

## WHAT THE WALL SEPARATES: A DEBATE ON THOMAS JEFFERSON'S "WALL OF SEPARATION" METAPHOR

[A]greement, in the abstract, that the First Amendment was designed to erect a "wall of separation between church and State," does not preclude a clash of views as to what the wall separates.

Justice Felix Frankfurter\*

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No word or phrase is associated more closely by Americans with the topic of church-state relations than the "wall of separation between church and state." Although it is unclear why this metaphor has become so ingrained in the public mind, there is no doubt that Americans associate the image with one person: Thomas Jefferson. In an 1802 letter to the Danbury Baptist Association of Connecticut, President Jefferson used the celebrated "wall of separation" metaphor to define the First Amendment religious clauses. Jefferson wrote:

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

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\* *McCullum v. Board of Education*, 333 U.S. 203, 213 (1948) (Frankfurter, J., concurring).

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free exercise thereof," thus building a wall of separation between Church & State.<sup>1</sup>

In the twentieth century, Jefferson's "wall" has profoundly influenced discourse and policy on church-state relations. It is accepted by many Americans as a pithy description of the constitutionally prescribed church-state arrangement. More important, the judiciary has embraced the metaphor, adopting it not only as an organizing theme of church-state analysis, but also as a virtual rule of constitutional law. The use of Jefferson's metaphor to define the First Amendment has not been without controversy.<sup>2</sup> The fact remains, however, that both the courts and the public at large have embraced the "wall" metaphor as *the* primary emblem of American church-state relations. Given the metaphor's influence, it is important to understand what Jefferson meant by it. To that end, this article presents two contrasting interpretations of Jefferson's "wall." John D. Whaley offers a broad separationist interpretation, in accord with recent judicial applications of the metaphor.<sup>3</sup> Daniel L. Dreisbach, to the contrary, argues that the principal function of the "wall" erected in the Danbury letter was to separate state and nation in matters pertaining to religion rather than to separate ecclesiastical authorities from all civil government.

Before presenting these arguments, we describe the circumstances that prompted Jefferson's correspondence with the Baptists, as well as the general historical context in which the Danbury letter was written. We then proceed to the argumentative sections. Whaley offers a separationist interpretation of Jefferson's "wall," followed by Dreisbach's argument for a jurisdictional interpretation. We conclude by offering some final observations on the use of metaphors in American law. In particular, we consider the promises and limitations of Jefferson's "wall" for informing discourse and shaping policy on church and state in the United States.

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1. Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a committee of the Danbury Baptist association in the state of Connecticut (Jan. 1, 1802), *The Papers of Thomas Jefferson* (Manuscript Division, Library of Congress), Series 1, Box 89, Dec. 2, 1801-Jan. 1, 1802. Also available in Daniel L. Dreisbach, "Sowing Useful Truths and Principles": *The Danbury Baptists, Thomas Jefferson, and the "Wall of Separation,"* 39 J. of Church & State 455, 455 (1997).

2. For a synthesis of these criticisms, see Dreisbach, 39 J. of Church & State at 493-500 (cited in note 1). Portions of this article are reprinted here by permission.

3. See, e.g., *Everson v. Board of Education*, 330 U.S. 1 (1947); *McCullum v. Board of Education*, 333 U.S. 203 (1948); *Engel v. Vitale*, 370 U.S. 421 (1962); *Wallace v. Jaffree*, 472 U.S. 38 (1985).

## I. JEFFERSON, THE DANBURY BAPTISTS, AND AMERICA IN TRANSITION

Jefferson was inaugurated the third president of the United States on March 4, 1801, following one of the most bitterly contested presidential elections in American history. Religion, in particular, emerged as a critical issue in the campaign. This was due in part to Jefferson's unorthodox religious views, but more generally to the fact that American religious culture was changing dramatically. The Second Great Awakening, in its early stages at the turn of the century, unleashed a proliferation of diverse denominations and dissenting sects that chafed under the old establishment order. This revival was only one part of the dynamic aftermath of the American Revolution, a period that would see the United States quickly become the most commercial, egalitarian, and evangelical nation in the world.<sup>4</sup> All forms of authority and hierarchy—social, political, economic and especially religious—were being re-thought. According to historian Gordon S. Wood, “the American Revolution accelerated the challenges to religious authority that had begun with the First Great Awakening. Just as people were taking over their governments, so, it was said, they should take over their churches. Christianity had to be republicanized.”<sup>5</sup> This aversion to ecclesiastical authority encouraged the disestablishment of state churches throughout the former colonies, a trend that had begun in Jefferson's own Virginia. And, referring to the presidential election of 1800, John Adams admitted that an anti-establishment sentiment among these popular, voluntaristic sects “had an immense effect, and turned [voters] in such numbers as decided the election.”<sup>6</sup>

It was against this backdrop that on October 7, 1801, a committee of the Danbury Baptist Association wrote a congratulatory letter to Jefferson on his “appointment to the chief Magistracy in the United States.”<sup>7</sup> Organized in 1790, the

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4. Gordon S. Wood, *The Radicalism of the American Revolution* 332 (Alfred A. Knopf, 1992).

5. *Id.* at 332. For further discussion on the popular effects of the Second Great Awakening, see Nathan O. Hatch, *The Democratization of American Christianity* (Yale U. Press, 1989); Perry Miller, *From the Covenant to the Revival*, in James Ward Smith and A. Leland Jamison, eds., *The Shaping of American Religion* (Princeton U. Press, 1961).

6. Letter from John Adams to Mercy Warren (Aug. 8, 1807), in Charles F. Adams, ed., *Correspondence Between John E. Adams and Mercy Warren* 435, 436 (Arno Press, 1972).

7. Letter from a committee of the Danbury Baptist association to Thomas Jeffer-

Danbury Baptist Association was an alliance of “twenty-six churches, most of them in the Connecticut Valley, stretching from Suffield to Middletown and including several as far west as Amenia, New York.” By the turn of the century, “[t]hese twenty-six churches had a total of 1484 members but this number could be multiplied by five to include all the nominal adherents of these churches.”<sup>8</sup> The Connecticut Baptists, who were a religious minority in a state where Congregationalism was the established church, supported Jefferson politically because of his unflagging commitment to religious liberty. The Danbury Baptists were also Republican partisans in a stronghold of the Federalist party. In short, they were a beleaguered religious and political minority subjected to discrimination by law in a state in which a Congregationalist-Federalist axis firmly controlled political life.

In their address, the Danbury Baptists celebrated Jefferson’s election, affirmed their devotion to religious liberty, and chastised those who had criticized the president “as an enemy of religion Law & good order.” The Baptists wrote:

Our Sentiments are uniformly on the side of Religious Liberty-That Religion is at all times and places a Matter between God and Individuals—That no man ought to suffer in Name, person or effects on account of his religious Opinions-That the legitimate Power of civil Government extends no further than to punish the man who *works ill to his neighbour*. But Sir, our constitution of government is not specific. Our antient charter, together with the Laws made coincident therewith, were adopted as the Basis of our government, At the time of our revolution; and such had been our Laws & usages, & such still are; that Religion is consider,d as the first object of Legislation; & therefore what religious privileges we enjoy (as a minor part of the State) we enjoy as favors granted, and not as inalienable rights: and these favors we receive at the expence of such degrading acknowledgements, as are inconsistent with the rights of fre[e]men. It is not to be wondered at therefore; if those, who seek after *power & gain* under the pretence of *government & Religion* should reproach their fellow men—should reproach their chief Magistrate, as an enemy of religion Law & good order because he will not, dares

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son (Oct. 7, 1801), in *The Papers of Thomas Jefferson* (Manuscript Division, Library of Congress), Series 1, Box 87, Aug. 30, 1801-Oct. 15, 1801. Also available in Dreisbach, 39 *J. of Church & State* at 460-61 (cited in note 1).

8. William G. McLoughlin, 2 *New England Dissent, 1630-1833: The Baptists and the Separation of Church and State* 920, 986 (Harvard U. Press, 1971) (footnote omitted).

not assume the prerogative of Jehovah and make Laws to govern the Kingdom of Christ.

Sir, we are sensible that the President of the united States, is not the national Legislator, & also sensible that the national government cannot destroy the Laws of each State; but our hopes are strong that the sentiments of our beloved President, which have had such genial Effect already, like the radiant beams of the Sun, will shine & prevail through all these States and all the world till Hierarchy and tyranny be destroyed from the Earth. Sir, when we reflect on your past services, and see a glow of philanthropy and good will shining forth in a course of more than thirty years we have reason to believe that America's God has raised you up to fill the chair of State out of that good will which he bears to the Millions which you preside over. May God strengthen you for the arduous task which providence & the voice of the people have cal,d you to sustain and support you in your Administration against all the predetermined opposition of those who wish to rise to wealth & importance on the poverty and subjection of the people.<sup>9</sup>

The issue of foremost importance to the Baptists was whether "religious privileges" were rightly regarded as "inalienable rights" or merely as "favours granted" and subject to withdrawal by the civil state. The Baptists believed that religious liberty was an inalienable right, and they were deeply troubled that the religious privileges of dissenters in Connecticut were treated as favours that could be granted or denied by the political authorities. They outlined the basic principles undergirding their claim to religious liberty. They described religion as an essentially private matter between an individual and his God. No citizen, they reasoned, ought to suffer civil disability on account of his religious opinions. The legitimate powers of civil government reach actions, but not opinions. These were principles Jefferson embraced, and he reaffirmed them in his reply to the Baptists.

The surviving manuscripts reveal that Jefferson's reply was written with meticulous care and planned effect. The fact that a preliminary draft of the letter—with scribbled amendments and a marginal note explaining one major change—was retained in Jefferson's papers along with the version of the letter eventually sent indicates the significance the president attached to this

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9. Letter from a committee of the Danbury Baptist association to Thomas Jefferson (Oct. 7, 1801), in *The Papers of Thomas Jefferson* (cited in note 7).

statement.<sup>10</sup> Letters of courtesy, like the one sent by the Danbury Baptists, were not particularly welcomed by the president but neither were they lightly dismissed with merely a cordial response in kind. Rather, Jefferson thought such correspondence furnished an occasion for “sowing useful truths & principles among the people, which might germinate and become rooted among their political tenets.”<sup>11</sup> Although the Danbury Baptists did not request a religious proclamation, Jefferson thought the letter provided an opportunity for “sowing useful truths, & principles” and for explaining why he declined to follow the tradition of his predecessors in designating days for public fasting and thanksgiving. Jefferson had been criticized for departing from the practice of his presidential predecessors and virtually all state chief executives, who routinely designated days for prayer, fasting, and thanksgiving.

The president was keenly aware of the political implications of his pronouncement on a delicate church-state issue. Before sending his considered response, Jefferson solicited the political advice and comment of “his chief consultants on New England,” Attorney General Levi Lincoln, a Massachusetts Republican, and Postmaster General Gideon Granger, a Connecticut Republican.<sup>12</sup> In a brief note to Lincoln, Jefferson remarked that “the Baptist address . . . furnishes an occasion too, which I have long wished to find, of saying why I do not proclaim fastings & thanksgivings, as my predecessors did. [T]he address to be sure does not point at this, . . . but I foresee no opportunity of doing it more pertinently. I know,” the president candidly acknowledged, the response “will give great offence to the New England clergy: but the advocate for religious freedom is to expect neither peace nor forgiveness from them. [W]ill you be so good,” he asked Lincoln, “as to examine the answer and suggest any alterations which might prevent an ill effect, or promote a good one, among *the people*? [Y]ou understand the temper of those in

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10. For a useful analysis of the preliminary draft of the letter, see James Hutson, “A Wall of Separation”: FBI Helps Restore Jefferson's Obliterated Draft, 57 *The Library of Congress Information Bulletin* 136-39, 163 (June 1998).

11. Letter from Thomas Jefferson to Levi Lincoln (Jan. 1, 1802), in *The Papers of Thomas Jefferson* (Manuscript Division, Library of Congress), Series 1, Box 89, Dec. 2, 1801-Jan. 1, 1802. Also available in Dreisbach, 39 *J. of Church & State* at 465 (cited in note 1).

12. Dumas Malone, *Jefferson the President: First Term, 1801-1805* at 109 (Little, Brown and Co., 1970). Jefferson's solicitation of advice from his cabinet officers further controverts the claims of critics who discount or belittle the Danbury letter as a hastily drafted little note of courtesy, lacking deliberation or precision.

the North, and can weaken it therefore to their stomachs: it is at present seasoned to the Southern taste only."<sup>13</sup>

In compliance with the president's request, Lincoln perused Jefferson's original reply and promptly returned his comments. The attorney general counseled caution in the manner of Jefferson's expression. Not only the Federalists and Congregationalists, but also the Republicans in New England, he warned, might be offended by Jefferson's departure from the ancient and venerable "habit of observing fasts and thanksgivings in performance of proclamations from their respective Executives."<sup>14</sup>

Granger, whom Jefferson "entrusted with important party responsibilities in Connecticut," registered less political concern than Lincoln with Jefferson's response to the Danbury Baptists.<sup>15</sup> Indeed, he opined that Jefferson had expressed truths embraced by the "great Majority" of New Englanders, including nearly half the citizens of Connecticut. Therefore, he recommended that not "a Sentence [be] changed," even though Jefferson's response might "occasion a temporary Spasm among the Established Religionists."<sup>16</sup>

Jefferson considered the comments of Lincoln and Granger and composed a revised copy of the letter to the Danbury Baptists. Jefferson wrote:

Gentlemen

The affectionate sentiments of esteem and approbation which you are so good as to express towards me, on behalf of the Danbury Baptist association, give me the highest satisfaction. [M]y duties dictate a faithful & zealous pursuit of the interests of my constituents, & in proportion as they are per-

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13. Letter from Thomas Jefferson to Levi Lincoln (Jan. 1, 1802), in *The Papers of Thomas Jefferson* (cited in note 11). A careless reading of Jefferson's letter to Attorney General Levi Lincoln is the source of the frequently repeated error that the Danbury Baptists requested Jefferson to designate a day of public fasting and national thanksgiving. As the text indicates, Jefferson was well aware that the Baptists' request did not touch on the matter.

