

The Mythical “Wall of Separation”: How a Misused Metaphor Changed Church–State Law, Policy, and Discourse

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No metaphor in American letters has had a more profound influence on law and policy than Thomas Jefferson’s “wall of separation between church and state.” Today, this figure of speech is accepted by many Americans as a pithy description of the constitutionally prescribed church–state arrangement, and it has become the sacred icon of a strict separationist dogma that champions a secular polity in which religious influences are systematically and coercively stripped from public life.

In our own time, 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 nowhere to be found in the U.S. Constitution. In *Everson v. Board of Education* (1947), the United States 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 “was intended to erect ‘a wall of separation between church and State’...[that] must be kept high and impregnable. We could not approve the slightest breach.”

In the half-century 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’s recent warning that our democracy is threatened “[w]hen we remove a brick from the wall that was designed to separate religion and government.”¹

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? Of Jefferson’s many celebrated pronouncements, this is one of his most misunderstood and misused. I would like to challenge the conventional, secular myth that Thomas Jefferson, or the constitutional architects, erected a high wall between religion and the civil government.²

BUILDING A “WALL OF SEPARATION”

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. His Federalist Party 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

¹ *Zelman v. Simmons-Harris*, 536 U.S. 639, 686 (2002) (Stevens, J., dissenting).

² I explore these questions in *Thomas Jefferson and the Wall of Separation Between Church and State* (New York: New York University Press, 2002).

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.)

One pocket of support for the Jeffersonian Republicans in Federalist New England existed among the Baptists. At the dawn of the 19th century, Jefferson's Federalist opponents, led by John Adams, dominated New England politics, and the Congregationalist church was legally established in Massachusetts and Connecticut. The Baptists, who supported Jefferson, were outsiders—a beleaguered religious and political minority in a region where a Congregationalist–Federalist axis dominated political life.

On New Year's Day, 1802, President Jefferson penned a missive to the Baptist Association of Danbury, Connecticut. The Baptists 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.”

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

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.³

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 him as an infidel and atheist in the recent campaign. James H. Hutson of the Library of Congress has 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.”⁴

JEFFERSON'S UNDERSTANDING OF THE “WALL”

Throughout his public career, including two terms as President, Jefferson pursued 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. 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.”

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, Jefferson placed the federal government on one side of his

³ 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, 1 January 1802, The Papers of Thomas Jefferson (Manuscript Division, Library of Congress), Series 1, Box 89, December 2, 1801–January 1, 1802.

⁴ James Hutson, “‘A Wall of Separation’: FBI Helps Restore Jefferson's Obliterated Draft,” *Library of Congress Information Bulletin*, Vol. 57, No. 6 (June 1998), pp. 137, 163.

wall 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 setting aside days in the public calendar for 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.⁵

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. He told Attorney General Levi Lincoln that his response to the Danbury 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." 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.

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" and, as governor in 1779, designated a day for "publick and solemn thanksgiving and prayer to Almighty God."

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 firmly believed that the First Amendment, with its metaphoric "wall of separation," prohibited religious establishments by the federal government only. Addressing the same topic of religious proclamations, Jefferson elsewhere relied on the Tenth Amendment, arguing that because "no power to prescribe any reli-

gious exercise...has been delegated to the General [i.e., federal] Government[,] it must then rest with the States, as far as it can be in any human authority." 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., federal] government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it; but have left them, as the constitution found them, under the direction and discipline of State or Church authorities acknowledged by the several religious societies.

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 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. In short, Jefferson's "wall" was erected between the federal and state governments on matters pertaining to religion.

THE WALL THAT BLACK BUILT

The phrase "wall of separation" entered the lexicon of American constitutional law in 1879. In *Reynolds v. United States*, the U.S. Supreme Court opined that the Danbury letter "may be accepted almost as an authoritative declaration of the scope and effect of the [first] amendment thus secured."⁶ Although the Court reprinted the entire second paragraph of Jefferson's letter containing the metaphorical phrase, Jefferson's language is generally characterized as *obiter dictum*.

