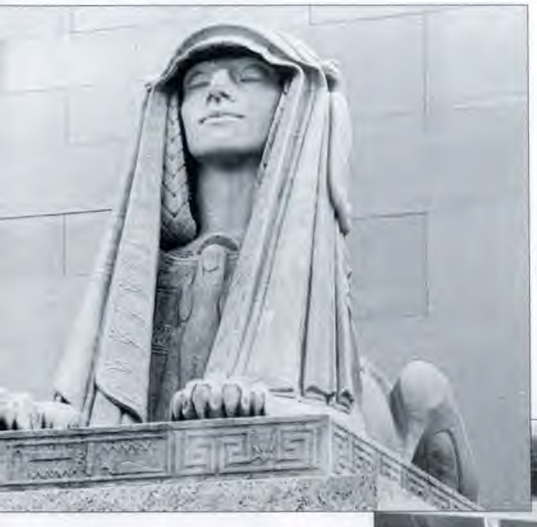
Finally, there's the Third Church of Christ, Scientist—the end of the road for houses of worship on Sixteenth Street before Lafayette Park and the White House.

Any nation can build magnificent edifices to greatness, ideals, and freedom—even if they are mammoth lies of steel and stone. In the United States, however—founded on the great ideal that religious freedom is a right bestowed on humanity by the Creator Himself—the massive monuments testifying to these freedoms depict reality, which is that separation of church and state works so well that the same street where the heart of American political power rests, everyone from Baptists to Buddhists to Baha'is can build churches, temples, Viharas, and worship in an atmosphere of freedom almost unknown in the history of the world.

Next time anyone visiting in Washington, D.C., wants reality, not symbols; proof, not promises; examples of freedom, not mere engravings about it—skip the Lincoln, Madison, or Jefferson memorials . . .

And take a ride down Sixteenth Street, N.W., Washington, D.C., instead.

Clifford Goldstein is editor of Liberty.



Sphinx outside the SVPREME COVNCIL 33° MVSEVM/LIBRARY.

Nikes and Buddha on Sixteenth Street.

Sacred Heart Catholic Church: Sermons also in Vietnamese, Spanish, and Haitian.

BY WILLIAM KEVIN STOOS

THE WOOD CARVER

NAZIS, BLACKS, AND A LESSON IN STEREOTYPES

The Holy Mother stands silently, frozen in time, gazing softly at the Infant on her right hip. Her left hand gently gathers the soft folds of her flowing robe. She wears a crown. It is not gaudy or bejeweled. It is regal, yet understated. The Baby holds a small cluster of tiny, perfectly carved grapes in His tiny, perfectly carved fingers. His soft, tight locks hug His tiny head. His facial features are gentle and kind. He smiles sweetly, His nose and eyes no bigger than a pinhead. It is hard to imagine how the oak that I cannot drive a nail through can be fashioned with such minute precision. The statue is exquisite, delicate, perfect. Carved from a 500-year-old oak beam salvaged from a Catholic church destroyed by war, it is the most beautiful carving I have ever seen. Each time I gaze at the holy pair I am reminded of the grizzled old man whose love found expression in that old oak beam.

I was raised to be tolerant of all faiths, religions, and customs. My father grew up in Philly, among people of all races and ethnic groups. He detested prejudice in any form. My mother was a small-town girl raised by good-hearted German immigrants who settled in Iowa. Her parents were proud, patriotic Americans living in a country at war with Germany. They lived in constant fear of deportation by the adopted country they loved. Derogatory remarks about another's religion, race, or origin were not allowed in my parents' home. No exceptions.

After college I joined the Army. Both my home life and my college life had reinforced my belief that the greatness of our country was in its diversity. I was proud to serve in the Army, just as my father did.

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ILLUSTRATION BY DAVID KLEIN

When I was ordered to Germany as a liaison officer on NATO exercises in the fall of 1977, I was excited. I spoke fluent German and viewed the NATO maneuvers as a great opportunity to see the country I had studied for years—the country of my ancestors, the country that my father and uncles fought in World War II, and the country whose tongue I now spoke with ease. Until I got to Germany and drew the curious looks of Germans who asked why I was wearing an American Army uniform, I did not realize that I spoke German with a German accent. All of my college instructors had been German nationals. So, when our unit was sent to the Schwabish Alps, I was elected unofficial tour guide, historian, and interpreter.

My unit driver was a young black private from southern Louisiana. Charles was a quiet, shy kid who had never been outside his tiny hometown except to join the Army. Although I was tolerant, open-minded, and never stereotyped people, or so I believed, I felt a special responsibility for Charles. Not just the responsibility conferred by the chain of command, but to protect him from the insults and derogatory remarks that I expected. Although both of us were American small-town boys, I was a white, blond-haired, German-speaking officer of German extraction, and Charles was, well, *black*. And we had entered a country not exactly known for its racial or ethnic tolerance. A country that once sought to exterminate Jews, Gypsies, and any other minority group that posed a threat to purity of the mythical Aryan race.

And though we were allies now, I was still uneasy about these Germans. We had heard about the rise of the neo-Nazis. So, my antennae were up. After all, were not all Germans racists at heart? And didn't persons like Charles need the protection of a white American liberal like me? I did not yet fully appreciate my own hypocrisy.

