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# THE “WALL OF SEPARATION” MOTIF IN BIBLICAL LITERATURE AND WESTERN POLITICAL AND LEGAL THOUGHT

Daniel L. Dreisbach<sup>†</sup>

## I. INTRODUCTION

The wall metaphor is ubiquitous in biblical and western literature. Throughout the ages, writers have been drawn to the motif. A wall conjures up the image of an unambiguous, concrete barrier. It is a simple, yet dramatic and versatile, figure of speech – as rich as foundation, fortress, tower, pillar, bridge, or any other architectural metaphor. However, the purposes for walls – both literal and metaphorical – can be enigmatic.

Walls serve a variety of functions. In its most primitive form, a wall defines space, marking a boundary that separates one area from another. A wall can be the supporting structure of a building. It is “one of the sides of a room or building connecting floor and ceiling or foundation and roof.”<sup>1</sup> Walls are often built for protection from undesirable elements, such as buffeting winds or rain, or, in the case of a seawall, from threatening waves or a rising tide. Retaining walls are designed to maintain the status quo, to keep soil and structures intact, safe from wind, water, or erosion. Walls can shield the senses from unwelcomed sights or sounds. They can also provide sanctuary from human elements. The Great Wall of China and Hadrian’s Wall, for two examples, were constructed to keep out marauding hordes; other walls, like the Iron Curtain (including the Berlin Wall) and prison walls, have been erected to keep people in. Until recent times, walls were an essential component of a community’s defenses.

The poet Robert Frost identified the puzzle and paradox of walls, both literal and metaphorical walls, in his much-anthologized poem, “Mending Wall.”<sup>2</sup>

Before I built a wall I’d ask to know  
What I was walling in or walling out,  
And to whom I was like to give offence.<sup>3</sup>

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1. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1993), s.v. “wall.”

2. ROBERT FROST, *Mending Wall*, in *NORTH OF BOSTON* (1914) reprinted in *COLLECTED POEMS OF ROBERT FROST* (1930), 47-48.

One yearns for the boundaries and security that walls provide; yet one often chafes at the restraints on liberty imposed by a barrier. “Good fences make good neighbours,”<sup>4</sup> said the poem’s antagonist. At the same time, “Something there is that doesn’t love a wall, / That wants it down.”<sup>5</sup> (Frost clearly identified with the poem’s narrator who questioned the need for a wall.)<sup>6</sup> The rustic stone walls that crisscross the rocky landscape of Frost’s native New England capture the contradiction. They are typically low – easily overstepped – marking where one’s property ends and a neighbor’s begins. Low walls invite neighbors to meet at the wall to engage in cordial intercourse or even pass objects between them. Walls, however, are not always welcomed. They inhibit freedom of movement, to be sure. As Frost observed, even the frozen earth beneath swells in rebellion against stone walls, causing boulders to tumble and creating gaps in the barrier.<sup>7</sup> Furthermore, to one involuntarily walled in or walled out, said Frost, the barrier is “like to give offence.”<sup>8</sup>

For the last five hundred years, a “wall of separation” has been an influential metaphor in western theological and political literature. In the post-Reformation western mind, the “wall of separation” has been most often associated with the relationship between church and state. The wall in church-state discourse has been a source of much controversy, most of it relating to the purpose and propriety of the wall. What is (or should be) the nature of the wall

3. *Id.* at 48.

4. For more on the ancient origins of this proverb, see GEORGE MONTEIRO, ROBERT FROST AND THE NEW ENGLAND RENAISSANCE 126 (1988); JEFFREY S. CRAMER, ROBERT FROST AMONG HIS POEMS: A LITERARY COMPANION TO THE POET’S OWN BIOGRAPHICAL CONTEXTS AND ASSOCIATIONS 30-31 (1996); Addison Barker, *Notes & Queriers: Good Fences Make Good Neighbors*, 64 JOURNAL OF AMERICAN FOLKLORE 421 (1951).

5. FROST, *supra* note 2, at 48.

6. See EARLY FROST: THE FIRST THREE BOOKS xxiii (Jeffrey Meyers ed., 1996) (arguing that Frost “clearly stands with the narrator who questions the very need to have a wall and repeats his belief: ‘Something there is that doesn’t love a wall.’ That ‘something,’ a natural force, which breaks down the wall and indicates the poet’s point of view is – of course – frost.”); MORDECAI MARCUS, THE POEMS OF ROBERT FROST: AN EXPLICATION 42 (1991) (noting that “Mending Wall,” “often quoted out of context, is sometimes, mistakenly said to declare that ‘Good fences make good neighbors,’ which – as Frost sometimes had to point out – is the formula of the poem’s antagonist”; noting that Frost himself suggested that he, perhaps, was both of the poem’s characters; noting the pun, in the poem’s opening lines, that it is frost that does not love a wall and that “makes the stones in walls” tumble).

7. FROST, *supra* note 2, at 47 (lines 1-4).

8. *Id.* at 48. See MARCUS, *supra* note 6, at 42 (suggesting that the word “offense” was a pun on “fence”); MONTEIRO, *supra* note 4, at 127 (“What finally emerges from Frost’s poem is the idea that the stock reply – unexamined wisdom from the past – seals off the possibility of further thought and communication. When thought has frozen into folk expression, language itself becomes another wall, one unresponsive to that which it encircles and given over to fulfilling a new and perhaps unintended function.”).

between church and state? Is it a wall of amity or enmity? Does it make for "good neighbours," or does it "give offence"? "If nowhere else, in the relation between Church and State," wrote Justice Felix Frankfurter invoking Frost's immortal line, "'good fences make good neighbors.'"<sup>9</sup> "True enough!" J. M. O'Neill retorted. "But only fences that allow for cooperation, friendly intercourse. Fences so 'high and impregnable' as not to permit the slightest breach *never* make good neighbors. They are called 'spite fences' and are *never* built by good neighbors. They are only the instruments of extreme unneighborliness."<sup>10</sup>

This article briefly surveys the "wall of separation" motif in biblical literature and in western political and legal thought. The nature and diverse uses of metaphorical walls in this literature are of particular interest. Special attention is focused on the "wall of separation between church and state" erected two centuries ago by Thomas Jefferson. This is the "wall of separation" best known to a twenty-first-century audience. The Jeffersonian trope has had a profound influence on American church-state law, policy, and discourse, due largely to the U.S. Supreme Court's mid-twentieth-century adoption of the figurative phrase as the organizing theme of its church-state jurisprudence.

## II. THE WALL IN BIBLICAL LITERATURE

Walls are prominently featured in some of the Bible's most memorable stories. Joshua and the falling walls of Jericho,<sup>11</sup> Nehemiah rebuilding the walls of Jerusalem,<sup>12</sup> and the handwritings on the wall at Belshazzar's feast<sup>13</sup> are among these unforgettable stories.<sup>14</sup> The focus here, however, is on strictly

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9. *McCollum v. Bd. of Educ.*, 333 U.S. 203, 232 (1948) (Frankfurter, J., concurring).

10. J.M. O'NEILL, *RELIGION AND EDUCATION UNDER THE CONSTITUTION* 243 (1949) (emphasis in the original). See also *Farris v. Minit Mart Foods, Inc.*, 684 S.W.2d 845, 850 (Ky. 1984) (Wintersheimer, J., dissenting) ("The wall of separation should not become a spite fence."); JOSEPH H. BRADY, *CONFUSION TWICE CONFOUNDED: THE FIRST AMENDMENT AND THE SUPREME COURT: AN HISTORICAL STUDY* 149 (1954) ("Deriving our specifications from the Court's own statement about a 'high and impregnable' wall we seem to arrive at what is in common parlance called a 'spite fence,' which is the public denial of good neighborliness. The fence which makes 'good neighbors' is the low fence, allowing freedom of communication between those on either side of it, with a gate or two to allow free exchange of visits and the performance of deeds of neighborly courtesy and help. It is, in fact, this kind of a fence which has separated church and state in this country from the beginning until now, when the Supreme Court would replace it with its 'spite fence.'").

11. *Joshua* 6:20. All biblical quotations, unless otherwise indicated, are taken from the Authorized (King James) Version.

12. *Nehemiah* 3:1-7:3.

13. *Daniel* 5:5, 25-28.