14. Letter from Levi Lincoln to Thomas Jefferson (Jan. 1, 1802), in *The Papers of Thomas Jefferson* (Manuscript Division, Library of Congress), Series 1, Box 89, Dec. 2, 1801-Jan. 1, 1802. Also available in Dreisbach, 39 *J. of Church & State* at 466-67 (cited in note 1).

15. Allen Johnson and Dumas Malone, eds., 7 *Dictionary of American Biography* 483 (Charles Scribner's Sons, 1946).

16. Letter from Gideon Granger to Thomas Jefferson (Dec. 1801), in *The Papers of Thomas Jefferson* (Manuscript Division, Library of Congress), Series 1, Box 89, Dec. 2, 1801-Jan. 1, 1802. Also available in Dreisbach, 39 *J. of Church & State* at 467 (cited in note 1).

sueded of my fidelity to those duties, the discharge of them becomes more and more pleasing.

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<sup>17</sup> 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. [A]dhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

I reciprocate your kind prayers for the protection & blessing of the common father and creator of man, and tender you for yourselves & your religious association, assurances of my high respect & esteem.<sup>18</sup>

Memorable phrases and key principles in Jefferson’s reply correspond to language in the Baptists’ address. Both letters, for example, assert in similar language that religion is an essentially private “matter which lies solely between Man & his God.” Both letters maintain that “the legitimate powers of government reach actions only, & not opinions.” The Baptists clearly drew on themes Jefferson had championed in the celebrated “Statute of Virginia for Establishing Religious Freedom” and his other public pronouncements on the rights of conscience.

It is also striking, as historian Jon Butler observed, that “Jefferson himself subtly shifted the First Amendment’s meaning in the most complex ways” when he described an ideal “wall of separation” between church and state. His use of “the term *church* inevitably narrowed the meaning of an amendment concerned instead with religion and government.” Jefferson’s use of the word “church” rather than “religion” in his restatement of the First Amendment emphasized that the constitutional separa-

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17. Most published collections of Jefferson’s writings incorrectly transcribe this word as “legislative.”

18. Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a committee of the Danbury Baptist association in the state of Connecticut (Jan. 1, 1802), in *The Papers of Thomas Jefferson* (Manuscript Division, Library of Congress), Series 1, Box 89, Dec. 2, 1801-Jan. 1, 1802.



tion was between ecclesiastical *institutions* and the state. His language, no doubt, appealed to pious, evangelical dissenters who disapproved of established churches but believed religion played an indispensable role in public life.<sup>19</sup>

How much significance did Jefferson attach to the "wall of separation" metaphor? Did he regard it as the defining motif of his church-state views? No evidence has yet been discovered that he ever again used the "wall" metaphor. Furthermore, there is little evidence that Jefferson considered the "wall" the quintessential symbolic expression or theme of his church-state thought. And yet, Jefferson's metaphor has come to symbolize church-state relations in the twentieth century. Judicial and popular conceptions of a "wall" that separates religion from civil government have led to sweeping changes in American public life and political thought. For the last fifty years, Jefferson's "wall" has been invoked by those seeking to restrict the role of religion in public life, as well as by religious organizations seeking protection from intrusive government regulation.

But was this broad separationist principle really envisioned by Jefferson when he wrote that the First Amendment built a "wall of separation between Church & State"? Is this interpretation rooted in Jefferson's text, or is it just an example of interpreting early nineteenth-century writings with perceptions formed in the twentieth century? In the following section, Whaley argues that Jefferson indeed intended his First Amendment "wall" to be broadly interpreted. Dreisbach counters that Jefferson's "wall" merely reflected the principle of federalism inherent in the First Amendment; that the "wall of separation" was erected only between the *national* government and religion, leaving the states free to regulate religion as they saw fit.

## II. A SEPARATIONIST INTERPRETATION OF THE "WALL"

To interpret Jefferson's intended meaning for his "wall of separation" metaphor is to enter treacherous waters. Before offering my interpretation, I briefly discuss two issues that influence an examination of church-state relationships in the American experience. First, any analysis is filtered through twentieth

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19. Jon Butler, *Coercion, Miracle, Reason: Rethinking the American Religious Experience in the Revolutionary Age*, in Ronald Hoffman and Peter J. Albert, eds., *Religion in a Revolutionary Age* 1, 29-30 (U. Press of Virginia, 1994).

century eyes; the relationship between church and state today inevitably colors one's perception of its historical evolution. Second, government's interaction with religion may affect, either positively or negatively, one's religious expression, and one's religious beliefs may influence one's views of appropriate church-state relations. Accordingly, I propose that any interpretation of Jefferson's "wall of separation" cannot be entirely disentangled from subjective opinion.<sup>20</sup>

With that in mind, let me be candid about my position: I support a strong wall of separation between church and state. I believe that this "wall" has facilitated the amazing combination of religiosity and religious diversity in the United States, a combination unmatched by any other nation. While I concede that my analysis of Jefferson's "wall" cannot be entirely free from my own sentiments in the matter, my examination of the issue is not compromised. My position evolved over a significant period of time wherein I began by agreeing with Dreisbach's jurisdictional interpretation and then came to see its weaknesses. After more thorough consideration, I became convinced that Dreisbach's narrow argument misconstrued Jefferson's position.

Whereas Dreisbach takes a jurisdictional view of Jefferson's "wall," I will argue that this metaphor was no mere reference to federalism. Rather, my separationist interpretation sees Jefferson's metaphor for the First Amendment as a reflection of his enlightened vision for America's future. My analysis begins by exploring the underlying philosophical ideas that most influenced Jefferson and the other framers, focusing specifically on the most plausible source for the "wall" metaphor, the Enlightenment figure James Burgh. With this foundation firmly in place, I then turn to a careful analysis of the letters themselves.

### A Historical Backdrop

Critics of a broad separationist interpretation of the First Amendment often argue that modern analyses fail to conform to the framers' original intent. Moreover, these critics claim that current separationist readings of the First Amendment and Jef-

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20. Erwin Chemerinsky agrees with my proposition, noting that "[h]istoriographers persuasively argued that the process of historical examination is inevitably interpretive and influenced by the values of the historian." Erwin Chemerinsky, *The Vanishing Constitution*, 103 Harv. L. Rev. 44, 92 (1989). According to Haig Bosmajian, church-state cases have been particularly plagued by historical subjectivity. Haig Bosmajian, *Is a Page of History Worth a Volume of Logic?*, 38 J. of Church & State 397, 409 (1996).

Jefferson's Danbury letter fail to place these documents in an appropriate historical context. In order to counter these critics, this section provides a historical backdrop. In connection with the introduction's brief description of the Second Great Awakening, this backdrop describes the dynamism of the post-Revolutionary era, including the framers' philosophical vision during this period of nation-building. The focus then turns to Jefferson's own philosophy and to the Enlightenment reformer who likely influenced his use of the "wall" metaphor, James Burgh.

According to Gordon Wood, "[e]quality was in fact the most radical and most powerful ideological force let loose in the Revolution."<sup>21</sup> Not surprisingly, the concept had wide appeal among the lower and middle classes. But equality had a particularly attractive quality for the framers. It is common knowledge that most of the framers were wealthy land-owners. But what is not generally known is that the vast majority of this influential group were first-generation gentlemen. Nearly all of them were the first in their families to get a college education. Thomas Jefferson, Samuel Adams, John Adams, James Madison, James Otis, John Jay, Benjamin Rush and John Marshall were among this group.

The framers were self-made and forward-looking. In fact, as Wood noted, "[t]he vision of the revolutionary leaders is breathtaking . . . . As hard-headed and practical as they were, they knew that by becoming republican they were expressing nothing less than a utopian hope for a new moral and social order led by enlightened and virtuous men. Their soaring dreams and eventual disappointments make them the most extraordinary generation of political leaders in American history."<sup>22</sup> These men saw America's future through the eyes of the Enlightenment, and were determined to re-shape it by expelling the darkness of the past. They hoped that America, through education and virtue, could exemplify the ideals set forth in the Enlightenment. Or, as Thomas Paine put it, "[t]he mind once enlightened cannot again become dark."<sup>23</sup>

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21. Wood, *The Radicalism of the American Revolution* at 232 (cited in note 4). See also Henry F. May, *The Enlightenment in America* (Oxford U. Press, 1976); Bernard Bailyn, *The Ideological Origins of the American Revolution* (Belknap Press, 1967).

22. Wood, *The Radicalism of the American Revolution* at 189-90 (cited in note 4).

23. Letter from Thomas Paine to Abbé Raynal (1782), in Moncure Daniel Conway, ed., *2 The Writings of Thomas Paine* 107 (AMS Press, 1967).

Jefferson was an avid proponent of these Enlightenment ideas and, therefore, questioned many assumptions of his day. With regard to religion, Jefferson was particularly concerned with the practice of church establishment. While government support for religion was only sparsely applied to the colonies in the seventeenth century, England had expanded establishment in the early 1700's to promote and assert monarchical power. Therefore, Jefferson and the framers had two reasons to oppose establishment: reliance on the Enlightenment's critique of coerced religious faith, and opposition to a clerical authority that symbolized British oppression.

Jefferson in particular expressed hostility towards clerical leaders and ecclesiastical establishment. In a letter written the year he was elected president, he wrote that "[t]he clergy, by getting themselves established by law, and ingrafted into the machine of government, have been a very formidable engine against the civil and religious rights of man."<sup>24</sup> Criticisms of religious establishment were common in Enlightenment thought, particularly in the works of Paine and Locke. However, a lesser-known Enlightenment reformer, James Burgh, may have influenced even more Jefferson's profound distaste for institutional religious authority. In fact, Burgh is the most plausible source for Jefferson's "wall" metaphor in the Danbury letter.<sup>25</sup>

While largely unknown until recently, this radical Whig Commonwealthman has emerged in recent scholarship as a prominent source of American revolutionary thought.<sup>26</sup> One of many reform-minded thinkers in England at that time, Burgh was part of a tight group of intellectuals that included Richard Price and Joseph Priestley, along with other important reform writers of the time, such as "Cato" (Trenchard and Gordon) and

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24. Letter from Thomas Jefferson to J. Moor (Aug. 14, 1800), in Norman Cousins, ed., *In God We Trust: The Religious Beliefs and Ideas of the American Founding Fathers* 130 (Harper & Brothers, 1958).

25. Others have opined that Roger Williams coined the "wall" metaphor; however, evidence indicates that Burgh is a much more plausible source. For a discussion of this issue, see Dreisbach, 39 *J. of Church & State* at 481-90 (cited in note 1).

26. Carla H. Hay, *James Burgh, Spokesman for Reform in Hanoverian England* 41-44 (U. Press of America, 1979). According to Hay, *Political Disquisitions* "quickly secured the status in England and in America of a monumental reference work with the authority of a political classic. An impressive number of America's founding fathers and virtually all the key figures in the English reform movement were indebted to the work." *Id.* at 105. See also Caroline Robbins, *The Eighteenth-Century Commonwealthman: Studies in the Transmission, Development and Circumstances of English Liberal Thought from the Restoration of Charles II until the War with the Thirteen Colonies* (Harvard U. Press, 1959).

Viscount Bolingbroke.<sup>27</sup> According to Isaac Kramnick, these "English reformers of the American Revolutionary Era were, in fact, committed partisans of modernity, of liberal individualism, and of market society."<sup>28</sup> Current historians posit that James Burgh was "the crucial figure" within this group.<sup>29</sup> And Oscar and Mary Handlin, the first twentieth century authors to focus specifically on Burgh, argue that "he was as close to American thought as any European of his time."<sup>30</sup>

In one of his major themes, Burgh warned his readers of the potential corrupting influence of ecclesiastical establishment. In his work *Crito*, he argued that danger existed in "a church's getting too much power into her hands, and turning religion into a mere state-engine."<sup>31</sup> He offered the metaphor of a "wall" as a defense against religious establishment:

We have in our times a proof, from the conduct of some among us, in respect of the [people's] appointment of their public administrators of religion, that such a scheme will answer all the necessary purposes, and prevent infinite corruption;—*ecclesiastical* corruption; the most odious of all corruption.

Build an impenetrable wall of *separation* between things *sacred* and *civil*.<sup>32</sup>

Burgh clearly argued against entanglement between church and state. He believed that anything less than "an impenetrable wall of *separation* between things *sacred* and *civil*" would lead to societal corruption—the very corruption that his adversaries argued ecclesiastical establishment would prevent.

Jefferson highly regarded Burgh's work, and even urged one of his books on Congress in 1803.<sup>33</sup> In fact, in 1790 Jefferson advised his future son-in-law, lawyer Thomas Mann Randolph,

27. Benjamin Franklin was a "guest member" of this group, visiting them when he traveled to England. See Oscar and Mary Handlin, *James Burgh and American Revolutionary Theory*, 73 Proceedings of the Massachusetts Historical Society 38, 42, 52 (1961).

