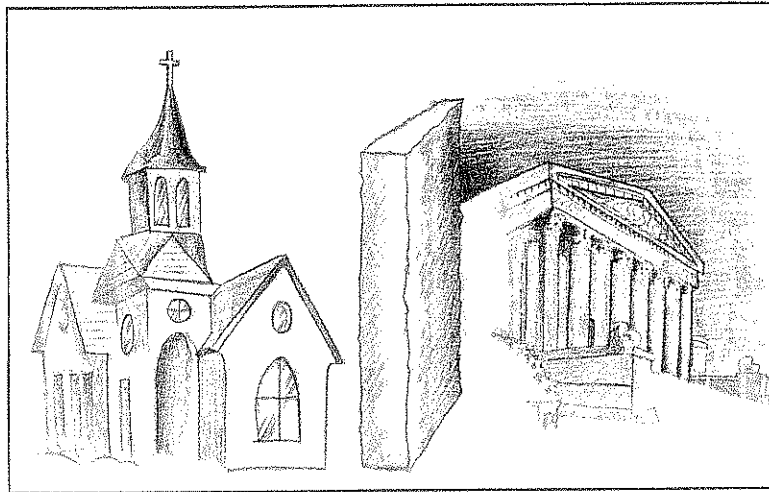


How Thomas Jefferson's "Wall of Separation" Redefined Church-State Law and Policy

by Daniel L. Dreisbach



Stan Tumilowicz

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." Many Americans accept it as a pithy description of the constitutionally prescribed Church-State arrangement, 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 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 Constitution. 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." Our democracy is threatened, Justice John Paul Stevens warned last term, "[w]henver we remove a brick from the wall that was designed to separate religion and government."

What is the source of this figure of speech, and how has this symbol of strict separation between religion and public life come to dominate Church-State law and policy? I address these questions in my new book, *Thomas Jefferson and the Wall of Separation Between Church and State* (2002).

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 advo-

cacy for religious liberty and chastised those who had criticized him "as an enemy of religion[,] Law & good order."

In 1800, Jefferson's Federalist Party opponents, led by John Adams, dominated New England politics, and the Congregationalist Church was still legally established in Connecticut. The Danbury Baptists were outsiders—a beleaguered religious and political minority in a state where a Congregationalist-Federalist establishment dominated public life. They were drawn to Jefferson's political cause because of his unflinching commitment to religious liberty.

In a carefully crafted reply endorsing the persecuted Baptists' aspirations for religious liberty, the President 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 religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State.

The 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 fully expected the Holy Scriptures to be confiscated and burned by the new administration in Washington. (These fears resonated with Americans who had received

Daniel L. Dreisbach, a professor of justice, law, and society at American University, is the author, most recently, of *Thomas Jefferson and the Wall of Separation Between Church and State* (New York University Press), from which this article is adapted.

alarming reports of the French Revolution, which Jefferson was said to support, and the widespread desecration of religious sanctuaries and symbols in France.) The Danbury letter was written to reassure pious Baptist constituents of Jefferson's continuing commitment to their rights of conscience and to strike back at the Federalist-Congregationalist establishment in Connecticut for shamelessly vilifying him in the recent campaign.

Jefferson's wall, according to conventional wisdom, represents a universal principle on the prudential and constitutional relationship between religion and the civil state. To the contrary, this wall had less to do with the separation between religion and *all* civil government than with the separation between federal 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 federal government only (see, for example, Jefferson's 1798 draft of the Kentucky Resolutions). In other words, the wall separated the federal regime on one side from state governments and religious authorities on the other.

How did this wall, limited in its jurisdictional application,

come to exert such enormous influence on American jurisprudence? The political principle of separation between religion and politics began to gain currency among Jeffersonian partisans in the campaign of 1800, not to promote liberty but to silence the Federalist clergy who had denounced candidate Jefferson as an infidel and atheist. In the Danbury letter, Jefferson deftly transformed the political principle into the constitutional principle of separation between Church and State by equating the language of separation with the text of the First Amendment. The constitutional principle was eventually elevated to constitutional law by the Supreme Court in the mid-20th century, effectively recreating First Amendment doctrine.

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 constitutional law in the U.S. Supreme Court's ruling in *Reynolds v. United States* (1879). Opining that the missive "may be accepted almost as an authoritative declaration of the scope and effect of the [First A]mendment thus secured," the Court reprinted a flawed transcription of the Danbury letter. Most scholars agree that the wall metaphor played no role in the Court's decision. Chief Justice Morrison R. Waite, who authored the opinion, was drawn to another clause in Jefferson's text, but he could not edit the letter artfully to leave out the figurative phrase. The Chief Justice relied on Jefferson's statement that the powers of civil government could reach men's actions only, not their opinions. The *Reynolds* Court was focused on the legislative powers of Congress to criminalize the Mormon practice of polygamy and was apparently drawn to this passage because of the mistranscription of "legitimate powers" as "legislative powers." But for this erroneous transcription, the Court might have had little or no interest in the Danbury letter, and the wall metaphor might not have entered the American legal lexicon.

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 construction of the First Amendment prohibition on laws "respecting an establishment of religion." "In the words of Jefferson," the Court 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." Like *Reynolds*, the *Everson* ruling was replete with references to history, especially the roles played by Jefferson and Madison in the Virginia disestablishment struggles. 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 in the Danbury letter containing the "wall of separation." 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.”

The trope’s current fame and pervasive influence in popular, political, and legal discourse date from its rediscovery by the *Everson* Court. Shortly after the 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 (today known by the more politically correct name “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 the 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 Danbury letter continued to be cited frequently and favorably by the Supreme Court. In *McCullum v. Board of Education* (1948), the following term, and in subsequent cases, 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.

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 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 our understanding of the subject. Metaphors inevitably graft onto their subjects connotations, emotional intensity, and/or cultural associations that transform the former understanding of the subject. If attributes of the metaphor are erroneously or misleadingly assigned to the subject and the distortion goes unchallenged, 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 we are unable to contemplate the subject apart from its metaphoric formulation. Thus, distortions perpetuated by the metaphor are sustained and magnified.

The judiciary’s reliance on an extraconstitutional metaphor as a substitute for the text of the First Amendment almost inevitably distorts constitutional principles governing Church-State relations. Although the “wall of separation” may felicitously express some aspects of First Amendment law, it seriously misrepresents or obscures others. In *Thomas Jefferson and the Wall of Separation Between Church and State*, I contend that the wall metaphor mischievously misrepresents constitutional 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. Jefferson’s Baptist correspondents, who agitated for disestablishment but not for separation, were apparently discomfited by the figurative phrase. 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 morals could be nurtured only by the Christian religion.

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 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, and, thus, it necessarily exceeds the limitations imposed by the Constitution.

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, deprive religious citizens of the civil liberty to participate in politics armed with ideas informed by their spiritual beliefs, and infringe the right of religious communities and institutions to extend their ministries into the public square. The wall has been used to silence the religious voice in the public marketplace of ideas and to segregate faith communities behind a restrictive barrier.

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”? I think not. Although other tropes may yield interesting insights, we are best served by returning to the First Amendment itself.

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. It has obfuscated our understanding of constitutional principles governing Church-State relationships.

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, indiscriminately used to express different and sometimes contradictory ideas.” 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.” This is advice that courts would do well to heed.

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