Wallace v. Jaffree (1985)

Is It Constitutional Now? How About Now? Or Now?

Three Big Things:

1. After it became clear that state-sponsored prayer was no longer a realistic option in public education, states began experimenting with the idea of a "moment of silence" during which students *could* pray (although no one had ever suggested that they couldn't).

2. Alabama, in particular, kept nudging the idea forward – first it was a "moment of silence," then a moment in which students might choose to pray, then teachers leading students in "voluntary" prayer, etc.

3. Along the way, one federal judge acknowledged that this was akin to "establishing a state religion," but determined that was perfectly fine because states could do that. The Supreme Court agreed with the first part of that decision. They did not go along with the second.

~~~~~~

Background

In *Stone v. Graham* (1980), the Court shot down the required posting of the Ten Commandments in public school classrooms. In case anyone had wondered, the Constitution still frowned on pushing religion via the public education system.

But then Reagan took office, and a conservative revolution of sorts swept the nation. At the risk of overdramatizing, the Reagan Era wasn't just a presidential administration. As President, he championed a sort of American Exceptionalism marinated in Book-of-Revelation Sauce. The passion and righteous zeal of his adherents at times pre-empted reason, law, or precedent. It was a social movement as much as a political shift, comparable to Kennedy's "Camelot" in impact but quite distinct in its flavor. Evangelicals were emboldened while the media and courts were demonized. Liberals weren't just political opponents, but America's enemies – both deceptive and deceived.

It was in this climate that Alabama decided that American Christianity could simply no longer survive without their assistance. It was time to make a statement and test the limits of this silly "wall of separation." If their righteous fury just happened to appeal to a widely conservative voting base, well… thy will be done.

A Moment Of (Insert Options Here)

In 1978, Alabama passed legislation calling for a "moment of silence" at the start of each school day to allow "for meditation." They weren't alone. Many states had instituted some variety of the "moment of silence" after *Engel v. Vitale* (1962) and *Abington v. Schempp* (1963) had made it quite clear that overt theological indoctrination or proselytization by representatives of the State were a big "no-no" during the school day.

The "moment of silence" was thus a symbolic move as much as anything. Few non-politicians would argue that taking 5 – 7 seconds (or even the full minute required by some versions) to sit in awkward silence has a measurable impact on students' mindsets or willingness to learn. Students, of course, had never lost the right to pray whenever and wherever they chose, so long as they did not willfully disrupt classes or become overly aggressive towards the uncooperative. (In other words, they were expected to be better behaved than their political leaders.)
~~~~~~

What the "moment of silence" allowed legislatures to do, however, was to step right up to the line of church-state separation and dare the courts to do something about it. Legislators sponsoring these bills often said as much from the floor, dropping subtle little hints like, "We're doing this because we want to get prayer back into public schools and we dare the courts to do anything about it."

This reality alone would have been enough to kill any chance of proposed legislation surviving the "Lemon Test," the first stage of which was that legislation must have a valid secular purpose. It's possible none of them knew this, but it seems more likely they simply had ulterior motives for pushing the issue anyway. In Alabama, at least, that's exactly what they did.

After a few years of a "moment of silence" went by without recorded difficulty, Alabama took things a step further. In 1981, the state legislature updated the statute so that the moment of silence would be presented each day as a time "for mediation and voluntary prayer." Their momentum building, they upped their game yet again in 1982 and instructed teachers to lead "willing students" in a state-written prayer.

That part, not surprisingly, finally triggered the anticipated backlash.

Pray Or Be Prey

Ishmael Jaffree had three kids in Mobile County Public Schools – two in second grade and one in kindergarten. He protested the state-designed prayer, starting at the building level, but to no avail. Although he had plenty of established case law on his side, he didn't initially focus on the abstract constitutional issues in play. Jaffree's primary concern was that his kindergartener was being targeted by other kids for not participating in the prayers. His five-year-old was essentially bullied for not falling into line with state-mandated religious activities, and teachers refused to do much to stop it.

He wasn't alone. In a similar case going on in West Virginia at the same time, a Jewish student was challenged by peers for quietly reading during the "moment of silence." He needed to pray, they told him, or he'd "go to hell with the rest of the Jews."