As we traveled throughout the beautiful rolling countryside of the Schwabish Alps, we would stop occasionally to sample the food at the local Gasthauses. Each time we entered a Gasthaus, I was on guard, certain that the time would come when I would have to defend Charles. Few black faces were ever seen in this part of Germany. Subtle and not so subtle looks were plentiful. However, we always managed to avoid problems.

One cool autumn evening we ate at our favorite watering hole, the Lowen Gasthaus in Kettenacker, Germany. Our group—four young captains, an older sergeant, and Charles—ordered dinner and sat quaffing steins of our favorite local beer. As we talked, I noticed a tall, quiet man with rough-hewn features, drinking beer and smoking at a table next to us. He sat by himself. He was a dark, almost brooding presence. I was at once apprehensive of him, yet curiously attracted. His craggy face occasionally gazed down at the wooden statues on the floor next to the table. Now and then he would reach down to the floor and pick up a statue in his gnarled hands, caress it, inspect it, and return it to the floor. These were religious figures of some sort. He saw my interest. He looked like a peddler who had stopped for dinner on his way home.

All evening the dark man sat drinking, smoking, and looking at us. He watched Charles intently. I noticed; if Charles did, he did not say so. After a few hours the man waved his hand as if to invite us over. In slightly slurred German, he spoke to me: *"Kommen!"* We came over.

After some small talk, Josef ordered a round for his guests. We raised our steins to him. His passion was wood carving. He did it to pass the time, he said. He sold a few pieces now and then. I told him it was the most beautiful work I had ever seen. He shrugged it off. He caressed a small statue of Mary and the Baby Jesus. He handed it to me and explained its origin. He had salvaged the beam from an old church. His grizzled hands and furrowed face spoke of harshness and suffering. Yet there was kindness in his voice. His gruff exterior belied the heart of a gentle person. He was apparently a devout Catholic. All of his figures were the Madonna and Child—in different poses and sizes.

The inevitable subject of the war came up, largely through my gentle prodding. Where

had he served? Whom had he fought? What was it like?

"I was at Stalingrad," he replied softly. I understood. It was a ferocious, brutal campaign. This was much better than a history book. This was the real thing. He glanced again at Charles. I thought I detected a smile. How was it at Stalingrad? I pressed Josef further. His face darkened again as he recalled. "Cold . . . terrible" were the only two words he ever spoke about it. He did not want to discuss it further. He was staring at Charles now. Charles was visibly uncomfortable.

What unit was he in? I pressed him. He told me that he was Infanterie. He was a Nazi. I had not expected that. He was sent to the Russian front with the most elite units that the Reichswehr could field. He joined the Nazi Party, he explained, "because all patriots did." He was not proud of it now. I translated to my buddies: "This man was a storm trooper." No one replied. A jackbooted, black-helmeted, death's head storm trooper. The guys who had blown up my uncle's tank somewhere in Germany. The kind I had read about in Army comics when I was a kid. I did not know whether to hate this man. My feelings seemed irrelevant. That was, after all, a long time ago. What I saw before me was a kind, grizzled old man who loved the Virgin Mary and her Child. The contradictions were overwhelming. I sat silently, drinking my beer.

After studying Charles again intently, he pulled on his cigarette and pointed at the young black kid from Louisiana. I knew what was coming.

"*Die Schwarzen. . .*" his voiced trailed off. He pointed at Charles again. *Here it comes,* I thought. It was time to go. I suggested to my comrades that we pack up. It seemed to be the right time. Josef continued as we started to get up: "*Ich liebe die Schwarzen. . . .*" He took another drink of beer. I sat down, stunned. I interpreted again. No one else spoke. "*He loved the blacks?*" But why? Charles and the rest perked up. "I was captured by the Americans," he continued slowly. "They took me to your South. I was put in a camp." He looked at Charles again, this time almost affectionately. How was he treated, I asked, sure that we had treated our prisoners better than the Germans had treated theirs. Josef frowned. "Terrible. I hated it. I hated Americans . . . *at least the white ones.*" I translated once again, awestruck, unprepared for what I had heard. "The black ones," he continued, "I love them. They were good to me. They were the *only ones.*" He paused. He reached over and shook Charles's hand. Charles was embarrassed, unsure how to react. He smiled faintly at the former Nazi. "They sneaked me candy and food. They were kind to me." I translated again. Josef was thanking this nervous young private for all the kindness that his race had shown him in his captivity at the hands of white American troops. Perhaps they understood Josef's plight. Perhaps they knew what it was like to be treated as a second-class citizen, to be chained, to be the object of scorn and derision. This young black kid and this grizzled old Nazi had a bond that none of us could begin to understand. It was a stunning, poignant moment that I will never forget.

After studying Charles again intently, he pulled on his cigarette and pointed at the young black kid from Louisiana. I knew what was coming.

This white ex-Nazi was not a racist, if he ever had been. In fact, he liked American blacks far better than whites. This young black private did not need my protection, if he ever did. He was, in a strange way, bound more closely to this old man than to me. And I saw more love in the carvings and in the words of this former Nazi than I had ever seen in any man of the cloth. The irony overwhelmed me.

