Clanking Chains: Rehnquist's Polemic (Continued); Robert Bork: "Slouching, Still"; Regulating the Court: Madison's Separation of Powers

> The repetition of this error … does not make it any sounder historically. Finally, in *Abington School District v. Schempp,* 374 U.S. 203 , 214 (1963), the Court made the truly remarkable statement that the views of Madison and Jefferson came to be incorporated not only in the Federal Constitution but likewise in those of most of our States. On the basis of what evidence we have, this statement is demonstrably incorrect as a matter of history. And its repetition in varying forms in succeeding opinions of the Court can give it no more authority than it possesses as a matter of fact; *stare decisis* **[*Black's Law Dictionary*, 1968, 1577:** Policy of courts to stand by precedent and not to disturb settled point. Doctrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same.**]** may bind courts as to matters of law, but it cannot bind them as to matters of history.
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> [R]evisions were debated in the House on August 15, 1789. None of the other Members of Congress who spoke during the … debate expressed the slightest indication that they thought the language before them from the Select Committee, or the evil to be aimed at, would require that the Government be absolutely neutral as between religion and irreligion. The evil to be aimed at, so far as those who spoke were concerned, appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another; but it was definitely not concerned about whether the Government might aid all religions evenhandedly.
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> The actions of the First Congress, which reenacted the Northwest Ordinance for the governance of the Northwest Territory in 1789, confirm the view that Congress did not mean that the Government should be neutral between religion and irreligion. The House of Representatives took up the Northwest Ordinance on the same day as Madison introduced his proposed amendments which became the Bill of Rights; while at that time the Federal Government was, of course, not bound by draft amendments to the Constitution which had not yet been proposed by Congress, say nothing of ratified by the States, it seems highly unlikely that the House of Representatives would simultaneously consider proposed amendments to the Constitution and enact an important piece of territorial legislation which conflicted with the intent of those proposals. The Northwest Ordinance, 1 Stat. 50, reenacted the Northwest Ordinance of 1787 and provided that [r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.
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> Joseph Story, a Member of this Court from 1811 to 1845, and during much of that time a professor at the Harvard Law School, published by far the most comprehensive treatise on the United States Constitution that had then appeared. Volume 2 of Story's Commentaries on the Constitution of the United States 630-632 (5th ed. 1891) discussed the meaning of the Establishment Clause of the First Amendment this way:
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> > Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration [First Amendment], the general if not the universal sentiment in America was that Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

> It would seem from this evidence that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations. Indeed, the first American dictionary defined the word "establishment" as "the act of establishing, founding, ratifying or ordaining," such as in "[t]he episcopal form of religion, so called, in England." N. Webster, American Dictionary of the English Language (1st ed. 1828). The Establishment Clause did not require government neutrality between religion and irreligion, nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson.*
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> Notwithstanding the absence of a historical basis for this theory of rigid separation, the wall idea might well have served as a useful, albeit misguided, analytical concept, had it led this Court to unified and principled results in Establishment Clause cases. The opposite, unfortunately, has been true; in the 38 years since *Everson,* our Establishment Clause cases have been neither principled nor unified. Our recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the "wall of separation" is merely a "blurred, indistinct, and variable barrier," which "is not wholly accurate" and can only be "dimly perceived." *Lemon v. Kurtzman,* 403 U.S. 602 , 614 (1971); *Tilton v. Richardson,* 403 U.S. 672, 677-678, (1971); *Wolman v. Walter,* 433 U.S. 229, 236 (1977); *Lynch v. Donnelly,* 465 U.S. 668 , 673 (1984).
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> Whether due to its lack of historical support or its practical unworkability, the *Everson* "wall" has proved all but useless as a guide to sound constitutional adjudication. It illustrates only too well the wisdom of Benjamin Cardozo's observation that "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Berkey v. Third Avenue R. Co.,* 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926).
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> But the greatest injury of the "wall" notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. The "crucible of litigation," is well adapted to adjudicating factual disputes on the basis of testimony presented in court, but no amount of repetition of historical errors in judicial opinions can make the errors true. The "wall of separation between church and State" is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.

