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“Origins and Dangers of the ‘Wall of Separation’ Between Church and State”

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No metaphor in American letters has had a greater influence on law and policy than Thomas Jefferson’s “wall of separation between church and state.” For many Americans, this metaphor has supplanted the actual text of the First Amendment to the U.S. Constitution, and it has become the locus classicus of the notion that the First Amendment separated religion and the civil state, thereby mandating a strictly secular polity.

More important, the judiciary has embraced this figurative language as a virtual rule of constitutional law and as the organizing theme of church-state jurisprudence. Writing for the U.S. Supreme Court in 1948, Justice Hugo L. Black asserted that the justices had “agreed that the First Amendment’s language, properly interpreted, had erected a wall of separation between Church and State.” The continuing influence of this wall is evident in the Court’s most recent church-state pronouncements.

The rhetoric of church-state separation has been a part of western political discourse for many centuries, but it has only lately come to a place of prominence in American constitutional law and discourse. What is the source of the “wall of separation” metaphor so frequently referenced today? How has this symbol of strict separation between religion and public life become so influential in American legal and political thought? Most important, what are the policy and legal consequences of the ascendancy of separationist rhetoric and of the transformation of “separation of church and state” from a much-debated political idea to a doctrine of constitutional law embraced by the nation’s highest court?

The Wall that Jefferson Built

On New Year’s Day, 1802, President Jefferson penned a missive to the Baptist Association of Danbury, Connecticut. The Baptists had written the new president a “fan” letter in October 1801, congratulating him on his election to the “chief Magistracy in the United States.” They celebrated his 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.” At the time, the Congregationalist Church was still legally established in Connecticut and the Federalist party controlled New England politics. Thus the Danbury Baptists were outsiders—a beleaguered religious and political minority in a state where a Congregationalist-Federalist party establishment dominated public life. They were drawn to Jefferson’s political cause because of his celebrated advocacy for religious liberty.

In a carefully crafted reply, the president allied himself with the New England Baptists in their struggle to enjoy the right of conscience as an inalienable right—not merely as a favor granted, and subject to withdrawal, by the civil state:

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

This missive was written in the wake of the bitter presidential contest of 1800. Candidate Jefferson’s religion, or the alleged lack thereof, was a critical issue in the campaign. His Federalist foes vilified him as an “infidel” and “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 Washington. (These fears resonated with 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.) Jefferson wrote to these pious Baptists to reassure them of his continuing commitment to their right of conscience and to strike back at the Federalist-Congregationalist establishment in Connecticut for shamelessly vilifying him in the recent campaign.

Several features of Jefferson’s letter challenge conventional, strictly secular constructions of his famous metaphor. First, the metaphor rests on a cluster of explicitly religious propositions (i.e., “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”). Second, Jefferson’s wall was constructed in the service of the free exercise of religion. 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. Third, Jefferson concluded his presidential missive with a prayer, reciprocating his Baptist 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.”

The conventional wisdom is that Jefferson’s wall represents a universal principle concerning the prudential and constitutional relationship between religion and the civil state. In fact, this wall had less to do with the separation between religion and *all* civil government than with the separation between the national and state governments on matters pertaining to religion (such as official proclamations of days of prayer, fasting, and thanksgiving). The “wall of separation” was a metaphoric construction of the First Amendment, which Jefferson time and again said imposed

its restrictions on the national government only (see, e.g., Jefferson's 1798 draft of the Kentucky Resolutions).

In other words, Jefferson's wall separated the national government on one side from state governments and religious authorities on the other. This construction is consistent with a virtually unchallenged assumption of the early constitutional era: the First Amendment in particular and the Bill of Rights in general affirmed the fundamental constitutional principle of federalism. The First Amendment, as originally understood, had little substantive content apart from its affirmation that the national government was denied all power over religious matters. Jurisdiction in such concerns was reserved to individual citizens, religious societies, and state governments. (Of course, 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 Fourteenth Amendment.)

The Metaphor Enters Public Discourse

By late January 1802, printed copies of Jefferson's reply to the Danbury Baptists began appearing in New England newspapers. The letter, however, was not accessible to a wide audience until it was reprinted in the first major collection of Jefferson's papers, published in the mid-19th century.

The phrase "wall of separation" entered the lexicon of American law in the U.S. Supreme Court's 1878 ruling in *Reynolds v. United States*, although most scholars agree that the wall metaphor played no role in the Court's reasoning. Chief Justice Morrison R. Waite, who authored the opinion, was drawn to another clause in Jefferson's text. The *Reynolds* Court, in short, was drawn to the passage, not to advance a strict separation between church and state, but to support the proposition that the legitimate powers of civil government could reach men's actions only and not their opinions.

