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## Failed Constitutional Metaphors: The Wall of Separation and the Penumbra

Louis J. Sirico Jr.

*Villanova University School of Law*

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# ARTICLES

## FAILED CONSTITUTIONAL METAPHORS: THE WALL OF SEPARATION AND THE PENUMBRA

*Louis J. Sirico, Jr.* \*

### I. INTRODUCTION

Metaphors are common devices in judicial opinions. Courts often find them useful in explaining the law and its application. And in recent years, metaphors have sparked an increased interest among legal scholars who are concerned with the metaphor's role in advocacy and judicial opinion writing.<sup>1</sup> Although courts use metaphors to explain the law, they also use metaphors for a more significant purpose: they use them to create the meaning of the law. For example, when courts use the metaphor "the marketplace of ideas" with respect to the First Amendment's guarantee of freedom of expression, we understand that freedom of expression was meant to take place in a forum resembling a laissez-faire market.<sup>2</sup> Further, in this environment the best arguments

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\* Professor of Law, Villanova University School of Law. I wish to thank my research assistant at Villanova Law School, Kathryn Mellinger. Thanks also go to Professors Julie Oseid and Chris Rideout for taking the time to review my manuscript.

1. See, e.g., HAIG BOSMAJIAN, METAPHOR AND REASON IN JUDICIAL OPINIONS (Robert K. Burdette ed., 1992); STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND (2001); Symposium, *Using Metaphor in Legal Analysis and Communication*, 58 MERCER L. REV. 835 (2007); see also Michael R. Smith, *Levels of Metaphor in Persuasive Legal Writing*, 58 MERCER L. REV. 919, 945-47 (2007) (providing bibliography of recent scholarship on metaphor); Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 J. ASS'N LEGAL WRITING DIRECTORS 129, 135 (2006) (same).

2. See, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . . rather than to countenance monopolization of that market . . .").

should win out. As Justice John Paul Stevens wrote, “But the First Amendment does guarantee an open marketplace for ideas—where divergent points of view can freely compete for the attention of those in power and of those to whom the powerful must account.”<sup>3</sup> Thus, because the constitutional amendment now promises a marketplace of ideas, freedom of expression furthers essential societal goals and enjoys considerable protection.

In the law of criminal procedure, the doctrine of the “fruit of the poisonous tree” has played a significant role in defining the constitutionally based exclusionary rule.<sup>4</sup> According to the doctrine, evidence is inadmissible when it is obtained in an illegal arrest, unreasonable search, or coercive interrogation.<sup>5</sup> The initial illegal evidence is the “poisonous tree” and the secondary evidence is the “tainted fruit.”<sup>6</sup> The biblical roots of the metaphor in the Gospel of St. Matthew<sup>7</sup> and perhaps in the Book of Genesis<sup>8</sup>

3. *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 300 (1984) (Stevens, J., dissenting). The concept of the marketplace of ideas traces back to the dissent of Justice Oliver Wendell Holmes in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), although Holmes did not use the term, but only the word, “market.” The entire metaphorical term first appeared in the concurring opinion of Justice William Brennan in *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring). For detailed analyses of the metaphor, see Linda L. Berger, *What Is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ASS’N LEGAL WRITING DIRECTORS 169, 180–204 (2004); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1188–91 (1989).

4. See 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 20.07 (5th ed. 2010) (defining the doctrine); 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 9.3 (3d ed. 2007) (same). The doctrine made its first appearance in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920), although the opinion did not use the “poisonous tree” metaphor but did rest on Fourth Amendment grounds. The metaphor itself first appeared in Justice Frankfurter’s opinion in *Nardone v. United States*, 308 U.S. 338, 341 (1939), which dealt with wiretapping that violated a federal statute. The metaphor later appeared in Justice Stewart’s opinion in *Lanza v. New York*, 370 U.S. 139, 145 (1962), in which the Court stated that the defendant had not raised a “fruit of the poisonous tree” argument with respect to evidence that had been obtained from an intercepted conversation in a jail. The metaphor was first employed to forbid evidence on constitutional grounds in *Wong Sun v. United States*, 371 U.S. 471, 484–87 (1963).