14. See also the stories of the walls of water the Lord created parting the Red Sea (*Exodus*

metaphorical, rather than literal or historical, walls in biblical literature. The Bible is replete with metaphorical references and allusions to walls in all their uses – to strengthen or buttress, to protect, to separate. A few examples will illustrate the rich and varied uses of the wall metaphor in biblical literature:

Walls in Scripture are frequently symbols of protection, security, and strength. The city or property surrounded by a high, well-maintained wall is secure; hence, such walls often signify safety, peace, and prosperity.<sup>15</sup> Moreover, a city's walls metaphorically separate the orderliness and civilization within from disorderliness and barbarism without. Walls, accordingly, are often visible signs of God's blessing and protection.<sup>16</sup> "Carried a step further, walls become a symbol of salvation itself."<sup>17</sup> Just as walls of bricks and mortar literally provide physical salvation from hostile elements, so the Lord's salvation protects His people from spiritual dangers.<sup>18</sup>

If high, fortified, and well-maintained walls signify safety, salvation, and blessing, then broken down walls or no walls at all symbolize vulnerability, divine judgment, and spiritual defeat. A people against whom God has pronounced judgment is depicted as "like a break in a high wall, bulging out, and about to collapse,"<sup>19</sup> or as a community without protective walls and, thus, defenseless.<sup>20</sup> One who imprudently trusts man rather than God is described as "a leaning wall and a tottering fence."<sup>21</sup> The rich man foolishly places his security in the "high wall" of his own possessions, but a righteous people find true safety in the tower of the Lord.<sup>22</sup> A hypocrite is compared to the whitewashed wall that appears beautiful to the eye but is actually in disrepair.<sup>23</sup> One of Solomon's proverbs graphically equates self-discipline with walls: "He that hath no rule over his own spirit is like a city that is broken down, and without walls."<sup>24</sup> The fields of the sluggard and of the man lacking good sense,

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14:21-29); the fastening of King Saul's decapitated body to an enemy's city walls (1 *Samuel* 31:8-10); the court eunuchs throwing Queen Jezebel from a wall, splattering her blood on the wall (2 *Kings* 9:30-35); and Saul's escape from death in Damascus when he was lowered over the wall in a basket (*Acts* 9:23-25).

15. See, e.g., 1 *Samuel* 25:16.

16. See *Ezra* 9:9; *Isaiah* 62:6; *Jeremiah* 1:18; *Jeremiah* 15:20; *Zechariah* 2:5.

17. *DICTIONARY OF BIBLICAL IMAGERY* 924 (Leland Ryken, James C. Wilhoit & Tremper Longman III eds., 1998), s.v. "Wall."

18. *Isaiah* 26:1; *Isaiah* 60:18.

19. *Isaiah* 30:13 (Revised Standard Version).

20. See *Psalms* 89:40; *Isaiah* 5:5; *Isaiah* 25:12; *Jeremiah* 50:15; *Ezekiel* 13:14.

21. *Psalms* 62:3. See also *Isaiah* 30:13.

22. *Proverbs* 18:10-11.

23. *Acts* 23:3; cf. *Ezekiel* 13:10-15.

24. *Proverbs* 25:28.

according to Proverbs, are surrounded by broken down stone walls.<sup>25</sup> The absence of walls or broken walls leave the individual or community defenseless.

Most relevant to the present discussion is Ephesians 2:14: "For He [Christ] Himself is our peace, who has made both one, and he has broken down the middle wall of separation."<sup>26</sup> The *Good News Bible* renders the verse this way: "For Christ himself has brought us peace by making Jews and Gentiles one people. With his own body he broke down the wall that separated them and kept them enemies." Here, the Apostle Paul uses the metaphor of a "wall of separation" or "the division-wall (*mesotoichon*) of the fence."<sup>27</sup> Christ Jesus is praised as the author of peace where enmity once existed. "He Himself" emphasizes that Christ alone is the source of this peace. The peace Christ authors is a union or reconciliation between man and fellow man, between Jew and Gentile, and, ultimately in verses 16 and 17, between God and man.<sup>28</sup> The peace and reconciliation accomplished in the breaking down of the wall of separation is not merely a peace limited to the souls of individuals but it "is a social and political event. The 'Messianic peace' here proclaimed is in Eph. 4:3 distinctly called a 'bond' uniting different people."<sup>29</sup> Paul's use of the aorist tense, "he has broken down," emphasizes

the factual, historical, completed destruction of the obstacle . . . . At this point Paul does not discuss the possibility, desirability, or necessity of the saints operating to wreck and remove the barrier. He wants to proclaim no more and no less than an event created, and a fact accomplished by Jesus Christ once and for all. All later imperatives demanding reconciliation stand upon the basis of this fact. "God has reconciled us to himself through Christ . . . . He has put among us the word of reconciliation . . . . Therefore we ask in Christ's name, Be reconciled with God."<sup>30</sup>

What do we know about this "wall of separation" Christ "has broken down"? It is a wall of enmity, not the kind of fence that makes for good neighbors. "[I]t is a wall that prevents certain persons from entering a house or a city (cf. Eph. 2:19), and is as much a mark of hostility (2:14, 16) as, e.g. a ghetto wall, the

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25. *Proverbs* 24:30-31.

26. *Ephesians* 2:14 (New King James Version).

27. *Ephesians* 2:14 (Anchor Bible); MARKUS BARTH, *EPHESIANS: INTRODUCTION, TRANSLATION, AND COMMENTARY ON CHAPTERS 1-3* at 263 (1974).

28. See also *Romans* 5:10; *2 Corinthians* 5:18-21; *Colossians* 1:20, 22.

29. BARTH, *supra* note 27, at 262.

30. *Id.* at 263 (citing *2 Corinthians* 5:18-20).

Iron Curtain, the Berlin Wall, a racial barrier, or a railroad track that separates the right from the wrong side of the city, not to speak of the wall between state and church.”<sup>31</sup> The wall that separates Jews and Gentiles has been a wall of segregation and hostility, and only in its destruction is there hope for reconciliation and peace.

Is this “wall of separation” an allusion to a literal, historical fence, or is it a strictly metaphorical reference to, for example, divisive cultural customs, ceremonial laws and commandments, or the “works of the flesh”?<sup>32</sup> If it is an allusion to a literal wall, then Paul may have had in mind the barrier built around Mount Sinai,<sup>33</sup> a fence around the law.<sup>34</sup> He may have been referencing the curtain in the Tabernacle and, later, the Temple that separated the Holy Place from the Most Holy Place (Holiest of Holies), which separated men from God’s presence. According to Gospel accounts, the Temple curtain was torn in two, from top to bottom, (or broken down) at the moment of Christ’s death on Golgotha Hill.<sup>35</sup> The renting of this veil symbolized that the path to God’s presence was open to all through the sacrifice of the Son on the cross.<sup>36</sup> Still another, and perhaps the most obvious, allusion is to a familiar wall in the Temple precincts. Josephus describes a wall that separated the Outer Court of the Gentiles from the Court of Women and other more interior Temple sanctuaries.<sup>37</sup> Gentiles bearing offerings could approach the stairs separating the Court of Gentiles from interior sanctums, but for a Gentile to trespass this far without offerings was a capital offense.<sup>38</sup> An explosive incident recounted in Acts 21:17-36 reveals Jewish sensitivity to these laws. Fellow worshipers at the Temple angrily accused Paul of bringing “Greeks into the temple” and defiling “this holy place.”<sup>39</sup> The accusation led to riots; the Apostle was beaten and eventually arrested.<sup>40</sup> This episode, involving a wall separating Jews and Gentiles, may have been foremost in Paul’s memory when he penned this

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31. BARTH, *supra* note 27, at 263-64.

32. *Id.* at 283-87. See *Ephesians* 2:11; *Galatians* 5:19-21. See also HAROLD W. HOEHNER, *EPHESIANS: AN EXEGETICAL COMMENTARY* 371 (2002) (arguing that this wall “was not a literal wall but a metaphorical wall”).

33. *Exodus* 19:12, 21-24.

34. See HOEHNER, *supra* note 32, at 370-71.

35. *Matthew* 27:51; *Mark* 15:38; *Luke* 23:45.

36. *Hebrews* 10:19-23. But see HOEHNER, *supra* note 32, at 369-70 (discounting the view that Paul was alluding to this curtain).

37. Josephus, A.J. 15.11.5 sec. 417; B.J 5.5.2 secs. 193-94.

38. *Id.*

39. *Acts* 21:28.

40. *Acts* 21:30-36.

passage.<sup>41</sup> In any case, "Paul could not help being aware of the practical and symbolic meanings of fence and wall in the temple precincts."<sup>42</sup>

The Christ of Ephesians 2:14 destroys walls that separate Jews and Gentiles, circumcised and uncircumcised, slaves and freemen, males and females. In Christ, all are Abraham's children and "heirs according to the promise."<sup>43</sup> The Christ of the New Testament rent asunder the Temple veil, granting all believers personal access to God's presence.

### III. THE WALL OF SEPARATION IN WESTERN POLITICAL AND LEGAL THOUGHT

Whereas the wall of separation described by the Apostle Paul in his Epistle to the Ephesians was an obstacle to unity between Jews and Gentiles in the body of Christ, the walls of separation prominent in post-Reformation political literature were concerned with a division of a different sort – a separation between the church and the civil state or the world.