Yes, the prayer was technically voluntary – but as anyone in education knows, "voluntary" can mean many different things. As had been demonstrated a generation before when young Jehovah's Witnesses quietly refused to pledge their allegiance to the American flag, it matters whether such choices are defended by those in power. There will always be those who hurt others verbally, physically, or otherwise for not sharing their nationalism or their faith, but there will be far more hurting going on when those in the minority are "otherized" by the State (at any level) because of their beliefs.

Establishing A State Religion

In an interesting wrinkle, the federal district judge who heard this case as it worked its way through the system chose to ignore precedent and acknowledge that while, yes, Alabama was in effect "establishing" a state religion, they were perfectly within their rights to do so. While the federal government was constrained by the First Amendment, the states were not. "Alabama has the power to establish a State religion if it chooses to do so," he explained. He even had a few pages of convoluted historical analysis to back this up.

Needless to say, that one caught everyone on both sides pretty much off guard. The decision was quickly reversed by the 11th Circuit Court of Appeals, and the case – not surprisingly – eventually ended up in the Supreme Court. It had already been determined in the lower courts that the first version of the law – the "moment of silence" from 1978 – was constitutionally acceptable. Since no one was disputing that, the Supreme Court acknowledged then ignored it. The Court of Appeals had already declared both the second and third versions of the law unconstitutional based on having no legitimate secular purpose. The Supreme

Court accepted without debate that determination regarding version three – where teaches led willing students in a "voluntary" prayer.

What remained to be determined, however, was that middle version – the one about "voluntary meditation or prayer." Was this establishment, or would shutting it down be a violation of free exercise?

The Decision

The Court determined 6 – 3 that Alabama, in their 1981 version of the "moment of silence" law, had violated the Establishment Clause of the First Amendment as applied to the states via the Fourteenth. They cited testimony from the lawmaker sponsoring the bill, who was – to his credit – upfront about its purpose. Because the changes implemented in 1981 clearly had no valid secular purpose, as required by the "Lemon Test," the law was unconstitutional.

Justice Sandra Day O'Connor wrote an interesting concurring opinion, supported (but not officially joined) by Justice Lewis F. Powell in his own. O'Connor began by reminding everyone of a fact often lost in the political rhetoric: nothing decided by the Court in any way limited the rights of students to pray individually or collectively at school or anywhere else, so long as they were not overly disruptive to the school day. She used the rest of her concurrence to address two facets of *Wallace* she believed required a little jurisprudential elaboration. In her own words:

> *I write separately to identify the peculiar features of the Alabama law that render it invalid, and to explain why moment of silence laws in other States do not necessarily manifest the same infirmity. I also write to explain why neither history nor the Free Exercise Clause of the First Amendment validates the Alabama law struck down by the Court today.*

Her historical analysis is interesting enough. Along the way she defends the continued use of the "Lemon Test" while suggesting perhaps it would benefit from some polishing or updating to help maintain its usefulness.

The more relevant part for states and districts post-Wallace, however, is her discussion of similar "moment of silence" laws which may share the goals and even the verbiage of Alabama's but not its background. In other words, how would this statute – or something very similar – fare if passed without being preceded by the announcement it was intended to be evangelical and almost immediately followed by an "oh just pray with them already!" update? The short version was that they'd probably be fine if they simply avoided being quite so transparent about their religious goals.

While O'Connor expressed confidence the Court could tell the difference between sincere efforts at secular legislation and thinly veiled movements towards state-sponsorship of religion, it's not much of a leap to infer that the real lesson was that politicians should be a bit less forthcoming about their motivations for this sort of legislation. In short, Alabama had simply made it too obvious what they were trying to do.

Dissents

Each of the three dissenting justices wrote a separate opinion. Justice White's is brief and not particularly enlightening. The other two, however, are both scathing and poignant. As the balance of power in the nation's highest court continues to shift, it's quite possible they'll find new life in 21st century jurisprudence. It's not inconceivable they could soon represent the majority view rather than the outraged minority.

Chief Justice Warren Burger primarily disagreed with the idea that the option of voluntarily praying during a moment of silence qualified as government coercion towards religion. He cited other examples of times

religion appeared in government functions without great trauma. Burger was particularly unimpressed by the Court's citations of the law's sponsor as proof it lacked a valid secular purpose.

Burger pointed out that the comments came after the bill's passage and were accompanied by an assertion by the same legislator that he simply wanted to make the point that students had every right to pray in school if they so chose. Most significantly, in Burger's mind, there was no evidence that the comments of one legislator after-the-fact in any way reflected the reasoning of the majority who'd voted to support the legislation in the first place.