28. Isaac Kramnick, *Republicanism Revisited: The Case of James Burgh*, in Milton M. Klein, Richard D. Brown, and John B. Hench, eds., *The Republican Synthesis Revisited: Essays in Honor of George Athan Billias* 19, 22 (American Antiquarian Society, 1992).

29. Id.

30. Oscar and Mary Handlin, 73 Proceedings of the Massachusetts Historical Society at 57 (cited in note 27).

31. [James Burgh], 1 *Crito, or Essays on Various Subjects* 7 (J. Dodsley, 1766).

32. [James Burgh], 2 *Crito, or Essays on Various Subjects* 118-19 (J. Dodsley, 1767) (emphasis in original).

33. Hay, *James Burgh* at 43 (cited in note 26).

that a young man preparing for a law career should read Adam Smith, Montesquieu (with reservations), Locke's "little book on government," the *Federalist*, and James Burgh's *Political Disquisitions*.<sup>34</sup> Given Jefferson's familiarity with and esteem for Burgh, it is plausible that Burgh's prescription for an "impene-trable wall" influenced Jefferson when he depicted his vision for the First Amendment in the Danbury letter.

In addition to Burgh's influence, a more immediate event likely had an impact on Jefferson's response to the Danbury Baptists. On the very day Jefferson wrote the Danbury letter, a rather strange incident occurred in Washington. Arriving from a small town in western Massachusetts was a "mammoth" cheese, weighing some 1,235 pounds, which was presented to the president. This enormous gift was created by the townspeople of Cheshire, Massachusetts under the supervision of the Elder John Leland, the town's eccentric pastor and promoter of the project.<sup>35</sup>

The careers of Leland and Jefferson had crossed paths many times. Born in Massachusetts, Leland was ordained in Virginia in 1777 where he had already "begun to acquire a state-wide reputation for his vigorous, anecdotal, and somewhat eccentric manner of preaching."<sup>36</sup> Leland became an ardent proponent of Jefferson's reforms for Virginia in 1776. According to C.A. Browne, "Leland's influence was a great factor in winning the rank and file of Virginia's population to the support of Jefferson's bill for the complete separation of church and state."<sup>37</sup>

After spending fourteen years in Virginia, Leland returned to Massachusetts. Settling in Cheshire, Leland created a stronghold of Jeffersonian Republicanism in an ardently Federalist state.<sup>38</sup> When news reached Cheshire that the House of Representatives had decided in favor of Jefferson over Burr, the town erupted in celebration. On April 9, 1801 following Jefferson's

34. Letter from Thomas Jefferson to Thomas Mann Randolph (May 30, 1790), in Andrew A. Lipscomb and Albert Ellery Bergh, eds., 8 *The Writings of Thomas Jefferson* 29, 31 (Thomas Jefferson Memorial Association, 1904) (Monticello edition) ("*Writings of Jefferson*").

35. C.A. Browne, *Elder John Leland and the Mammoth Cheshire Cheese*, 18 *Agricultural History* 145 (1944)

36. *Id.*

37. *Id.*

38. In Massachusetts gubernatorial elections from 1800-1808, out of the town's 200 eligible voters, only *one* consistently voted Federalist. L.H. Butterfield, *Elder John Leland, Jeffersonian Itinerant*, 62 *Proceedings of the American Antiquarian Society* 155, 215-16 (1952).

inauguration, Leland delivered an enthusiastic sermon to commemorate the event.

Pardon me, my hearers, if I am over-warm. I lived in Virginia fourteen years. The beneficent influence of my hero was too generally felt to leave me stoic. What may we not expect, under the auspices of heaven, while JEFFERSON presides, with *Madison* in state by his side. Now the greatest orbit in America is occupied by its brightest orb: but, sirs, expect to see religious bigots, like cashiered officers, and displaced statesmen, growl and gnaw at their galling bands, and, like yelping mastiff, bark at the moon rising they cannot prevent.<sup>39</sup>

Leland's reverence for Jefferson stemmed primarily from the president's historical commitment to church-state separation. In 1829, as Massachusetts was debating ecclesiastical disestablishment, Leland contended that "Thomas Jefferson did more than any one man to bring the felonious principle [of establishment] to the stake."<sup>40</sup>

In the summer immediately following Jefferson's inauguration, Leland conceived of a grand plan both to commemorate the event and to promote Cheshire's chief agricultural commodity. This project involved collecting the curds of every cow within the precinct of Cheshire (Federalist cows were excluded, however), and pressing these curds into one mammoth cheese. The cheese, over four feet in diameter and seventeen inches thick, was then transported to Washington and presented to the president.

As it traveled by boat and horse-drawn cart down the eastern seaboard, the cheese attracted a great deal of publicity. Many articles and editorials were written about the mammoth cheese and, as the newspapers of the day were typically of a solid Federalist or Republican bent, they bestowed either ridicule or praise respectively upon the gift.

No doubt Jefferson was caught up in the excitement that accompanied the arrival of the cheese in Washington. Newspaper reports described him standing in the doorway of the White House as the cheese made its way down Pennsylvania Avenue.<sup>41</sup> One eyewitness wrote that "If I can judge from Mr. Jefferson's

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39. L.H. Greene, ed., *The Writings of the Late Elder John Leland* 255 (New York, 1845).

40. Id. at 553.

41. See, e.g., *National Intelligence and Washington Advertiser* 2 (Jan. 20, 1802); *Washington Federalist* 3 (Jan. 2, 1802); *Boston Independent Chronicle* 2 (Jan. 25, 1802).

countenance he is highly diverted with the present curiosity, as all alive people are flocking in from all quarters to see the New England mammoth."<sup>42</sup> Leland himself presented the cheese to the president. In his address to Jefferson, Leland insisted that the town's "attachment to the National Constitution is indissoluble." Leland praised the Constitution for its "beautiful features—the right of free suffrage to correct abuses, the prohibition of religious tests to prevent all hierarchy, and the means of amendment which it contains within itself to remove defects as fast as they are discovered."<sup>43</sup> Jefferson responded to the address with a written response of his own, in which he concurred with Leland on the virtues of the Constitution. Two days later, Jefferson further demonstrated his solidarity with Leland as he sat in attendance while Leland preached a sermon in the U.S. capitol.

Given the spectacle created by the mammoth cheese, this event was undoubtedly on Jefferson's mind as he drafted the Danbury letter. Added to the impact of the cheese's arrival was the presence of John Leland, the man who had supported Jefferson so steadfastly in Virginia during his battle to enact the "Statute for Establishing Religious Freedom." It would seem, therefore, that while Jefferson was responding to the Danbury Baptist's views on church-state relations, Jefferson must have also been thinking about his life-long commitment to church-state separation, and the battles he had fought to establish this principle in Virginia.

### The Danbury Correspondence

A grasp of the historical context is crucial before one attempts to divine Jefferson's "wall of separation." So too is familiarity with *all* the relevant correspondence surrounding the Danbury letter. This section focuses specifically on the first version of Jefferson's reply, and his written exchanges with Attorney General Levi Lincoln and Postmaster General Gideon Granger. Through careful analysis of these letters and their effect on Jefferson's final reply to the Danbury Baptists, I believe

42. Letter from Benjamin Robinson (Jan. 1, 1802), in Browne, 18 *Agricultural History* at 151 (cited in note 35).

43. Letter from Daniel Brown, Hezekiah Mason, Jonathan Richardson, John Waterman, and John Wells, Jr. to Thomas Jefferson, in Browne, 18 *Agricultural History* at 150 (cited in note 35). While this letter was signed by the aforementioned citizens of Cheshire, it was most likely written by Leland himself. *Id.* at 150 n.14; Butterfield, 62 *Proceedings of the American Antiquarian Society* at 224 (cited in note 38).



one can glean a clear understanding of Jefferson's intention for the "wall of separation." This interpretation directly contradicts Dreisbach's jurisdictional argument, to which I will refer in my analysis.

Dreisbach argues that Jefferson's "wall of separation" was not addressing the broad issue of separation between religion and civil government. Rather, "the principal importance of his 'wall,'" Dreisbach opines, "like the First Amendment it metaphorically represents, is its clear delineation of the legitimate jurisdictions of federal and state governments on religious matters. In short, the 'wall' constructed by Jefferson separated the federal regime, on one side, and ecclesiastical institutions and state governments, on the other."<sup>44</sup> Dreisbach rightly notes that both the Danbury address to Jefferson and his reply include acknowledgment of the federalism aspects of the First Amendment. In their letter the Baptists observed: "Sir, we are sensible that the President of the [U]nited States, is not the national Legislator, & also sensible that the national government cannot destroy the Laws of each State." As for Jefferson, he quoted the First Amendment's prescription that "*their* legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'" "Their" or the people's legislature certainly applies to Congress, rather than state legislatures. And as Dreisbach's impressive collection of evidence attests, Jefferson certainly acknowledged and supported the principle of federalism embedded in the Bill of Rights.

The issue before us, however, is *not* Jefferson's views on federalism. Rather, we seek to ascertain his understanding of the "wall" metaphor as expressed in his reply to the Danbury Baptists. A *complete* reading of that document reveals that Jefferson had more in mind than merely restating jurisdictional principles. There is no doubt that the Danbury Baptists wrote to Jefferson because they were a marginalized religious minority in Connecticut. Their religious privileges were "enjoy[ed] as favors granted, and not as inalienable rights." A strict federalism reading of Jefferson's "wall" would not change this situation; Connecticut could continue discriminating against religious minorities, regardless of the First Amendment.

Jefferson's reply offers a much more supportive and optimistic view of the Danbury Baptists' plight than the jurisdic-

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44. See below, p. 649.

tional view will allow. Looking at the middle and most crucial paragraph of his reply again, it seems clear that Jefferson's focus was on religious liberty, not federalism. If the jurisdictional argument holds, then this paragraph's most compelling elements seem oddly out of place. A jurisdictional interpretation would maintain that Jefferson "contemplate[d] with sovereign reference" solely the federalism component of the First Amendment. Assuming for a moment that Jefferson was merely referring to federalism in the First Amendment, how does "adhering to this expression of the supreme will of the nation *in behalf of the rights of conscience*" lead to "the *progress* of those sentiments which tend to restore to man all his natural rights . . ." (my emphasis)? Does it follow that merely limiting the role of the federal government in matters of religion (while allowing the states to discriminate at will) would lead to this type of "progress"? I think not.<sup>45</sup>

Let us now turn to a lesser known piece of the Danbury puzzle: the first version of Jefferson's reply. It is in this document that Jefferson first employs his "wall of separation" metaphor; therefore, its relevance to the present discussion is apparent. In order to further highlight its relevance, I would rebut the assumption that this document is merely a rough draft. For this purpose and in order to examine the document in detail, I reproduce it here in full.

To messrs. Nehemiah Dodge, Ephraim Robbins, & Stephen S. Nelson a committee of the Danbury Baptist association in the state of Connecticut.

Gentlemen

The affectionate sentiments of esteem & approbation which you are so good as to express towards me, on behalf of the Danbury Baptist association, give me the highest satisfaction. [M]y duties dictate a faithful & zealous pursuit of the interests of my constituents, and, in proportion as they are persuaded of my fidelity to those duties, the discharge of them becomes more & more pleasing.

Believing with you that religion is a matter which lies solely between man & his god, that he owes account to none other

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45. One might argue that the last sentence was merely a flowery offering of solidarity. However, given that it is the summary sentence of the primary paragraph, rather than in the closing, this seems unlikely.

for his faith or his worship, that the legitimate powers of government reach actions only and 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 <sup>46</sup> separation between church and state. [Congress thus inhibited from acts respecting religion, and the Executive authorised only to execute their acts, I have refrained from prescribing even occasional performances of devotion, prescribed indeed legally where an Executive is the legal head of a national church, but subject here, as religious exercises only to the voluntary regulations and discipline of each respective sect.]† [A]dhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

I reciprocate your kind prayers for the protection and blessing of the common father and creator of man, and tender you for yourselves and your religious association, assurances of my high respect & esteem.

Th: Jefferson  
Jan. 1. 1802<sup>47</sup>

† Jefferson circled the sentence in brackets and added the following note in the margin: "this paragraph was omitted on the suggestion that it might give uneasiness to some of our republican friends in the eastern States where the proclamation of thanksgivings etc [?] by their Executive is an antient habit, & is respected."

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46. Jefferson made a number of changes to this document, including many portions that were scratched out and are now illegible. It appears that he originally wrote "thus building a wall of *eternal* separation," but then scratched out the word "eternal." This is strikingly similar in tone to Burgh's decree, which encouraged his fellow citizens to "build an *impenetrable* wall of separation." Or perhaps, as Dreisbach offers in his work, Jefferson's choice of "eternal" reflects his other uses of the word, such as in his 1800 letter to Benjamin Rush: "I have sworn upon the altar of God, eternal hostility against every form of tyranny over the mind of man." Dreisbach, 39 J. of Church & State at 462 n.13 (cited in note 1).

47. Preliminary draft of letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a committee of the Danbury Baptist association in the state of Connecticut (Jan. 1, 1802), in *The Papers of Thomas Jefferson* (Manuscript Division, Library of Congress), Series 1, Box 89, Dec. 2, 1801-Jan. 1, 1802. Also available in Dreisbach, 39 J. of Church & State at 462 (cited in note 1).