Conflicts between ecclesiastical authorities and civil magistrates, and the institutions they represent, are as old as recorded history. The rise of the modern nation-state a half millennium ago and the sectarian splits in Christendom brought about by the Protestant Reformation redefined, intensified, and expanded these conflicts. At mid-millennium, the institutional concepts of "church" and "state" were being redefined. Religious and political authorities clashed with increasing frequency and intensity as both endeavored to extend their respective empires and influence. In the post-Reformation era, the civil state extended its reach into domains formerly within the exclusive jurisdiction of the church, and religious societies labored to retain their hold over kings and kingdoms. Rulers and ruled, in many lands, no longer shared religious affiliations, sometimes leading to unrest and persecution. Christian denominations competed for the favor and aid of civil government and *vice versa*, thus setting the stage for bitter conflicts, even protracted wars, among religious sects and between ecclesiastical and civil institutions.

For at least a half millennium, the wall of separation has been a prominent feature of church-state discourse. Some commentators have championed a wall of separation as a prudential, indeed an essential, fixture of church-state relationships. Others have denounced walls of separation as obstacles to healthy, cooperative relations between church and civil state. Leading theorists

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41. *But see* HOEHNER, *supra* note 32, at 369 (rejecting that this was the wall referenced).

42. BARTH, *supra* note 27, at 284.

43. *Galatians* 3:26-29; *Colossians* 3:11.



on both sides of this debate have claimed that the Bible mandates or justifies their respective positions.

Walls of separation have been described by numerous writers advancing diverse arguments and serving a variety of theological and political purposes. A wall is a structure of unambiguous demarcation, differentiating between the sacred and the temporal, between ecclesiastical and civil institutions.<sup>44</sup> By marking this boundary with a wall and by clearly identifying each side's respective jurisdictions, some writers hoped that conflict between the two sides could be ameliorated. A wall, for some theorists, was a symbol of protection and freedom, and for others it was a restrictive structure that imposed undue restraints on the proper roles of both church and state in civil society. Some thought a wall of separation shielded individual conscience from the rough and corrupting hands of civil or clerical authorities. Religious dissenters, in particular, hoped that placement of a wall between church and civil state would provide a measure of autonomy from religious establishments in the exercise of religion. There were those who believed a wall safeguarded the purity of religious truth and Christ's church from a fallen world. (Puritan literature, in particular, made frequent appeals for protective walls to safeguard the church and religious truth from the destructive incursions and depredations of the world.) Still others thought a wall of separation protected the civil polity from ecclesiastical interference or domination. A high barrier between church and civil state also promised to avoid conflict among religious sects competing for government favor or aid. All these uses of walls have figured in the diverse applications and interpretations of the "wall of separation" between church and civil state.

Separationist themes emerged from the Renaissance and later the Reformation. The language of separation is found in the writings of theological reformers. John Witte, Jr. observed that

[Martin] Luther, John Calvin, Thomas Cranmer, Menno Simons, and other sixteenth-century reformers all began their movements with a call for freedom from this ecclesiastical regime – freedom of the individual conscience from intrusive canon laws and clerical controls, freedom of political officials from ecclesiastical power and

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44. Jesus Christ Himself distinguished between that which is God's and that which is Caesar's. When the Pharisees sought to trap Him by asking whether or not it was lawful to pay taxes to Caesar, Jesus answered: "Render unto Caesar the things which are Caesar's; and unto God the things that are God's." *Matthew* 22:21; *Mark* 12:17; *Luke* 20:25; see also *Romans* 13:7. "My Kingdom is not of this world," Jesus responded elsewhere to the interrogation of Pontius Pilate. *John* 18:36.

privileges, freedom of the local clergy from central papal rule and oppressive princely controls.<sup>45</sup>

Early in his reformation ministry, Martin Luther (1483-1546) wrote of a "paper wall" between the "spiritual estate" and the "temporal estate."<sup>46</sup> In his *Institutes of the Christian Religion*, John Calvin (1509-1564) asserted that the "spiritual kingdom" and "political kingdom" "must always be considered separately" because there is a great "difference and unlikeness . . . between ecclesiastical and civil power" and it would be unwise to "mingle these two, which have a completely different nature."<sup>47</sup> The reformers agreed that both church and state, while separate, were divinely ordained institutions under God's authority and that citizens were to be in submission to those God had placed in positions of civil leadership.<sup>48</sup>

#### A. Pre-Jeffersonian Walls of Separation

Thomas Jefferson's "wall of separation between church and state" is the figurative barrier with which we are most familiar today. Although widely credited with coining the "wall of separation" metaphor, Jefferson was not the first to use it in a church-state context. The image of a wall or similar barrier separating the realms of the church and civil government can be found in western theological and political literature centuries before Jefferson put pen to paper.<sup>49</sup> As noted earlier, many commentators who invoked walls of separation prior to Jefferson explained their position in biblical terms.

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45. JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES* 14 (2000). See also JOHN WITTE, JR., *LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION* chs. 2-4 (2002).

46. MARTIN LUTHER, *To the Christian Nobility of the German Nation* (1520), in *THREE TREATISES* 12, 16 (1970), see also *id.*, at 11 ("these walls of straw and paper").

47. JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION*, bk. 3, ch. 19.15; bk. 4, ch. 11.3, bk. 4, ch. 20.1 (John T. McNeill ed., F. Battles trans. 1960) (1559). In his *Commentaries*, Calvin used a "wall of separation" metaphor on several occasions, usually to illustrate the separation of God's chosen people from the world. See, e.g., JOHN CALVIN, *5 COMMENTARIES ON THE PROPHET JEREMIAH AND THE LAMENTATIONS* 63 (John Owen trans. 1950) (commenting on *Jeremiah* 49:6); JOHN CALVIN, *2 COMMENTARIES ON THE BOOK OF GENESIS* 400 (John King trans. 1948) (commenting on *Genesis* 47:3); JOHN CALVIN, *1 COMMENTARY UPON THE ACTS OF THE APOSTLES* 432-433 (Henry Beveridge ed., Christopher Fetherstone trans. 1999) (commenting on *Acts* 10:28).

48. See *Romans* 13.

49. This article focuses on constructions of a "wall of separation" between religious and civil authorities. For an insightful, comprehensive examination of "separation of church and state" as a concept and constitutional standard in American history, see PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002). Hamburger and others have noted that separatist themes and rhetoric have long been a feature of Western discourse. For one influential example

The Anabaptists, who believed they were in the world but not of the world,<sup>50</sup> emphatically rejected the close identification of civil state and church that had been prevalent in Western Christendom since the reign of Constantine. They believed the secular kingdom should be separated from the church of Christ. No true Christian, they maintained, should exercise the sword of temporal authority; and no civil magistrate should exercise jurisdiction in spiritual matters because this is under the authority of God alone.<sup>51</sup> Although the civil state was instituted and ordained by God and is “necessary in the ‘world,’ that is, among those who do not heed or obey Christ’s teachings, it is not necessary among the true disciples of Christ.”<sup>52</sup> Anabaptists thus avoided participation in, and interaction with, the civil state. Menno Simons (1496-1561), a leader of the nonviolent wing of the Dutch Anabaptists, spoke of a “*Scheidingsmaurer*” – a “separating wall” or “wall of separation” – between the realms of the true church and a fallen world. In a December 1548 epistle, Menno Simons wrote: “You see, our people have always insisted that the church [*Gemeende*; religious community] must be entirely outside [*buiten*] the world. We must have a separating wall [*Scheidingsmaurer*] between us.”<sup>53</sup>

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that would have been familiar to Jefferson, see JOHN LOCKE, *A Letter Concerning Toleration* (1689), in 6 THE WORKS OF JOHN LOCKE 21 (1823) (“the church itself is a thing absolutely separate and distinct from the commonwealth. The boundaries on both sides are fixed and immoveable. He jumbles heaven and earth together, the things most remote and opposite, who mixes these societies, which are, in their original, end, business, and in every thing, perfectly distinct, and infinitely different from each other.”).

50. For biblical texts noting that Christians are in the world but not of the world, see *John* 15:19 and *John* 17:14-16. Anabaptists took to heart biblical admonitions that Christians should “be not conformed to this world” (*Romans* 12:2) but remain “separate” from the world and its temptations (1 *Corinthians* 6:14-17). For more on the biblical roots of Anabaptist separationism, see BIBLICAL CONCORDANCE OF THE SWISS BRETHREN, 1540 at 56-60 (C. Arnold Snyder ed., Gilbert Fast and Gaelen Peters trans. 2001). See also The Schleithem Confession of Faith, art. 6. (1527).

51. Heinrich Bullinger, *Anabaptist Origins* (1561), in ANABAPTISM OUTLINE: SELECTED PRIMARY SOURCES 300 (Walter Klaassen ed., 1981).

52. Hans J. Hillerbrand, *An Early Anabaptist Treatise on the Christian and the State*, 32 MENNONITE QUARTERLY REVIEW 30-31 (1958). See also HAROLD S. BENDER, THE ANABAPTISTS AND RELIGIOUS LIBERTY IN THE SIXTEENTH CENTURY 1-22 (1970); Hans J. Hillerbrand, *The Anabaptist View of the State*, 32 MENNONITE QUARTERLY REVIEW 83-110 (1958); Walter Klaassen, *The Anabaptist Understanding of the Separation of the Church*, 46 CHURCH HISTORY 421-36 (December 1977); ANABAPTISM IN OUTLINE: SELECTED PRIMARY SOURCES 244-301 (1981).

