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Separation of Church and State: The Supreme Court’s Misleading Metaphor

John C. Fischer*

In 1947, the Supreme Court created a doctrine that has dominated Establishment Clause jurisprudence for the past fifty years—the “separation of church and state.” As a result, the Court has become “a national theology board,” moving toward the elimination of all contact between government and religion. What began as an attack on indoctrination turned into an assault on religion in general. The Court has used several tests to apply this

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1. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).
2. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (“The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable.”).
4. On the other hand, an extreme position that seeks to eliminate any boundary between religion and government is equally pernicious. Some level of separation is required to protect religion and individual conscience from government interference. For a discussion of this point, see infra notes 160–65 and accompanying text.
7. The “Lemon Test” prohibits government action that (1) lacks a secular purpose, (2) has a primary effect of promoting religion, or (3) encourages an excessive entanglement between government and religion. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). Justice O’Connor advocated the “Endorsement Test,” which focuses on whether the government has endorsed religion. See Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (“Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community . . .”). Finally, the Psychological Coercion Test has been applied in the school context. Lee v. Weisman, 505
separationist doctrine. In the process, it has resolved a wide variety of "divisive" issues, including the display of a nativity scene and the observance of a moment of silence. However, while the separation of church and state may be a catchy phrase, it is flawed as a tool to enforce the Establishment Clause.

This Note will explore the historical and cultural problems that have grown out of the Court's usage of the "wall of separation" metaphor in analyzing Establishment Clause issues. First, the doctrine is built on "a mistaken understanding of constitutional history." Second, it has created a culture where religion is not welcome in the public square. Finally, it is inconsistent with our identity as a religious nation, which was once again revealed in the aftermath of the September 11 attacks.

U.S. 577, 592 (1992) (noting that students were subtly coerced through peer pressure to stand for a graduation invocation). The Court has often acknowledged that it is not obligated to apply particular test. See, e.g., Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (noting its "unwillingness to be confined to any single test or criterion).

8. In its opinions, the Court has often used this word to describe the religious activity at issue. See, e.g., Sante Fe, 530 U.S. at 311 (stating that the mechanism of students electing whether to have a prayer before a high school football game "encourages divisiveness"); Lee, 505 U.S. at 587 (noting the "divisiveness" of choosing a particular member of the clergy to say a prayer at a middle school graduation).

11. Engel v. Vitale, 370 U.S. 421, 445–46 (1962) (Stewart, J., dissenting) (arguing that "the Court's task... is not responsibly aided by the uncritical invocation of metaphors like the 'wall of separation' "). Notwithstanding this admonition, the wall has its supporters. One of these fans has ranked the metaphor as "one of the mightiest monuments of constitutional government" in our history. LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 250 (2d ed. 1994).

12. Wallace, 472 U.S. at 92 (Rehnquist, J., dissenting). See also Lee, 505 U.S. at 644 (Scalia, J., dissenting) ("Our religion clause jurisprudence has become bedeviled... by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions.")
I. THE MISLEADING METAPHOR ¹³

In Everson v. Board of Education, the Court stated: "[i]n the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' "¹⁴ Not only has this phrase become the touchstone of Establishment Clause cases, it has become a fixture in the American lexicon. However, the historical roots of the phrase are not as widely known. In "a short note of courtesy"¹⁵ to the Danbury Baptists,¹⁶ President Thomas Jefferson used those words to alleviate any fears that the federal government would interfere with the free exercise of religion.¹⁷ Nonetheless, whatever its meaning in this context, it does not offer the most plausible explanation for why the Establishment Clause was drafted.¹⁸

¹³. See Wallace, 472 U.S. at 92 (Rehnquist, J., dissenting).
¹⁴. 330 U.S. 1, 16 (1947) (quoting Reynolds v. U.S., 98 U.S. 145, 164 (1879)).
¹⁵. See Wallace, 472 U.S. at 92 (Rehnquist, J., dissenting).
¹⁸. This section of the article merely examines whether the Framers intended to build a wall between church and state. It does not attempt to describe the exact role that history should play in constitutional interpretation. For some different views on the proper method of constitutional interpretation, see DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 1–3 (2002) (arguing in favor of a pragmatic approach and disparaging the concept of a grand theory); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37–41 (1997) (advocating an approach that looks exclusively at the original meaning of the text); HADLEY ARKES, BEYOND THE CONSTITUTION 18 (1991) (stating the original understanding of the Constitution cannot be interpreted apart from "the principles of right and wrong that stood antecedent" to the document).
It is true that the Establishment Clause places a barrier between religion and government, however, it does not appear that this barrier was intended to be high and impregnable. During the debates that led to the adoption of the First Amendment, not one of the ninety delegates mentioned the phrase “separation of church and state.” Rather, the debates appear to indicate that the delegates were concerned with the possibility of Congress establishing a national religion. As a representative on the House floor, James Madison, who is often invoked by those who embrace the “wall of separation” metaphor, argued “that if the word ‘national’ was introduced [before the word religion], it would point the amendment directly to the object it was intended to prevent.” Other House members indicated that they did not want the influence of religion to be diluted. Representative Peter Sylvester of New York feared that the First Amendment would be used to “abolish religion altogether.” Representative Benjamin Huntington of Connecticut worried that an improper construction would be “extremely hurtful to the cause of religion.”

19. Professor Philip Hamburger has noted that the separation of church and state does not reflect the concerns of the Founders. HAMBURGER, supra note 16, at 13 (noting that because of the separation metaphor “the First Amendment has often been understood to limit religious freedom in ways never imagined by the late eighteenth-century dissenters who demanded constitutional guarantees of religious liberty”).

20. 1 ANNALS OF CONG. 729–31 (Joseph Gales ed., 1834). This is the language that the House debated: “[no] religion shall be established by law, nor shall the equal rights of conscience be infringed.” Id. at 729.


22. See CORD, supra note 17, at 5 (stating that the Religion Clauses denied “Congress the constitutional authority to pass legislation providing for the formal and legal union of any single church, religion, or sect with the Federal Government”).

23. See infra note 51 and accompanying text.

24. 1 ANNALS OF CONG. 731 (Joseph Gales ed., 1834).

25. Id. at 729.

26. Id. at 730. The House record shows that Huntington agreed with Madison that the Amendment was intended to prevent Congress from “infring[ing] the rights of conscience and [from] establish[ing] a national religion.” Id. at 730–31 (emphasis added).
much debate, the Senate and the House passed the language that remains intact today.27

Proponents of the separation doctrine have used the final language and the legislative history of the Establishment Clause to support their cause. Justice Souter has argued that although they discussed such narrow language as “a national religion” or “a religion,” the Framers settled on the broad term “religion.”28 Accordingly, he contends that they intended the Clause to prevent “support for religion in general.”29 By itself, this position is at least arguable.30 However, when combined with the actions of our First Congress and our first President, it loses its luster.