For the moment, ignore the content of the document and how it contrasts with the final version. Notice that Jefferson included both the full greeting and dated closing in this letter, formatted identically as that of his final reply. Moreover, his letter to Levi Lincoln describes the document as his “answer,” rather than as a draft. Gideon Granger insisted that Jefferson send it as is, wishing not “a Sentence changed.” There is also the question why Jefferson saved the document at all, and the fact that he explained in the margin why he omitted the section, as if it pained him significantly to do so. At the very least, the evidence attests to this document’s relevance in interpreting Jefferson’s understanding of the “wall” metaphor, an opinion which Dreisbach shares. Moreover, I would argue that the above observations indicate that Jefferson could very well have intended to send *this* version, but at the last moment drafted a revised version after further considering the political ramifications of the letter. This theory supports the idea that Jefferson realized the Danbury letter was a significant and broad statement on the First Amendment’s church-state prescriptions.<sup>48</sup>

Looking at the document’s content, we first notice that Jefferson included an explanation as to why he had “refrained from prescribing even occasional performances of devotion.” In his letter to Lincoln, Jefferson wrote that the Danbury address “furnishes an occasion too, which I have long wished to find, of saying why I do not proclaim fastings & thanksgivings, as my predecessors did.” The word “too” makes it clear that Jefferson wished to kill two birds with one stone: one, to make a statement about religious liberty as per the Danbury Baptists’ request,<sup>49</sup> and two, to explain why he refrained from issuing religious proclamations as president. Since Jefferson in the end deleted any mention of the latter in his final reply, we can only assume that the letter is about religious liberty.

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48. One could argue that Jefferson’s final copy was sufficiently watered down to discount the letter being a “significant and broad statement on the First Amendment’s church-state prescriptions,” supporting the letter’s jurisdictional intent. I would counter that the following investigation of the first copy, combined with my previous analysis, points to the “wall of separation” as a symbol of religious liberty beyond the minimal guarantees which federalism provided.

49. Constance B. Schulz described the purpose of the letter as Jefferson’s way of communicating his true convictions on matters of faith and morality to loyal “Republicans in New England, who might be sensitive to or confused by” the Federalist press’s unrelenting attacks on Jefferson’s alleged immorality and irreligion. “*Of Bigotry in Politics and Religion*”: *Jefferson’s Religion, the Federalist Press, and the Syllabus*, 91 *Virginia Magazine of History and Biography* 73, 85-86 (1983).

Importantly, this document shows that the omitted sentence is *the* transitional section linking the "wall" metaphor and its "progress." Note that at the end of the sentence, Jefferson did not write "of each respective *state*," but rather "*sect*." Further, notice that these "regulations and discipline" were "voluntary." He therefore saw religious exercises as the *sole* responsibility of the sects themselves, not of *any* government authority, neither *state* nor federal. This sentence, which directly follows the "wall" metaphor, seems to contradict the jurisdictional interpretation.

In fact, it was this crucial "linking" sentence that Lincoln saw as the most politically dangerous. In his reply to Jefferson, Lincoln offered a specific editorial point, so that Jefferson's reply would not be seen as an "implied censure" of the right of the states to impose their will. His editorial recommendation is inserted here in italics: "...only to the voluntary regulations & discipline of each respective sect, *as mere religious exercises, and to the particular situations, usages & recommendations of the several states, in point of time & local circumstances.*" If Jefferson's intention for the "wall" parallels the jurisdictional argument, then why did he not include Lincoln's suggestion, rather than omitting the entire section and leaving it disjointed and ambiguous? Looking at Jefferson's first version in conjunction with the final version, I would argue that his intentions are clear: he believed that the First Amendment constructed a "wall of separation" that offered the potential for true religious liberty, in contrast to other nations where "an Executive is the legal head of a national church." Indeed, as the phrase "but subject here [in the United States]" implies, matters of religion should be left solely "to the voluntary regulations and discipline of each respective sect." It is *this* expression of the people that Jefferson hoped would eventually lead to the "progress of those sentiments which tend to restore to man all his natural rights." Only with the entire section intact does Jefferson's intent for the letter and its "wall of separation" become clear.

This broad interpretation of Jefferson's "wall" gains further strength when taken in historical context. As outlined in the beginning of this section, the Enlightenment promoted radical ideas for its time. And Jefferson was at the forefront of this movement in the United States, often promoting the most radical of Enlightenment ideas. Of particular importance to Jefferson was the abolition of ecclesiastical establishment. To have such an avid proponent as John Leland arrive in Washington on

New Year's Day (bearing a 1,200 pound cheese, no less), could only have provided further inspiration for church-state separation as he wrote his Danbury response.

Furthermore, James Burgh's influence on Jefferson supports the argument that Jefferson intended his "wall of separation between Church & State" to be a broad and futuristic vision for American church-state relations. It is interesting to note that Burgh dedicated his book *Crito*, in which he argued for an "impenetrable wall of separation," to "The Good People of *Britain* of the *twentieth century*," because he believed his contemporaries were incapable of heeding his advice.<sup>50</sup> Similarly, Jefferson realized that the First Amendment's "wall of separation" was an idea that would be fully realized over time. In his letter to Lincoln, Jefferson expressed the hope that his vision for the First Amendment would "sow[] useful truths & principles among the people, which might germinate and become rooted among their political tenets."<sup>51</sup>

It seems only fitting that in the twentieth century, an era in which Burgh hoped people would have finally attained sufficient wisdom to appreciate his ideas, that Jefferson's vision of the First Amendment would become an inescapable part of the American conscience. In fact, Jefferson's "wall" has come to symbolize the First Amendment.<sup>52</sup> Jefferson's visionary "wall of separation between Church & State" has brought our nation unparalleled religious freedom, for both the believer and non-believer. To interpret the "wall" metaphor in such a broad and enlightened manner would no doubt please Jefferson, a man who so changed his own time and who had such high hopes for a virtuous American future.

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50. 2 *Crito*, Preface (cited in note 32) (emphasis in original).

51. That is not to say, however, that the growth of these "truths and principles" had not already begun to take root. The Danbury Baptists' address points to their strong desire for true religious liberty (without the shackles of state establishment allowed under federalism).

52. As R. Freeman Butts noted, Jefferson's "words 'a wall of separation between church and state' are not simply a metaphor of one private citizen's language; they reflect accurately the intent of those most responsible for the First Amendment; and they came to reflect the majority will of the American people. The words 'separation of church and state' are an accurate and convenient shorthand meaning of the First Amendment itself; they represent a well-defined historical principle from the pen of one who in many official statements and actions helped to frame the authentic American tradition of political and religious liberty." R. Freeman Butts, *The American Tradition in Religion and Education* 93 (Beacon Press, 1950). Edwin S. Gaustad similarly noted that "Jefferson's 'wall of separation' phrase, to be found nowhere in the Constitution, came to grow more familiar than the constitutional language itself." Edwin S. Gaustad, *Sworn on the Altar of God: A Religious Biography of Thomas Jefferson* 99 (Wm. B. Eerdmans Pub. Co., 1996).

### III. A JURISDICTIONAL INTERPRETATION OF THE "WALL"

The "wall" Jefferson erected in his letter to the Danbury Baptists served primarily to separate state and nation in matters pertaining to religion rather than to separate ecclesiastical from all governmental authorities. Jefferson did not use the "wall" to articulate a general, universal theory of the prudential relationship between religion and all civil government. The principal importance of his "wall," like the First Amendment it metaphorically represents, is its clear delineation of the legitimate jurisdictions of federal and state governments on religious matters. In short, the "wall" constructed by Jefferson separated the federal regime, on one side, and ecclesiastical institutions and state governments, on the other. This jurisdictional interpretation of the metaphor is rooted in the text, structure, and historic, pre-Fourteenth Amendment understanding of the Bill of Rights, in general, and the First Amendment, in particular. This view is buttressed by the text of the Danbury letter (including evidence gleaned from a preliminary draft), as well as by Jefferson's explanation of the letter and his stance on specific church-state issues apparently addressed in his correspondence with the Baptists.

#### Federalism and the Bill of Rights

Jefferson's "wall of separation" was a figurative device used to illuminate the First Amendment, which explicitly prohibited Congress from making laws "respecting an establishment of religion, or prohibiting the free exercise thereof." The metaphor's meaning cannot exceed the scope of the First Amendment. The Constitution provided for a national government of limited, strictly delegated, and enumerated powers. Those matters not entrusted to the federal government were assumed to be reserved by the individual or the states (so far as they legitimately resided in any governmental authority). "American federalism as formulated in the Constitution," Mark DeWolfe Howe noted, "made national disability the rule and national power the exception."<sup>53</sup> Since the new federal government had delegated powers

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53. Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* 19-20 (U. of Chicago Press, 1965). In *The Federalist Papers*, James Madison observed that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the

only, and affirmative power in the religious sphere had not been so delegated, it was acknowledged that authority over religious matters was not extended to the federal regime, and the states were free to maintain their own church-state arrangements and policies. Moreover, by imposing its restrictions specifically on "Congress," the First Amendment affirmed, by implication, that the states retained authority to determine church-state policies within their respective jurisdictions.<sup>54</sup> Neither the Article VI, clause 3 ban on religious tests for federal officeholders nor the First Amendment religion provisions were "laid upon the individual states. . . . Broad as were the principles upon which the national government was based, the matter of church establishment or dis-establishment, of taxation compulsory or voluntary contribution, of test acts, oaths and religious qualifications for office, was left entirely to the discretion of the sovereign states."<sup>55</sup> Indeed, some states retained religious establishments well into the nineteenth century. Each state was free to define the content and scope of civil and religious liberties and to structure church-state arrangements pursuant to its own constitution, declaration of rights, and statutes.<sup>56</sup> In short, ratification of the Constitution in 1788 and the Bill of Rights in 1791 had no immediate legal effect on church-state arrangements in the states and altered nothing in matters regarding federal involvement with religion. They merely made explicit the jurisdictional policies that were already implicit in the constitutional order.

The federal Bill of Rights, which included the First Amendment, served a dual purpose: to assure the citizenry that the federal government would not encroach upon the civil and

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several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist 45 (Madison), in Clinton Rossiter, ed., *The Federalist Papers* 288, 292-93 (Mentor Books, 1961).

54. See Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 Harv. L. Rev. 1700, 1706-07 (1992) (the word "Congress" emphasizes the federalism component of the First Amendment); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106, 1111-12 (1994) (same). See also Edward S. Corwin, *The Supreme Court as National School Board*, in *A Constitution of Powers in a Secular State* 89, 109 (Michie Co., 1951) ("the First Amendment, taken by itself, is binding only on Congress").

55. Joseph Francis Thorning, *Religious Liberty in Transition* 4 (Benzige Brothers, 1931).

56. The First Amendment, it should be noted, denied the national government jurisdiction over religion not because religion was thought unimportant or because governmental support for religion was generally regarded as improper, but rather because jurisdiction in issues pertaining to "establishment" and government regulation of religion were thought appropriately reserved by the states.



religious liberties of individuals, and to guarantee the states that the federal government would not usurp the states' jurisdiction over civil and religious liberties.<sup>57</sup> The Bill of Rights embodied a principle of federalism; it was essentially a states' rights document. "Indeed, the federalism of the Bill of Rights was widely regarded in 1791 as far more important than the protection it afforded to the individual. Odd as it may seem today, the First Amendment was not only a guarantee to the individual that Congress could not establish a national religion, but also a guarantee to the states that they were free to determine the meaning of religious establishment within their jurisdictions, and to newly establish, maintain, or disestablish religion as they saw fit."<sup>58</sup> This accords with Edward S. Corwin's observation that "the principal importance of the [First] Amendment lay in the separation which it effected between the respective jurisdictions of State and nation regarding religion, rather than in its bearing on the question of the Separation of Church and State."<sup>59</sup>

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57. James McClellan, *Joseph Story and the American Constitution: A Study in Political and Legal Thought* 146 (U. of Oklahoma Press, 1971). Note also the view of Thomas Jefferson, who wrote to James Madison in July 1788: "I hope therefore a bill of rights will be formed to guard the people against the federal government, as they are already guarded against their state governments in most instances." Letter from Thomas Jefferson to James Madison (July 31, 1788), in Julian P. Boyd, ed., 13 *The Papers of Thomas Jefferson* 440, 443 (Princeton U. Press, 1956) ("*Papers of Jefferson*"). See also Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 134-36, 182 (Harvard U. Press, 1977).

58. James McClellan, *The Making and the Unmaking of the Establishment Clause*, in Patrick B. McGuigan and Randall R. Rader, eds., *A Blueprint for Judicial Reform* 295, 314-15 (Free Congress Research and Education Foundation, 1981) (footnote omitted).