19- Justice Rehnquist clearly understands the error of twentieth-century Supreme Court decisions related to the religion clauses of the First Amendment and the need to change them.

20- As the situation now stands, an unrestrained, left-leaning, and judicially active Court, led by Mr. Rehnquist himself, continues on a course tantamount to judicial tyranny over religion in America.

21- To paraphrase Patrick Henry, this Court's decisions are meant to bind and rivet upon us those chains that the Luciferian Conspiracy has been so long forging. Judge Robert H. Bork alludes to these intentions in an interview with George Gilder in the current issue of *The American Spectator*:

> **Gilder, George. "Slouching, Still." *The American Spectator*, July/August 2002, 32, 34:**
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> **George Gilder:** There seems to be something about jurisprudence that incapacitates conservatives with an excessive respect for precedents, which are almost always accumulated offenses and abuses of the other side.

Robert Bork: There's a huge body of cases now that go the wrong way because of a misunderstanding of the role of precedent. In statutory law [enforcement of laws passed by the legislative branch], if a judge gets it wrong, Congress can correct him. In constitutional law, nobody can correct the Supreme Court except itself. That is a good reason to go back and say, "What did the Constitution mean? We've got it wrong all this time." But conservative justices don't do that often enough. They go on repeating the same error … and the leftward march of the judiciary continues unabated.

One reason all hell broke loose when I was nominated was that the left could see the court going 5-to-4 the other way. They could not accept the idea that the Court might stay within its proper limits and give democracy greater freedom to govern. I remember debating the head of the ACLU a while back, and I said the Supreme Court shouldn't block communities from trying to safeguard their moral and aesthetic environment by controlling obscenity and pornography. He called me a fascist. The ACLU is the litigating arm of the left intelligentsia, which views the democratic expression of the community's values as tyrannical; the only true democracy, according to them, is a tyranny of liberal judges. That's a disaster, because those judges have become an adversary to traditional American values.

The left wing of the Democratic Party relies upon the fact that they can get courts to legislate much more liberal laws then they can get through Congress or state legislatures. That is why the nomination of judicial conservatives—men and women who would interpret the Constitution as it was originally designed—is anathema to left liberals like Senators Pat Leahy and Edward Kennedy. The battle over judges has extended from Supreme Court nominees to Court of Appeals nominees. That is why Senator Leahy, who is chairman of the judiciary committee, won't give President Bush's nominees a hearing. The Senate Democrats want to politicize the judiciary and give it a strong leftward bias.

George Gilder: And this is a court overwhelmingly appointed by Republicans.

Robert Bork: Yes, but they're not always conservative. Yet, such appointees have given us the fictitious abortion "right," systematic hostility to religion, uncontrollable obscenity and pornography, unnecessary roadblocks to the prosecution and punishment of criminals and much more.

The thought that a computer's rendering of child pornography is all right, because no actual child is involved, is ludicrous. The fact that computer-generated pornography will probably trigger pedophilia by people who may be on the verge, and the fact that it lowers the moral tone of the society in general—those things apparently mean nothing.

George Gilder: Where does an attitude like that come from?

Robert Bork: Ultimately, it comes from intellectual class attitudes which many justices share. And more immediately, those attitudes are powerful because justices want their clerks to like them. They want university and law school faculties to like them. They want *The Washington Post* and *The New York Times* to like them. I can't think of a single case in the 20th century where a Supreme Court justice turned to the right after he was appointed.

The result is a growing body of constitutional law which is adversarial toward traditional virtues, traditional values. The Supreme Court is incredibly hostile to religion—almost every time they get their hands on religions expression, they rule it out. The Supreme Court has become arguably the most important institution in domestic affairs, certainly in cultural affairs, and that news is not good.

22- There is a way the Court's pernicious influence can be curbed and that is by acts of Congress. This will never happen in our lifetime, but the Constitution does have a provision for future generations to utilize if one should ever decide to restore order to the commonwealth.

