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Craig B. Mousin

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# SYMPOSIUM

## CONFRONTING THE WALL OF SEPARATION: A NEW DIALOGUE BETWEEN LAW AND RELIGION ON THE MEANING OF THE FIRST AMENDMENT

*Craig B. Mousin\**

Thomas Jefferson's enduring metaphor describing the religion clauses of the First Amendment<sup>1</sup> set the foundation for the long-standing "wall of separation between church and State."<sup>2</sup> In the Bicentennial Year of the ratification of the Bill of Rights, the DePaul University College of Law Center for Church/State Studies convened a two-day conference to examine the underpinnings of that metaphor, evaluate its continued validity as a source of constitutional jurisprudence, and explore other metaphors for understanding the relationship between religion and government.<sup>3</sup> The metaphor of the wall has separated more than just church and state. In addition, the wall has been employed to justify separating the discourse between religion and the law, dividing individual responses into public and private segments, and concretizing perceptions of the state and religion in our nation. Although much has been written on church and state within the United States, the disciples of law and religion

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\* Executive Director, Center for Church/State Studies at DePaul University College of Law. Professor Mousin is also an ordained minister at the Wellington Avenue United Church of Christ.

1. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

2. ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* 112 (1990) (quoting Thomas Jefferson, Reply to the Danbury Baptist Association (Jan. 1, 1802), in 8 *THE WRITINGS OF THOMAS JEFFERSON* 113-14 (H. Washington ed., 1853)).

3. The DePaul University College of Law Center for Church/State Studies sponsored the Conference in Chicago on December 6 and 7, 1991. The Conference would not have been possible without the encouragement and contributions of the Center's Friends and Supporters and funding support from the University Research Council of DePaul University. Thanks and recognition are also due to Thomas C. Berg, Amy Cranford, Patty Gerstenblith, Robin Lovin, and William P. Marshall for their assistance in planning and implementing the Conference.

have often labored in separate vineyards when describing that relationship of religion and government. Consequently, the spheres of law and religion have often developed distinct understandings of the relationship between religion and the state, often to the detriment of both. Although courts have struggled with whether the wall should block all influence of church and state on each other, or permit some joint involvement in public life, the decisions in the courthouse frequently failed to understand the reality within the house of worship. Supreme Court cases and their interpretation in the lower courts, moreover, record the government's understanding of the relationship with religion. Thus, the official record remains skewed in favor of the state's analysis.

Recognizing that much of constitutional jurisprudence and scholarly work on the First Amendment has been dominated by legal scholars and judges, the Conference sought to provide a forum for scholars of both religion and law to engage in a new dialogue. By gathering scholars from both sides of the wall, the Conference intended to encourage and enrich the dialogue between church and state, question old assumptions, and expose representatives of each side to the language and theories of those encamped on the other side of the wall. Although theological and legal language may differ, the reality that religion exists within society necessitates that shared concerns must be addressed. Different approaches may shed new insights into old debates.

Sallie McFague, for example, notes that religious language runs the risk of becoming both idolatrous and irrelevant.<sup>4</sup> Idolatrous freezing of language into authoritative and literal images often excludes persons from access while diminishing the power of the initial metaphor.<sup>5</sup> Frequent repetition without a full understanding of the context of the metaphor, however, leads to irrelevance.<sup>6</sup> For McFague, to avoid the twin problems of idolatry and irrelevance, metaphorical language must be interpreted within "the relativity and plurality of the interpretive context."<sup>7</sup>

Metaphorical language has posed the same problem for the courts. The first time the Supreme Court cited Jefferson's metaphor,

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4. SALLIE MCFAGUE, *METAPHORICAL THEOLOGY: MODELS OF GOD IN RELIGIOUS LANGUAGE* 2 (1982).

5. *Id.* at 4-7.

6. *Id.* at 7-10.

7. *Id.* at 3.

Chief Justice Waite stated that Jefferson's wall "may be accepted almost as an authoritative declaration of the scope and effect of the amendment . . . ."<sup>8</sup> In the hundred years following that decision, the wall has remained remarkably resilient, echoing, however, some of McFague's concerns about the consequences of idolatry. Not only has it served as a template for Establishment Clause decisions since 1947, it has become the starting point for judicial and public understanding of the complexity of the relationship between government and religion.<sup>9</sup>

Justice Rehnquist's dissent in *Wallace v. Jaffree*<sup>10</sup> parallels McFague's problem with irrelevant metaphorical language in his critique of the wall's relevance:

But the greatest injury of the "wall" notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. The "crucible of litigation," is well adapted to adjudicating factual disputes on the basis of testimony presented in court, but no amount of repetition of historical errors in judicial opinions can make the errors true. The "wall of separation between church and State" is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.<sup>11</sup>

Changing historical context and loss of original meaning have led others to question the relevance of the wall for contemporary society.