53. Letter from Menno Simons to “J.V.” [perhaps Johannes Voetius, a Dutch jurist] (Dec. 1548). Menno enclosed a copy of the Schleithem Confession (1527) in this correspondence with “J.V.” This document in the Rijksarchief in the Hague, Netherlands, was brought to my attention by John Witte, Jr.

The Anabaptist principle of church-state separation, illustrated by Menno Simons’s

Richard Hooker (1554-1600), the sixteenth-century Anglican divine and leading apologist for the English ecclesiastical establishment (i.e., the Elizabethan settlement promulgated in the 1559 Acts of Supremacy and Uniformity), described "walles of separation" between "the *Church* and the *Commonwealth*" in his magnum opus *Of the Laws of Ecclesiastical Polity*.<sup>54</sup> Both revelation and reason, he argued, supported the organic identity of church and state, as coextensive aspects of a unified Christian society. He believed, further, that "the episcopal form of government was best for the Church of England, and that Church and state were two aspects of the same commonwealth, a commonwealth in which both were rightly under the monarch."<sup>55</sup> "[W]ith us one society is both the *Church* and *Commonwealth* . . . whole and entire . . . under one chief Governor," Hooker wrote.<sup>56</sup> He contended that the crown was invested with powers both temporal and spiritual. This was the English model in which "power in causes *Ecclesiastical* is by the laws of this Realm annexed unto the *Crown*."<sup>57</sup> Hooker viewed the English monarch as, in the words of Isaiah 49:23, a "nursing father" to the church. (This peculiar metaphor was a popular expression in Anglo-American literature of the duty of kings and civil magistrates to nurture and protect the true religion and Christ's church.)<sup>58</sup> He renounced those – such as the Puritans of his day –

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"wall of separation," was based on theological grounds different from those that informed the separationist doctrines of others in the Reformed Protestant tradition and was certainly far removed from the secular political precepts upon which the separationist principles of the Enlightenment rested. See John H. Redekop, *The State and the Free Church*, in KINGDOM, CROSS, AND COMMUNITY 181 (John Richard Burkholder and Calvin Redekop eds., 1976) ("Theories about 'a wall of separation,' especially as set forth in early American history, have their root in political, constitutional, and juridical thought, not in theology or the assertions of early Anabaptist theologians").

54. RICHARD HOOKER, *Of the Laws of Ecclesiastical Polity: Books VI, VII, VIII*, at 320, in 3 THE FOLGER LIBRARY EDITION OF THE WORKS OF RICHARD HOOKER (P.G. Stanwood ed., 1981). All other quotations in this section from *Ecclesiastical Polity*, with modernized spelling, are from RICHARD HOOKER, OF THE LAWS OF ECCLESIASTICAL POLITY: PREFACE, BOOK I, BOOK VIII (Arthur Stephen McGrade ed., 1989) [hereinafter *Ecclesiastical Polity*].

55. KENNETH SCOTT LATOURETTE, A HISTORY OF CHRISTIANITY 812 (1953). Puritans were dissenting Protestants of the Reformed theological tradition who wished to reform and purify the Church of England but declined to break fully from the Anglican establishment.

56. *Ecclesiastical Polity*, *supra* note 54, at VIII.1.7 (158).

57. *Ecclesiastical Polity*, *supra* note 54, at VIII.1.2 (129).

58. James H. Hutson has observed that for centuries this metaphor "dominated the church-state dialogue in the Anglo-American world." A Calvinist interpretation of *Isaiah* 49:23 instructed kings and civil magistrates to "form a nurturing bond with religious institutions within [their] jurisdiction . . . [and,] in fact, become the 'nursing father[s]' of the church." The "nursing father" metaphor, according to Hutson, was transmitted to the American colonies where it continued to inform church-state discourse until the mid-nineteenth century. Although American constructions of the phrase evolved over time, at a minimum it stood for the

who would gather all authority ecclesiastical and spiritual unto the Church and deny Christian princes the supreme power to defend truth and to protect and provide for the Christian religion and spiritual matters. He rejected the Puritan notion of church and commonwealth as two distinct and perpetually separated corporations, divided by “walls of separation” that denied the crown its divine prerogative over the church:

[The Puritans argue] that *Bishops* may not meddle with the affairs of the commonwealth because they are governors of another corporation, which is the *Church*, nor *Kings*, with making laws for the *Church* because they have government not of this corporation, but of another divided from it, the *Commonwealth*, and the walls of separation between these two must forever be upheld. They hold the necessity of personal separation which clean excludeth the power of one man’s dealing in both, we of natural which doth not hinder, but that one and the same person may in both bear a principal sway.<sup>59</sup>

Thus, Hooker viewed such “walls of separation” as an unfortunate impediment preventing the Christian prince from protecting and nurturing the spiritual estate.

The seventeenth-century colonial advocate for religious liberty and founder of Rhode Island and Providence Plantation, Roger Williams (1603?-1683), championed a “hedge or wall of separation” to preserve the religious purity of Christ’s church. Williams was a spiritual or theological separatist whose relentless quest was to separate the true church from theological impurity and the unclean world.<sup>60</sup> He adamantly rejected the idea of a national church because it improperly combined regenerate and unregenerate members of society. Where there was an established church, Williams instructed

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proposition that civil magistrates had a duty to model and extol lives of Christian rectitude, protect and even encourage religion (and religious institutions), and promote laws and policies that facilitate and protect religious practices and resist laws that do not. In short, civil rulers must nurture religion as a good father cares for his children or as a shepherd attends to his flock. This was seen by some clergy as the first duty of civil rulers. JAMES HUTSON, FORGOTTEN FEATURES OF THE FOUNDING: THE RECOVERY OF RELIGIOUS THEMES IN THE EARLY AMERICAN REPUBLIC 45-46 (2003).

59. *Ecclesiastical Polity*, *supra* note 54, at VIII 1.2 (129).

60. See the Apostle Paul’s injunction in 2 *Corinthians* 6:14-15, 17 that believers separate themselves from unbelievers: “Be ye not unequally yoked together with unbelievers: for what fellowship hath righteousness with unrighteousness? And what communion hath light with darkness? And what concord hath Christ with Belial? or what part hath he that believeth with an infidel? . . . Wherefore come out from among them, and be ye separate, saith the Lord, and touch not the unclean *thing*; and I will receive you.”

congregations to be separated from it in order to maintain spiritual purity. He further instructed individual believers to be fully separated from unbelievers. Williams, his critics said, even refused fellowship with his own wife when he thought she was insufficiently pure in her spiritual walk.<sup>61</sup>

Drawing on the imagery of Isaiah 5:5-6, Williams set forth the necessity of a "hedge or wall of separation" in a 1644 tract:

[T]he faithful labors of many witnesses of Jesus Christ, extant to the world, abundantly proving that . . . when they have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made His garden a wilderness, as at this day. And that therefore if He will ever please to restore His garden and paradise again, it must of necessity be walled in peculiarly unto Himself from the world; and that all that shall be saved out of the world are to be transplanted out of the wilderness of the world, and added unto His church or garden.<sup>62</sup>

Williams held that a "wall of separation" was peculiarly appropriate to safeguard the "most sweet and fragrant *Garden* of the *Church*"<sup>63</sup> (and religious truth) from the rough and corrupting hand of the world.<sup>64</sup> "When the imagination of Roger Williams built the wall of separation," according to legal historian Mark DeWolfe Howe, "it was not because he was fearful that without such a barrier the arm of the church would extend its reach. It was, rather, the dread of the worldly corruptions which might consume the churches if sturdy fences against the wilderness were not maintained." Any breach in the "wall" would transform Christ's "garden" into a "wilderness." In contrast, the Enlightenment perspective attributed to Jefferson viewed a "wall of separation"

61. TIMOTHY L. HALL, *SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY* 27, 42 n. 48 (1998); HAMBURGER, *supra* note 49, at 40.

62. Roger Williams, *Mr. Cotton's Letter Lately Printed, Examined and Answered*, in 1 *THE COMPLETE WRITINGS OF ROGER WILLIAMS* 392 (Reuben Aldridge Guild ed., 1866). The quotation is taken from Perry Miller's modernized version. PERRY MILLER, *ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION* 98 (1962).

The motif of a protective "hedge" or "wall" was ubiquitous in the rhetoric of colonial New England. These barriers were vital structures of demarcation between the degrading "wilderness of the world" and the enclosed, fragrant "garden of the church." See generally *THE WALL AND THE GARDEN: SELECTED MASSACHUSETTS ELECTION SERMONS, 1670-1775* (A.W. Plumstead ed., 1968). Williams was particularly fond of these metaphors.

63. ROGER WILLIAMS, *The Bloody Tenent Yet More Bloody*, in 4 *COMPLETE WRITINGS OF WILLIAMS* 333 (Samuel L. Caldwell ed., 1963).

64. MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 19 (1965).

as a device to safeguard the secular polity “against ecclesiastical depredations and excursions” or to protect civil society from sectarian strife.<sup>65</sup>

Another version of the “wall of separation” is found in the work of the eighteenth-century dissenting Scottish schoolmaster James Burgh (1714-1775). Although largely unknown to modern audiences, this radical Whig Commonwealthman was “one of Britain’s foremost spokesmen for political reform,” whose writings influenced political thought in revolutionary America.<sup>66</sup> Of the four walls of separation mentioned thus far, Burgh’s is the only wall that, based on history and intellectual content, one can plausibly argue informed Jefferson’s figurative barrier. (Although Jefferson probably encountered Hooker’s wall in his reading, it is unlikely that he was familiar with Menno’s or Williams’s uses of the metaphor.)

Burgh was a man of faith, as well as a man of reason. Indeed, he was preoccupied with religion, which was the wellspring of his politics and his moral code.<sup>67</sup> Burgh brought to his writings a dissenter’s zeal for religious toleration and a distrust of established churches. His antipathy to ecclesiastical establishments was a logical extension of his staunch defense of religious toleration.<sup>68</sup> Burgh thought religion was a matter between God and one’s conscience; and he contended that two citizens with different religious views are “both equally fit for being employed, in the service of our country.”<sup>69</sup> He alerted readers to the potential corrupting influences of established churches. Danger existed, he warned, in “a church’s getting too much power into her hands, and turning religion into a mere state-engine.”<sup>70</sup> Therefore, in his work *Crito*, Burgh proposed building “an impenetrable wall of *separation* between things *sacred* and *civil*.”<sup>71</sup> He dismissed the conventional argument that the public administration of the church was necessary to preserve religion’s salutary influence in society.

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65. *Id.* at 6, 2.

66. CARLA H. HAY, JAMES BURGH: SPOKESMAN FOR REFORM IN HANOVERIAN ENGLAND 30, 41-44 (1979).

67. *Id.* at 49. Carla H. Hay briefly traced the evolution of Burgh’s religious beliefs from his early Calvinist training as the son of a Church of Scotland clergyman to a conversion “to some form of unitarianism.” In his later works he rejected Trinitarianism and other doctrines of orthodox Christianity. However, “[t]here was never any question in Burgh’s mind that organized Christianity was the most valid expression of man’s religious needs and duties.” *Id.* at 49-55.

68. *Id.* at 51.

69. [JAMES BURGH], 2 CRITO, OR ESSAYS ON VARIOUS SUBJECTS 68 (London, 1766, 1767).

70. 1 CRITO, *supra* note 69, at 7.

71. 2 CRITO, *supra* note 69, at 119 (emphasis in the original).

I will fairly tell you what will be the consequences of your setting up such a mixed-mungrel-spiritual-temporal-secular-ecclesiastical establishment. You will make the dispensers of religion *despicable* and *odious* to all men of sense, and will destroy the *spirituality*, in which consists the whole *value*, of religion . . . .

Shew yourselves superior to all these follies and knaveries. Put into the hands of the *people* the clerical emoluments; and let them give them to whom they will; *choosing* their public teachers, and maintaining them decently, but *moderately*, as becomes their *spiritual* character. We have in our times a proof, from the conduct of some among us, in respect of the appointment of their public administrators of religion, that such a scheme will answer all the necessary purposes, and prevent infinite corruption; – *ecclesiastical* corruption; the most odious of all corruption.

Build an impenetrable wall of *separation* between things *sacred* and *civil*. Do not send a *graceless* officer, reeking from the arms of his *trull*, to the performance of a *holy* rite of *religion*, as a test for his holding the command of a regiment. To *profane*, in such a manner, a religion, which you pretend to *reverence*; is an impiety sufficient to bring down upon your heads, the roof of the sacred building you thus defile.<sup>72</sup>

Burgh concluded that entanglements between religion and the civil state led to the very corruption that establishmentarians argued was countered by an ecclesiastical establishment.

These early references to walls of separation and the religious rationales for their construction or destruction are largely forgotten today. Most familiar to us is the wall constructed by Thomas Jefferson, which, in the course of time, has had a profound influence on church-state law, policy, and discourse. We now turn our attention to this famous wall and examine briefly the context in which Jefferson built it, his understanding of the metaphor, and, finally, the propriety of judicial reliance on the figurative phrase.

### B. *The Wall that Jefferson Built*

Few metaphors in American letters have had a greater influence on law and policy than Thomas Jefferson's "wall of separation between church and state." In the course of time, it has been accepted by many Americans as a pithy description of the constitutionally prescribed church-state arrangement. Most

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72. 2 CRITO, *supra* note 69, at 117-19 (emphasis in the original).



important, the judiciary has embraced this figurative phrase as a virtual rule of constitutional law and as the organizing theme of church-state jurisprudence, even though the metaphor is not found in the U.S. Constitution or elsewhere in the organic laws of the United States. In *Everson v. Board of Education* (1947), the U.S. Supreme Court was asked to interpret the First Amendment's prohibition on laws "respecting an establishment of religion." "In the words of Jefferson," the justices famously declared, the First Amendment has erected "'a wall of separation between church and State' . . . . That wall must be kept high and impregnable. We could not approve the slightest breach."<sup>73</sup> In the six decades since this landmark ruling, the "wall of separation" has become the *locus classicus* of the notion that the First Amendment separated religion and the civil state, thereby mandating a strictly secular polity. The trope's continuing influence can be seen in Justice John Paul Stevens' recent warning that our democracy is threatened "[w]hen we remove a brick from the wall that was designed to separate religion and government."<sup>74</sup>

What is the source of this figure of speech, and how has this symbol of strict separation between religion and public life become so influential in American legal and political thought? More important, what are the consequences of the ascendancy of this metaphor in church-state law and policy? The conventional wisdom today is that Jefferson and the constitutional architects erected a high wall that represents a prudential and constitutional principle that religion must be divorced from the concerns of the civil state. Does this accord with Jefferson's view of the wall?

Jefferson was inaugurated the third president of the United States on March 4, 1801, following one of the most bitterly contested elections in history. His religion, or the alleged lack thereof, was a critical issue in the campaign.<sup>75</sup> His Federalist party foes vilified him as an "infidel" and an "atheist." The campaign rhetoric was so vitriolic that, when news of Jefferson's election swept across the country, housewives in New England were seen burying family Bibles in their gardens or hiding them in wells because they expected the Holy Scriptures to be confiscated and burned by the new administration in

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73. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16-18 (1947). In *McCullum v. Board of Education*, decided the following term, Justice Hugo L. Black revealed the extent to which the Court had constitutionalized the wall metaphor: "The majority in the *Everson* case, and the minority . . . , agreed that the First Amendment's language, properly interpreted, had erected a wall of separation between Church and State." *McCullum v. Bd. of Educ.*, 333 U.S. 203, 211 (1948).

74. *Zelman v. Simmons-Harris*, 536 U.S. 639, 686 (2002) (Stevens, J., dissenting).

75. See EDWIN S. GAUSTAD, *SWORN ON THE ALTAR OF GOD: A RELIGIOUS BIOGRAPHY OF THOMAS JEFFERSON* 90 (1996).

Washington.<sup>76</sup> (These fears resonated with pious Americans who had received alarming reports of the French Revolution, which Jefferson was said to support, and the widespread desecration of religious sanctuaries and symbols in France.)

One pocket of support for the Jeffersonian Republicans in Federalist New England existed among the Baptists. At the dawn of the nineteenth century, Jefferson's Federalist opponents, led by John Adams of Massachusetts, dominated New England politics, and the Congregationalist church still enjoyed legal preference throughout much of New England, including Connecticut. The Baptists, who supported Jefferson, were outsiders – they were a beleaguered religious and political minority in a region where a Congregationalist-Federalist axis dominated public life. They were drawn to Jefferson's political candidacy because of his unflagging commitment to religious liberty.

On New Year's Day, 1802, President Jefferson penned a missive to the Baptist Association of Danbury, Connecticut. Organized in 1790, the Danbury Baptist Association was an alliance of more than two dozen churches stretching along the Connecticut Valley.<sup>77</sup> They had written the president a "fan" letter in October 1801, congratulating him on his election to the "chief Magistracy in the United States." They celebrated Jefferson's zealous advocacy for religious liberty and chastised those who had criticized him "as an enemy of religion[,] Law & good order because he will not, dares not assume the prerogative of Jehovah and make Laws to govern the Kingdom of Christ."<sup>78</sup>

In a carefully crafted reply, endorsing the persecuted Baptists' aspirations for religious liberty, Jefferson wrote:

Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that *their* legislature should "make no law respecting an establishment of

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76. 3 DUMAS MALONE, *JEFFERSON AND HIS TIME* 481 (1962); DAVID SAVILLE MUZZEY, *THOMAS JEFFERSON* 207-08 (1918); ALBERT JAY NOCK, *JEFFERSON* 238 (1926).

77. 2 WILLIAM G. MCLOUGHLIN, *NEW ENGLAND DISSENT, 1630-1883: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE* 920, 986 (1971).