On the same day that it began to debate the Amendments to the Constitution, the First Congress reenacted the Northwest Ordinance, which listed the requirements for statehood.31 Article III provided that “[r]eligion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”32 While this ordinance pre-dated the final version of the Establishment Clause, it is improbable that the delegates would approve legislation that would contradict with the intent of one of the proposed amendments they were simultaneously examining.33

This “support for religion in general” did not stop with the Northwest Ordinance. Three days before the First Amendment was ratified, the First Congress appointed paid chaplains who would begin each session with prayer.34 Further, within days after they ratified the First Amendment, Congress adopted a resolution

27. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”).
29. Id. at 616.
30. However, the House Record indicates another possible reason for this narrow language. Representative Elbridge Gerry of Massachusetts opposed the word “national” because he felt it might infer that the Constitution established a national government rather than a federal government. See 1 ANNALS OF CONG. 731.
32. Northwest Ordinance 1 Stat. 51, 52 (1789).
33. See Wallace, 472 U.S. at 100 (Rehnquist, J., dissenting).
urging President Washington to proclaim “a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts the many signal favors of Almighty God.” President Washington fulfilled their request. This was not long after his inauguration, where the “Father of our Country” uttered these words:

[I]t would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes.

This pattern sheds light on the intent of the Framers. It seems that few would have a clearer understanding of the Establishment
Clause than its draftsmen or the President who oversaw its formation.

Given the spiritual foundation of the Revolution that our Founders had fought, these actions should not be seen as an aberration. The whole purpose of our government is to secure the rights that God granted to us. In determining the intent of the Framers, the Constitution should not be read apart from the Declaration of Independence, which established the foundation upon which the Constitution was to stand. The two function together in the same way as a corporation's Articles of Incorporation and By-laws relate to one another. As David Barton aptly stated, one "call[s] the entity into legal existence" and the other "explain[s] how it will be governed." However, "the governing of the corporation . . . must always be within the framework and purposes" established in its Articles. In 1897, the Supreme Court affirmed this concept: "the latter [Constitution] is but the body and the letter of which the former [Declaration] is the thought and the spirit, and it is always safe to read the letter of the

39. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), www.archives.gov/exhibit_hall/charters_of_freedom/declaration/declaration_transcription.html (stating "[t]hat to secure these [God-given] rights, Governments are instituted among Men").

40. At least one Founder agreed with this statement. Samuel Adams, a signer of the Declaration, noted that "[b]efore the formation of this Constitution. . . . [t]his Declaration of Independence was received and ratified by all the States in the Union and has never been disannulled." BARTON, supra note 21, at 247 (quoting Letter from Samuel Adams to the Legislature of Massachusetts (January 17, 1794), in 4 THE WRITINGS OF SAMUEL ADAMS 357 (Harry Alonzo Cushing ed., 1908)).

41. This very fact prompted Martin Luther King to "have a dream . . . that one day we will recognize the words of Jefferson that 'all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.'" Martin Luther King, Jr., Address at the Freedom Rally in Cobo Hall (June 23, 1963), in A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR. 72 (Clayborne Carson & Kris Shepard eds., 2001).

42. BARTON, supra note 21, at 247.
43. Id.
Constitution in the spirit of the Declaration of Independence.\textsuperscript{44} When this is done, it is unlikely that a document that openly appeals "to the Supreme Judge of the World for the rectitude of [its] intentions"\textsuperscript{45} could possibly be consistent with the Court's advancement toward total separation of religion from government.\textsuperscript{46}

These broader historical considerations notwithstanding, the Court has relied extensively on the select words of two Founders—Thomas Jefferson and James Madison—to perpetuate its separation doctrine.\textsuperscript{47} Jefferson was in France when the Constitution was framed; therefore,\textsuperscript{48} it is odd that the Court originally selected his words\textsuperscript{49} to articulate the Framer's intent. More importantly, Jefferson's actions and other words suggest he may not have supported the Court's separation doctrine.\textsuperscript{50} Because

\begin{itemize}
\item 44. Gulf, Colorado and Santa Fe Ry. Co. v. Ellis, 165 U.S. 150, 160 (1897).
\item 46. But see Hall, supra note 38, at 48–49 (arguing that it is no accident that the Constitution is "godless").
\item 47. Not only has the Court looked at history in general with a narrow focus, it has examined the views of Jefferson and Madison with a narrow focus as well. In Everson, for example, the Court focused on the actions of Madison and Jefferson during 1785-86, when they fought a Virginia tax that supported a religious institution. 330 U.S. 1, 11–12 (1947). Then, without explaining its context, the Court relied on Jefferson's well known metaphor. Id. at 16 (citing Reynolds v. U.S., 98 U.S. 145, 164 (1879)). The Court did not, however, discuss Madison's actions as a member of the First Congress or as President. See infra notes 53–54 and accompanying text. Further, the Court ignored Jefferson's presidential actions. See infra note 50.
\item 49. See supra note 14 and accompanying text.
\item 50. As the author of the Declaration of Independence, Jefferson believed that God is the author of our rights. This caused him to doubt whether "the liberties of a nation [could] be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God." THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 169 (Frank Shuffelton ed., Penguin Books 1999) (1787). And even though he coined the phrase "wall of separation," as President he prayed during both of his inaugural addresses, see Lee v. Weissman, 505 U.S. 577, 633–34 (1993) (Scalia, J.,}
Madison played a prominent role in the drafting of the Virginia Bill for Religious Liberty in 1786, the Court has argued that this standard was incorporated into the First Amendment. However, during the debates that led to the Bill of Rights, Madison was acting in a different capacity than he was in Virginia three years earlier. Furthermore, as a member of the First Congress Madison approved funds for congressional chaplains, and as President he issued days of thanksgiving and prayer. Madison and Jefferson played a role in the formation of the First Amendment, but the Court has overstated that role. Moreover, since each man’s actions and words were often in conflict, it is difficult to argue with any certainty that they supported an impregnable wall between church and state. What appears to be certain, however, is that a broader historical focus, rather than the narrow view employed by the Court, gives us a better chance of understanding the historical context of the Establishment Clause.

51. See, e.g., Everson, 330 U.S. at 13 (noting “that the provisions of the First Amendment . . . had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute”).

52. See Wallace, 472 U.S. at 98 (Rehnquist, J., dissenting) (arguing that Madison acted as “an advocate of sensible legislative compromise” rather than “an advocate of incorporating the Virginia Statute . . . into the United States Constitution”). For a description of the language that Madison proposed during the debates, see supra note 24 and accompanying text.