5. See LAFAVE, *supra* note 4, § 9.3(a).

6. See *id.*

7. Even so every good tree bringeth forth good fruit; but a corrupt tree bringeth forth evil fruit. A good tree cannot bring forth evil fruit, neither can a corrupt tree bring forth good fruit. Every tree that bringeth not forth good fruit is hewn down, and cast into the fire. Wherefore by their fruits ye shall know them.

*Matthew 7:17–20* (King James).

8. “And the LORD God commanded the man, saying, Of every tree of the garden thou mayest freely eat: but of the tree of the knowledge of good and evil, thou shalt not eat

undoubtedly add to its power and durability. The sensory and health threatening connotations of a poisonous tree and its fruit also compel a desire to exclude them from our criminal justice system. Thus, the metaphor contributes to a broad definition of the exclusionary rule.

Metaphors, however, have their drawbacks. They do not yield precise legal tests. In the words of Judge Richard Posner, they are “powerful though allogical modes of persuasion.”<sup>9</sup> As Justice Benjamin Cardozo wrote, “A metaphor, however, is, to say the least, a shifting test whereby to measure degrees of guilt that mean the difference between life and death.”<sup>10</sup> For example, the metaphor of the marketplace does not indicate the extent to which the marketplace—or free speech—can be regulated.<sup>11</sup> Not only are metaphors prone to ambiguity, they also can define the law so that it cannot grow to accommodate new situations in a flexible manner.<sup>12</sup> Thus, some might argue that the marketplace metaphor should not justify permitting corporations to make extensive contributions to federal election campaigns.<sup>13</sup> As Justice Cardozo also observed, “Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”<sup>14</sup>

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of it: for in the day that thou eatest thereof thou shalt surely die.” *Genesis* 2:16–17 (King James).

9. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 456 (1990). For a history of how rhetorical theory has viewed metaphors, see J. Christopher Rideout, *Penumbra! Thinking Revisited: Metaphor in Legal Argumentation*, 7 J. ASS’N LEGAL WRITING DIRECTORS 155, 159–71 (2010).

10. BENJAMIN N. CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* 100 (1931).

11. See, e.g., Tamara R. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem that Won’t Go Away*, 41 LOYOLA L.A. L. REV. 181, 223 (2007) (“[T]he metaphor of the ‘marketplace of ideas,’ while illuminating some issues, is inadequate to the task of articulating appropriate boundaries for the regulation of commercial speech, even on its own terms.”).

12. See Steven L. Winter, *The Meaning of “Under Color of” Law*, 91 MICH. L. REV. 323, 331 & n.37, 388 (1992) (citing David A. Anderson, *Metaphorical Scholarship*, 79 CAL. L. REV. 1205, 1214–15 (1991)).

13. The marketplace of ideas is not actually a place where items—or laws—are meant to be bought and sold, and when we move from the realm of economics to the realm of corporate electioneering, there may be “no reason to think the market ordering is intrinsically good at all.” *Citizens United v. FEC*, 558 U.S. \_\_\_, \_\_\_, 130 S. Ct. 876, 977 (2010) (Stevens, J., concurring in part and dissenting in part) (quoting David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1386 (1994)).

14. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926); see MICHAEL R. SMITH,

Because metaphors have inherent limitations, they can fail. This article is about metaphors that have failed. More specifically, it examines through a historical lens two well-known metaphors that the Supreme Court of the United States has adopted with questionable results. The first metaphor is the wall that allegedly separates church from state in service of the Constitution's Establishment Clause. The second is the penumbra emanating from several amendments in the Bill of Rights that safeguards the constitutional right to privacy. The first metaphor defines the Establishment Clause in a debatable way that does not always comport with the Court's decisions. The second justifies the constitutional right of privacy with imagery that, I argue, weakens its force and restrains its reach. The first metaphor gives the reader a highly concrete image, while the second provides an image that is far more abstract. Yet they share similar difficulties. The lesson from this examination is that we should pay attention to the cautionary statements of Justice Cardozo when adopting a metaphor and continuing to use it.

The subjects of these two metaphors present particular difficulties. Some metaphors serve a purpose until courts devise more precise (though not completely precise) tests. For example, although the metaphor of the "dormant commerce clause" still enjoys lip service in opinions, courts apply an articulated balancing test, though one that leaves considerable room for diverse results.<sup>15</sup> The two metaphors under discussion here, however, seem

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ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 207–11 (2d ed. 2008) (elaborating on Cardozo's point and illustrating how to challenge an unfavorable doctrinal metaphor). *But see* Rideout, *supra* note 9, at 167 (explaining that a statement of law interacting with a metaphor results in a concept with a new meaning, not necessarily a negative consequence of the interaction) (citing I.A. RICHARDS, *THE PHILOSOPHY OF RHETORIC* 93 (1964)).