78. Letter from a Committee of the Danbury Baptist Association to Jefferson (Oct. 7, 1801), in *The Papers of Thomas Jefferson, Series 1, Box 87, August 30, 1801 - October 15, 1801* (Manuscript Division, Library of Congress), available at [http://memory.loc.gov/ammem/collections/jefferson\\_papers/mtjser1.html](http://memory.loc.gov/ammem/collections/jefferson_papers/mtjser1.html) (follow "November 14, 1801" hyperlink; then enter image # 957).

religion, or prohibiting the free exercise thereof,” thus building a wall of separation between Church & State.<sup>79</sup>

Jefferson allied himself with the New England Baptists in their struggle to enjoy the rights of conscience as an inalienable right and not merely as a favor granted, and subject to withdrawal, by the civil state.

Although today Jefferson’s Danbury letter is thought of as a principled statement on the prudential and constitutional relationship between church and state, it was, in fact, a political statement written to reassure pious Baptist constituents that Jefferson was, indeed, a friend of religion and to strike back at the Federalist-Congregationalist establishment in Connecticut for shamelessly vilifying the president as an infidel and atheist in the recent campaign. Before posting his response, Jefferson solicited the advice of “his chief consultants on New England” politics, Postmaster General Gideon Granger of Connecticut and Attorney General Levi Lincoln of Massachusetts.<sup>80</sup> Jefferson’s own notes reveal that political considerations guided his revision of the missive. Only days after it was written, the letter was published in partisan Republican newspapers where it served its maximum political purpose. (This suggests that Jefferson was writing for an audience beyond the Danbury Baptists – including, perhaps, the New England Federalists.) Jefferson candidly acknowledged in a letter to Lincoln an objective to use letters to constituents, such as his reply to the Baptists, to inform the people’s “political tenets.”<sup>81</sup> For these and other reasons, James H. Hutson of the Library of Congress concluded that the president “regarded his reply to the Danbury Baptists as a political letter, not as a dispassionate theoretical pronouncement on the relations between government and religion.” In short, “it was meant to be a political manifesto, nothing more.”<sup>82</sup>

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79. Letter from Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a committee of the Danbury Baptist association in the state of Connecticut (Jan. 1 1802), in *The Papers of Thomas Jefferson*, Series 1, Box 89, December 2, 1801 - January 1, 1802 (Manuscript Division, Library of Congress), available at [http://memory.loc.gov/ammem/collections/jefferson\\_papers/mtjser1.html](http://memory.loc.gov/ammem/collections/jefferson_papers/mtjser1.html) (follow “March 31, 1802” hyperlink; then enter image # 558).

80. 4 DUMAS MALONE, *JEFFERSON AND HIS TIME* 109 (1970).

81. Letter from Jefferson to Levi Lincoln (Jan. 1, 1802), in *The Papers of Thomas Jefferson*, Series 1, Box 89, December 2, 1801 - January 1, 1802 (Manuscript Division, Library of Congress) [*hereinafter* Letter to Levi Lincoln], available at [http://memory.loc.gov/ammem/collections/jefferson\\_papers/mtjser1.html](http://memory.loc.gov/ammem/collections/jefferson_papers/mtjser1.html) (follow “March 31, 1802” hyperlink; then enter image # 561).

82. James Hutson, “*A Wall of Separation*”: *FBI Helps Restore Jefferson’s Obliterated Draft*, 57 *LIBRARY OF CONGRESS INFORMATION BULLETIN* 137, 163 (1998).

What was Jefferson's understanding of this wall of separation? I contend that the wall is used today in ways that its architect almost certainly would not recognize and, perhaps, would even repudiate. First of all, throughout his public career, including two terms as president, Jefferson adopted policies incompatible with the "high and impregnable" wall the modern Supreme Court has erroneously attributed to him. For example, he endorsed the use of federal funds to build churches and to support Christian missionaries working among the Indians.<sup>83</sup> The absurd conclusion that countless courts and commentators would have us reach is that Jefferson routinely pursued policies that violated his own "wall of separation."

Second, Jefferson's wall, as a matter of federalism, was erected between the national and state governments on matters pertaining to religion and not, more generally, between the church and *all* civil government. In other words, the wall Jefferson constructed placed the national regime on one side and state governments and churches on the other. The wall's primary function was to delineate the constitutional jurisdictions of the national and state governments respectively on religious concerns, such as official proclamations for days of public prayer, fasting, and thanksgiving. Evidence for this jurisdictional or structural understanding of the wall can be found in both the texts and the context of the correspondence between Jefferson and the Danbury Baptist Association.

President Jefferson had been under Federalist attack for refusing to issue executive proclamations setting aside days for national fasting and thanksgiving, and he said he wanted to explain his policy on this delicate matter.<sup>84</sup> He told Attorney General Lincoln that his response to the Danbury

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83. See ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 37-39, 57-59 (1982).

84. As president, Jefferson employed rhetoric in official utterances that, in terms of religious content, was virtually indistinguishable from the traditional thanksgiving day proclamations issued by his presidential predecessors and by state chief executives. See JOHN G. WEST, JR., *THE POLITICS OF REVELATION AND REASON: RELIGION AND CIVIC LIFE IN THE NEW NATION* 57 (1996). He used language skillfully to play both sides of this fractious controversy. He satisfied disestablishmentarians by declining to issue official religious proclamations, yet he employed religious rhetoric in public pronouncements that appealed to pious constituents who thought public virtue and social tranquility required leaders to cultivate religious morality and to acknowledge God publicly in the life of the nation. His first annual message to Congress, for example, brims with thanksgiving: "While we devoutly return thanks to the beneficent Being who has been pleased to breathe into them the spirit of conciliation and forgiveness, we are bound with peculiar gratitude to be thankful to him that our own peace has been preserved through so perilous a season, and ourselves permitted quietly to cultivate the earth and to practice and improve those arts which tend to increase our comforts." Thomas Jefferson, First Annual Message (Dec. 8, 1801), in 3 *THE WRITINGS OF THOMAS JEFFERSON* 327 (Andrew A.

Baptists “furnishes an occasion too, which I have long wished to find, of saying why I do not proclaim fastings & thanksgivings, as my predecessors [Presidents Washington and Adams] did.”<sup>85</sup> The president was eager to address this topic because his Federalist foes had demanded religious proclamations and then smeared him as an enemy of religion when he declined to issue them.<sup>86</sup>

Significantly, Jefferson’s refusal, as president, to set aside days in the public calendar for religious observances contrasted with his actions in Virginia where, in the late 1770s, he framed “A Bill for Appointing Days of Public Fasting and Thanksgiving,”<sup>87</sup> and, as governor in 1779, he designated a day for

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Lipscomb & Albert Ellery Bergh eds., 1905) [hereinafter WRITINGS OF JEFFERSON]. His second annual message opened with the following thanksgiving: “When we assemble together, fellow citizens, to consider the state of our beloved country, our just attentions are first drawn to those pleasing circumstances which mark the goodness of that Being from whose favor they flow, and the large measure of thankfulness we owe for his bounty.” Thomas Jefferson, Second Annual Message, (Dec. 15, 1802), in 3 WRITINGS OF JEFFERSON, *supra* note 84, at 340. Jefferson concluded his second inaugural address by asking Americans to join with him in prayer that the “Being in whose hands we are . . . will so enlighten the minds of your servants, guide their councils, and prosper their measures, that whatsoever they do, shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations.” Jefferson, Second Inaugural Address (Mar. 4, 1805), in 3 WRITINGS OF JEFFERSON, *supra* note 84, at 383. His public papers are replete with similar expressions of thanksgiving and devotion.

85. Letter to Levi Lincoln, *supra* note 81.

86. Jefferson also wanted to address this topic because religious proclamations had emerged as a sensitive political issue in the days leading to the election of 1800. When, in March 1799, President John Adams recommended a national “day of solemn humiliation, fasting, and prayer,” his political adversaries depicted him as a tool of conservative religionists intent on establishing a national church. John Adams, Proclamation for a National Fast (Mar. 6, 1799), in 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 172-74 (Charles Francis Adams ed., 1854). “A general suspicion prevailed,” Adams recounted more than a decade later, “that the Presbyterian Church [which was presumed to be behind the proclamation] was ambitious and aimed at an establishment as a national church.” Although disclaiming any involvement in such a scheme, Adams ruefully reported that he “was represented as a Presbyterian [which he was not] and at the head of this political and ecclesiastical project. The secret whisper ran through all the sects, ‘Let us have Jefferson, Madison, Burr, anybody, whether they be philosophers, Deists, or even atheists, rather than a Presbyterian President.’” Letter from John Adams to Benjamin Rush (June 12, 1812), in THE SPUR OF FAME: DIALOGUES OF JOHN ADAMS AND BENJAMIN RUSH, 1805-1813, at 224 (John A. Schutz and Douglass Adair eds., 1966). This reservoir of opposition to “national fasts and thanksgivings,” according to Adams, cost him the election in 1800. Jefferson was the political beneficiary, if not the instigator, of this sentiment and, no doubt, was eager to go on the record denouncing presidential religious proclamations. This episode challenges the often-repeated claim that Jefferson steadfastly refused to issue religious proclamations despite substantial political costs, thereby emphasizing that his position was principled. Clearly, political benefits, as well as costs, accompanied action on either side of this controversial practice.