Nearly seven decades later, in the landmark case of *Everson v. Board of Education* (1947), the Supreme Court rediscovered the metaphor: "In the words of Jefferson, the [First Amendment] clause against establishment of

⁵ For a detailed analysis of these letters, see my *Thomas Jefferson and the Wall of Separation Between Church and State*.

⁶ *Reynolds v. United States*, 98 U.S. 145, 164 (1879).

religion by law was intended to erect ‘a wall of separation between church and State’... That wall,” the justices concluded in a sweeping separationist declaration, “must be kept high and impregnable. We could not approve the slightest breach.”⁷ Jefferson’s words were woven neatly into the *Everson* ruling, which, like *Reynolds*, was replete with references and allusions to history, especially the roles played by Jefferson and Madison in the Virginia disestablishment struggles.

Justice Hugo L. Black, who authored the Court’s ruling, likely encountered the metaphor in briefs filed in *Everson*. In an extended discussion of American history that highlighted Virginia’s disestablishment battles and supported the proposition that “separation of church and state is a fundamental American principle,” attorneys for the American Civil Liberties Union quoted the single clause in the Danbury letter that contains the “wall of separation” image. The challenged state statute, the ACLU ominously concluded, “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.”⁸

The trope’s current fame and pervasive influence in popular, political, and legal discourse date from its rediscovery by the *Everson* Court. The Danbury letter was also cited frequently and favorably in the cases that followed *Everson*. In *McCullum v. Board of Education* (1948), the following term, and in subsequent cases, the Court essentially constitutionalized the Jeffersonian phrase, subtly and blithely substituting Jefferson’s figurative language for the literal text of the First Amendment.⁹ In the last half of the 20th century, it became the defining motif for church–state jurisprudence.

⁷ *Everson*, 330 U.S. 1, 16, 18 (1947).

⁸ Brief of the American Civil Liberties Union as *Amicus Curiae* at 8, 12, 34.

⁹ In *McCullum v. Board of Education*, 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*, 333 U.S. 203, 211 (1948).

The “high and impregnable” wall central to the past 50 years of church–state jurisprudence is not Jefferson’s wall; rather, it is the wall that Black—Justice Hugo Black—built in 1947 in *Everson v. Board of Education*.

The 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 Justice Black’s and the modern Supreme Court’s “high and impregnable” wall of separation. 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, the Court’s wall, more expansively, separates *religion* and all civil government.

Jefferson’s wall separated church and the federal government only. By incorporating the First Amendment non-establishment provision into the due process clause of the Fourteenth Amendment, Black’s wall separates religion and civil government at all levels—federal, 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. 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.

RECONCEPTUALIZING THE FIRST AMENDMENT

After two centuries, Jefferson’s trope is enormously influential, but it remains 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 governmental 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.

I contend that the graphic wall metaphor 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 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 institutional concept of "non-establishment.")

Indeed, 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. The Danbury Baptists in 1802 were alarmed by the erection of a wall that 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 dependant on a moral people and that morals could be nurtured only by the Christian religion.

Second, the very nature of a wall further reconceptualizes First Amendment principles. A wall is a bilateral barrier that inhibits the activities of both the civil state and religion, unlike the First Amendment, which imposes restrictions on civil government only. The First Amendment, with all its guarantees, was entirely

a check or restraint on civil government, specifically Congress. The free press 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 federal government.

Similarly, the religion provisions were added to the Constitution to protect religion and religious institutions from corrupting interference by the federal government and not to protect the civil state from the influence of, or overreaching by, religion. The wall, however, is a bilateral barrier that unavoidably restricts religion's ability to influence public life; thus, it necessarily and dangerously exceeds the limitations imposed by the First Amendment.