To provide the interpretive context necessary to avoid both idolatry and irrelevance for the wall of separation, the Conference gathered both legal and religious scholars for a discussion on the continued validity or abandonment of the metaphor of the wall of separation. By disassembling the barrier that for too long has obstructed discourse on important issues of religion and government, the Conference further sought to address the wall's continuing vital-

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8. *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

9. In *Lee v. Weisman*, 112 S. Ct. 2649 (1992), decided subsequent to the Conference, Justice Blackmun again cited Jefferson's wall of separation in his concurrence to support his observation that the Court's jurisprudence on the Establishment Clause had distilled one clear understanding. *Id.* at 2662. The utility of the metaphor, both in court cases and in the popular culture remains strong. Its exact meaning and the intent are somewhat more circumspect. Gallup polls in 1988 reveal that 79% of Americans support the principle of separation of church and state. In a separate poll, however, Gallup also reported that of those who were aware that a constitutional amendment had been proposed to permit prayer in public schools, 68% favored the amendment. GEORGE GALLUP, JR. & SARAH JONES, 100 QUESTIONS & ANSWERS: RELIGION IN AMERICA 134-37 (1989).

10. 472 U.S. 38 (1985).

11. *Id.* at 107 (Rehnquist, J., dissenting) (citation omitted).

ity for both religion in the United States and constitutional jurisprudence.

To fully understand the power of the metaphor, however, one must recognize that it has separated more than just the discourse between law and religion. Part of its sustaining strength has been its ability to separate spheres of action within our society. Under that philosophical divide, political decisions and decisive action belong within the state's bailiwick; private belief and conscience should remain on their side of the wall. Jefferson distinguished between conscience and works in behalf of that conscience. Although courts and scholars most frequently quote the one phrase in the Danbury Baptist letter that generates the wall metaphor, the full quote reveals the significance Jefferson placed on separating conscience and action:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative 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 separation between church and State. 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.<sup>12</sup>

The Supreme Court seized Jefferson's modification of the impregnability of the wall to separate and distinguish types of free exercise claims. In denying Mr. Reynolds's free exercise claim, the Supreme Court emphasized that "Congress was denied of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."<sup>13</sup> Over a century later in *Employment Division v. Smith*,<sup>14</sup> the Court presented scant historical evidence that the good order of the state had been sabotaged by conscience; nevertheless, the Court concluded that to accept a test that permitted exceptions to laws for "all actions thought to be religiously commanded" would be "courting anar-

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12. ADAMS & EMMERICH, *supra* note 2, at 112 (quoting Thomas Jefferson, Reply to the Danbury Baptist Association (Jan. 1, 1802)).

13. *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

14. 494 U.S. 872 (1990).

chy."<sup>15</sup> By separating conscience from action, the metaphor has helped limit religion to the private sphere.

Former Chief Justice Waite in his *Reynolds* opinion implicitly raised a further barrier separating law and religion that sustains the distinction between church and state and remains unchallenged if religion commentators have less than equal access to the discourse. In noting Jefferson's role as an advocate for the Bill of Rights and the authoritative effect of his role within the formation of the Constitution and the Bill of Rights,<sup>16</sup> Waite substantiated Jefferson's view of the state's primacy in the relationship controlled by this metaphor. Significantly, the First Amendment limits congressional action over religion, and since incorporation through the Fourteenth Amendment, state action as well. Religion enters the public discourse voluntarily when its members participate in society, but as Michael McConnell points out, different religious groups will decide theologically and ecclesiologically whether to participate or remain apart from culture.<sup>17</sup> Some will argue for the sovereignty of religion and belief over the demands of the state,<sup>18</sup> yet the Supreme Court's acceptance of Jefferson's logic leaves them little alternative. For those religious persons who seek to influence society, the wall becomes the initial obstructing involvement. For those who seek to remain apart from culture, the primacy of that state requires obedience to the general laws of society in maintaining the state's order notwithstanding religious objection to them. The variety of religious experience within this nation suggests, however, that mere appeals to the wall of separation will fail to resolve these questions.