Finally, for good measure, he mocks the Court's use of the "Lemon Test," calling it a "naive preoccupation with an easy, bright-line approach for addressing constitutional issues." In short, Burger thinks the majority's reasoning is absurd and their reactions completely out of proportion to circumstances, and he's not shy about explaining precisely why.

Justice William Rehnquist (who will eventually become Chief Justice) takes an entirely different approach. His dissent undercuts the validity of the "wall of separation" imagery as an accurate representation of the goal of the First Amendment's religion clauses to begin with. Most of his dissent is taken up in extended historical analysis of the origins of the Amendment and how very much NOT THERE Jefferson was the entire time. He also cites multiple examples from early American history in which the same men who wrote and ratified the First Amendment clearly didn't seem to think it prohibited the federal government from proclaiming days of prayer or thanksgiving or otherwise acknowledging the role of the Almighty in their affairs.

It's a pretty impressive historical case.

In short, Rehnquist prefers Madison's approach to the "establishment" and "free exercise" clauses – protections from official government religions mandating one flavor of Protestantism over another and severely restricting private religious behavior. The idea that any sort of "wall" – metaphorical or otherwise – was ever intended to be erected between church and state was absurd, according to Rehnquist.

Aftermath

Many other states had similar laws on the books, and others have added them since, without serious constitutional challenge. A "moment of silence" is fine in public schools, as long as there's no overtly expressed pressure to pray. There's little to indicate that the 5 – 7 seconds of awkward silence typically beginning morning announcements actually accomplish anything in terms of mentally or emotionally preparing students for the school day, but *effectiveness* is not part of the "Lemon Test." All it takes is a plausible assertion of valid secular goals.

Calm, focused students fit that requirement.

Excerpts from *Wallace v. Jaffree* (1985), Majority Opinion by Justice John Paul Stevens

{Edited for Readability}

As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience. Until the Fourteenth Amendment was added to the Constitution, the First Amendment's restraints on the exercise of federal power simply did not apply to the States. But when the Constitution was amended to prohibit any State from depriving any person of liberty without due process of law, that Amendment imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power. This Court has confirmed and endorsed this elementary proposition of law time and time again...

Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time, it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.

This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects -- or even intolerance among “religions” -- to encompass intolerance of the disbeliever and the uncertain. As Justice Jackson eloquently stated in *West Virginia Board of Education v. Barnette* (1943):

> *If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.*

The State of Alabama, no less than the Congress of the United States, must respect that basic truth...

When the Court has been called upon to construe the breadth of the Establishment Clause, it has examined the criteria developed over a period of many years. Thus, in *Lemon v. Kurtzman* (1971), we wrote:

> *Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion* (Board of Education v. Allen, 1968*); finally, the statute must not foster "an excessive government entanglement with religion"* (Walz v. Tax Comm'n, 1970).

It is the first of these three criteria that is most plainly implicated by this case. As the District Court correctly recognized, no consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose...

The unrebutted evidence of legislative intent contained in the legislative record and in the testimony of the sponsor of {this legislation} is confirmed by a consideration of the relationship between this statute and the two other measures that were considered in this case. The District Court found that the 1981 statute

and its 1982 sequel had a common, non-secular purpose. The wholly religious character of the later enactment is plainly evident from its text. When the differences between {the 1981 version} and its 1978 predecessor are examined, it is equally clear that the 1981 statute has the same wholly religious character…

The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day. The 1978 statute already protected that right, containing nothing that prevented any student from engaging in voluntary prayer during a silent minute of meditation. Appellants have not identified any secular purpose that was not fully served by {the original 1978 legislation} before the enactment of {the 1981 changes}. Thus, only two conclusions are consistent with the {newer} text: (1) the statute was enacted to convey a message of state endorsement and promotion of prayer; or (2) the statute was enacted for no purpose. No one suggests that the statute was nothing but a meaningless or irrational act.

We must, therefore, conclude that the Alabama Legislature… enacted {their 1981 updates to the "moment of silence" law}… for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day. The addition of "or voluntary prayer" indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion.

Excerpts from *Wallace v. Jaffree* (1985), Dissenting Opinion by Chief Justice Warren Burger

{Edited for Readability}

I make several points about today's curious holding.