Let me say as an aside: I do not believe that many so-called strict separationists are, in fact, consistent adherents of their "high and impregnable" wall. Virtually all advocate the separation of religion (and religious influences) from the civil state and public life, but few consistently argue that civil government should be completely separated from the concerns of the church. Few strict separationists are willing, even in strict adherence to a wall-of-separation principle, to exempt churches, clergy, and religious entities from the civil state's generally applicable civil rights, criminal, employment, tax, and zoning laws, as well as health and safety regulations.

Is their wall a single-sided wall that imposes restrictions on the church but not on the civil state? All too often, the wall of separation 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.

LEGACY OF INTOLERANCE

We must confront the uncomfortable fact that, for much of American history, the phrase "separation of church and state" and its attendant metaphoric formulation, "a wall of separation," have often been expressions of exclusion, intolerance, and bigotry. These phrases have been used to silence people and communities of faith and to exclude them from full participation in public life.

In the late 18th and early 19th centuries, establishmentarians sought to frighten Americans by deliberately mischaracterizing the religious dissenters' aspirations for disestablishment and liberty of conscience as advocacy for a separation of religion from public life that would inevitably lead to political atheism and rampant licentiousness. This was a political smear. Religious dissenters, indeed, agitated for disestablishment, but like most Americans, they did not wish to separate religious values from public life and policy.

In the bitter presidential campaign of 1800, Jeffersonian Republicans cynically advocated the rhetoric and policy of separation, not to promote religious worship and expression, but to silence the Federalist clergy who had vigorously denounced Jefferson as an infidel and atheist. (Two centuries later, the American Civil Liberties Union and its allies continue to use these phrases to silence people and communities of faith that seek to participate in the public marketplace of ideas armed with ideas informed by spiritual values.)

Not surprisingly, this separationist rhetoric returned to fashion in the 1830s and 1840s and, again, in the last quarter of the 19th century when waves of Catholic immigrants, with their peculiar liturgy and resistance to assimilation into the Protestant establishment, arrived on American shores. Nativist elements, including the Know Nothings and later the Ku Klux Klan, embraced separationist rhetoric and principles in a continuing, and often violent, campaign to restrict the role of Catholics in public life.

Again, in the mid-20th century, the rhetoric of separation was revived and ultimately constitutionalized by anti-Catholic elites, such as Hugo Black, and the American Civil Liberties Union 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.¹⁰

¹⁰ These themes are explored in John T. McGreevy, "Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928–1960," *Journal of American History*, Vol. 84 (June 1997), pp.

Let me be clear: Various strains of political, religious, and intellectual thought have embraced notions of separation, but a particularly dominant—perhaps the most dominant—strain in 19th-century America was this nativist, bigoted strain.

In short, the terms "separation of church and state" and "wall of separation," although not necessarily expressions of intolerance, have often been closely identified in the American experience with the ugly impulses of nativism and bigotry. These phrases, in our cultural and political experience, have been so freighted with nativist and bigoted connotations that I believe we must reconsider the propriety of their continued use in legal and political discourse.

WHY IT MATTERS

Why should we care about this metaphor today? We should care because the wall is all too often used to separate religion from public life, thereby promoting a religion that is essentially private and a state that is strictly secular. This would have alarmed the founders because they viewed religion, to paraphrase George Washington's words, as an indispensable support for social order and political prosperity.

Today, the wall is the cherished emblem of a strict separationist dogma intolerant of religious influences in the public square. Federal and state courts have used

97–131, and Philip Hamburger, *Separation of Church and State* (Cambridge, Mass.: Harvard University Press, 2002). The chief architect of the modern "wall" was Justice Hugo Black, whose affinity for church–state separation and the metaphor was rooted in virulent anti-Catholicism. Philip Hamburger has argued that Justice Black, a former Alabama Ku Klux Klansman, was the product of a remarkable "confluence of Protestant [specifically Baptist], 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, "Black's distaste for Catholicism did not diminish." Hamburger, *Separation of Church and State*, pp. 423, 434, 462, 463.

the “wall of separation” concept to justify censoring private religious expression (such as Christmas crèches) in public fora; stripping public spaces of religious symbols (such as crosses); denying public benefits (such as education vouchers) for religious entities; and excluding 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 democratic and pluralistic society.