McFague stresses that religious language can be simultaneously idolatrous and irrelevant.<sup>19</sup> This constitutional metaphor has faced the same fate. In addition to Chief Justice Rehnquist's attack on the irrelevance of the metaphor, others recognize some of the cracks in its ability to withstand the historical changes our nation has experienced since the ratification of the First Amendment. John Wilson

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15. *Id.* at 888 (holding that neutral laws of general applicability can withstand free exercise claims seeking judicially established exemptions from the law).

16. *Reynolds*, 98 U.S. at 164.

17. See Michael W. McConnell, *Christ, Culture, and Courts: A Niebuhrian Examination of First Amendment Jurisprudence*, 42 DEPAUL L. REV. 191 (1992).

18. Compare, for example, McConnell's reference to James Madison's belief that religion is "exempt from the authority of the Society at large" to Jefferson's restriction on action. *Id.* at 192 n.7.

19. MCFAGUE, *supra* note 4, at 2.

argues that the crumbling of the Protestant hegemony places interpretation of the religion clauses in a completely different context than when they were drafted.<sup>20</sup> Wilson also points out that when Christianity dominated the culture, the issue of legal separation was less critical, and therefore, not challenged.<sup>21</sup> As hegemonic influence waned, the consequences of the separation became more dramatic and called into question the relevance of the wall in a pluralistic society.<sup>22</sup> Moreover, the expanding role of government in citizens' lives contrasts with the earliest days of the Republic. For many, the reality of government action in their lives makes the wall's separation an unfair restriction on religious participation in public life.

Given the twin challenge to current understandings of church and state, the Conference marked a timely moment to re-examine the wall's continued relevance. Marking two hundred years of the First Amendment's impact on this particular democracy, it also fell after the Supreme Court's *Employment Division v. Smith*<sup>23</sup> decision and the initial ramifications of a new Free Exercise Clause test announced therein and before the Court ruled on the challenge to the Establishment Clause test in *Lee v. Weisman*.<sup>24</sup> The significant challenges to the constitutional tests recently made in *Smith* and *Lee* as well as the current efforts to enact the Religious Freedom Restoration Act<sup>25</sup> made it appropriate to bring together both sides in this dialogue.

Three main papers were presented on the first day of the Conference to provide a foundation for that interpretive context of the Conference. Recognizing that judicial pronouncements on the proper relation of religion and society have often unfairly emphasized the state's side of the wall, the Conference first discussed the historical perspective of religion's views of the law of church and state. James Washington opened the session with an analysis of the transformation of the role of conscience since the drafting of the

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20. John F. Wilson, *Religion, Political Culture, and the Law*, 41 DEPAUL L. REV. 821, 823 (1992). See also ROBERT T. HANDY, UNDERMINED ESTABLISHMENT: CHURCH-STATE RELATIONS IN AMERICA 1880-1920 (1991) (arguing that increasing governmental and religious complexity and growth of the immigrant population make the terms church and state less descriptive of the realities in America and fail to express the change in the culture from a Protestant one to a less Christian-centered culture).

21. Wilson, *supra* note 20, at 831-32.

22. *Id.* at 835.

23. 494 U.S. 872 (1990).

24. 112 S. Ct. 2649 (1992).

25. H.R. 5377, 101st Cong., 2d Sess. (1990).

First Amendment.<sup>26</sup> Finding that the cultural understanding of the role of conscience in society and the individual changed dramatically with the loss of the sacred understanding of conscience, Washington points out that the evisceration of conscience prevented its ability to call the state into question when both the law and culture supported, for example, slavery, wars, or, in some cases, implicitly condoned the killing fields of the twentieth century.<sup>27</sup> While some theologians have raised the question of how one practices theology after the Holocaust,<sup>28</sup> Washington poses the equally disturbing dilemma of how one now approaches church-state relations given this century's disregard for life from the Holocaust to the gulags, death camps, and death squads.<sup>29</sup> Washington calls for a renewed commitment to the "sanctity of the body" as a necessary element of conscience.<sup>30</sup> Otherwise, even if the Court accepts Jefferson's assurances that "the supreme will of the nation in behalf of the rights of conscience"<sup>31</sup> protects religious liberty, the protection becomes a meaningless gesture. Douglas Sturm<sup>32</sup> and Mark Fackler<sup>33</sup> offer alternative religious perspectives on conscience, while Cole Durham<sup>34</sup> and Laura Underkuffler<sup>35</sup> approach Washington's notion of conscience from the law's perspective.