54. See infra note 146.

55. Justice Souter has noted that Madison admitted to “backsliding” after his presidency and even lamented that his approval of a congressional chaplain was “a palpable violation of constitutional principles.” Lee v. Weisman, 505 U.S. 577, 624–25 (1993) (Souter, J., concurring) (quoting James Madison, Detached Memoranda, in 3 WM. & MARY Q. 534, 558 (Elizabeth Fleet ed., 1946)). However, in evaluating the intent of the Establishment Clause, it is unclear why his private writings upon retirement should be given more weight than his prior actions. See CORD, supra note 17, at 36 (noting that “the repudiation of one’s actions taken when in public power, by an elderly statesman out of power, is hardly a solid base upon which to build a convincing historical argument, much less constitutional law”).
While the Court has focused on Madison and Jefferson, it has ignored the views of the other Framers who played such a large role in the founding. It is difficult to believe that these other men wanted to “create a complete and permanent separation of the spheres of religious activity and civil authority.” In fact, many of them believed that religion was an essential component of civil society. Accordingly, Patrick Henry, who is best known for the words “give me Liberty or give me death,” believed that “virtue, morality, and religion” are “[t]he great pillars of all government and of social life.” Further, many of them believed that law and government are grounded in religion. James Wilson, who signed

56. Indeed, there is evidence that Madison himself would be uncomfortable with the role he has posthumously played in shaping Establishment Clause jurisprudence. In refuting an assertion that he was the writer of the Constitution, he said: “[y]ou give me a credit to which I have no claim . . . . This was not, like the fabled Goddess of Wisdom, the offspring of a single brain. It ought to be regarded as the work of many heads and hands.” Letter from James Madison to William Cogswell (March 10, 1834), in 4 THE LETTERS AND OTHER WRITINGS OF JAMES MADISON 341-42 (R. Worthington ed., New York 1884).


58. Abraham Baldwin, who was a delegate to the Constitutional Convention and a member of the First Congress, stated that “it should be . . . among the first objects of those who wish well to the national prosperity to encourage and support the principles of religion and morality.” CHARLES C. JONES, BIOGRAPHICAL SKETCHES OF THE DELEGATES FROM GEORGIA TO THE CONTINENTAL CONGRESS 7 (Boston, Houghton, Mifflin, & Co. 1891). And William Paterson, who served as a delegate to the Constitutional Convention and a Justice on the United States Supreme Court, observed that “[r]eligion and morality . . . [are] necessary to good government, good order, and good laws, for ‘when the righteous are in authority, the people rejoice.’” William Paterson, Instructions to a Portsmouth, N.H. Jury, May 1800 in U.S. Oracle (May 24, 1800), in 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789-1800, at 436 (Maeva Marcus ed., Columbia Univ. Press 1988) (quoting Proverbs 29:2).


60. Alexander Hamilton, who served as a delegate to the Constitutional Convention and wrote the Federalist Papers along with John Jay and James Madison, believed in natural law, which is “dictated by God himself.”
both the Declaration of Independence and the Constitution and served as an original Justice of the Court, said “religion and law are twin sisters, friends, and mutual assistants.” These quotes are not determinative, but they provide an important gloss on the official acts of the First Congress and President Washington.

“Separationists” have not adequately addressed those actions of our founding government that run contrary to their thesis. In his concurrence in *Lee v. Weissman*, Justice Souter attempted to explain the inconsistency between these historical facts and the Court’s strict separationist cases by suggesting that the Founders either did not understand the Constitution they drafted or simply ignored the guidelines it imposed on them. In his dissent in *Wallace v. Jaffree*, Justice Rehnquist offered an appropriate response when he stated “[h]istory must judge whether it was the Father of his Country in 1789, or a majority of the Court today, which has strayed from the meaning of the Establishment Clause.”

Justice Story, a man who was not only close to the Founding but also highly regarded in the legal field, had this to say:

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Alexander Hamilton, The Farmer Refuted (Feb. 23, 1775), in 1 THE PAPERS OF ALEXANDER HAMILTON 81, 87 (Harold C. Syrett & Jacob E. Cooke eds., 1961) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *41) (internal quotations omitted). Hamilton wrote, moreover, that God’s law is “binding over all the globe, in all countries, and at all times.” *Id.* (internal quotations omitted). According to Hamilton, if a law is contrary to natural law, it is not a valid law. *Id.*

61. James Wilson, Of the General Principles of Law and Obligation, in 1 THE WORKS OF THE HONOURABLE JAMES WILSON, 55, 106 (Bird Wilson ed., Philadelphia, Bronson & Chauncey 1804). Wilson also believed that “[h]uman law must rest its authority, ultimately, upon the authority of that law, which is divine.” *Id.* at 104–05.

62. Lee v. Weisman, 505 U.S. 577, 626 (1992) (Souter, J., concurring) (arguing that the practices of the First Congress and President George Washington prove “at best, that the Framers simply did not share a common understanding of the Establishment Clause, and, at worst, that they, like other politicians, could raise constitutional ideals one day and turn their backs on them the next”).


64. Story’s father was one of the colonists in the Boston Tea Party. BARTON, supra note 21, at 420. More importantly, for his efforts in the legal field, he earned the nickname of the “Father of American Jurisprudence.” *Id.*
say about the purpose of the Clause: "the real object [was] ... to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment ...". This view seems to comport with history as expressed by the fight for independence, the debates that led to the Bill of Rights, the actions of the First Congress and President Washington, and the views of a significant number of the Founders. The evidence suggests that the Establishment Clause was not designed to completely separate church from state. It is more likely that it was designed to forbid the federal government from establishing a national religion or from preferring one denomination to another.

II. SECOND HAND SMOKE—"YOU HAVE TO CHECK YOUR RELIGION AT THE DOOR"

In addition to its historical shortcomings, the separation doctrine is equally problematic because of its pernicious effect on our society. The phrase "separation of church and state" has produced a culture where religion is not welcome in the public

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He served as a Supreme Court justice from 1811-45 and founded Harvard Law School. Id. See also Wallace, 472 U.S. at 104 (Rehnquist, J., dissenting) (noting that Story "published by far the most comprehensive treatise on the United States Constitution that had then appeared").

65. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 664 (3d ed., Boston, Little, Brown, and Co. 1891). Of course, since the Establishment Clause has been incorporated into the 14th Amendment, this prohibition would also apply to the states. See Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947). Therefore, if one applied the most likely intent of the Framers, states would also be prohibited from establishing a state religion or preferring one sect to another.

66. See William C. Porth & Robert P. George, Trimming the Ivy: A Bicentennial Re-Examination of the Establishment Clause, 90 W. VA. L. REV. 109, 135–37 (1987) (looking at the plain meaning of the term "establishment" to conclude that the clause was intended to forbid the federal government from setting up a national church or from interfering with state establishments).

67. See Robert L. Cord & Howard Ball, The Separation of Church and State: A Debate, 1987 UTAH L. Rev. 895, 899. In this debate, Professor Cord argues that the Framers intended the Establishment Clause "to preclude the government from discriminatory religious favoritism." Id.
Former President Bill Clinton described the problem this way: "Americans feel that instead of celebrating their love for God in public, they’re being forced to hide their faith behind closed doors." However, perhaps one commentator summarized it best when he said that religion is currently treated like smoking—"something which you can indulge in private but which the government must protect you from in public."

It could be argued that public schools have been the biggest target of this cleansing. In the name of the "wall of separation," teachers and school officials have zealously reacted to any hint of religion, even if it is in the form of individual student expression.


70. Editorial, Let Us Pray, Wall St. J., June 21, 2000, at A26 (quoting Kevin J. Hasson of The Becket Fund for Religious Liberty). In this quote, Hasson attributes this view of religion to Justice Stevens. Id. Our culture as a whole, however, has unfortunately subscribed to this deleterious outlook as well. See supra notes 71–90 and accompanying text.