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. Jefferson’s metaphor, sadly, has been used to silence the religious voice in the marketplace of ideas and, in a form of religious apartheid, to segregate faith communities behind a restrictive barrier.

The wall metaphor provides little practical guidance for the application of First Amendment principles to real-world church–state controversies, short of recommending a policy of absolute separation. Few courts or even separationist partisans, however, contend that a total and perfect separation is practical or mandated by the Constitution. In short, the wall is incapable of providing specific, practical guidelines that can be implemented in difficult disputes that require a delicate balancing of competing constitutional values, such as the freedoms of speech, association, religious exercise, and the non-establishment of religion.

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.

Jefferson’s figurative language has not produced the practical solutions that its apparent clarity and directness lead the wall-builders to expect. Indeed, this wall has done what walls frequently do—it has obstructed the view. It has obfuscated our understanding of constitutional principles. There is little advantage in metaphor if it is unable to bring clarity to an ambiguous or confusing text or if it fails to aid in the interpretive process.

Absent Jefferson’s metaphor, church–state debate might well be more candid and transparent. The separation principle would not necessarily be deemed an essential feature of the First Amendment; rather, it would be understood as only one among several plausible constructions of the amendment. Moreover, separationists would be compelled to articulate precisely the assumptions and rationales of their perspective rather than gloss over them with a metaphoric slogan.

THE TROUBLE WITH METAPHORS IN THE LAW

Metaphors 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. Who can imagine Abraham Lincoln’s articulation of his great cause absent the biblical allusion to a “house divided” or Winston Churchill’s Cold War charge without mention of the “iron curtain”? Metaphors, however, must be used with caution in the law, especially in judicial opinions and statutes. Legal discourse, unlike much political rhetoric, requires precision of expression, strict and orderly adherence to rules set forth in legislative enactments or past judicial decisions.

Metaphor is a valuable literary device, but its 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 recognized, can distort or pollute one's understanding of the actual 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 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 one is unable to contemplate the subject apart from its metaphoric formulation. Thus, distortions perpetuated by the metaphor are sustained and magnified.

Jefferson's phrase powerfully illustrates this. Although the metaphor may felicitously express some aspects of the First Amendment, it seriously misrepresents or obscures others.

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."¹¹ 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."¹² This is advice that courts would do well to heed.

A year after *Everson*, Justice Stanley F. Reed denounced the Court's reliance on the metaphor. "A rule of law," he protested, "should not be drawn from a figure of speech."¹³ Justice Potter Stewart similarly opined in the first school-prayer case that the Court's

task in resolving complex constitutional controversies "is not responsibly aided by the uncritical invocation of metaphors like the 'wall of separation,' a phrase nowhere to be found in the Constitution."¹⁴ In a stinging repudiation of the Court's use of the trope, Justice William Rehnquist offered that the wall "is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned."¹⁵

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 Supreme Court's conception of that wall stands as a defining image of the prudential and constitutional role of religion in the public arena. Serious consideration must be given to whether that wall accurately represents constitutional principles and usefully contributes to American democracy and to a civil society.

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¹¹ *Tiller v. Atlantic Coast Line Railroad Co.*, 318 U.S. 54, 68 (1943) (Frankfurter, J., concurring).

¹² *Berkey v. Third Ave. Ry. Co.*, 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926).

¹³ *McCullum*, 333 U.S. at 247 (Reed, J., dissenting).

¹⁴ *Engel v. Vitale*, 370 U.S. 421, 445–446 (1962) (Stewart, J., dissenting).

¹⁵ *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).