87. *Report of the Committee of Revisors Appointed by the General Assembly of Virginia in MDCCLXXVI*, at 59-60 (1784), in 2 THE PAPERS OF THOMAS JEFFERSON 556 (Julian P. Boyd ed.,

"publick and solemn thanksgiving and prayer to Almighty God."<sup>88</sup> The former, far from simply granting the "Governor, or Chief Magistrate [of the Commonwealth]," the authority to appoint "days of public fasting and humiliation, or thanksgiving," included the following punitive provision: "Every minister of the gospel shall on each day so to be appointed, attend and perform divine service and preach a sermon, or discourse, suited to the occasion, in his church, on pain of forfeiting fifty pounds for every failure, not having a reasonable excuse."<sup>89</sup>

How can Jefferson's public record on religious proclamations in Virginia be reconciled with the stance he took as president of the United States? The answer, I believe, is found in the principle of federalism. Jefferson's phrase was a metaphoric construction of the First Amendment, which time and again he said imposed its restrictions on the national government only (see, for example, Jefferson's 1798 draft of the Kentucky Resolutions).<sup>90</sup> Addressing the same topic of religious proclamations, Jefferson elsewhere relied on the Tenth Amendment, arguing that because "no power to prescribe any religious exercise . . . has been delegated to the General [i.e., national] Government[,] it must then rest with the States, as far as it can be in any human authority."<sup>91</sup> He sounded the same theme in his Second Inaugural Address delivered in March 1805:

In matters of religion, I have considered that its free exercise is placed by the constitution independent of the powers of the general [i.e., national] government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it; but have

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1950) [hereinafter PAPERS OF JEFFERSON]. This bill was part of a legislative package in Virginia's revised code that included Jefferson's "Bill for Establishing Religious Freedom" and "Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers." All three bills were apparently framed by Jefferson and sponsored in the Virginia legislature by James Madison. See Daniel L. Dreisbach, *A New Perspective on Jefferson's Views on Church-State Relations: The Virginia Statute for Establishing Religious Freedom in Its Legislative Context*, 35 AM. J. OF LEGAL HIST. 172-204 (1991).

88. Thomas Jefferson, Proclamation Appointing a Day of Thanksgiving and Prayer (Nov. 11, 1779), in 3 PAPERS OF JEFFERSON, *supra* note 87, at 177-79. This proclamation was issued after Jefferson penned his famous "Bill for Establishing Religious Freedom."

89. *Report of the Committee of Revisors*, *supra* note 87, at 60, in 2 PAPERS OF JEFFERSON, *supra* note 87, at 556.

90. This original understanding of the First Amendment was turned on its head by the modern U.S. Supreme Court's "incorporation" of the First Amendment into the due process of law clause of the Fourteenth Amendment. See DANIEL L. DREISBACH, *REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT* 69-75, 89-96 (1987).

91. Letter from Jefferson to the Reverend Samuel Miller (Jan. 23, 1808), in 11 WRITINGS OF JEFFERSON, *supra* note 84, at 428.

left them, as the constitution found them, under the direction and discipline of State or Church authorities acknowledged by the several religious societies.<sup>92</sup>

(These two statements were, in essence, Jefferson's own commentary on the Danbury letter, insofar as they grappled with identical issues.) Thus, as a matter of federalism, he thought it was inappropriate for the nation's chief executive to proclaim days for religious observance; however, he acknowledged the authority of state officials to issue religious proclamations. Again, Jefferson's wall was erected between the national and state governments on matters pertaining to religion.

The separation of powers and checks and balances, which were indispensable features of American federalism, provided vital protections for liberty that, in Jefferson's view, were arguably more important than a bill of rights. Clearly, Jefferson lamented the persecution of Baptists in New England. It is plausible, even likely, that Jefferson desired each state, following Virginia's example, through its respective constitutions and laws to erect its own wall of separation between ecclesiastical and state authorities. But these state walls would not be the same as the First Amendment wall described in the Danbury letter. The use of a First Amendment wall to protect dissenters' religious rights in the states would have dangerously undermined that other great protector of civil and religious liberty – federalism.

### C. *The Wall that Black Built*

Just as the walls described by Menno, Hooker, and Williams differ from Jefferson's, so too does Jefferson's wall differ from the "high and impregnable" wall central to the last sixty years of church-state jurisprudence. Although this modern barrier has been attributed to the third president, it is not Jefferson's wall, rather it is the wall that Black – Justice Hugo L. Black – built in 1947 in *Everson v. Board of Education*.<sup>93</sup> Black's wall has come to define contemporary church-state law, policy, and discourse.

The significant differences between the two walls are suggested by Jefferson's record as a public official in both Virginia and the nation, which shows that he initiated practices and implemented policies inconsistent with

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92. Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), in 3 WRITINGS OF JEFFERSON, *supra* note 84, at 378. See 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 335 (1950). (stating that in this passage of the address Jefferson "doubtless had in mind particularly his well-known objection to presidential Thanksgiving Day proclamations"); GAUSTAD, *supra* note 75, at 99-100.

93. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

Justice Black's and the modern Supreme Court's "high and impregnable" wall of separation.

Jefferson's separationist construction rests on a cluster of explicitly religious propositions (e.g., "that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship . . ." <sup>94</sup>), whereas Black's barrier is apparently premised on the desirability of a religiously-neutral, secular polity. This distinction is a reminder that Jefferson's wall is closely linked with freedom of conscience (that is, his wall is a bulwark against government intrusion on the individual's free exercise of religion). Black's wall, however, is usually identified with the nonestablishment of religion (that is, the prohibition of any commingling of the civil state's authority, influence, and resources with that of religion). <sup>95</sup>

Black, unlike Jefferson, pointedly characterized his wall as "high and impregnable." <sup>96</sup> Even among the metaphor's proponents, this has generated much debate concerning the proper dimensions of the wall.

Whereas Jefferson's wall expressly separated the institutions of *church* and state (specifically the national regime), the Court's wall, more expansively, apparently separates *religion* and all civil government:

Jefferson's wall separated church and the national government only. By incorporating the First Amendment nonestablishment provision into the due process clause of the Fourteenth Amendment, Black's wall separates religion and civil government at all levels – national, state, and local. By extending its prohibitions to state and local jurisdictions, Black turned the First Amendment, as ratified in 1791, on its head. A barrier originally designed, as a matter of federalism, to separate the national and state governments, and thereby to preserve state jurisdiction in matters pertaining to religion, was transformed into an instrument of the federal judiciary to invalidate policies and programs of state and local authorities.

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94. Letter from Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a committee of the Danbury Baptist association in the state of Connecticut (Jan. 1 1802), *supra* note 79.

95. A close reading of Jefferson's Danbury letter suggests that it was constructed in the service of the free exercise of religion. If this is correct, then use of the metaphor to restrict religious exercise (e.g., to disallow a citizen's religious expression in the public square) conflicts with the very principle Jefferson hoped his metaphor would advance. Moreover, Jefferson concluded his presidential missive with a prayer, reciprocating his Baptists correspondents' "kind prayers for the protection & blessing of the common father and creator of man." Ironically, some strict separationists today contend that such solemn words in a presidential address violate a constitutional "wall of separation." See, e.g., *Newdow v. Bush*, 391 F.Supp.2d 95 (D.D.C. 2005), and related litigation.

96. *Everson v. Bd. of Educ.*, 330 U.S. at 17.



As the normative constitutional rule applicable to all relationships between religion and the civil state, the wall that Black built has become the defining structure of a putatively secular polity.

#### IV. RECONCEPTUALIZING THE FIRST AMENDMENT

After two centuries, Jefferson's trope is still influential, but it remains enormously controversial. The question bitterly debated is whether the wall illuminates or obfuscates the constitutional principles it metaphorically represents.

The wall's defenders argue that it promotes private, voluntary religion and freedom of conscience in a secular polity. The wall prevents religious establishments and avoids sectarian conflict among denominations competing for government favor and aid. An impenetrable barrier prohibits not only the formal recognition of, and legal preference for, one particular church (or denomination) but also all other forms of government assistance or encouragement for religious objectives. A regime of strict separation, defenders insist, is the best, if not the only, way to promote religious liberty, especially the rights of religious minorities. Champions of the wall are fond of quoting the ancient proverb made famous by Robert Frost: "Good fences make good neighbors."<sup>97</sup>

Critics counter that the judiciary's reliance on an extraconstitutional metaphor as a substitute for First Amendment text almost inevitably distorts constitutional principles governing church-state relationships. The limitations of the wall arise from the very nature of metaphor.<sup>98</sup> Metaphors are a valuable literary device. They enrich language by making it dramatic and colorful, rendering abstract concepts concrete, condensing complex concepts into a few words, and unleashing creative and analogical insights. But their uncritical use can lead to distortion and misrepresentation. At its heart, metaphor compares two or more things that are not identical. A metaphor's literal meaning is used nonliterally in a comparison with its subject. While the comparison may yield useful insights, the dissimilarities between the metaphor and its subject, if not acknowledged, can distort or pollute one's understanding of the subject. Metaphors inevitably graft onto their subjects connotations, emotional intensity, and/or cultural associations that transform the understanding of the subject as it was known pre-metaphor. If attributes of the metaphor are erroneously or

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97. FROST, *supra* note 2, at 48.