15. The Constitution authorizes Congress to regulate interstate commerce. *See* U.S. CONST. art I, § 8, cl. 3. According to the dormant commerce clause, state and local regulations cannot unduly burden interstate commerce. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 5.3.1 (3d ed. 2006). Thus states cannot impose an invalid burden even if Congress has not regulated in the area—that is, Congress has permitted its commerce power to lie dormant. *Id.* For a general explanation of the doctrine and its historic development, see *id.* § 5.3.

The current balancing test is:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest

not to lend themselves to workable alternative tests. And despite their failings, they have demonstrated considerable staying power.

## II. CHURCH-STATE RELATIONS AND THE JEFFERSONIAN WALL

Although the metaphor of a wall separating church and state may be the most prominent metaphor in constitutional law, it has not proven immune to criticism for the obstacle it has created in finding a middle ground between strict separation and an accommodation of the role of religion in American life. It is understandable then that the metaphor has enjoyed the allegiance of separationists and encountered an unfavorable reception by accommodationists. As the following chronicle demonstrates, the Court has slowly moved away from the wall metaphor to a test that turned out to be burdened by another troublesome metaphor—the entanglement metaphor. In recent cases, some Court members have worked to reduced the influence of that metaphor and, to some degree, focus on a less metaphorical test.

This section begins with a discussion of Jefferson’s metaphor and then chronicles its entrance into the Supreme Court’s case law. It then discusses the growing discontent with the metaphor, the rise of the *Lemon* test and its controversial “entanglement” prong, and the decline of the “wall” metaphor.

### A. *Jefferson’s Metaphor*

Although the metaphor of a “wall” separating church and state harkens back at least to the sixteenth century Anabaptist leader

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involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

*Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960)). The Second Circuit has articulated the test this way:

A state statute or regulation may violate the dormant Commerce Clause only if it (1) “clearly discriminates against interstate commerce in favor of intrastate commerce,” (2) “imposes a burden on interstate commerce incommensurate with the local benefits secured,” or (3) “has the practical effect of ‘extra-territorial’ control of commerce occurring entirely outside the boundaries of the state in question.”

*Selevan v. New York Thruway Auth.*, 584 F.3d 82, 90 (2d Cir. 2009) (quoting *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir. 2004)).

Menno Simons,<sup>16</sup> its prominence in American jurisprudence stems from Thomas Jefferson's familiar Letter to the Danbury Baptist Association in 1802.<sup>17</sup> The metaphor Jefferson used has since played a significant role in giving meaning to the First Amendment's Establishment Clause.<sup>18</sup> The Baptists had written Jefferson to congratulate him on his election to the presidency and to express their concern as a minority religion in a state dominated by Congregationalists, as their state did not recognize their religious freedoms as inalienable rights, but rather as "favours granted."<sup>19</sup> They hoped that Jefferson's influence would improve their predicament and "like the radiant beams of the Sun, [would] shine & prevail through all these States and all the world till Hierarchy and tyranny be destroyed from the Earth."<sup>20</sup> In his reply, Jefferson wished his correspondents well and stated that he concurred with their sentiments:

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

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16. Daniel L. Dreisbach, *The "Wall of Separation" Motif in Biblical Literature and Western Political and Legal Thought*, 2 LIBERTY U. L. REV. 79, 88 & n.53 (2007); see *id.* at 85–93 (noting the use of the metaphor by religious leaders beginning with the Protestant Reformation, who often supported their rhetorical argument with biblical references).

17. Letter from Thomas Jefferson, President of the United States, to Nehemiah Dodge et al., Danbury Baptist Ass'n (Jan. 1, 1802), in DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE, app. 6, at 148 (2002). For detailed histories of Jefferson's letter, see DREISBACH, *supra*, at 9–54; PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 144–89 (2002). For a historical and rhetorical analysis of Jefferson's metaphor, see Julie A. Oseid, *The Power of Metaphor: Thomas Jefferson's "Wall of Separation Between Church & State,"* 7 J. ASS'N LEGAL WRITING DIRECTORS 123 (2010). For recent histories of the Establishment Clause, see HAMBURGER, *supra*; JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT (3d ed. 2011).

18. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I. For a comprehensive discussion of the Supreme Court case law on the Establishment Clause, see 6 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 21.3 (4th ed. 2008).

19. Letter from Nehemiah Dodge et al., Danbury Baptist Ass'n, to Thomas Jefferson, President of the United States (Oct. 7, 1801), in DREISBACH, *supra* note 17, app. 6, at 142–43.

20. *Id.* at 143.

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>21</sup>

Jefferson never again used the metaphor in this context and may not have meant it to express his definitive view on church-state relations.<sup>22</sup> Yet, for future generations, the metaphor has lent itself to at least four interpretations.<sup>23</sup> The wall could “protect the church from the state.”<sup>24</sup> It could “protect the state from the church.”<sup>25</sup> It could prevent the federal government from interfering with state authority over church matters,<sup>26</sup> and it could prevent the state establishment of churches.<sup>27</sup>

First, the wall could serve as a barrier to protect churches from intrusions by the state, in Jefferson’s words, to prevent “intermeddling with religious institutions, their doctrines, discipline, or exercises. . . . 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 peculiar tenets . . . .”<sup>28</sup>

Second, the wall could protect the citizen and the state from the church. Thus, in Jefferson’s letter to the Danbury Baptists, he asserted that “religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his

21. Letter from Thomas Jefferson, President of the United States, to Nehemiah Dodge et al., Danbury Baptist Ass’n (Jan. 1, 1802), in DREISBACH, *supra* note 17, app. 6, at 148. For copies of Jefferson’s preliminary drafts and their histories, see *id.* at 34–49.

22. *Id.* at 54.

23. I derive my analysis from the analysis in John Witte, Jr., *Facts and Fictions About the History of Separation of Church and State*, 48 J. CHURCH & STATE 15, 28–33 (2006) [hereinafter Witte, *Facts and Fictions*] (discussing five understandings of the separation of church and state); John Witte, Jr., *That Serpentine Wall of Separation*, 101 MICH. L. REV. 1869, 1889–91 (2003) [hereinafter Witte, *That Serpentine Wall*] (discussing five varieties of separationism).

24. Witte, *Facts and Fictions*, *supra* note 23, at 28; Witte, *That Serpentine Wall*, *supra* note 23, at 1889.

25. Witte, *Facts and Fictions*, *supra* note 23, at 30; Witte, *That Serpentine Wall*, *supra* note 23, at 1890.

26. Witte, *Facts and Fictions*, *supra* note 23, at 32; Witte, *That Serpentine Wall*, *supra* note 23, at 1890.

27. Witte, *Facts and Fictions*, *supra* note 23, at 33; Witte, *That Serpentine Wall*, *supra* note 23, at 1891.

28. Letter from Thomas Jefferson, President of the United States, to Reverend Samuel Miller (Jan. 23, 1808), in DREISBACH, *supra* note 17, app. 9, at 153–54.



worship, that the legitimate powers of government reach actions only, & not opinions."<sup>29</sup>

Third, the wall could separate the jurisdiction of the federal government from that of the state governments. As Jefferson stated in his 1805 Second Inaugural address:

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>30</sup>

Fourth, the wall could prevent churches from obliging citizens from having to support churches and participate in church activities, for example, by paying tithes, swearing oaths, and attending religious services, all of which were common occurrences in early America.<sup>31</sup> Thus, the Virginia Bill for Religious Liberty, drafted by Jefferson, declared:

That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves *and* *abhors*, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness . . . .<sup>32</sup>

These very plausible meanings for Jefferson's wall metaphor demonstrate its versatility in resolving societal issues and perhaps helps explain its longevity as a staple in church-state dialogue.

Even more central to its longevity is the nature of the metaphor. One need not subscribe to the tenets of cognitive linguistics to recognize that a wall, which separates and containerizes, is a fundamental conceptual construction employed by the human

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29. Letter from Thomas Jefferson, President of the United States, to Nehemiah Dodge et al., Danbury Baptist Ass'n (Jan. 1, 1802), in DREISBACH, *supra* note 17, app. 6, at 148.