Nearly seven decades later, in the landmark case of *Everson v. Board of Education* (1947), the Supreme Court "rediscovered" the metaphor and elevated it to constitutional doctrine. Citing no source or authority other than *Reynolds*, Justice Hugo L. Black, writing for the majority, invoked the Danbury letter's "wall of separation" passage in support of his strict separationist interpretation of the First Amendment prohibition on laws "respecting an establishment of religion." "In the words of Jefferson," he 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." In even more sweeping terms, Justice Wiley B. Rutledge asserted in a separate opinion that the First Amendment's purpose was "to uproot" all religious establishments and "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." This rhetoric, more than any other, set the terms and the tone for a strict separationist jurisprudence that reached ascendancy on the Court in the second half of the 20th century.

Like *Reynolds*, the *Everson* ruling was replete with references to history, especially the roles played by Jefferson and Madison in the Virginia disestablishment struggles in the tumultuous decade following independence from Great Britain. Jefferson was depicted as a leading architect

of the First Amendment despite the fact that he was in France when the measure was drafted by the First Federal Congress in 1789.

Black and his judicial brethren also encountered the metaphor in briefs filed in *Everson*. In a lengthy discussion of history supporting the proposition that “separation of church and state is a fundamental American principle,” an amicus brief filed by the American Civil Liberties Union quoted the clause from the Danbury letter containing the “wall of separation” image. The ACLU ominously concluded that the challenged state statute, which provided state reimbursements for the transportation of students to and from parochial schools, “constitutes a definite crack in the wall of separation between church and state. Such cracks have a tendency to widen beyond repair unless promptly sealed up.”

Shortly after the *Everson* ruling was handed down, the metaphor began to proliferate in books and articles. In a 1949 best-selling anti-Catholic polemic, *American Freedom and Catholic Power*, Paul Blanshard advocated an uncompromising political and legal platform favoring “a wall of separation between church and state.” Protestants and Other Americans United for the Separation of Church and State (an organization today known by the more politically correct appellation of Americans United for Separation of Church and State), a leading strict-separationist advocacy organization, wrote the phrase into its 1948 founding manifesto. Among the “immediate objectives” of this new organization was “[t]o resist every attempt by law or the administration of law further to widen the breach in the wall of separation of church and state.”

The Supreme Court frequently and favorably referenced the “wall of separation” in the cases that followed. In *McCullum v. Board of Education* (1948), the Court essentially constitutionalized Jefferson’s phrase, subtly and blithely substituting his figurative language for the literal text of the First Amendment. In the last half of the 20th century, the metaphor emerged as the defining motif for church-state jurisprudence, thereby elevating a strict separationist construction of the First Amendment to accepted dogma among jurists and commentators.

The Trouble with Metaphors in the Law

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 confusion and distortion. At its heart, metaphor compares two or more things that are not, in fact, identical. A metaphor’s literal meaning is used non-literally 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. If attributes of the metaphor are erroneously or misleadingly assigned to the subject and the distortion goes unchallenged, then the metaphor may 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 even magnified. This is the lesson of the “wall of separation” metaphor.

The judiciary’s reliance on an extra-constitutional metaphor as a substitute for the text of the First Amendment almost inevitably distorts constitutional principles governing church-state relationships. Although the “wall of separation” may felicitously express some aspects of First

Amendment law, it seriously misrepresents or obscures others, and has become a source of much mischief in modern church-state jurisprudence. It reconceptualized (indeed 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 non-establishment and free exercise of religion. (Although these terms are often conflated today, in the lexicon of 1802, the expansive concept of "separation" was distinct from the narrow institutional concept of "non-establishment.") 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. They, like many Americans, feared that the erection of such a wall would separate religious influences from public life and policy. Few evangelical dissenters (including the Baptists) challenged the widespread assumption of the age that republican government and civic virtue were dependent on a moral people and that religion supported and nurtured morality.

Second, a wall is a bilateral barrier that inhibits the activities of both the civil government and religion—unlike the First Amendment, which imposes restrictions on civil government 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 guarantee, for example, was not written to protect the civil state from the press, but 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 the civil state from the influence of, or overreaching by, religion. As a bilateral barrier, however, the wall unavoidably restricts religion's ability to influence public life, thereby exceeding the limitations imposed by the First Amendment.

Herein lies the danger of this metaphor. The "high and impregnable" wall constructed by the modern Court has been used to inhibit religion's ability to inform the public ethic, to deprive religious citizens of the civil liberty to participate in politics armed with ideas informed by their faith, and to infringe the right of religious communities and institutions to extend their prophetic ministries into the public square. Today, the "wall of separation" is the sacred icon of a strict separationist dogma intolerant of religious influences in the public arena. It has been used to silence religious voices in the public marketplace of ideas and to segregate faith communities behind a restrictive barrier.

Federal and state courts have used the "wall of separation" concept to justify censoring private religious expression (such as Christmas creches) in public, to deny public benefits (such as education vouchers) for religious entities, and to exclude religious 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 systematic and coercive 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 pluralistic society.