Stanley Hauerwas and Michael Baxter's contemporary perspective of religion's views of the law of church and state also emphasizes the role of conscience.<sup>36</sup> For Hauerwas and Baxter, however, the legal debate regarding the relationship between church and state

26. See James M. Washington, *The Crisis in the Sanctity of Conscience in American Jurisprudence*, 42 DEPAUL L. REV. 11 (1992).

27. *Id.*

28. See, e.g., EMIL L. FACKENHEIM, *GOD'S PRESENCE IN HISTORY: JEWISH AFFIRMATIONS AND PHILOSOPHICAL REFLECTIONS* (1970); PAUL M. VAN BUREN, *A THEOLOGY OF THE JEWISH-CHRISTIAN REALITY, PART 3: CHRIST IN CONTEXT* 156-82 (1988); Gordon Legge, *Spiritual Withering Affects More than Christians*, CALGARY HERALD, Apr. 18, 1992, at G1.

29. Washington, *supra* note 26.

30. *Id.* at 24.

31. Thomas Jefferson, Reply to the Danbury Baptist Association (Jan. 1, 1802), in 8 *THE WRITINGS OF THOMAS JEFFERSON* 113-14 (H. Washington ed., 1853)).

32. See Douglas Sturm, *Repentance, Constitutionalism, and Sacrality*, 42 DEPAUL L. REV. 61 (1992).

33. See Mark Fackler, *Christian Voices in the Public Square*, 42 DEPAUL L. REV. 89 (1992).

34. See W. Cole Durham, Jr., *Religious Liberty and the Call of Conscience*, 42 DEPAUL L. REV. 71 (1992).

35. See Laura S. Underkuffler, *Individual Conscience and the Law*, 42 DEPAUL L. REV. 93 (1992).

36. See Stanley Hauerwas & Michael Baxter, C.S.C., *The Kingship of Christ: Why Freedom of "Belief" Is Not Enough*, 42 DEPAUL L. REV. 107 (1992).



is irrelevant as Christians owe total allegiance to the Kingdom of Christ and any attempt to compromise that by the elusive elixir of balancing between the loyalties of state and church leads to a privatized conscience and a meaningless Christianity. Freedom of conscience, by itself, hurts religion more than it helps if it only protects beliefs that do not count or threaten the primacy of the state. Michael Dyson,<sup>37</sup> Bryan Hehir,<sup>38</sup> and Charles Strain<sup>39</sup> challenge Hauerwas and Baxter's view of the relationship between state and church arguing that Hauerwas and Baxter do not speak for all Christians, let alone all people of faith. They relate the diverse experiences of other faithful communities in reacting to the conflicting loyalties of society and faith. John Garvey discusses some constitutional issues raised by the Hauerwas and Baxter position.<sup>40</sup> Frederick Gedicks responds with both a legal analysis as well as a powerful personal testimony of how the Church of Jesus Christ of Latter-Day Saints reacted to the Supreme Court's rulings against the United States.<sup>41</sup>

Finally, Michael McConnell examines how the law, through its Supreme Court decisions, has defined the role of religion in society.<sup>42</sup> McConnell relies on H. Richard Niebuhr's taxonomy in *Christ and Culture*<sup>43</sup> to analyze how the law has protected or punished those different religious communities.<sup>44</sup> Asserting that the Court has issued different decisions based on, for example, its perceptions that the "Church" was "Aligned with Culture" or in "Conflict with Culture" or "Apart from Culture," McConnell notes that whenever conscience moved to action that threatened the state, the state, through its courts, prevailed.<sup>45</sup> Ira Lupu<sup>46</sup> and Mark Tushnet<sup>47</sup> challenge both the diversity of the religious response of

37. See Michael Eric Dyson, "God Almighty Has Spoken from Washington, D.C.": *American Society and Christian Faith*, 42 DEPAUL L. REV. 129 (1992).

38. See J. Bryan Hehir, *Church-State and Church-World*, 42 DEPAUL L. REV. 175 (1992).

39. See Charles R. Strain, *Religious Freedom and the Cultural Captivity of Religion in America: An Argument for Religious Pluralism*, 42 DEPAUL L. REV. 181 (1992).

40. See John H. Garvey, *Hauerwas on Religious Freedom*, 42 DEPAUL L. REV. 161 (1992).

41. See Frederick Mark Gedicks, *The Integrity of Survival: A Mormon Response to Stanley Hauerwas*, 42 DEPAUL L. REV. 167 (1992).