59. Corwin, *The Supreme Court as National School Board* at 106 (cited in note 54). See also Howe, *The Garden and the Wilderness* at 29 (cited in note 53) ("the federalism of the First Amendment may be even more important than its libertarianism."). For other works that argue that the specific purpose of the First Amendment religion provisions was to preserve state sovereignty over religious matters, see Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *Yale L.J.* 1131 (1991); Chester James Antieau, Arthur T. Downey, and Edward C. Roberts, *Freedom From Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (Bruce, 1964); Jonathan P. Brose, *In Birmingham They Love the Governor: Why the Fourteenth Amendment Does Not Incorporate the Establishment Clause*, 24 *Ohio N.U. L. Rev.* 1 (1998); Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 *Nw. U. L. Rev.* 1113 (1988); Wilber G. Katz, *Religion and American Constitutions* 8-10 (Northwestern U. Press, 1964); Clifton B. Kruse, Jr., *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 *Washburn L.J.* 65 (1962); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 *Ariz. State L.J.* 1085 (1995) (arguing that the "original Establishment Clause expressed the principle of federalism"; however, the Establishment Clause was adopted a second time through the Fourteenth Amendment, and it then prohibited both state and federal governments from supporting or suppressing religion); James McClellan, *Hand's Writing on the Wall of Separation: The Significance of Jaffree in Future Cases on Religious Establishment*, in Robert A. Goldwin and Art Kaufman, eds., *How Does the*

This was the prevailing interpretation of the Bill of Rights and the First Amendment shared by Jefferson and his contemporaries. Chief Justice John Marshall, writing for a united Court in *Barron v. Baltimore*, declared that the liberties guaranteed in the Bill of Rights “contain no expression indicating an intention to apply them to the state governments.”<sup>60</sup> Specifically addressing religious liberty under the Constitution, the Supreme Court ruled unanimously in *Permoli v. Municipality* that “[t]he Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states.”<sup>61</sup> Justice Joseph Story concurred in his authoritative *Commentaries on the Constitution of the United States*. The purpose of the First Amendment, he wrote, was “to exclude from the national government all power to act upon the subject [of religion].”<sup>62</sup> He further opined that “the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions . . . .”<sup>63</sup>

Jefferson embraced this jurisdictional view, which was virtually unchallenged in the founding era. In an 1808 letter to the Reverend Samuel Miller, written, like the Danbury Baptist letter, to explain his refusal to issue thanksgiving day proclamations, Jefferson wrote: “I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exer-

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*Constitution Protect Religious Freedom?* 43 (American Enterprise Institute for Public Policy Research, 1987); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DePaul L. Rev. 1191 (1990); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 Harv. L. Rev. 1700 (1992); Stuart D. Poppel, *Federalism, Fundamental Fairness, and the Religion Clauses*, 25 Cumberland L. Rev. 247 (1995); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, Wash. U. L.Q. 371 (1954); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 Notre Dame L. Rev. 311 (1986); William C. Porth and Robert P. George, *Trimming the Ivy: A Bicentennial Re-Examination of the Establishment Clause*, 90 West Virginia L. Rev. 109 (1987); Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* 17-54 (Oxford U. Press, 1995).

60. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833).

61. *Permoli v. Municipality*, 44 U.S. (3 How.) 589, 609 (1845).

62. Joseph Story, 3 *Commentaries on the Constitution of the United States* 730 (Hilliard, Gray, and Co., 1833).

63. *Id.* at 731. See also *id.* at 728 (“The real object of the [first] amendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.”).

cises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion [First Amendment], but from that also which reserves to the States the powers not delegated to the United States [Tenth Amendment]. Certainly, no power to prescribe any religious exercise, or to assume authority in religious discipline, 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."<sup>64</sup> (Note how Jefferson tied together the First and Tenth Amendments to explain his reasons, rooted in federalism, for refusing to appoint a day for religious observance.) Jefferson thought other important First Amendment rights were similarly subject to state jurisdiction. For example, notwithstanding his commitment to a free press, he acknowledged in an 1804 letter to Abigail Adams that, as a matter of federalism, regulation of the press was a matter of state sovereignty: "While we deny that Congress have a right to control the freedom of the press, we have ever asserted the right of the States, and their exclusive right, to do so."<sup>65</sup> Jefferson and his contemporaries firmly believed the states provided a valuable check on the abuse of rights by the federal regime.<sup>66</sup>

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64. Letter from Thomas Jefferson to the Reverend Samuel Miller (Jan. 23, 1808), in 11 *Writings of Jefferson* at 428 (cited in note 34). See also James Madison's argument in the Virginia ratifying convention: "There is not a shadow of right in the general [federal] government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation." Jonathan Elliot, ed., 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 313 (Privately Printed for Jonathan Elliot, 2d ed. 1836).

65. Letter from Thomas Jefferson to Mrs. John Adams (Sept. 11, 1804), in 11 *Writings of Jefferson* at 49, 51 (cited in note 34).

66. As early as 1798, Jefferson elaborated on this theme in his draft of "The Kentucky Resolutions" written in opposition to the Alien and Sedition Laws:

*Resolved*, That it is true as a general principle, and is also expressly declared by one of the amendments to the Constitution, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"; and that no power over the freedom of religion, freedom of speech, or freedom of the press being delegated to the United States by the Constitution, nor prohibited by it to the States, all lawful powers respecting the same did of right remain, and were reserved to the States or the people: that thus was manifested their determination to retain to themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use should be tolerated, rather than the use be destroyed. And thus also they guarded against all abridgment by the United States of the freedom of religious opinions and exercises, and retained to themselves the right of protecting the same, as this State, by a law passed on the general demand of its citizens, had already protected them from all human restraint or interference. And that in addition to this general principle and express declaration, another and more special provision has been made by one of the amendments to the Constitution, which expressly de-

Strictly speaking, Jefferson's "wall" was a metaphoric construction of the First Amendment, which governed relations between religion and the *national* government. His "wall," therefore, did not and *could not* specifically address relations between religion and *state* authorities. It is not self-evident that Jefferson thought the metaphor, more generally, usefully represented a universal, prudential doctrine of church-state relations governing the interaction between religion and *all* civil government—local, state, and federal.<sup>67</sup> Jefferson's "wall" expressly described the First Amendment and, thus, is appropriately construed in the context of the federalist design for the Bill of Rights.<sup>68</sup>

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clares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press": thereby guarding in the same sentence, and under the same words, the freedom of religion, of speech, and of the press: insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals.

Thomas Jefferson, Drafts of the Kentucky Resolutions of 1798 (Nov. 1798), in Paul Leicester Ford, ed., 8 *The Works of Thomas Jefferson* 463-65 (G.P. Putnam's Sons, Federal ed. 1904). Significantly, Jefferson coupled the Tenth and First Amendments and argued that power over religion, speech, and press was reserved to the state governments or the people. See generally Snee, 1954 Wash. U. L.Q. at 390-92 (cited in note 59); Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, B.Y.U. L. Rev. 645, 654-55 (1978).

67. In the light of the text and structure of the First Amendment, it is also appropriate to think of the First Amendment religion provisions as a restriction on civil government only and not a restraint on religion (or the role of religion in public life). Inasmuch as a wall is a bilateral, rather than a unilateral, barrier that not only prevents civil government from invading the ecclesiastical domain, as intended by the architects of the First Amendment, but also prohibits religion and the church from influencing the conduct of civil government, then the "wall" metaphor mischaracterizes the First Amendment. The various guarantees in the First Amendment were entirely a check or restraint on civil government, specifically the national legislature. 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 or interference by the federal government. Similarly, the religion provisions were added to the Constitution to protect religion and religious institutions from rough or corrupting interference by the federal government, and not to protect the civil state from the influence of, or overreaching by, religion. In other words, the First Amendment prohibition on religious establishment was a clear restraint on the power of civil government (i.e., the federal government) to give legal preference to any single sect or combination of sects or to invade the religious domain. Any construction of Jefferson's "wall" that imposes restraints on entities other than civil government exceeds the limitations imposed by the First Amendment, from which the "wall" metaphor was explicitly derived.

68. See J. M. O'Neill, *Religion and Education Under the Constitution* 67-69, 79-83 (Harper & Brothers, 1949) (arguing that Jefferson's "wall" separated the federal government and one religion); Snee, 1954 Wash. U. L. Q. at 389 (cited in note 59) (arguing that Jefferson's "wall" affirmed the principle of federalism); Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 115 (Lambeth Press, 1982) ("By this phrase Jefferson could only have meant that the 'wall of separation' was erected 'between church and State' in regard to possible federal action. . . . Therefore, to leave the impression that Jefferson's 'separation' statement was a universal one concerning the

## Thanksgiving Day Proclamations and the "Wall of Separation"

In his correspondence with Levi Lincoln, Jefferson said the Danbury letter "furnishes an occasion too, which I have long wished to find, of saying why I do not proclaim fastings & thanksgivings, as my predecessors did."<sup>69</sup> Jefferson perhaps wanted to address this topic because fast-day proclamations had emerged as a sensitive political issue in the days leading up to the election of 1800. President John Adams's recommendation for a national "day of solemn humiliation, fasting, and prayer," issued in March 1799,<sup>70</sup> was used by his political adversaries to depict him as a tool of conservative religionists intent on establishing a national church. "A general suspicion prevailed," Adams recounted more than a decade later, "that the Presbyterian Church [which was presumed to be behind the proclamation] was ambitious and aimed at an establishment as a national church." While disclaiming any involvement in such a scheme, Adams ruefully reported that he "was represented as a Presbyterian [which he was not] and at the head of this political and ecclesiastical project. The secret whisper ran through all the sects, 'Let us have Jefferson, Madison, Burr, anybody, whether they be philosophers, Deists, or even atheists, rather than a Presbyterian President.'"<sup>71</sup> This reservoir of opposition to "national fasts and thanksgivings," according to Adams, cost him the election in 1800. Jefferson was the political beneficiary, if not the instigator, of this sentiment and, no doubt, was eager to go on the record denouncing presidential religious proclamations. This episode challenges the often repeated claim that Jefferson steadfastly re-

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whole of the federal and state political system is extremely misleading."); M. Stanton Evans, *The Theme Is Freedom: Religion, Politics, and the American Tradition* 288 (Regnery Pub. Inc., 1994) ("The wall of separation, instead, was *between the federal government and the states*, [and was] meant to make sure the central authority didn't meddle with the customs of local jurisdictions."); Comment, 1978 B.Y.U. L. Rev. at 656-59 (cited in note 66) (arguing that Jefferson's "wall" was a study in federalism, and the "wall" described in the Danbury letter was erected only against the federal government).

69. Jefferson's final version of the Danbury letter did not explicitly mention the issue of "fastings & thanksgivings," and it would not be apparent from the text that this was the original object of the address were it not for his letter to Levi Lincoln. The "performances of devotion" is an oblique reference to the practice of "fastings & thanksgivings" mentioned in the preliminary draft.

70. Proclamation for a National Fast (Mar. 6, 1799), in Charles Francis Adams, ed., *9 The Works of John Adams, Second President of the United States* 172-74 (Little, Brown and Co., 1854).

71. Letter from John Adams to Benjamin Rush (June 12, 1812), in John A. Schutz and Douglass Adair, eds., *The Spur of Fame: Dialogues of John Adams and Benjamin Rush, 1805-1813* at 224 (Huntington Library, 1966). See generally Gaustad, *Sworn on the Altar of God* at 94-96 (cited in note 52).

fused to issue religious proclamations despite substantial political costs, thereby emphasizing that his position was principled. Clearly, political benefits, as well as costs, accompanied action on either side of this controversial practice.

Although President Jefferson refused to appoint a national day for public fasting and thanksgiving, his general views on the propriety of such proclamations by civil magistrates is not entirely free of ambiguity. In the Danbury letter, Jefferson concluded that the First Amendment prohibited the president of the United States from issuing religious proclamations. Yet, as president, he employed rhetoric in official utterances that, in terms of religious content, was virtually indistinguishable from the traditional thanksgiving day proclamations issued by his presidential predecessors and state chief executives.<sup>72</sup> In his first annual message, for example, he wrote: "While we devoutly return thanks to the beneficent Being who has been pleased to breathe into them the spirit of conciliation and forgiveness, we are bound with peculiar gratitude to be thankful to him that our own peace has been preserved through so perilous a season, and ourselves permitted quietly to cultivate the earth and to practice and improve those arts which tend to increase our comforts."<sup>73</sup> His second annual message to Congress opened with the following thanksgiving: "When we assemble together, fellow citizens, to consider the state of our beloved country, our just attentions are first drawn to those pleasing circumstances which mark the goodness of that Being from whose favor they flow, and the large measure of thankfulness we owe for his bounty."<sup>74</sup> His public papers are replete with similar expressions of thanksgiving and devotion. More important to the present discussion, Jefferson had a hand in crafting proclamations for religious observances when he was an elected official in his native Commonwealth. A careful scrutiny of Jefferson's public record

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72. See John G. West, Jr., *The Politics of Revelation and Reason: Religion and Civic Life in the New Nation* 57 (U. Press of Kansas, 1996).

73. Thomas Jefferson, First Annual Message (Dec. 8, 1801), in 3 *Writings of Jefferson* at 327 (cited in note 34).

74. Thomas Jefferson, Second Annual Message (Dec. 15, 1802), in 3 *Writings of Jefferson* at 340 (cited in note 34). Jefferson concluded his second inaugural address by asking Americans to join with him in prayer that the "Being in whose hands we . . . will so enlighten the minds of your servants, guide their councils, and prosper their measures, that whatsoever they do, shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations." Jefferson, Second Inaugural Address, 4 March 1805, 3 *Writings of Jefferson* at 375, 383 (cited in note 34).

on this issue buttresses a jurisdictional interpretation of the "wall" erected in the Danbury letter.