71. For example, The Becket Fund for Religious Liberty, see infra note 78, has represented Bryce Fisher, an 11-year-old student from South Bend, Indiana, who was barred from reading his Bible during an open reading period at school. See The Becket Fund, Litigation Activities: Religion and Education, at http://www.becketfund.org (last visited Feb. 3, 2003).
The well-publicized story of a first grader named Zachary Hood\textsuperscript{72} epitomizes this situation.\textsuperscript{73} As a reward for attaining a certain level of reading proficiency, the students were allowed to choose a story and read it to the class.\textsuperscript{74} Zachary selected a story from “The Beginner’s Bible” entitled “A Big Family.”\textsuperscript{75} This is the entire story:

Jacob traveled far away to his uncle’s house. He worked for his uncle, taking care of sheep. While he was there, Jacob got married. He had twelve sons. Jacob’s big family lived on his uncle’s land for many years. But Jacob wanted to go back home. One day, Jacob packed up all his animals and his family and everything he had. They traveled all the way back to where Esau lived. Now Jacob was afraid that Esau might still be angry at him. So he sent presents to Esau. He sent servants who said, “Please don’t be angry anymore.” But Esau wasn’t angry. He ran to Jacob. He hugged and kissed him. He was happy to see his brother again.\textsuperscript{76}

These harmless words, which do not even mention God, are not the type of words that one would expect schools to censor.

\textsuperscript{72} See, e.g., George F. Will, \textit{The Censoring of Zachary}, \textit{Newsweek}, March 20, 2000, at 82.

\textsuperscript{73} In a similar case, a ninth grade teacher refused to accept a research paper entitled “The Life of Jesus Christ” from one of her students. See \textit{Settle v. Dickson Co. Sch. Bd.}, 53 F.3d 152, 153 (6th Cir. 1995) (affirming district court’s grant of summary judgment to the school board). Although she offered a number of reasons for her decision, two of them are particularly relevant. First, she said “personal religious beliefs” are “not an appropriate thing to do in a public school.” \textit{Id.} at 154. Second, she stated “the law says we are not to deal with religious issues in the classroom.” \textit{Id.} This case illustrates the immeasurable impact of the Court’s separation doctrine.

\textsuperscript{74} See \textit{C.H. v. Oliva}, 990 F. Supp. 341, 346 (D. N.J. 1997), \textit{aff'd}, 226 F.3d 198 (3d Cir. 2000). The only requirement was that the story be of “suitable . . . length and complexity for first grade students.” \textit{Id.} at 346 n.2.

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} \textit{Id.} at 346–47 n.3.
Nonetheless, Zachary was not permitted to read the story to the class solely "because of its religious content." 77

Unfortunately, stories of overzealous separation of religion from the public sphere have become common. 78 In Colorado, a National Public Radio station refused to air a dentist's advertisement because it mentioned God. 79 In Massachusetts, seven high school students were suspended when they distributed candy canes that contained a religious message. 80 In Hillsborough,

77. Id. Zachary was allowed to read it to his teacher, and the District Court held that this solution properly resolved the tension between his free speech rights and "the principle of separation of church and state." Id. at 354 (emphasis added).

78. The existence of a number of legal groups who devote a large part of their work to this issue illustrates that the privatization of religion is a real problem. For example, The Becket Fund for Religious Liberty, according to its mission statement, "protect[s] the rights of religious people and institutions to participate in public affairs." See The Becket Fund for Religious Liberty, Litigation Activities, at http://www.becketfund.org (last visited Feb. 3, 2003). The group has represented a high school choir that was sued for performing religious songs at a Christmas concert. See Bauchman v. West High Sch., 132 F.3d 542 (10th Cir. 1997) (holding that student failed to state an Establishment Clause claim). It is even representing the Hagerstown Suns, a minor league baseball team that was sued under Maryland law for giving a discount to any fan who brought a church bulletin to the ballpark. See The Becket Fund for Religious Liberty, Litigation Activities: Public Expression, at http://www.becketfund.org (last visited Feb. 3, 2003). Another group is The American Center for Law and Justice, which is "committed to the defense of Judeo-Christian values." See The American Center for Law and Justice, at http://www.aclj.org/about/aboutm.asp (last visited Feb. 3, 2003). In accordance with this goal, the A.C.L.J. defends the right of employers and employees to express their faith in the workplace. See id. at http://www.aclj.org/resources/index.asp. The Center's website even has instructions for how to file a claim of religious discrimination with the Equal Employment Opportunity Commission. See id. at http://www.aclj.org/resources/workrts/filing_claim_info_letter.asp.


80. See Michele Kurtz, Students Sue Over Messages on Candy, BOSTON GLOBE, Jan. 14, 2003, at B3, available at 2003 WL 3374808. The message detailed the legend of the candy cane and offered a salvation message. Id. Even
New Jersey, the school district banned all holiday parties with a religious foundation. This prohibition not only covered Christmas and Hanukkah, but also Halloween and Valentine’s Day. At a Boys and Girls Club talent show in North Port, Florida, an eight year old girl was barred from singing “Kum Ba Yah” because the song required her to repeat the word “Lord.” The response of the club’s director adequately summarizes the damaging impact of the Court’s current separation doctrine: “[w]e just can’t allow any religious songs. You have to check your religion at the door.”

The world of politics has also exhibited an increasing hostility towards religion. Even though our history is replete with movements that had religion at their core, arguments grounded in faith have often been labeled as irrational and unreasonable.

organizations that vigorously defend the “wall of separation” have criticized the school’s actions. The American Civil Liberties Union filed a brief on behalf of the students, arguing that they “have a right to communicate ideas, religious or otherwise, to other students during their free time, before or after class, in the cafeteria, or elsewhere.” Press Release, American Civil Liberties Union, ACLU of MA Defends Students Punished for Distributing Candy Canes with Religious Messages (Feb. 21, 2003), available at http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=11876&c=159 (on file with the First Amendment Law Review).


82. Id. It was even suggested that “Valentine’s Day,” because it was derived from “St. Valentine’s Day,” be changed to “Special Person Day.” Id.


84. Id.

85. See infra notes 132–37 and accompanying text. This is not limited to historical evidence. Even in the 21st century, religion remains a vital source for democratic viewpoints. During the 2000 election, Joseph Lieberman, vice presidential running mate of Al Gore, repeatedly used his faith in God to support his policies. A devout Jew, Lieberman argued that civil rights are grounded in the inherent equality of God’s creation. See Richard Perez-Pena, Lieberman Stakes Claim to Basic Values, N.Y. TIMES, Oct. 17, 2000, at A28. He also based his environmental policies on the belief that humans are stewards of God’s creation. Richard Perez-Pena, Lieberman Cites Religion As Foundation of Environmentalism, N.Y. Times, Oct. 19, 2000, at A30.