42. See McConnell, *supra* note 17.

43. H. RICHARD NIEBUHR, *CHRIST AND CULTURE* (1951).

44. McConnell, *supra* note 17.

45. *Id.*

46. See Ira C. Lupu, *Models of Church-State Interaction and the Strategy of the Religion Clauses*, 42 DEPAUL L. REV. 223 (1992).

47. See Mark V. Tushnet, *Disaggregating "Church" and "Culture"*, 42 DEPAUL L. REV. 235

the Niebuhrian scheme and its helpfulness in a nation governed by the Constitution.

Given the foundation of the discussions that resulted from these presentations, the second day of the conference focused on Free Exercise Clause and Establishment Clause issues. Again following the format of a mixed panel of religion and legal scholars, the first panel inquired into whether the First Amendment is hostile to religion. Edward Gaffney,<sup>48</sup> Gerard Bradley,<sup>49</sup> William Marshall,<sup>50</sup> and Jeffrey Shaman<sup>51</sup> discuss different schools of thought regarding free exercise jurisprudence while Robin Lovin<sup>52</sup> offers a perspective on human freedom that calls into question the efficacy of relying on traditional judicial understandings of religious freedom. The second panel examines whether the United States still needs an Establishment Clause. In keeping with the purpose of expanding the interpretive context of these two clauses, Susan Gilles<sup>53</sup> and Richard Kay<sup>54</sup> provide a comparative analysis of the Canadian and British experiences in democratic societies with established churches. Daniel Conkle<sup>55</sup> and Douglas Laycock<sup>56</sup> compare the American experience under its Establishment Clause.

Finally, a word about format. To engage in this new dialogue, the intent of the planners of the Conference was to encourage new perspectives on the relationship of religion and government. By facilitating dialogue through a reduced emphasis on prepared papers, it was hoped that the language and theories of the different disciplines would provide the interpretive context necessary to fully examine the separation of state and church. In keeping with that format, we

(1992).

48. See Edward McGlynn Gaffney, Jr., *Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263 (1992).

49. See Gerard V. Bradley, *Protecting Religious Liberty: Judicial and Legislative Responsibilities*, 42 DEPAUL L. REV. 253 (1992).

50. See William P. Marshall, *Is the Constitutional Concern with Religious Involvement in the Public Square Hostility?*, 42 DEPAUL L. REV. 305 (1992).

51. See Jeffrey M. Shaman, *Is Constitutional Jurisprudence Hostile to Religion?*, 42 DEPAUL L. REV. 317 (1992).

52. See Robin Lovin, *What Kind of Freedom Does Religion Need?*, 42 DEPAUL L. REV. 311 (1992).

53. See Susan M. Gilles, "Worldly Corruptions" and "Ecclesiastical Depredations": *How Bad Is an Established Church?*, 42 DEPAUL L. REV. 349 (1992).

54. See Richard S. Kay, *The Canadian Constitution and the Dangers of Establishment*, 42 DEPAUL L. REV. 361 (1992).

55. See Daniel O. Conkle, *God Loveth Adverbs*, 42 DEPAUL L. REV. 339 (1992).

56. See Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373 (1992).

have published most of these presentations, adding footnotes and the necessary editing of the oral presentations. Some of the participants, however, have responded to the issues raised at the Conference and requested that we include their expanded comments in this issue. We have noted those papers where appropriate. Similarly, the Conference participants were encouraged to engage panelists in discussion following the presentations. Accordingly, we have attempted to incorporate some of the conversations that followed the initial presentations in an informal manner to capture the full flavor of the dialogues started by our main panelists. Moreover, questions and discussions would often build upon discussions from previous panels.

The plurality of opinions follow. We trust you will find them a helpful companion in seeking understanding of the First Amendment. Not unsurprisingly, debates focused as much on differences of opinion within religious understandings and legal doctrines as between law and religion. Nevertheless, the participants also posed new questions for all scholars of church and state in our society. We do not presume that all beliefs or disciplines could have been covered in this two-day conference. Indeed, this should start rather than conclude this dialogue. But the necessity to continue this discussion between disciplines is recognized in Robin Lovin's concluding comment that our society will continue to struggle with the appropriate relationship between government and religion "unless we can come up with a legal conception of human freedom and its social context that is adequate to contemporary religious and philosophical understandings of persons and their communities."<sup>57</sup>

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57. Lovin, *supra* note 52, at 316.