VI. How Congress Can Regulate the Supreme Court:

1- Our Client Nation's federal government is designed to supply a balance of power among its three branches and function under a principle called "separation of powers."

2- A brief summary of how the Founding Fathers decided upon the form of our tripartite government and how its offices were to be filled is important to our study.

3- The Founders were a group of well-read, highly educated men who studiously and earnestly examined the best minds of history's eminent figures in the field of human government.

4- Their deliberations in Philadelphia lasted almost three months—June 25 through September 17, 1787. Fifty-five men gathered there to frame a document that when ratified would create a new government. Their objective is expressed in their Preamble to the Constitution:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

5- The 54 days they met in Congress were filled with spirited debate that probed with great intensity and scrutiny the thinking of America's greatest minds who had studied the writings of the greatest thinkers of antiquity.

6- The leading thinker behind the Constitution was James Madison. It will be helpful in this portion of our study to have a general idea of what Madison hoped to, and eventually did, accomplish at Philadelphia. This overview is taken from:

> **Collier, Christopher and James Lincoln Collier. *Decision in Philadelphia: The Constitutional Convention in 1787*. (New York: Random House, 1986), 47-53:**
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> Like many eighteenth-century thinkers, Madison … accepted the idea … that nations and their governments were constructed on social contracts. The basic theory of the social contract was that power initially belonged to the people by innate, natural right. They could dispose of this power as they liked. To form a state they would contract among themselves to join together in a union. Then they would make a second contract with their rulers which would delegate certain powers but reserve all other authority to the people.
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> Madison believed … a group of people could sit down and devise a contract by which they would be governed. Second, Madison accepted the fact that human beings were by nature neither altogether good nor altogether evil but a little bit good and a little more evil. "Human beings," he maintained, "are generally governed by rather base and selfish motives, by suspicion, jealousy, desire for self-aggrandizement, and disinclination to do more than is required by convenience or self-interest, or exacted of them by force."
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> Above all, James Madison was intent on controlling power. Summing up, he said, "If men were angels, no government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."
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> Embedded in this statement, which comes from *Federalist* No. 51, is the belief that government must be powerful enough to be effective and to control unruly factions in the society, but not so powerful as to be able to interfere with the legitimate liberties of the citizens. It was the great conundrum: how do you give government enough power without giving it too much? This was the central issue that would face the men at Philadelphia: it was what the Constitutional Convention, at bottom, was all about.

> As a corollary, it was also widely believed that only a homogeneous nation with common ethics and attitudes could operate as a republic. A republic was a commonwealth, a nation that was organized to promote the welfare of all, and in which government was structured to reflect the will of the people, if small enough, otherwise through representatives.
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> A second virtue of the extended republic, Madison believed, was that it would certainly require the indirect election of most national office-holders, placing them a step or two away from the voters, and thus insulating them from the temporary passions of the mob.
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> The distinction between the American system and most others grew out of the recognition that the states would have to play a considerable role in the national government. The people would insist on it.
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> Madison wanted to lodge as much power as he reasonably could in the national government. He justified this desire from the theoretical principle that power ultimately was lodged in the people, and only they could distribute it. From this concept flowed several other ideas. One was that …the legislature should be proportional to the population of the states.
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> Proportional representation became for Madison a sine qua non of any new government. This line of thought led Madison to another conclusion that seemed to follow logically. If the people alone could delegate power, any new scheme of government that came out of the Philadelphia meetings would have to be ratified by them, not simply approved by state government. Madison therefore decided that if the Convention should write a new Constitution, it should be approved by state ratifying conventions. Madison's view was that the properly convened people could distribute their power as they liked.
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> Madison wanted a strong national government based on proportional representation in order to curb the power of the states; he wanted the separation of powers with its checks and balances, in order to curb the power of the national government. Everything in Madison's plan was meant to curtail, contain, constrain power wherever it might lie.

7- After eight weeks of debate, deliberation, and compromise the Framers decided upon the system established in the seven articles of the Constitution. Its dispersion of power, which in every case received its delegation from the people, was extremely close to what Madison envisioned.