In marked contrast to the separationist message of the Danbury letter, Jefferson demonstrated a willingness to issue religious proclamations in colonial and state government settings. For example, as a member of the House of Burgesses, on May 24, 1774, he participated in drafting and enacting a resolution designating a "Day of Fasting, Humiliation, and Prayer."<sup>75</sup> Jefferson recounted in his *Autobiography*:

We were under conviction of the necessity of arousing our people from the lethargy into which they had fallen, as to passing events [the Boston port bill]; and thought that the appointment of a day of general fasting and prayer would be most likely to call up and alarm their attention. . . . [W]e cooked up a resolution . . . for appointing the 1st day of June, on which the portbill was to commence, for a day of fasting, humiliation, and prayer, to implore Heaven to avert from us the evils of civil war, to inspire us with firmness in support of our rights, and to turn the hearts of the King and Parliament to moderation and justice.<sup>76</sup>

Jefferson thus seemed pleased with this accommodation between religion and the state.<sup>77</sup> In 1779, when Jefferson was governor of Virginia, he issued a proclamation decreeing a day "of publick and solemn THANKSGIVING and prayer to Almighty God."<sup>78</sup> (This proclamation was issued after Jefferson had penned his famous "Bill for Establishing Religious Freedom.") Also, in the late 1770s, as chair of the Virginia Committee of Revisors, Jefferson was chief architect of a revised code that included a measure entitled "A Bill for Appointing Days of Public Fasting and Thanksgiving."<sup>79</sup> This legislation apparently was

75. Resolution of the House of Burgesses Designating a Day of Fasting and Prayer (May 24, 1774), in 1 *Papers of Jefferson* at 105 (cited in note 57).

76. Thomas Jefferson, *Autobiography*, in 1 *Writings of Jefferson* at 1, 9-10 (cited in note 34).

77. See Robert M. Healey, *Jefferson on Religion in Public Education* 135 (Archon Books, 1970); Gaustad, *Sworn on the Altar of God* at 102-03 (cited in note 52) (commenting on Jefferson's role in this proclamation).

78. Proclamation Appointing a Day of Thanksgiving and Prayer (Nov. 11, 1779), in 3 *Papers of Jefferson* at 177-79 (cited in note 57).

79. *Report of the Committee of Revisors Appointed by the General Assembly of Virginia in MDCCLXXVI* at 59-60 (Dixon & Holt, 1784) ("*Report of the Revisors*"). The bill is reprinted in 2 *Papers of Jefferson* at 556 (cited in note 57). This bill was part of a legislative package that included Jefferson's "Bill for Establishing Religious Freedom" and "Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers." The three bills were apparently framed by Jefferson and sponsored in the Virginia legislature

framed by Jefferson and introduced in the Virginia legislature by James Madison on October 31, 1785.<sup>80</sup> The bill authorized “the Governor, or Chief Magistrate [of the Commonwealth], with the advice of the Council,” to designate days for thanksgiving and fasting and to notify the public by proclamation. Far from simply granting the governor power to appoint “days of public fasting and humiliation, or thanksgiving,” the bill included the following punitive provision: “Every minister of the gospel shall on each day so to be appointed, attend and perform divine service and preach a sermon, or discourse, suited to the occasion, in his church, on pain of forfeiting fifty pounds for every failure, not having a reasonable excuse.”<sup>81</sup> Although the measure was never enacted, it was sponsored by Madison, and a surviving manuscript copy of the bill bears a notation in the “clerk’s hand” indicating that it was “endorsed” by Jefferson.<sup>82</sup> The final disposition of this legislation is unimportant to the present discussion. The relevant consideration here is that Jefferson and Madison jointly sponsored a bill that authorized Virginia’s chief executive to designate days in the public calendar for fasting and thanksgiving.

How is Jefferson’s record on religious proclamations in Virginia reconciled with the position taken in the Danbury letter? A careful review of Jefferson’s actions throughout his public career suggests that he believed, as a matter of federalism, that the national government had no jurisdiction in religious matters, whereas state governments were authorized to accommodate

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by James Madison. See Daniel L. Dreisbach, *A New Perspective on Jefferson's Views on Church-State Relations: The Virginia Statute for Establishing Religious Freedom in Its Legislative Context*, 35 Am. J. of Legal Hist. 172 (1991).

80. Julian P. Boyd, editor of the Jefferson papers, did not explicitly attribute authorship of this bill to Jefferson. He did not, however, reject the possibility that Jefferson drafted “A Bill for Appointing Days of Public Fasting and Thanksgiving.” Boyd noted that Jefferson apparently endorsed the bill. 2 *Papers of Jefferson* at 556 (cited in note 57). Other scholars have described Jefferson as the author of this bill. See, e.g., Cord, *Separation of Church and State* at 220-21 (cited in note 68); Healey, *Jefferson on Religion in Public Education* at 135 (cited in note 77); Donald L. Drakeman, *Religion and the Republic: James Madison and the First Amendment*, 25 J. of Church & State 427, 441 (1983); Comment, 1978 B.Y.U. L. Rev. at 657, 666 (cited in note 66).

81. *Report of the Revisors* at 60 (cited in note 79); 2 *Papers of Jefferson* at 556 (cited in note 57). The punitive feature of “A Bill for Appointing Days of Public Fasting and Thanksgiving” is difficult to reconcile with that portion of Jefferson’s “Bill for Establishing Religious Freedom” declaring “that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever.” *Report of the Revisors* at 58; 2 *Papers of Jefferson* at 546; William Waller Hening, ed., 12 *The Statutes at Large; Being a Collection of all the Laws of Virginia, From the First Session of the Legislature, in the Year 1619* at 86 (J. & G. Cochran, 1823).

82. 2 *Papers of Jefferson* at 556 (cited in note 57).



and even prescribe religious exercises.<sup>83</sup> Therefore, Jefferson saw no inconsistency in sponsoring a religious proclamation as a state official and refusing to issue a similar proclamation as U.S. president. The "wall" metaphor was not offered as a general pronouncement on the prudential relationship between religion and all civil government; rather, it was, more specifically, a statement delineating the legitimate constitutional jurisdictions of the federal and state governments on matters pertaining to religion. Jefferson's "wall," strictly speaking, was gloss on the First Amendment, and it arguably had less to do with the separation between church and all civil government than with the separation between the federal and state governments.

Jefferson, one recalls, used the Danbury letter to explain why he, as president, declined to issue religious proclamations. Addressing the same issue in his letter to Samuel Miller, Jefferson specifically relied upon the Tenth Amendment principles of federalism and strictly delegated powers. He took the position that since no authority to appoint days for religious observance was delegated to the federal government (including the nation's chief executive), one must assume, pursuant to the Tenth Amendment and the principle of limited federal powers, that power in religious matters was "reserved to the States respectively, or to the people."<sup>84</sup> Jefferson, in short, acknowledged state sovereignty, rather than federal supremacy, in matters of religious liberty and establishment. He did not think that the principle of federalism was inconsistent or at odds with the goals of separationism inasmuch as both were concerned with checking the power of civil government, thereby protecting the rights of conscience. The states, he believed, checked the abuse of rights by the federal regime.<sup>85</sup> The separation of powers and checks and balances, which were indispensable features of American federalism, provided vital protections for liberty that in Jefferson's view were arguably more important than a bill of rights. While Jefferson, no doubt, desired each state through its respective constitutions and laws to protect the natural rights of citizens, it is unlikely that he thought the First Amendment with

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83. See Rodney K. Smith, *Public Prayer and the Constitution: A Case Study in Constitutional Interpretation* 98 n.71 (Scholarly Resources, Inc., 1987); Lietzau, 39 DePaul L. Rev. at 1203-04 (cited in note 59).

84. U.S. Const., Amend. X.

85. See letter from Thomas Jefferson to Monsieur Destutt de Tracy (Jan. 26, 1811), in 13 *Writings of Jefferson* at 13, 19 (cited in note 34) ("the true barriers of our liberty in this country are our State governments").

its “wall of separation” was the appropriate device to achieve this goal. The use of a First Amendment wall to protect dissenters’ religious rights in the states would have dangerously undermined that other great protector of civil and religious liberty—federalism.

Additional confirmation that the “wall of separation” was erected between religion (i.e., the church) and the federal regime is found in Jefferson’s second inaugural address, delivered in March 1805.<sup>86</sup>

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.<sup>87</sup>

The second inaugural address and letter to Samuel Miller addressed concerns identical to those raised in the Danbury letter. One could argue that, in a sense, these subsequent statements were Jefferson’s own commentary on the “wall of separation.”

Another constitutional question addressed in the Danbury letter was whether the First Amendment restricted only the *Congress* in matters respecting an establishment of religion, or whether its prohibitions extended to the coequal branches of the federal government (and, indeed, the entire federal government), thereby denying the executive branch the prerogative to issue religious proclamations.<sup>88</sup> “I contemplate with sovereign reverence,” Jefferson wrote, “*that act of the whole American people* [i.e., the people’s ratification of the First Amendment] which declared that *their legislature* [i.e., the federal Congress]

86. Edward S. Corwin described this portion of the second inaugural address, perhaps offered in response to criticisms of Jefferson’s refusal to appoint days for national religious observances, as a “more deliberate, more carefully considered evaluation by Jefferson of the religious clauses of the First Amendment” than the Danbury letter. Corwin, *The Supreme Court as National School Board* at 106 (cited in note 54).

87. Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), in 3 *Writings of Jefferson* at 375, 378 (cited in note 34). See Anson Phelps Stokes, 1 *Church and State in the United States* 335 (Harper & Brothers, 1950) (stating that in this passage of the address Jefferson “doubtless had in mind particularly his well-known objection to presidential Thanksgiving Day proclamations”); Gaustad, *Sworn on the Altar of God* at 99-100 (cited in note 52) (indicating that this passage of the address explicitly reaffirmed Jefferson’s opposition to “presidential proclamations relating to religion”).

88. Jefferson was concerned about the lack of presidential authority, under the federal Constitution, to appoint days for religious devotion. Comment, 1978 B.Y.U. L. Rev. at 656 (cited in note 66).

should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof [First Amendment religion clauses],' thus building a wall of separation between Church & State" (emphasis added). Since the powers of the executive are derivative of the creative powers of the legislature, Jefferson concluded that he, as president, could not assume power over matters (such as religion) denied Congress. This separation of powers argument was made forcefully in a sentence Jefferson included in the preliminary draft, but deleted from the final version, of the Danbury letter: "Congress thus inhibited from acts respecting religion, and the Executive authorised only to execute their acts, I have refrained from prescribing even occasional performances of devotion."<sup>89</sup> The text suggests, and Jefferson's actions as president confirm, that he concluded that the *federal* chief executive was as restrained in making religious proclamations as he believed the Congress to be pursuant to the First Amendment. This argument relating to the three branches of the federal government coincided with the federalism argument. The powers explicitly denied Congress were, in short, the powers denied all branches and agencies of the federal government. Therefore, the president, like Congress, must refrain from prescribing "performances of devotion."

Jefferson took seriously the jurisdictional prohibition on federal involvement with religion, and in this respect he was more separationist than many of his contemporaries. He went further than most national public figures of his day in limiting the federal government's acknowledgment of, or interaction with, religion. (Many of Jefferson's contemporaries, by contrast, did not believe thanksgiving proclamations by the national executive constituted a direct exercise of power over the subject of religion, and thus they did not view the practice as a violation of federalism or the nonestablishment provision.)<sup>90</sup> By taking the position that thanksgiving day proclamations by the federal chief

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89. Draft letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a committee of the Danbury Baptist association in the state of Connecticut (Jan. 1, 1802), in *The Papers of Thomas Jefferson* (cited in note 47). This sentence parallels an acknowledgment made in the letter from the Baptists: "we are sensible that the President of the united States, is not the national Legislator, & also sensible that the national government cannot destroy the Laws of each State." Letter from a committee of the Danbury Baptist association to Thomas Jefferson (Oct. 7, 1801), in *The Papers of Thomas Jefferson* (cited in note 7). Thus, language in both the Baptists' letter and Jefferson's response confirm that it was generally understood and unchallenged, as a principle of federalism, that religion was a subject of state jurisdiction.

90. See Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 Ariz. State L.J. 1085, 1096-97 (1995).

executive offended the First Amendment, he adopted a more extreme view than the First Congress and his two presidential predecessors. The strictures of the First and Tenth Amendments notwithstanding, the First Congress, which framed the First Amendment, called on President George Washington to designate "a day of public thanksgiving and prayer,"<sup>91</sup> and appointed legislative chaplains paid from the public treasury.<sup>92</sup> Both Presidents Washington and Adams designated days in the public calendar for religious observance.<sup>93</sup> By staking out a radical separationist position (in both the church-state and federalism senses) *at the federal level*, Jefferson was sowing principles that, as he implicitly conceded in his letter to Lincoln, were not yet political tenets widely and popularly accepted by the people.<sup>94</sup> Again, it should be emphasized that insofar as the separationist theme articulated in the Danbury letter was rooted in the First Amendment, Jefferson understood that it had application only at the federal level.

#### A First Amendment "Wall"

The Danbury letter touched on a variety of issues worthy of analysis, one of which was the principle of church-state separation. A comprehensive examination of Jefferson's church-state views is beyond the scope of this article. The purpose and function of the "wall" he erected, however, are under review. The "wall of separation" unquestionably was a figurative device used to describe the First Amendment, which explicitly prohibited Congress from making laws "respecting an establishment of religion, or prohibiting the free exercise thereof." Prior to incorporation by way of the Fourteenth Amendment,<sup>95</sup> the First

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91. Joseph Gales, ed., 1 *The Debates and Proceedings in the Congress of the United States* 914 (Gales and Seaton, 1834), 1st Cong., 1st Sess. (Sept. 25, 1789); Linda Grant De Pauw, ed., 1 *Documentary History of the First Federal Congress of the United States of America, March 4, 1789-March 3, 1791* at 197 (Johns Hopkins U. Press, 1972); *Journal of the First Session of the Senate of the United States of America* 154 (Thomas Greenleaf, 1789) (discussing Sept. 26, 1789).