(a) It makes no sense to say that Alabama has "endorsed prayer" by merely enacting a new statute "to specify expressly that voluntary prayer is one of the authorized activities during a moment of silence" ... To suggest that a moment-of-silence statute that includes the word "prayer" unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality, but hostility, toward religion. For decades, our opinions have stated that hostility toward any religion or toward all religions is as much forbidden by the Constitution as is an official establishment of religion... Today's decision recalls the observations of Justice Goldberg:

> *[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive dedication to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.*
>
> *Abington School District v. Schempp* (1963) (concurring opinion).

(b) The inexplicable aspect of the foregoing opinions, however, is what they advance as support for the holding concerning the purpose of the Alabama Legislature. Rather than determining legislative purpose from the face of the statute as a whole, the opinions rely on three factors in concluding that the Alabama Legislature had a "wholly religious" purpose for enacting the statute under review: (i) statements of the statute's sponsor, (ii) admissions in Governor James' answer to the second amended complaint, and (iii) the difference between {the law} and its predecessor statute.

Curiously, the opinions do not mention that all of the sponsor's statements relied upon -- including the statement "inserted" into the Senate Journal -- were made after the legislature had passed the statute; indeed, the testimony that the Court finds critical was given well over a year after the statute was enacted. As even the appellees concede... there is not a shred of evidence that the legislature as a whole shared the sponsor's motive or that a majority in either house was even aware of the sponsor's view of the bill when it was passed. The sole relevance of the sponsor's statements, therefore, is that they reflect the personal, subjective motives of a single legislator. No case in the 195-year history of this Court supports the disconcerting idea that post-enactment statements by individual legislators are relevant in determining the constitutionality of legislation.

Even if an individual legislator's after-the-fact statements could rationally be considered relevant, all of the opinions fail to mention that the sponsor also testified that one of his purposes in drafting and sponsoring the moment-of-silence bill was to clear up a widespread misunderstanding that a schoolchild is legally prohibited from engaging in silent, individual prayer once he steps inside a public school building... That testimony is at least as important as the statements the Court relies upon, and surely that testimony manifests a permissible purpose....

The several preceding opinions conclude that the principal difference between {the law being considered} and its predecessor statute proves that the sole purpose behind the inclusion of the phrase "or voluntary prayer"... was to endorse and promote prayer. This reasoning is simply a subtle way of focusing exclusively on the religious component of the statute, rather than examining the statute as a whole. Such logic -- if it

can be called that -- would lead the Court to hold, for example, that a state may enact a statute that provides reimbursement for bus transportation to the parents of all schoolchildren, but may not add parents of parochial school students to an existing program providing reimbursement for parents of public school students. Congress amended the statutory Pledge of Allegiance 31 years ago to add the words "under God." Do the several opinions in support of the judgment today render the Pledge unconstitutional?... And even were the Court's method correct, the inclusion of the words "or voluntary prayer"... is wholly consistent with the clearly permissible purpose of clarifying that silent, voluntary prayer is not forbidden in the public school building.

(c) The Court's extended treatment of the "test" of *Lemon v. Kurtzman* (1971) suggests a naive preoccupation with an easy, bright-line approach for addressing constitutional issues. We have repeatedly cautioned that *Lemon* did not establish a rigid caliper capable of resolving every Establishment Clause issue, but that it sought only to provide "signposts" ... In any event, our responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion. Given today's decision, however, perhaps it is understandable that the opinions in support of the judgment all but ignore the Establishment Clause itself and the concerns that underlie it.

(d) The notion that the Alabama statute is a step toward creating an established church borders on, if it does not trespass into, the ridiculous. The statute does not remotely threaten religious liberty; it affirmatively furthers the values of religious freedom and tolerance that the Establishment Clause was designed to protect. Without pressuring those who do not wish to pray, the statute simply creates an opportunity to think, to plan, or to pray if one wishes... It accommodates the purely private, voluntary religious choices of the individual pupils who wish to pray while at the same time creating a time for nonreligious reflection for those who do not choose to pray. The statute also provides a meaningful opportunity for schoolchildren to appreciate the absolute constitutional right of each individual to worship and believe as the individual wishes. The statute "endorses" only the view that the religious observances of others should be tolerated and, where possible, accommodated. If the government may not accommodate religious needs when it does so in a wholly neutral and noncoercive manner, the "benevolent neutrality" that we have long considered the correct constitutional standard will quickly translate into the "callous indifference" that the Court has consistently held the Establishment Clause does not require....