30. DREISBACH, *supra* note 17, at 65 (citing Thomas Jefferson, President of the United States, Second Inaugural Address of 1805).

31. Witte, *Facts and Fictions*, *supra* note 23, at 33; Witte, *That Serpentine Wall*, *supra* note 23, at 1891.

32. REPORT OF THE COMM. OF REVISORS APPOINTED BY THE GEN. ASSEMBLY OF VA. IN MDCCLXXVI (1784), in 2 THE PAPERS OF THOMAS JEFFERSON 545 (Julian P. Boyd ed., 1950).

mind.<sup>33</sup> People from all cultures and historical eras can visualize a wall and understand its functions. Its fundamental nature helps explain why the legal community would have great difficulty in displacing it with an alternative conceptual model. Thus, with respect to church-state relations, the rigidity of the metaphor—its inability to describe a wall that permits accommodation—contributes to the difficulty of modifying it to accept an interplay of church and state.

### B. *The Metaphor Enters the Case Law*

Jefferson's metaphor did not make an appearance in a Supreme Court judicial opinion until 1878 in *Reynolds v. United States*.<sup>34</sup> In that case, the Court held that the Constitution's Free Exercise Clause protected religious beliefs absolutely, but did not necessarily protect all religiously motivated conduct, including polygamy.<sup>35</sup> Writing for the Court, Chief Justice Morrison Waite related a history of governments allying with established religions to impose religious obligations on individuals and interfere with their religious freedom, followed by a discussion of the passage of a bill in the Virginia House of Delegates that allowed for religious freedom.<sup>36</sup> As part of his discussion on the adoption of the first constitutional amendment, Chief Justice Waite included Jefferson's letter.<sup>37</sup> He then stated that Jefferson's words defined the meaning of the constitutional provision:

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33. The germinal works on cognitive linguistics are GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980), and WINTER, *supra* note 1. For a recent collection of articles focusing on cognitive linguistics and the law, see Symposium, *Using Metaphor in Legal Analysis and Communication*, *supra* note 1, at 835. For a critique of cognitive linguistics, see Michael Goldberg, *Against Acting 'Humanely'*, 58 *MERCER L. REV.* 899, 900 n.3 (2007).

34. 98 U.S. 145, 164 (1878). Jefferson's letter was not widely disseminated until 1853 when a collection of his works was published. HAMBURGER, *supra* note 17, at 259 (citing Daniel L. Dreisbach, "Sowing Useful Truths and Principles": *The Danbury Baptists, Thomas Jefferson, and the "Wall of Separation,"* 39 *J. CHURCH & STATE* 455, 491 (1997)). For a detailed analysis of *Reynolds* in its historical context, see Donald L. Drakeman, *Reynolds v. United States: The Historical Construction of Constitutional Reality*, 21 *CONST. COMMENT.* 697 (2004).

35. *Reynolds*, 98 U.S. at 165–66.

36. *Id.* at 162–64.

37. *Id.* at 164.

Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived 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>38</sup>

Thus Waite offered no analysis of the wall metaphor, but discussed the letter's meaning as a whole. At best, he accepted the metaphor as part of the argument that a wall prevented government from intruding on religious beliefs.<sup>39</sup>

The wall metaphor did not again appear in Supreme Court opinions until *Everson v. Board of Education* in which the Court declared that the First Amendment's Establishment Clause was incorporated through the Due Process Clause of the Fourteenth Amendment and therefore applicable to the states.<sup>40</sup> In that case, Justice Hugo Black, writing for the majority, declared that the Establishment Clause did not prevent a state from expending public funds to transport children to religious schools.<sup>41</sup> However, he also recounted a history of religious oppression by government and America's rejection of that oppression—very similar to the history chronicled in *Reynolds v. United States* and the amicus brief submitted by the American Civil Liberties Union in *Everson*.<sup>42</sup>

As part of that history, Justice Black referred to Jefferson's letter and the wall metaphor: "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. 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.'"<sup>43</sup>

Justice Black saw the wall as protecting church from state and state from church. To clarify his argument, he quoted from *Watson v. Jones*, a nineteenth century case dealing with a church

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38. *Id.*

39. *See id.*

40. 330 U.S. 1, 8, 18 (1947).

41. *Id.* at 18.