There was a consensus among the founders that religion was indispensable to a system of republican self-government. The challenge the founders confronted was how to nurture personal

responsibility and social order in a system of self-government. Tyrants and dictators can use the whip and rod to force people to behave as they desire, but clearly this is incompatible with a self-governing people. In response to this challenge the founders looked to religion (and morality informed by religious faith) to provide the internal moral compass that would prompt citizens to behave in a disciplined manner and thereby promote social order and political stability. The literature of the founding era is replete with this argument, no example more famous than George Washington's statement in his Farewell Address of September 19, 1796:

Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labour to subvert these great Pillars of human happiness, these firmest props of the duties of Men and citizens And let us with caution indulge the supposition, that morality can be maintained without religion [R]eason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle.

Believing that religion and morality were indispensable to social order and political prosperity, the founders championed religious liberty in order to foster a vibrant religious culture in which a beneficent religious ethos would inform the public ethic and to promote an environment in which religious and moral leaders could speak out boldly, without restraint or inhibition, against corruption and immorality in civic life. Religious liberty was not merely a benevolent grant of the civil state; rather, it reflected an awareness among the founders that the very survival of the civil state and a civil society was dependent on a vibrant religious culture, and religious liberty nurtured such a religious culture. In other words, the civil state's respect for religious liberty is an act of self-preservation. The unfortunate consequence of 20th-century jurisprudence is that the First Amendment, designed to protect and promote a vital role for religion in public life, has been replaced with a wall of separation that, in the hands of the modern judiciary, has restricted religion's place in the polity.

Legacy of Intolerance

In his recent book, *Separation of Church and State*, Philip Hamburger amply documents that the rhetoric of separation of church and state became fashionable in the 1830s and 1840s and, again, in the last quarter of the 19th century. Why? It accompanied two substantial waves of Catholic immigrants with their peculiar liturgy and resistance to assimilation into the Protestant establishment, an initial wave of Irish in the first half of the century, and then more Irish along with other European immigrants later in the century. The rhetoric of separation was used by nativist elements, such as the Know-Nothings and later the Ku Klux Klan, to marginalize Catholics and to deny them, often through violence, entrance into the mainstream of public life. By the end of the century, an allegiance to the so-called "American principle" of separation of church and state had been woven into the membership oaths of the Ku Klux Klan. Today we typically think of the Klan strictly in terms of their views on race, and we forget that their hatred of Catholics was equally odious.

Again, in the mid-20th century, the rhetoric of separation was revived and ultimately constitutionalized by anti-Catholic elites, such as Justice Hugo L. Black, and fellow travelers in the ACLU and Protestants and Other Americans United for the Separation of Church and State, who feared the influence and wealth of the Catholic Church and perceived parochial education as a threat to public schools and democratic values. The chief architect of the modern "wall" was

Justice Black, whose affinity for church-state separation and the metaphor was rooted in virulent anti-Catholicism. Hamburger has argued that Justice Black, a former Alabama Ku Klux Klansman, was the product of a remarkable “confluence of Protestant, nativist, and progressive anti-Catholic forces... Black’s association with the Klan has been much discussed in connection with his liberal views on race, but, in fact, his membership suggests more about [his] ideals of Americanism,” especially his support for separation of church and state. “Black had long before sworn, under the light of flaming crosses, to preserve ‘the sacred constitutional rights’ of ‘free public schools’ and ‘separation of church and state.’” Although he later distanced himself from the Klan on matters of race, “Black’s distaste for Catholicism did not diminish.” Black’s admixture of progressive, Klan, and strict separationist views is best understood in terms of anti-Catholicism and, more broadly, a deep hostility to assertions of ecclesiastical authority. Separation of church and state, Black believed, was an American ideal of freedom from oppressive ecclesiastical authority, especially that of the Roman Catholic Church. A regime of separation enabled Americans to assert their individual autonomy and practice democracy, which Black believed was Protestantism in its secular form.

To be clear, diverse strains of political, religious, and intellectual thought have embraced notions of separation (I myself come from a faith tradition that believes church and state should operate in separate institutional spheres), but a particularly dominant strain in 19th-century America was this nativist, bigoted strain. We must confront the uncomfortable fact that the phrases “separation of church and state” and “wall of separation,” although not necessarily expressions of intolerance, have often, in the American experience, been closely identified with the ugly impulses of nativism and bigotry.

In conclusion, Jefferson’s figurative language has not produced the practical solutions to real world controversies that its apparent clarity and directness led its proponents to expect. Indeed, this wall has done what walls frequently do?it has obstructed the view, obfuscating our understanding of constitutional principles governing church-state relationships. The rhetoric of “separation of church and state” and “a wall of separation” has been instrumental in transforming judicial and popular constructions of the First Amendment from a provision protecting and encouraging religion in public life to one restricting religion’s place and role in civic culture. This transformation has undermined the “indispensable support” of religion in our system of republican self-government. This fact would have alarmed the framers of the Constitution, and we ignore it today at the peril of our political order and prosperity.

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