98. I say this recognizing that some philosophers and linguists argue that (1) all human reasoning is metaphorical and (2) common law lawyers are almost irresistibly drawn to metaphors because common law and metaphors require a similar form of reasoning by analogy.

misleadingly assigned to the subject and if the distortion goes unchallenged, then the metaphor may reconceptualize or otherwise alter the understanding of the underlying subject. The more appealing and powerful a metaphor, the more it tends to supplant or overshadow the original subject, and the more one is unable to contemplate the subject apart from its metaphoric formulation. Thus, distortions perpetuated by the metaphor are sustained and magnified. Jefferson's figurative phrase illustrates this danger. Although the "wall of separation" may felicitously express some aspects of First Amendment law, it seriously misrepresents or obscures others. The "wall" metaphor, I believe, has been a source of much mischief in modern church-state jurisprudence. It has reconceptualized – indeed, I would say, misconceptualized – First Amendment principles in at least two important ways:

First, Jefferson's trope emphasizes *separation* between church and state – unlike the First Amendment, which speaks in terms of the nonestablishment and free exercise of religion.<sup>99</sup> (Although these terms are often conflated today, in the lexicon of 1802, the expansive notion of "separation" was distinct from the narrow institutional concept of "nonestablishment.") Jefferson's Baptist correspondents, who agitated for disestablishment but not for separation, were apparently discomfited by the figurative phrase and, perhaps, even sought to suppress the president's letter.<sup>100</sup> The Danbury Baptists in 1802 were suspicious of a wall that they, like many Americans, feared would separate religious influences from public life and policy. Few Americans, including evangelical dissenters, challenged the widespread assumption of the age that republican government and civic virtue were dependent on a moral people and that religion was the wellspring of morality.

Second, the very nature of a wall further reconceptualizes First Amendment principles. A wall is a bilateral barrier that inhibits the activities of both civil government and religion – unlike the First Amendment, which imposes restrictions on civil government (i.e., "Congress") only. In short, a wall not only prevents the civil state from intruding on the religious domain but also prohibits religion from influencing the conduct of civil government. The various First Amendment guarantees, however, were entirely a check or restraint on civil government, specifically on Congress. The free press

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99. Strict separationists, like the late Leo Pfeffer, blithely dismiss this contention, arguing that "separation of church and state," like the popular term "fair trial," is merely a convenient shorthand expression for a basic constitutional principle universally accepted by the American people, even though the phrase does not appear in the Constitution. LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* 119 (1953).

100. See DANIEL L. DREIBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* 52-53 (2002); HAMBURGER, *supra* note 49, at 163-65.

guarantee, for example, was not written to protect the civil state from the press, rather it was designed to protect a free and independent press from control by the national government. Similarly, the religion provisions were added to the Constitution to protect religion and religious institutions from corrupting interference by the national government, not to protect civil government from the influence of, or overreaching by, religion. As a bilateral barrier, however, the wall unavoidably restricts religion's ability to influence public life; and, thus, it necessarily and dangerously exceeds the limitations imposed by the Constitution.<sup>101</sup>

Herein lies the danger of this metaphor and the reason why we should care about its use in law and policy. Today the wall is frequently used to separate religion from public life, thereby promoting a religion that is essentially private and a state that is strictly secular. The "high and impregnable" wall constructed by the Supreme Court inhibits religion's ability to inform the public ethic and policy, deprives religious citizens of the civil liberty to participate in politics armed with ideas informed by their spiritual values, and infringes the right of religious communities and institutions to extend their prophetic ministries into the public square.

The wall has become the sacred symbol of a strict separationist dogma that champions a secular polity in which religious influences are systematically and coercively stripped from the public square. Federal and state courts have used the "wall of separation" concept to justify censoring private religious expression (such as Christmas creches) in public fora, denying public benefits (such as education vouchers) for religious entities, and excluding religious

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101. The wall's critics contend that all too often it is used to silence the church and to limit its reach into public life, but it is rarely used to restrain the civil state's meddling in, and restraint of, the church. Yale University law professor Stephen L. Carter has denounced the modern judiciary's construction of a "single-sided wall" that confines, indeed imprisons, the community of faith, but imposes few corresponding restraints on the civil state's ability to interfere with religion and religious institutions. The civil state, acting through its judges, "decides when religion has crossed the wall of separation . . . . Unsurprisingly, then, religion is often found to have breached the wall, whereas the state almost never is." STEPHEN L. CARTER, *GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS* 79-80 (2000). "The separation of church and state, in its contemporary rendition," Carter lamented, "represents little more than an effort to subdue the power of religion, to twist it to the ends preferred by the state." *Id.* at 78. This is a perversion of the historical and constitutional origins of the separation principle, Carter complained. The single-sided wall erected in the First Amendment was designed to protect religion from interference by the civil state, but not to protect the civil state from religious influences. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 105 (1993). See also Richard John Neuhaus, *Contending for the Future: Overcoming the Pfefferian Inversion*, 8 J. L. & RELIGION 115, 19 (1990).

citizens and organizations (such as faith-based social welfare agencies) from full participation in civic life on the same terms as their secular counterparts. The coerced removal of religion from public life not only is at war with our cultural traditions insofar as it evinces a callous indifference toward religion but also offends basic notions of freedom of religious exercise, expression, and association in a democratic and pluralistic society.

Walls are often structures of enmity, built to separate antagonists. The Court's construction of a "high and impregnable" barrier, critics argue, evinces a hostility toward religion and the church. Jefferson's metaphor, sadly, has been used to silence the religious voice in the public marketplace of ideas and, in a form of religious apartheid, to segregate faith communities behind a restrictive barrier. The critics, too, evoke the poet Robert Frost who observed: "Something there is that doesn't love a wall / That wants it down."<sup>102</sup>

## V. CONCLUSION

If, as I have argued, the wall is a profoundly flawed metaphor for First Amendment doctrine, then should we search for a better, alternative metaphor, such as James Madison's "line of separation"?<sup>103</sup> I think not. Although other tropes may yield interesting insights, we are best served by returning to the text of the First Amendment.

Jefferson's figurative language has provided little specific, practical guidance for resolving difficult church-state controversies that require a delicate balancing of competing constitutional values. Moreover, the wall is politically divisive. Because it is so concrete and unyielding, its very invocation forecloses meaningful dialogue regarding the prudential and constitutional role of religion, faith communities, and religious citizens in public life. The uncritical use of the metaphor has unnecessarily injected inflexibility into church-state debate, fostered distortions and confusion, and polarized students of church-state relations, inhibiting the search for common ground and compromise on delicate and vexing issues. In short, the metaphor has not produced the practical solutions to real world controversies that its apparent clarity and directness lead its proponents to expect. Indeed, this wall has done what walls frequently do – it has obstructed the view. It has obfuscated our understanding of constitutional principles governing church-state relationships.<sup>104</sup>

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102. FROST, *supra* note 2, at 48.

103. Letter from James Madison to the Reverend Jasper Adams (Sept. 1833), in *RELIGION AND POLITICS IN THE EARLY REPUBLIC: JASPER ADAMS AND THE CHURCH-STATE DEBATE* 120 (Daniel L. Dreisbach ed., 1996).

104. See Robert M. Hutchins, *The Future of the Wall*, in *THE WALL BETWEEN CHURCH AND*

Given its extensive and continuing influence on church-state law, policy, and discourse, an examination of Jefferson's celebrated wall, constructed two centuries ago, casts light not only on the past but also on the future place of religion in American public life. Today the wall stands as a defining image of the prudential and constitutional role of religion in the public arena. We must seriously consider whether that wall accurately represents constitutional principles and usefully contributes to American democracy and to a civil society.

The repetitious, uncritical use of felicitous phrases, Justice Felix Frankfurter observed, bedevils the law: "A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, indiscriminatingly used to express different and sometimes contradictory ideas."<sup>105</sup> Figures of speech designed to simplify and liberate thought end often by trivializing or enslaving it. Therefore, as Judge Benjamin N. Cardozo counseled, "[m]etaphors in law are to be narrowly watched."<sup>106</sup> This is advice that courts would do well to heed.

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STATE 18, 19 (Dallin H. Oaks ed., 1963).

105. *Tiller v. Atlantic Coast Line R.R. Co.*, 318 U.S. 54, 68 (1943) (Frankfurter, J., concurring).

106. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926).