86. See Frederick Mark Gedicks, Public Life and Hostility to Religion, 78 VA. L. REV. 671, 695–96 (1992) (noting that political liberals have “privilege[d]
Liberal theorists have constructed various paradigms of the public sphere in which religious arguments are essentially prohibited. One professor has suggested that all restrictions on abortion are unconstitutional because all pro-life arguments rely on religious grounds and no secular argument regarding the issue can withstand analysis on its own. Such views should concern even staunch advocates of the “wall of separation” metaphor. As Professor secularism over religion by naming public life (the realm of secularism) rational and orderly and private life (the realm of religion) irrational and chaotic. This philosophy has spread to our universities. A biology professor at Texas Tech refused to write recommendations for his students if they would not profess a belief in evolution. See Karin Brulliard, In Texas, a Darwinian Debate: Religious Student Protests Professor’s Question on Evolution, WASH. POST, Feb. 16, 2003, at A7. There is a debate about whether this is a matter of academic freedom or discrimination based on religious belief. See id. No matter how that question is answered, this situation illustrates the hostility exhibited towards religious beliefs such as creationism.

87. See, e.g., KENT GREENAWALT, RELIGIOUS CONVictions AND POLITICAL CHOICE 216-17 (1988) (“The government of a liberal society knows no religious truth and a crucial premise about a liberal society is that citizens of extremely diverse religious views can build principles of political order and social justice that do not depend upon particular religious beliefs.”); BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 81 (1980) (“A liberal state exists, in short, only when actual power relations can be rationalized through [neutral dialogue].”) These objections are not based on any legal justification. They are based, rather, on liberal political theory, which states that public policies should be based on rational and objective reasons. See GREENAWALT, supra, at 21 (noting that “[l]iberalism is often associated . . . with a belief that important questions can be resolved through rational inquiry”). Therefore, it is difficult to argue that the Court is solely responsible for this development. Nonetheless, it has still contributed to it by favoring secular knowledge over religious belief in its Establishment Clause jurisprudence. See Gedicks, supra note 86, at 681 (“The privileging of secular knowledge in public life as objective and the marginalizing of religious belief in private life as subjective has been a foundational premise of American jurisprudence under the Religion Clause of the First Amendment.”).


89. See CARTER, supra note 68, at 113 (“A rule holding that the religious convictions of the proponents are enough to render a statute constitutionally suspect represents a sweeping rejection of the deepest beliefs of millions of Americans . . . .”). But see William P. Marshall, The Other Side of Religion, 44 HASTINGS L.J. 843, 859–63 (1993) (arguing that any involvement of religion in
Douglas Laycock noted, "[d]emocracy would be impoverished without [religious arguments]."  

With its decisions and corresponding rhetoric, the Court has played a key role in these developments. Because of the moral authority of the Court, it is not surprising that its zealous separationist path has coincided with a general cultural disdain directed toward religion. In 1962, the Court stated that the purpose of the Establishment Clause "was to create a complete and permanent separation of the spheres of religious activity and civil authority." This statement was not innocuous; later courts have taken up the separationist call. In 1993, the Court announced that "[t]he design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere." More importantly, the public life should be greeted with caution because of religion's potential to produce intolerance and persecution.

90. Douglas Laycock, Freedom of Speech That Is Both Religious and Political, 29 U.C. DAVIS L. REV. 793, 801 (1996). As Laycock pointed out, the abolitionists were so influenced by religion that Stephen Douglas attacked some of them on the same grounds that modern day commentators use today against individuals motivated by their faith:

I say sir, that the purity of the Christian church, the purity of our holy religion, and the preservation of our free institutions, require that Church and State shall be separated; that the preacher on the Sabbath day shall find his text in the Bible; shall preach "Jesus Christ and him crucified," shall preach from the Holy Scriptures, and not attempt to control the political organizations and political parties of the day.

Id. (quoting CONG. GLOBE, 33d Cong., 1st Sess. 656 (1854)).

91. For an argument that the Establishment Clause requires these developments, see Sullivan, supra note 68, at 198–99 (arguing that the Establishment Clause mandates a "secular public moral order").

92. See William P. Marshall, 'We Know It When We See It': The Supreme Court and Establishment, 59 S. CAL. L. REV. 495, 511 (1986) (acknowledging "that the Court speaks with religious force").


94. Lee v. Weisman, 505 U.S. 577, 589 (1993). Seven years later, the Court approvingly cited the exact same statement in support of its conclusion that a prayer before a high school football game was unconstitutional. See Santa
phrase “separation of church and state” has become so engrained in society that public actors, in the process of attempting to avoid “offending another’s religion,” have actually treated religion with hostility. As a result, by the Court’s own admissions, these individuals have fanatically over-enforced the doctrine.

Precedent illustrates that this hostility should be viewed as an unintended consequence of the doctrine. Not only was the “wall of separation” intended to benefit government, it was intended to benefit religion as well. The Court has noted that the Constitution does not require the government to exhibit a “callous indifference” towards religious groups. Several opinions have also stated that the First Amendment does not mandate hostility to religious groups. Therefore, the doctrine has been counterproductive, and now religion, like smoking, has been relegated to the home. Many reactions of our public officials would at least qualify as “callous indifference” and border on

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95. The director of operations of the Boys and Girls Club cited this concern when he barred an eight year old from singing “Kum Ba Yah.” See supra notes 83–84 and accompanying text. He said, “[w]e don’t want to take the chance of a child offending another child’s religion.” See Girl Barred from Singing ‘Kum Ba Yah,’ supra note 83.

96. See infra notes 97–99 and accompanying text.

97. See Engel v. Vitale, 370 U.S. 421, 431 (1962) (stating that the Establishment Clause rests on the notion “that a union of government and religion tends to destroy government and to degrade religion”).

98. Zorach v. Clauson, 343 U.S. 306, 314 (1952) (holding that the government may “respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs”).

99. See Lee v. Weisman, 505 U.S. 577, 598 (1993) (noting that “[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution”); Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 232 (1963) (Brennan, J., concurring) (“It should be unnecessary to observe that our holding does not declare that the First Amendment manifests hostility to the practice or teaching of religion.”). See also Santa Fe, 530 U.S. 290 at 313 (“By no means do[es] [the First Amendment] impose a prohibition on all religious activity in our public schools.”).
blatant hostility.\textsuperscript{100} Even those who ardently defend the wall between church and state would have a difficult time arguing that the intent of the Establishment Clause was to extirpate religion from the public square.\textsuperscript{101}

Rather than look at the separation doctrine in theory, the Court could view it in practice and focus on its effects. Justices on both sides of the spectrum have done this in a number of different contexts. In \textit{City of Richmond v. J.A. Croson Co.},\textsuperscript{102} Justice Marshall's dissent examined the effect of applying strict scrutiny to race-based measures designed to rectify past or current discrimination.\textsuperscript{103} He concluded that this insurmountable standard\textsuperscript{104} would discourage officials from addressing the problem.\textsuperscript{105} He further noted that the Court's opinion would "signal[] that it regards racial discrimination as largely a

\textsuperscript{100} See supra notes 71–90 and accompanying text.