Excerpts from *Wallace v. Jaffree* (1985), Dissenting Opinion by Justice William Rehnquist

{Edited for Readability}

Thirty-eight years ago this Court, in *Everson v. Board of Education* (1947), summarized its exegesis of Establishment Clause doctrine thus:

> *In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." (*Reynolds v. United States*, 1879)*

This language from *Reynolds*, a case involving the Free Exercise Clause of the First Amendment, rather than the Establishment Clause, quoted from Thomas Jefferson's letter to the Danbury Baptist Association:

> *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.*

It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years. Thomas Jefferson was, of course, in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.

Jefferson's fellow Virginian, James Madison, with whom he was joined in the battle for the enactment of the Virginia Statute of Religious Liberty of 1786, did play as large a part as anyone in the drafting of the Bill of Rights. He had two advantages over Jefferson in this regard: he was present in the United States, and he was a leading Member of the First Congress. But when we turn to the record of the proceedings in the First Congress leading up to the adoption of the Establishment Clause of the Constitution, including Madison's significant contributions thereto, we see a far different picture of its purpose than the highly simplified "wall of separation between church and State."

During the debates in the Thirteen Colonies over ratification of the Constitution, one of the arguments frequently used by opponents of ratification was that, without a Bill of Rights guaranteeing individual liberty, the new general Government carried with it a potential for tyranny…

{Editor's Note: The historical evolution of the First Amendment and analysis of contemporaneous debates surrounding it continue for some time before Justice Rehnquist brings it all back together…}

James Madison was undoubtedly the most important architect among the Members of the House of the Amendments which became the Bill of Rights, but it was James Madison speaking as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution… His sponsorship of the Amendments in the House was obviously not that of a zealous believer in the necessity of the Religion Clauses, but of one who felt it might do some good, could do no harm, and would satisfy those who had ratified the Constitution on the condition that Congress propose a Bill of Rights.

His original language "nor shall any national religion be established" obviously does not conform to the "wall of separation" between church and State idea which latter-day commentators have ascribed to him. His explanation on the floor of the meaning of his language… is of the same ilk…

Thus the Court's opinion in *Everson* -- while correct in bracketing Madison and Jefferson together in their exertions in their home State leading to the enactment of the Virginia Statute of Religious Liberty -- is totally incorrect in suggesting that Madison carried these views onto the floor of the United States House of Representatives when he proposed the language which would ultimately become the Bill of Rights.

The repetition of this error in the Court's opinion in *Illinois ex rel. McCollum v. Board of Education* (1948) and... *Engel v. Vitale* (1962), does not make it any sounder historically. Finally, in *Abington School District v. Schempp* (1963), the Court made the truly remarkable statement that

> *the views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States.*

On the basis of what evidence we have, this statement is demonstrably incorrect as a matter of history. And its repetition in varying forms in succeeding opinions of the Court can give it no more authority than it possesses as a matter of fact; stare decisis may bind courts as to matters of law, but it cannot bind them as to matters of history.

None of the other Members of Congress who spoke during the August 15th debate expressed the slightest indication that they thought the language before them from the Select Committee, or the evil to be aimed at, would require that the Government be absolutely neutral as between religion and irreligion. The evil to be aimed at, so far as those who spoke were concerned, appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another; but it was definitely not concerned about whether the Government might aid all religions evenhandedly...

Notwithstanding the absence of a historical basis for this theory of rigid separation, the wall idea might well have served as a useful, albeit misguided, analytical concept, had it led this Court to unified and principled results in Establishment Clause cases. The opposite, unfortunately, has been true; in the 38 years since *Everson*, our Establishment Clause cases have been neither principled nor unified. Our recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the "wall of separation" is merely a "blurred, indistinct, and variable barrier," which "is not wholly accurate" and can only be "dimly perceived." (See *Lemon v. Kurtzman*, 1971; *Tilton v. Richardson*, 1971; *Wolman v. Walter*, 1977; and *Lynch v. Donnelly*, 1984.)

Whether due to its lack of historical support or its practical unworkability, the *Everson* "wall" has proved all but useless as a guide to sound constitutional adjudication. It illustrates only too well the wisdom of {Judge} Benjamin Cardozo's observation that "{m}etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." (*Berkey v. Third Avenue Railway Co*., 1926 {heard by the New York Court of Appeals}).

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.