92. 1 *U.S. Statutes at Large* 23, 71 (1789).

93. For a discussion on the practices of Jefferson's two presidential predecessors in appointing days for public thanksgiving and religious observance, see Stokes, 1 *Church and State in the United States* at 486-91 (cited in note 87).

94. See Smith, *Public Prayer and the Constitution* at 62 (cited in note 83); Dreisbach, 39 *J. of Church & State* at 465-66 (cited in note 1).

95. In *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), and *Everson v. Board of Education*, 330 U.S. 1, 15 (1947), the First Amendment free exercise and nonestablishment of religion provisions respectively were incorporated into the "liberties" protected by the Fourteenth Amendment due process of law clause, thereby guarding these First Amendment rights from infringement by the states. The present discussion is about Jef-

Amendment imposed its restrictions only on Congress and, by extension, Jefferson concluded, the entire federal regime. In short, the "wall" Jefferson erected in the Danbury letter was between the federal government, on one side, and church authorities and state governments, on the other. Pursuant to the First and Tenth Amendments and the purely executive nature of his office, President Jefferson concluded that while state governments had the authority to act on matters pertaining to religion, such power was denied the entire federal government, including the national chief executive. Accordingly, Jefferson saw no contradiction in authoring a religious proclamation to be issued by *state* authorities and refusing to issue a similar proclamation as the *federal* chief executive.

Jefferson clearly disapproved of discrimination against the Baptists in Connecticut. In his address, he looked forward to the "progress of those sentiments which tend to restore to man all his natural rights. . . ." It is unlikely, however, that Jefferson thought the First Amendment "wall," which he described in the Danbury letter, was the device to achieve the "progress of those sentiments" at the state level.<sup>96</sup> More important, the use of a

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erson's construction of his "wall" and not about post-Fourteenth Amendment interpretations of the metaphor. It should be noted that if the jurisdictional interpretation of the First Amendment, and hence the "wall," is correct, then not only is it impossible (not to mention illogical) to "incorporate" into the "liberty" protected by the Fourteenth Amendment that which is essentially the structural assignment of authority over a specific subject matter to a particular level or branch of government (as opposed to a libertarian device that confers judicially enforceable, substantive rights upon individuals), but also the First Amendment "cannot be incorporated without eviscerating its *raison d'être*." Note, 105 Harv. L. Rev. at 1709 (footnote omitted) (cited in note 54). See also Smith, *Foreordained Failure* at 49-50 (cited in note 59); John F. Wilson, *Religion, Political Culture, and the Law*, 41 DePaul L. Rev. 821, 835-36 (1992) ("at one level of irony, the religion clauses . . . have become appropriated to specific purposes directly opposed to those that lead to their adoption."); Porth and George, 90 West Virginia L. Rev. at 138-39 (cited in note 59); John E. Dunsford, *Prayer in the Well: Some Heretical Reflections on the Establishment Syndrome*, 1984 Utah L. Rev. 1, 20-21 (1984) ("It is a supreme irony of history that the establishment clause was crafted by the framers for a purpose exactly opposite from the one to which the Supreme Court has put it."); Conkle, 82 Nw. U. L. Rev. at 1141 (cited in note 59); *Abington School District v. Schempp*, 374 U.S. 203, 309-10 (1963) (Stewart, J., dissenting) ("As a matter of history, the First Amendment was adopted solely as a limitation upon the newly created National Government. The events leading to its adoption strongly suggest that the Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments. . . . Each State was left free to go its own way and pursue its own policy with respect to religion. . . . [I]t is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy."). Pursuant to this view, incorporating the nonestablishment provision (and Jefferson's "wall") is as nonsensical as incorporating the Tenth Amendment.

96. Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins,

“wall” erected by the First Amendment as an instrument for church-state separation in the respective sovereign states would have been contrary to the fundamental principle of federalism, the unchallenged jurisdictional understanding of the federal Bill of Rights, and Jefferson’s commitment to a limited federal government and the sovereignty of the states.<sup>97</sup> It is plausible, even likely, that Jefferson desired each state through its respective constitutions and laws to erect its own wall of separation between ecclesiastical and state authorities, but these state walls would not be the same First Amendment “wall” described in the Danbury letter. There is every reason to believe that he would have wanted the states to follow the model implemented in Virginia with passage in 1786 of his celebrated “Statute for Establishing Religious Freedom.” In his 1808 letter to the Reverend Miller, Jefferson once again ardently defended the rights of conscience with arguments applicable, it would seem, to both state and federal magistrates,<sup>98</sup> but, as in the Danbury letter, although

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and Stephen S. Nelson, a committee of the Danbury Baptist association in the state of Connecticut (Jan. 1, 1802) in *The Papers of Thomas Jefferson* (cited in note 1). In the last sentence of the second paragraph of the Danbury letter, Jefferson wrote: “adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.” “[T]his expression of the supreme will of the nation” is a reference to the First Amendment, which was cited in the preceding two sentences of the preliminary draft and, as previously noted, applied only to the federal government. In the second clause of the sentence, it is not clear whether Jefferson was referring to a “progress of those sentiments” promoting the rights of conscience among individuals vis-a-vis the federal regime only, *pursuant to the First Amendment*, or whether he was looking forward to the “progress of those sentiments” among citizens in the states because state governments voluntarily adopted the First Amendment model. He certainly did not believe the states were subject to the First Amendment “wall.”

97. McClellan made this same point, forcefully repudiating the Supreme Court’s “incorporation” of the First Amendment and, by extension, Jefferson’s “wall” in recent church-state jurisprudence: “To apply Jefferson’s wall of separation theory to present cases, as the Supreme Court has done, is to lift it wholly out of context. Jefferson believed that the states were free to prescribe the nature of religious liberty within their respective jurisdictions. . . . The application of the Jeffersonian theory *against* the states, and its utilization by the federal courts in deciding how a state should behave with respect to civil liberties, is wholly contrary to the very basis of the Jeffersonian philosophy of states’ rights; and it is incompatible with Jefferson’s strong desire to resist the increasing powers of the Supreme Court. To say that the national courts instead of the various state courts should possess final authority in the enforcement of an absolute wall of separation between church and state is similar to arguing that the powers of the states are best preserved by transferring those powers to the federal government.” McClellan, *Joseph Story and the American Constitution* at 143-44 (footnote omitted) (cited in note 57).

98. Jefferson was concerned that a civil magistrate’s recommendation for a day of public fasting and prayer would be, in effect, indistinguishable from a mandatory prescription for such exercises, and thereby would impose penalties on those who for reasons of conscience failed to comply. This argument applies equally to state and federal

he specifically denied that the federal government had the "power to prescribe any religious exercise," he acknowledged that such power "rest[s] with the States, as far as it can be in any human authority." Notwithstanding the useful purposes Jefferson thought were served by the First Amendment "wall," he understood that its strictures were not imposed on state governments or the voluntary religious societies.

Jefferson's "wall," like the First Amendment, affirmed the policy of federalism. This policy emphasized that all governmental authority over religious matters was allocated to the states. The metaphor's principal function was to delineate the legitimate jurisdictions of state and nation on religious issues, and it was largely devoid of substantive content independent of its federalism.<sup>99</sup> This controverts the conventional notion that Jefferson's metaphor encapsulated a general constitutional, prudential, and libertarian doctrine of church-state relationships and religious liberty. Indeed, a jurisdictional understanding of the "wall" raises serious questions regarding the way the metaphor is typically used by courts and recommends an honest reappraisal of the propriety of its conventional use in discourse on church and state. There is no evidence that Jefferson considered the metaphor the quintessential symbolic expression of his church-state views. There is little evidence to indicate that Jefferson thought the metaphor encapsulated a *universal* principle of religious liberty or the prudential relationships between religion and *all* civil government (local, state, and federal). There is much evidence, as set forth above, that the "wall" has been used in ways—rhetorically and substantively—that its architect almost certainly would not have recognized and, perhaps, would have repudiated.

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magistrates. Jefferson further argued that it is in the interests of religion to direct its own exercises, discipline, and doctrines and not to vest such matters in the hands of civil government.

99. This language is borrowed from Steven D. Smith's commentary on the First Amendment religion clauses. Smith, *Foreordained Failure* at 17 (cited in note 59). The framers and ratifiers of the religion clauses, Smith argued, deliberately declined to adopt a principle or theory of religious liberty. "They consciously chose not to answer the religion question, and they were able for the most part to avoid it . . . because of the way in which they answered the jurisdiction question—that is, by assigning the religion question to the states." Accordingly, it is futile to locate in or extrapolate from the original meaning of the religion clauses a substantive right or principle of religious liberty. In other words, the First Amendment was calculated not to articulate a principle or theory of religious liberty but merely to specify who (or what level of civil government) shall substantively address this subject matter. *Id.* at 21, 25. See also Conkle, 82 Nw. U. L. Rev. at 1133-35 (cited in note 59); Lietzau, 39 DePaul L. Rev. at 1199-1200 (cited in note 59).

#### IV. CONCLUSION

The debate format of this article notwithstanding, the authors found significant points of agreement, as well as disagreement. In their respective conclusions, each author briefly critiques the other's position and summarizes his own interpretation of Jefferson's metaphor. In their final remarks, the authors join in shared observations of the promises and problems of employing metaphors in politics and law.

##### Whaley's Conclusions

Without question, Dreisbach's analysis demonstrates that Jefferson strongly supported the concept of federalism. This is hardly surprising, since both federalism and religious liberty were important principles for the Constitution's framers. However, a tension exists between the two concepts, and undoubtedly Jefferson was aware of it. Federalism allows states to govern autonomously, yet it is doubtful that Jefferson believed states should govern with impunity. In this vein, Jefferson clearly voiced his commitment to individual liberty in his response to the Danbury Baptists, writing that "religion is a matter which lies solely between Man & his God." In this and other writings Jefferson insisted that this right is inalienable, and should not be infringed by any "legitimate powers of government," neither federal nor state.

Jefferson's commitment to this principle is embodied in the "Statute of Virginia for Establishing Religious Freedom." And in the wake of its adoption, Jefferson must have taken great pride in witnessing other states following the Statute's model for church disestablishment. Because this tide of religious liberty grew out of state, rather than federal, government action, it is no wonder that Jefferson greatly supported states' rights, since he saw states as the firebrands of liberty. Given the recent British example, wherein the awesome power of a large national government had led to a decrease in individual liberties, Jefferson felt that states offered more hope for freedom of conscience than the federal government. Even though some states still maintained traditional church-state ties during Jefferson's presidency, the tide was clearly turning in favor of increased religious liberty.

This rising tide had not yet reached Connecticut, however, and for groups like the Danbury Baptists there was little that could be done to improve their marginal status. Federalism prevented intrusion by the federal government, even to guard rights



listed in the Bill of Rights. Jefferson respected this and, as Dreisbach points out, in his 1808 letter to the Reverend Samuel Miller, Jefferson argued that the Constitution made it clear in the First and Tenth Amendments that "certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, 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."

This last phrase is particularly instructive of Jefferson's views and is indicative of the tension between states' rights and individual liberties. Jefferson could have ended this paragraph by merely acknowledging that authority over religion "must then rest with the states." However, he emphasized the limitations of state power, reminding Reverend Miller that state authority is not absolute in this area. Here, Jefferson implicitly stated that in matters of conscience, authority over religion lies primarily with the individual or with the church. His insistence on this position can be found further on in the same letter.

I do not believe it is for the interest of religion to invite the civil magistrate to direct its exercises, its discipline, or its doctrines; nor of the religious societies, that the General [i.e., federal] Government should be invested with the power of effecting any uniformity of time or matter among them. Fasting and prayer are religious exercises; the enjoining of them an act of discipline. Every religious society has a right to determine for itself the times for these exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it.<sup>100</sup>

In the last phrase of this passage, Jefferson insisted that the Constitution deposited religious authority in the hands of religious societies, whereas earlier in the same letter he had acknowledged state authority as well. An examination of the *entire* Miller letter therefore shows how Jefferson could deftly blend the concepts of both federalism and individual rights in matters of religion.

A similar blending of state and individual religious authority can be found in Jefferson's second inaugural address, to which Dreisbach refers above:

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100. Letter from Thomas Jefferson to the Reverend Samuel Miller (Jan. 23, 1808), in 11 *Writings of Jefferson* at 428, 429 (cited in note 34).

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.

Again, we see that *two* entities could have jurisdiction over religious matters, either “*State or Church* authorities.” Clearly, as in the case of the Danbury Baptists, this model could lead to conflict. In Connecticut, the Baptist Church authorities and their members desired increased liberty and autonomy, but they remained subservient to the state and its established Congregationalist church.

How is the apparent contradiction between Jefferson’s behavior in Virginia and in the White House reconciled with a separationist construction of the “wall of separation” metaphor? Dreisbach argues that Jefferson’s record in Virginia demonstrates that he believed that under federalism states were authorized to advance religion even though it might infringe the religious rights of some individual citizens. Dreisbach concludes that the “wall” in Jefferson’s Danbury letter merely separated the federal government, which was proscribed from action regarding religion, from the states, which retained jurisdiction in religious matters.