\textsuperscript{101} John Adams, signer and member of the drafting committee of the Declaration of Independence, our first Vice President, and our second President, said that "[o]ur Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), \textit{in} 9 \textit{THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES} 229 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1854). George Washington, who as President oversaw the formation of the Bill of Rights, believed that "[r]eligion and morality are the essential pillars of civil society." Letter from George Washington to the Clergy of Different Denominations Residing in and Near the City of Philadelphia (Mar. 3, 1797), \textit{in} 35 \textit{THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES} 1745-1799, at 416 (John C. Fitzpatrick ed., 1932). Finally, Gouverneur Morris, who served as a Pennsylvania delegate to the Constitutional Convention, maintained that "education should teach the precepts of religion and the duties of man towards God." \textit{JARED SPARKS, 3 THE LIFE OF GOUVENEUR MORRIS} 483 (Boston, Gray & Bowen 1832). It would seem to be inconsistent for these men, who viewed religion as a prerequisite to national success, to desire it to be swept from the public sphere.

\textsuperscript{102} 488 U.S. 469 (1989) (holding minority set-aside program unconstitutional).

\textsuperscript{103} \textit{id.} at 551–56 (Marshall, J., dissenting).

\textsuperscript{104} See \textit{id.} at 554 (comparing strict scrutiny to a "straitjacket").

\textsuperscript{105} \textit{id.} at 529 ("The majority's unnecessary pronouncements will inevitably discourage or prevent governmental entities ... from acting to rectify the scourge of past discrimination.").
phenomenon of the past.” In United States v. Virginia, Justice Scalia’s dissent examined the consequences of applying heightened intermediate scrutiny to single-sex public education. He concluded that the threat of a high-cost, high-risk lawsuit would deter public officials from operating such a program. As a result, he argued that “single-sex public education is functionally dead.”

The Court could view its Establishment Clause cases through the same lens. A “wall of separation” between religion and public life is erected daily by public actors. Although this wall is improper in some cases, many of them will not be litigated. In reality then, these cases are decided by public actors, and it is their interpretation of Court decisions, not the interpretation of the Court itself, that controls the true reach of Establishment Clause jurisprudence. In order to properly evaluate the “wall of separation” metaphor, therefore, the Court must do more than view it theoretically. It must examine its effect.

The Court used this technique when it decided the landmark case of Brown v. Board of Education. Rather than continue to apply its prior framework, the Court “look[ed]
instead to the effect of segregation itself on public education." The Court concluded that this practice stamped blacks with a badge of inferiority. Therefore, the Court held that "in the field of public education the doctrine of 'separate but equal' has no place." Given the detrimental effects of the doctrine of separation of church and state, the Court could easily conclude that this phrase "has no place" in Establishment Clause jurisprudence.

Whatever its creators claimed it would do in theory, the separation doctrine has done quite another in practice. Religion has not benefited from its application. Instead, it has been viewed with a general disdain, and at times, an unmistakable bigotry. No matter what the public venue, Americans have been forced to check their spirituality at the door. Former President Clinton stated the following objective: "[w]herever and whenever the religious rights of [Americans] are threatened or suppressed, we must move quickly to correct it. We want to make it easier and more acceptable for people to express and to celebrate their faith." By "frankly and explicitly abandoning" the high and

by Plessy v. Ferguson, 163 U.S. 537 (1896), overruled by 347 U.S. 483 (1954). See, e.g., Sweatt v. Painter, 339 U.S. 629 (1950) (concluding that the law school opportunities provided to blacks and whites from Texas were not substantially equal).

116. Id. at 494.
117. Id. at 495.
118. See supra notes 68–70 and accompanying text.
119. In Planned Parenthood v. Casey, the Court offered guidelines to determine when it is obliged to follow precedent. 505 U.S. 833, 854–55 (1992). One justification for abandoning precedent was said to be a change in facts, or a change in how those facts are seen, that has rendered the old rule inapplicable or unjustifiable. Id. at 855. The Court noted that "separate but equal" was overruled because of this reason, as it rested on the incorrect understanding that it would not "stigmatize those who were segregated with a 'badge of inferiority.' " Id. at 863 (quoting Plessy, 163 U.S. at 551). The "wall of separation" depends on an equally incorrect assumption – that its existence does not produce hostility towards religion.
120. 2 PUB. PAPERS, supra note 69.
impregnable wall\textsuperscript{121} and its corresponding tests,\textsuperscript{122} the Court would take a step towards accomplishing this worthy goal.

\section{III. One Nation Under God}

Another problematic side-effect of the separation doctrine is the strain it places on our national identity. From its inception, this Nation has been a religious one.\textsuperscript{123} Our culture is filled with examples of this collective spirituality. Every Fourth of July, we celebrate the Declaration of Independence, a document that not only declares our freedom, but also our dependence upon God.\textsuperscript{124} Before beginning their terms, most of our Presidents have personally acknowledged this same dependence.\textsuperscript{125} Our national

\textsuperscript{121}See Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) (arguing that the "wall of separation" lacks a historical foundation and yields inconsistent results).

\textsuperscript{122}See supra note 7.

\textsuperscript{123}See GEORGE GALLUP, JR. & D. MICHAEL LINDSAY, SURVEYING THE RELIGIOUS LANDSCAPE: TRENDS IN U.S. BELIEFS 1 (1999) ("One cannot understand America if one does not have an awareness and appreciation of the religious underpinnings of our society.").

\textsuperscript{124}See THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776), available at www.archives.gov/exhibit_hall/charters_of_freedom/declaration/declaration_transcription.html (stating our "firm reliance on the protection of divine Providence").

\textsuperscript{125}Starting with George Washington, the tradition of our President beginning his term with a prayer or declaration of faith has applied across the political spectrum. On January 20, 1961, President John F. Kennedy said:

\begin{quote}

The world is very different now. And yet the same revolutionary beliefs for which our forbears fought are still at issue around the globe – the belief that the rights of man come not from the generosity of the state but from the hand of God . . . . [L]et us go forth to lead the land we love, asking His blessing and His help, but knowing that here on earth God's work must truly be our own.