I bought Josef's Madonna and Child before we left the Gasthaus. He had more at home. I was welcome to it. I paid more than he asked. He did not ask enough. I knew somehow that I could not leave that night without the statue. It has been my constant companion ever since. The Mother and Child sit on my Chinese altar table. Now and then I look at them. Each time I do, I think about Charles and Josef. And I am reminded that every time I have ever tried to judge my fellowman according to his creed, race, or religion, I have been unfailingly wrong.

THE GRAND INQUISITOR

"We have taken the sword of Caesar, and in taking it, of course, we have rejected Thee and followed him." *—The Grand Inquisitor*

In the greatest chapter ("The Grand Inquisitor") in the greatest novel *(The Brothers Karamazov)* of the West's greatest novelist (Fyodor Dostoyevsky), Jesus Christ returns to earth—not in heavenly glory on bright clouds of angels—but "in that human shape in which He walked among men for thirty-three years." The time and place of this advent were awkward for the church: Seville, Spain, in the sixteenth century, where "the day before almost a hundred heretics had, *ad majorem gloriam Dei,* been burned by the cardinal, the Grand Inquisitor, in a magnificent *auto da fe,* in the presence of the king, the court, the knights, the cardinals, the most charming ladies of the court, and the whole population of Seville."

The crowds swoon around the Messiah, who "moves silently in their midst with a gentle smile of infinite compassion"—after He heals someone blind from birth, children throw flowers at His feet. When a funeral procession carrying a young girl sets her coffin before Jesus, "His lips once more softly pronounce, 'Maiden, arise!'" She does.

But the Grand Inquisitor, seeing everything, throws Him in the dungeon, and that night, with a light in his hand, he comes to the Prisoner and asks, "Why, then, art Thou come to hinder us? . . . Tomorrow I shall condemn Thee and burn Thee at the stake as the worst of heretics. And the very people who have today kissed Thy feet, tomorrow at the faintest sign from me will rush to heap up the embers of Thy fire."

The Grand Inquisitor lectures Christ on His mistake of giving human beings freedom. Using the temptations in the wilderness as his focal point, the "old man" tells Christ that He misunderstood human nature, and that by granting humans freedom He increased their misery, because only by vanquishing freedom can men be happy. It's not freedom they want, he says; it's the bread that Christ refused to make from stones.

"In the end," the old man says, "they will lay their freedom at our feet, and say to us, 'Make us your slaves, but feed us.'" Because Jesus insisted on giving humanity freedom, "Thou didst reject the only way by which men might be made happy. But, fortunately, departing Thou didst hand on the work to us. Thou hast promised, Thou hast established by Thy word, Thou hast given to us the right to bind and to unbind, and now, of course, Thou canst not think of taking it away. Why, then, hast Thou come to hinder us?"

As an ardent Russian nationalist (a few years in Siberia cured him of his socialist leanings) Dostoyevsky used "The Grand Inquisitor" to attack Roman Catholicism. Yet the point of the poem could be applied to any church that attempts to arrogate political power to itself in blatant contradiction to the life, example, and ministry of Jesus Christ.

Suppose, instead of sixteenth-century Spain, Jesus returned to 1998 America in the same manner He does in *The Brothers Karamazov?* How would the National Council of Churches treat Him? Would He be asked to write for *Sojourners?* Would He join

Operation Rescue? Would Christ pass out Christian Coalition Voter Guides? (If He were in office, how would Christ fare in them?) Would James Dobson put Jesus on his radio program to discuss politics? Would He be a welcome lecturer in political science at Jerry Falwell's Liberty University? Would Gary Bauer want Him on the staff of the Family Research Council? Would Pat Robertson want Jesus ruminating about politics on the *700 Club*? Would He be asked to write for *First Things* on political issues? Would Jesus be invited to speak at the Christian Coalition's Road to Victory conference? Would Jesus be asked to speak at the Republican National Convention? Would Bill Clinton invite Him to the White House to help promote his political agenda?

Or, instead—would Christ stand in their way? Would His refusal to be involved in politics, or even speak out on it, make Him an embarrassment, even a gadfly, to those who pursue political agendas in His name? Nothing about Christ (judging by the words and methods that He used at His first advent) would make Him an asset to the political groups that today use Him to justify their goals. How inconvenient that Christ left no example or command for the church that bears His name to arrogate for itself political power. Thus, what could those who in His name seek that power say to Him if He returned—except "Why hast Thou come to hinder us?"

At the end of the poem, the Grand Inquisitor utters to the Prisoner: "I repeat, tomorrow Thou shalt see that obedient flock who at a sign from me will hasten to heap up the hot cinders about the pile on which I shall burn Thee for coming to hinder us. For if anyone has ever deserved our fires, it is Thou. Tomorrow I shall burn Thee. *Dixi.*"

How did Christ respond?

"The old man longed for Him to say something, however bitter and terrible. But He suddenly approached the old man in silence and softly kissed him on his bloodless aged lips."

No wonder Jesus would be in their way.

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