In contrast, I argue that Jefferson’s actions in Virginia merely reflect the historical context within which the guarantee of individual liberties was a novel idea. At that time, the concept of true religious liberty had barely been established, and it would have been unrealistic to expect America at the turn of the eighteenth century to quickly and universally embrace it. Additionally, let us not forget that Jefferson was a career politician and, as such, was not unknown to engage in largely political acts.<sup>101</sup> Jefferson’s occasional willingness to employ religion on behalf of the states’ secular interests could be interpreted as a betrayal of his principles. However, I would argue that these acts do little to undermine his overall commitment to religious liberty, and may

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101. For example, note Jefferson’s willingness in Virginia to “cook up” a resolution for fasting, thanksgiving and prayer to advance a political cause. See page 657 above. See also Daniel L. Dreisbach, *Real Threat and Mere Shadow: Religious Liberty and the First Amendment* 107-11 (Crossways Books, 1987).

be interpreted as mere political maneuvering in an era when church and state still maintained their traditionally close ties.

Given Jefferson's commitment to religious liberty, it seems likely that the "wall" in the Danbury letter has more meaning than a simple delineation of federal powers. Rather, Jefferson most likely saw his "wall of separation between Church and State" as the best way to maintain the integrity of religious belief, just as James Burgh had intended his "wall" in *Crito*. That Jefferson would have used the Danbury response as a vehicle for conveying this metaphor is not surprising. As Constance B. Schulz noted, "[a]s President, he had used official responses to citizen petitions as a means of publicly stating important principles" and "making his true political views known."<sup>102</sup>

Jefferson's Virginia record may seem inconsistent with a separationist interpretation of the "wall." However, an examination of the Danbury and Miller letters, as well as his second inaugural address, provides the necessary insight to come to a separationist conclusion. As I have argued above, Jefferson felt strongly that true religious liberty was only possible when individuals could express their beliefs free from government intrusion of any type. His views on this are irrefutable. Still, Jefferson must have recognized that in his time this view was not universally held. Various forms of religious establishment continued, and his contentious election in 1800 provided considerable evidence that complete religious freedom would be slow in coming. Even in Virginia, where the "Statute for Establishing Religious Freedom" was already on the books, political realities occasionally made it necessary to enact legislation contrary to the goals of true religious liberty.

It is within this context of fledgling religious liberty (and *not* with twentieth-century hindsight) that one can explain the conflict between Jefferson's political actions and his "wall of separation." His commitment to the rights of conscience is not compromised by his statements in the Miller letter or second inaugural address that both states *and* individuals (and their churches) retained final jurisdiction over religion. Jefferson was merely acknowledging the present reality: individuals in some states enjoyed greater religious liberty than in others. In New England, state authority over religion was still the norm, while in other states authority over religion was slowly but surely being

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102. Schulz, 91 *Virginia Magazine of History and Biography* at 85 (cited in note 49).

transferred to where, in Jefferson's mind, it belonged—a matter “solely between Man & his God.”

Jefferson rejoiced in this notion that the best way to preserve freedom of conscience was to prevent government collusion with religion. And while he recognized that acceptance of the concept of church-state separation remained incomplete, he saw in the First Amendment an important representation of this goal. Even though the Constitution reserved to the states jurisdiction in this area, the First Amendment was a national symbol of the principle that he held so dear. No wonder Jefferson “contemplate[d] with solemn reverence that act of the whole American people.” The Constitution had erected an enduring symbol of religious liberty—a “wall of separation between Church and State” that James Burgh would have admired. And while under federalism the “wall” had its limitations, its mere presence made a national statement for the importance of religious liberty. In this vein Jefferson looked forward to the “progress” of religious liberty embodied in the First Amendment as he concluded the critical section of his famous Danbury letter.

#### Dreisbach's Conclusions

Whaley has succumbed to the temptation of reading late-twentieth-century values and sensibilities into early-nineteenth-century text. His argument rests precariously on dubious inferences, unsubstantiated speculation, and wishful thinking.<sup>103</sup> He discounts the explicit text of the Danbury letter, as well as Jefferson's unequivocal pronouncements that clearly confirm his jurisdictional construction of the First Amendment. For example, Whaley's most compelling argument, in my judgment, is his observation that Jefferson declined Levi Lincoln's proposed revision which emphasized the jurisdictional reason for not appointing days for religious observance. Whaley assumes that Jefferson eschewed Lincoln's recommendation because he wanted the “wall” to articulate a universal principle of church-state

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103. Whaley argues, it seems to me, that Jefferson's intent is found primarily, not in the final draft of the Danbury letter which Jefferson sent, but in a preliminary draft which he did *not* send. When interpreting a document for the purpose of shaping public policy, it strikes me as problematic to rely on a draft rather than the final version of that document. A common sense rule of interpretation suggests that one rely primarily on the letter sent—the letter that became a part of the public record. I agree that the draft letter gives insight into Jefferson's thinking, but I am unwilling to rely on a draft letter that Jefferson never sent to form the basis of constitutional interpretation or shape public policy. Moreover, Whaley's wishful reading of the preliminary draft notwithstanding, I find that the text of the draft buttresses the jurisdictional interpretation of the “wall.”

separation and not merely a jurisdictional principle. Although this speculation is appealing to the modern, secular mind, it ignores other explanations for Jefferson's decision not to accept Lincoln's proposal—such as a concern that the revised sentence was becoming inartful, unwieldy, and confusing. Moreover, Whaley is insufficiently attentive to Jefferson's Kentucky Resolutions (1798), second inaugural address (1805), and letter to the Reverend Miller (1808) in which Jefferson explicitly embraced the jurisdictional doctrine expressed in Lincoln's revision.<sup>104</sup> The second inaugural address and Miller letter are especially germane since historians report that they addressed concerns identical to those in the Danbury letter. In these documents Jefferson emphasized the jurisdictional principle over a *universal* separationist principle. Whaley presumes to know what Jefferson meant or wanted to communicate, whether or not a plain reading of the Danbury letter supports such a conclusion. Interestingly, in order to preserve Jefferson's strict separationist credentials, Whaley dismisses Jefferson's problematic public record in Virginia pertaining to executive religious proclamations as the actions of an unprincipled "career politician" who found "it necessary [i.e., politically expedient] to enact legislation contrary to the goals of true religious liberty."

This debate is not about what Jefferson might have desired or envisioned for the future, much less about what Whaley would like a "wall of separation" to achieve. Rather, this debate is about the meaning of the "wall of separation" Jefferson erected in his 1802 letter to the Danbury Baptist Association. It is my contention that insofar as the "wall" was a metaphoric representation of the First Amendment, it had no application to church-state relationships in the states. It is thus an acknowledgment of the fundamental constitutional principle of federalism, which was an essential feature of the national Bill of Rights.

Once again, the issue addressed in this article is the meaning Jefferson attached to his "wall" metaphor. I readily concede that Jefferson embraced a separation of the institutions of

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104. When Whaley turns his attention to these documents in his conclusion, he concedes their jurisdictional import; but he adds, in an argument with which I agree, that Jefferson believed religion was, first and foremost, a matter between an individual and his God, and any institutional relationship between religion and the civil state should be limited. In other words, Jefferson believed that matters of religion are presumptively and most appropriately left to the individual and church authorities, and the civil state has only the most limited authority to interfere in religious matters. This is wholly consistent with the jurisdictional interpretation.

church and state in his native Commonwealth. Moreover, he supported a strict, but not absolute, separation principle at the federal level that was more extreme than that endorsed by most of his contemporaries. It does not follow from this, however, that the “wall” erected in the Danbury letter articulated a universal separationist principle that governed church-state relationships at both the national and state levels. Indeed, the text of the letter is clear; the “wall” was a metaphoric construction of the First Amendment which, in Jefferson’s day, was universally understood to apply to the federal government only. Given their respect for state sovereignty, “it cannot reasonably be inferred from Madison’s and Jefferson’s opposition to establishment in the state of Virginia that they supported a federally-imposed requirement of separation of church and state.”<sup>105</sup>

The conventional separationist construction of the “wall,” which Whaley ably defends, is rich with irony. A metaphor that affirmed the principle of federalism has been used to restrict state policy pertaining to religion. Thus Jefferson’s “wall” has been appropriated for purposes diametrically opposite to those for which it was constructed. In the second half of the twentieth century, since the Supreme Court’s landmark ruling in *Everson v. Board of Education*,<sup>106</sup> Jefferson’s metaphor has been coopted by separationist partisans for use in the bitter struggle to redefine church-state relations. (Indeed, I would argue that Whaley defends not Jefferson’s “wall” but the wall erected by Justice Hugo L. Black and his judicial brethren in *Everson*.) Those who have used the metaphor to shape church-state debate and policies in the states have turned Jefferson’s metaphor on its head. To apply Jefferson’s “wall” to state policies achieves the opposite of that which it was designed to accomplish. The First Amendment with its metaphoric “wall” originally prevented the federal government from interfering with state authority over religion.

One can speculate, as does Whaley, about Jefferson’s ulterior motives or secret agenda in using the graphic “wall” metaphor. The text and surviving documentary record, however, are absolutely clear that Jefferson’s “wall” was a metaphoric representation of the *First Amendment*. The historical record also indicates that Jefferson understood that the First Amendment was

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105. Note, 105 Harv. L. Rev. at 1705 (footnote omitted) (cited in note 54).

106. 330 U.S. 1 (1947).

adopted solely as a limitation upon the national government.<sup>107</sup> Thus the “wall” Jefferson erected in the Danbury letter was a First Amendment wall applicable only at the federal level. The text further reveals that Jefferson believed that his “wall,” and hence the First Amendment, separated the institutions of “church” and “state,” rather than separating “religion” from public life. It is not self-evident—the conventional secular, separationist construction of the “wall” notwithstanding—that Jefferson thought his celebrated metaphor expressed a universal, prudential principle of church-state relations.

### Final Thoughts

There is, perhaps, a danger in reading too much into Jefferson's simple, yet powerfully expressive, metaphor. The Danbury letter was written more than a decade after the First Amendment was added to the Constitution, by a man who did not participate in either the Constitutional Convention or the First Congress. The “wall” was neither Jefferson's first nor his last word on the constitutional and prudential relationship between church and state. There is no indication that he thought this figure of speech encapsulated the most salient aspects of his church-state views or was his definitive word on the First Amendment. All this invites the question whether or not it is appropriate for courts and commentators to rely on the metaphor as a supplement to or substitute for constitutional language.

There is little doubt that Jefferson advocated a broad separation between civil and ecclesiastical institutions. Whether or not he deliberately expressed this principle—applicable to all relationships between religion and all agencies and levels of civil government—in his celebrated metaphor is the subject of this debate. Given Jefferson's distrust of the union of church and state and his commitment to an expansive right of conscience for all citizens, Whaley argues that there is every reason to believe that Jefferson desired his “wall of separation” to promote the

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107. See *Abington School District v. Schempp*, 374 U.S. 203, 309-10 (1963) (Stewart, J., dissenting) (“As a matter of history, the First Amendment was adopted solely as a limitation upon the newly created National Government. The events leading to its adoption strongly suggest that the Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments. . . . Each State was left free to go its own way and pursue its own policy with respect to religion. . . . [I]t is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy.”).

“progress of those sentiments” at all levels of civil government—state and nation. To abandon this interpretation of Jefferson’s “wall” would be to disregard the vision of this nation’s most renowned champion of religious liberty, as well as to threaten America’s unparalleled combination of religious protection and pluralism. If, on the other hand, Jefferson’s “wall” is appropriately construed only in the context of constitutional federalism, then Dreisbach suggests we must rethink the propriety of engrafting Jefferson’s metaphor onto the Constitution—rhetorically or doctrinally—as an expression of a prudential and universal principle of church-state relations and religious liberty. The jurisdictional interpretation of the metaphor posits that the “wall” has been substantially misconstrued since Justice Hugo L. Black rescued it from obscurity in *Everson v. Board of Education*. This debate has monumental implications for the legitimacy of past decisions, as well as for the future direction of law, policy, and discourse on church and state in the United States.

Metaphors hold the promise of illuminating ambiguous and complex ideas, of giving insight by way of analogy. They provide new perspective, and often help to visualize or amplify difficult concepts. There are also limitations to metaphors, especially in the law. “It is one of the misfortunes of the law,” Justice Oliver Wendell Holmes observed, “that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.”<sup>108</sup> Figures of speech designed to simplify and clarify thought end often by trivializing or enslaving it. Therefore, as Justice Benjamin Cardozo counseled, “[m]etaphors in law are to be narrowly watched.”<sup>109</sup> Whether one believes Jefferson’s “wall” is substantive or jurisdictional, whether one believes it informs or distorts church-state debate, given its pervasive and continuing influence on American church-state law and discourse, the metaphor’s meaning merits frequent reference and reexamination.

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108. *Hyde v. United States*, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting).

109. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926). See also Ronald F. Thiemann, *Religion in Public Life: A Dilemma for Democracy* 42-43 (Georgetown U. Press, 1996) (“Principles derived from metaphors have the advantage of capturing with vividness and felicity the essential elements of a complicated situation. They have the distinct disadvantage, however, of encouraging simplicity instead of precise analysis or fostering caricature when detailed portraiture is needed.”).