\end{quote}

\textit{Inaugural Addresses}, supra note 37, at 306–08. Just four years earlier, President Dwight Eisenhower said: "Before all else, we seek, upon our common labor as a nation, the blessings of Almighty God. And the hopes in our hearts fashion the deepest prayers of our whole people." \textit{Id.} at 300.
motto, which appears on our currency,\textsuperscript{126} is "In God We Trust."\textsuperscript{127} Every school morning, our children recite the words "one Nation under God."\textsuperscript{128} Every Thanksgiving, our President issues a proclamation to signify the spiritual foundation of this national holiday.\textsuperscript{129} Each year, pursuant to Congressional directive, the President declares the first Thursday in May as the National Day of Prayer.\textsuperscript{130} And every Sunday during the National Football League

\begin{itemize}
\item \textsuperscript{126} 31 U.S.C. § 324 (1998).
\item \textsuperscript{127} 36 U.S.C. § 186 (1998).
\item \textsuperscript{128} See 4 U.S.C. § 4 (1998). Of course, the decision by the Ninth Circuit at least temporarily suspends this requirement for children within its jurisdiction. See Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir. 2002) (judgment stayed on June 27, 2002, pending en banc review). For a discussion of the public response to this decision, see infra notes 156–59 and accompanying text.
\item \textsuperscript{129} President George W. Bush issued the following proclamation in November 2002:
\begin{quote}
In celebration of Thanksgiving Day 1902, President Theodore Roosevelt wrote, "Rarely has any people enjoyed greater prosperity than we are now enjoying. For this we render heartfelt and solemn thanks to the Giver of Good; and we seek to praise Him -- not by words only -- but by deeds, by the way in which we do our duty to ourselves and to our fellow men." President Roosevelt's words gracefully remind us that, as citizens of this great Nation, we have much for which to be thankful; and his timeless call inspires us to meet our responsibilities to help those in need and to promote greater understanding at home and abroad. As the Pilgrims did almost four centuries ago, we gratefully give thanks this year for the beauty, abundance, and opportunity this great land offers. We also thank God for the blessings of freedom and prosperity; and, with gratitude and humility, we acknowledge the importance of faith in our lives.
\end{quote}
Proclamation No. 7628, 67 Fed. Reg. 70831 (2002). Similarly, President Clinton commemorated our 1996 Thanksgiving by proclaiming that "we still -- and always -- raise our voices in prayer to God, thanking Him in humility for the countless blessings He has bestowed on our Nation and our people."
\item \textsuperscript{130} The United States Code directs the President to "set aside and proclaim a suitable day each year . . . as a National Day of Prayer, on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." 36 U.S.C. § 119 (1998). Robert Bellah
season opposing players gather together at the end of each game to join in prayer.  

As G.K. Chesterton succinctly stated, America is “a nation with the soul of a church.” Accordingly, just about every defining moment of this Nation can be characterized by our faith filled response. When the Pilgrims finally landed in an uncolonized area at Plymouth Rock, they drafted a document that stated their goal of working together “for the glory of God.” The American Revolution was fought to obtain the “certain unalienable [r]ights” with which our Creator endowed us.

has argued that our tradition of publicly acknowledging God amounts to a civil religion. See Robert N. Bellah, Civil Religion in America, in AMERICAN CIVIL RELIGION 21 (Russell E. Richey & Donald G. Jones eds., 1974). This religion consists of “a set of beliefs, symbols, and rituals” that forms “the whole fabric of American life.” Id. at 24. It is institutionalized, he argues, and exists independent of the religion that is associated with the church. Id. at 29.

Two examples from the 2002 season illustrate that prayer is not limited to the end of games. When Emmitt Smith broke Walter Payton’s career rushing record of 16,726 yards, even amidst fireworks, applause, and shouts of appreciation from fans, he knelt in prayer. See Leonard Shapiro, It All Comes in a Rush, WASH. POST, Oct. 28, 2002, at D1. On a more sober note, when Steelers quarterback Tommy Maddox lay on the ground from an apparent spine injury, players from both teams knelt down and prayed. Mike Penner, Week 11 in the NFL: Afternoon of High Trauma, L.A. TIMES, Nov. 18, 2002, at D1, available at 2002 WL 103218483.


See GALLUP & LINDSAY, supra note 123, at 120 (noting that “[r]eligion galvanized many of the movements that have shaped American culture and current society”).

The Mayflower Compact was signed in November of 1620. The Mayflower Compact, in 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL Charters, and OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND ColoniaNw or Heretofore Forming the United States of America 1841 (Francis Newton Thorpe ed., 1909).

See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), available at www.archives.gov/exhibit_hall/charters_of_freedom/declaration/declaration_transcription.html. The Liberty Bell, which was rung in 1776 to celebrate our independence, has Leviticus 25:10 engraved on its side. JOHN BAER STOUDT, THE LIBERTY BELLS OF PENNSYLVANIA, in 37 PENNSYLVANIA GERMAN SOCIETY PROCEEDINGS AND ADDRESSES 37 (1930). This verse, which says
Slavery came to an end due in large part to the efforts of those motivated by spiritual convictions. Martin Luther King, Jr., who fueled the Civil Rights Movement, frequently relied on his Christian faith in championing equality.

In the aftermath of September 11, 2001, America reaffirmed its religious identity. The song God Bless America, which is not only a song but a prayer as well, was sung on the

“proclaim liberty throughout the land unto all inhabitants thereof,” illustrates the Biblical foundation of our freedom. Id.

136. See supra note 90. See also Edward McGlynn Gaffney, Jr., Politics Without Brackets on Religious Convictions: Michael Perry and Bruce Ackerman on Neutrality, 64 TUL. L. REV. 1143, 1158–65 (1990) (discussing how slaves united together through Christian hymns and abolitionists defended their cause through religious imagery).

137. King compared the plight of black Americans to the journey of the Israelites through the wilderness. See Martin Luther King, Jr., The Birth of a New Nation (Apr. 7, 1957), in A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR., supra note 41, at 17, 29–41. He also connected the fight for equality to his faith. Id. at 38 (“God has injected a principle in this universe . . . that all men must respect the dignity and worth of all human personality . . .”). Finally, in support of his nonviolent tactics, King cited the Biblical principle of “love your enemies.” See Martin Luther King, Jr., Address at the Freedom Rally in Cobo Hall, in A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR., supra note 41, at 67. For a detailed description of the religious underpinnings of the Civil Rights Movement, see Gaffney, Jr., supra note 136, at 1166–74 (discussing the significant efforts of African-American preachers).


139. IRVING BERLIN, GOD BLESS AMERICA (1938), available at http://usinfo.state.gov/usa/infousa/facts/symbols/songs.htm#GBA. The well known lyrics are as follows:

God Bless America
Land that I love
Stand beside her, and guide her
Through the night with the light from above.
From the mountains, to the prairies
To the oceans, white with foam
steps of the Capitol, at ballparks across the country, and even on the floor of the New York Stock Exchange. The words “God Bless America” were also featured on public school marquees, despite protests from those who believed it sent a “hurtful, divisive message.” Teachers and students united in prayer during assemblies and before sporting events. Furthermore, President George W. Bush declared a National Day of Prayer and Remembrance. On this day, seven different religious leaders spoke at the National Cathedral in our Nation’s capital, and President Bush, in a speech that was reminiscent of a sermon, delivered the following statement:

As we have been assured, neither death nor life, nor angels nor principalities nor power, nor things present nor things to come, nor height nor depth, can separate us from God’s love. May He bless the souls of the departed. May He comfort our own. And may He always guide our country.

These actions were consistent with our time-honored religious identity. President Bush was simply following in the footsteps of some of our most revered leaders. When this Nation was

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God Bless America, my home sweet home.

Id.


142. Id.

143. President’s Proclamation of a National Day of Prayer and Remembrance for the Victims of the Terrorist Attacks on September 11, 2001, 37 WEEKLY COMP. PRES. DOC. 1308 (Sept. 13, 2001).

144. This group included a Jewish rabbi, a Muslim imam, a Catholic bishop, and the Rev. Billy Graham. See Bill Sammon, Soothing the Soul, Rousing the Spirit, WASH. TIMES, Oct. 9, 2002, at A1.

confronted with war, Presidents James Madison, Abraham Lincoln, and Franklin Roosevelt each responded by emphasizing our faith in Almighty God.

While we may "be far more heterogeneous religiously" than our forefathers, the statistics show that we are still a religious nation. Ninety-six percent of Americans profess a belief in

146. During the War of 1812, President Madison recommended that the American people "render[] the Sovereign of the Universe . . . [t]he public homage due to His holy attributes." James Madison, Proclamation of a Day of Public Humiliation and Prayer (July 9, 1812), in 1 A Compilation of the Messages and Papers of the Presidents, supra note 36, at 513.

147. During the Civil War, President Lincoln proclaimed a day for prayer and fasting, stating:

[It] is the duty of nations as well as of men, to own their dependence upon the overruling power of God, to confess their sins and transgressions, in humble sorrow, yet with assured hope that genuine repentance will lead to mercy and pardon; and to recognize the sublime truth, announced in the Holy Scriptures and proven by all of history, that those nations only are blessed whose God is the Lord.

Abraham Lincoln, Proclamation Appointing a National Fast Day (March 30, 1863), in 6 A Compilation of the Messages and Papers of the Presidents, supra note 36, at 164–65.

148. Following the D-Day invasion, President Roosevelt offered the following prayer:

Lead [our sons] straight and true; give strength to their arms, stoutness to their hearts, steadfastness in their faith. They will need Thy blessings. Their road will be long and hard. For the enemy is strong. He may hurl back our forces. Success may not come with rushing speed, but we shall return again and again; and we know by Thy grace, and by the righteousness of our cause, our sons will triumph.


God, and nearly seventy percent belong to a church or synagogue. The majority of Americans, moreover, affirm the existence of miracles and the power of prayer. Indeed, it appears that religion is uniquely woven into the lives of our citizens. As researchers George Gallup, Jr. and D. Michael Lindsay point out, “Americans outshine most other industrialized nations in religious fervor.”

The public backlash that followed the Ninth Circuit’s decision to hold the Pledge of Allegiance unconstitutional provides another illustration of our spirituality. Leaders from both political parties harshly criticized the decision, and the Senate voted 99-0 to express its approval of retaining the words “one Nation, under God” in the pledge. A Newsweek poll showed that 87% of Americans also disagreed with removing “under God” from the pledge. Democrats and Republicans may not be able to agree on the best way to stimulate the economy or fight terrorism. There is one thing, however, that they apparently can agree upon—we are “one Nation under God.”

Critics argue that all of this evidence of continuing religious fervor illustrates that the separation doctrine has not

151. GALLUP & LINDSAY, supra note 123, at 121. This figure has remained stable throughout the past fifty years. See id. at 23 (“Over the past fifty years of research, the percentage of Americans who believe in God has never dropped below 90%.”).
152. Id. at 12.
153. Id. at 25 (“[A]n overwhelming majority of Americans believe in miracles (79%).”).
154. Id. at 45 (“Nine out of ten U.S. adults say that they pray. Nearly all who pray think their prayers are heard (97%) and are answered (95%).”).
155. Id. at 119. For example, only seventy percent of Canadians and sixty percent of Britons believe in God, compared to ninety-six percent of Americans who share this belief. Id. at 121.
156. See Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir. 2002).
158. See id.
stifled our identity. While this may be true, it has placed a strain upon our ability to forge this identity. More importantly, just because its impact has not yet materialized does not mean that we should give legal imprimatur to a culturally damaging policy.

Some element of separation is necessary. The task of determining how much separation is not an easy one, and it would be foolish to suggest that this line is clear. Several principles, however, should guide this determination. First, separation was designed to protect religion from government. This is what prompted Roger Williams, who many have claimed is partly responsible for our tradition of religious freedom, to advocate a boundary between church and state. Williams wanted to ensure that the purity of the church would be protected from corrupting influences.

Second, the high and impregnable boundary constructed by the Court goes beyond what is necessary to enforce the Establishment Clause. As a consequence, the identity of our Nation has been diluted so that it is more palatable to extremists who desire a secular society. Of course, the purpose of a Bill of Rights is to remove some issues from majoritarian control. In its

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160. The Court has acknowledged this difficulty. See Tilton v. Richardson, 403 U.S. 672, 678 (1971) ("[W]e can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication.").


162. See, e.g., Timothy L. Hall, Separating Church and State: Roger Williams and Religious Liberty 117 (1998) (noting that Williams was a "key theoretician" of the "believing parentage" who were partly responsible for shaping the American concept of religious liberty).

163. In 1644, Williams stated that "the garden of the church" should be separated from "the wilderness of the world." See Hall, supra note 162, at 83 (quoting Roger Williams, Mr. Cottons Letter Lately Printed, Examined and Answered, in 1 The Complete Writings of Roger Williams 392 (Russell & Russell 1963)).

164. A description of the requisite amount of separation is beyond the scope of this piece. For a powerful argument that coercion is necessary for an Establishment Clause violation, see Michael W. McConnell, Coercion: The Lost Element of Establishment, 27 Wm. & Mary L. Rev. 933 (1986).
zeal to protect the government and its people from the influence of religion, however, the Court has removed too much.165

As George Washington said in his Farewell Address, "[o]f all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports."166 Therefore, we should embrace our spiritual identity. And the Court, rather than hinder our attempts to further cement it, should simply heed the warning of Justice Harlan: "[n]either the Government nor this Court can or should ignore that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings."167 The best way to honor these words is to eliminate the metaphor that has misled this country for over fifty years.

IV. CONCLUSION

Although the Establishment Clause mandates some boundary between church and state, the "wall of separation" metaphor should not be used to police this line. In the words of Justice Douglas, "[w]e are a religious people whose institutions presuppose a Supreme Being."168 The metaphor strains this identity. Moreover, it conflicts with the most likely original intent of the Framers and creates a culture where religious activity in the public sphere is met with hostility. Therefore, any value it brings would seem to be outweighed by these shortcomings. In using its "wall of separation" metaphor, the Court has inappropriately moved towards complete separation.169 President George W. Bush

165. See HAMBURGER, supra note 16, at 484 ("[S]eparation has barred otherwise constitutional connections between church and state.").
169. See Michael W. McConnell, Religious Freedom at a Crossroads, 59 U. Chi. L. Rev. 115, 120 (1992) (charging that the Warren and Burger Courts "press[ed] relentlessly in the direction of a more secular society"). The Rehnquist Court has shown encouraging signs, but it has never repudiated its
summarized our heritage when he stated the following desire: “America’s own great hope has never been in ourselves alone. The Founders humbly sought the wisdom and the blessing of Divine Providence. May we always live by that same trust.” And may the Court eliminate the metaphor that has hindered us from doing just that.

prior rhetoric. See McConnell, supra, at 141 (noting that the Rehnquist Court has never “explicitly announc[ed] a change in doctrine”).