42. Compare *id.* at 8-14, with *Reynolds*, 98 U.S. at 162-63, and Brief for ACLU as Amicus Curiae Supporting Appellant at 7-12, *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (No. 52).

43. *Everson*, 330 U.S. at 16 (quoting *Reynolds*, 98 U.S. at 164).

property dispute: "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority."<sup>44</sup>

Justice Black concluded his opinion on a strongly separatist note: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."<sup>45</sup> This declaration set the tone for future Court opinions.

In the ensuing years, the wall metaphor continued to make an appearance, although on an irregular basis. Justice Black, writing for the majority in the 1948 decision *Indiana ex rel. McCollum v. Board of Education*, reiterated the requirement of a wall.<sup>46</sup> In that case, the Court invalidated a released time program in which the school board permitted students to receive voluntary religious instruction on school grounds.<sup>47</sup> However, Justice Black ascribed an additional, nurturing function to the wall of separation:

For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the *Everson* case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.<sup>48</sup>

In his concurring opinion, Justice Jackson voiced his concern with the ambiguous guidance that the Establishment Clause offers courts.<sup>49</sup> In emphasizing the danger that judicial decisions may depend on the personal prepossessions of the judges, he made reference to the wall that Jefferson had designed for the University of Virginia: "And, more importantly, we are likely to make the legal 'wall of separation between church and state' as

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44. *Id.* at 15 (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 730 (1871)). *Watson v. Jones* was decided before the religion clauses were incorporated against the states. The Supreme Court incorporated the First Amendment's protection of free exercise of religion in 1940 in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Thus, the opinion did not rest on constitutional grounds.

45. *Everson*, 330 U.S. at 18.

46. 333 U.S. 203, 211 (1948) (citing *Everson*, 330 U.S. at 15–16).

47. *Id.* at 207, 209–10.

48. *Id.* at 212.

49. *Id.* at 237–38 (Jackson, J., concurring).

winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded.”<sup>50</sup>

In 1952, in *Zorach v. Clauson*, the wall metaphor appeared in the dissents of Justices Black<sup>51</sup> and Jackson.<sup>52</sup> The case permitted public schools to release students to offsite locations for religious instruction or devotion.<sup>53</sup> In his dissent, Justice Jackson offered an odd metaphorical concern about the Jeffersonian wall: “The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected.”<sup>54</sup>

After 1952, the metaphor fell into disuse until the early 1960s when it reappeared in at least four cases.<sup>55</sup> Once again, it then fell out of fashion until Justice Black revived it in his 1968 dissent to *Board of Education v. Allen*, a case permitting New York to require local school boards to lend school texts to students in private schools, including religiously affiliated ones.<sup>56</sup> Also, in 1968, the metaphor received mention in *Epperson v. Arkansas*, a case striking down a state statute forbidding the teaching of evolution in public schools.<sup>57</sup>

### C. Questioning the Metaphor: The Lemon Test

By the 1970s, some of the Justices began questioning the value and accuracy of the wall as a metaphor for the Establishment Clause. In *Walz v. Tax Commission of New York*, Chief Justice Burger wrote, “The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited.”<sup>58</sup> Burger thus replaced the “wall” with a “line,” a boun-

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50. *Id.* at 238; see DREISBACH, *supra* note 17, at 109.

51. See 343 U.S. 306, 317 (1952) (Black, J., dissenting).

52. See *id.* at 325 (Jackson, J., dissenting).

53. *Id.* at 308–10, 315 (majority opinion).

54. *Id.* at 325 (Jackson, J., dissenting).

55. See *Engel v. Vitale*, 370 U.S. 421, 425 (1962) (invalidating school prayer); *Torcaso v. Watkins*, 367 U.S. 488, 493 (1961) (invalidating a religious test for holding public office); *Braunfeld v. Brown*, 366 U.S. 599, 604 (1961) (plurality opinion) (upholding a Sunday closing law); *McGowan v. Maryland*, 366 U.S. 420, 443 (1961) (same).

56. 392 U.S. 236, 251 (1968) (Black, J., dissenting).

57. 393 U.S. 97, 106 (1968).

58. 397 U.S. 664, 669 (1970).

dary that could be shifted with greater ease. His conceptualization stands in contrast to the absolute separatism of Justice Frankfurter in *McCullum*: "Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a 'wall of separation,' not of a fine line easily overstepped."<sup>59</sup> In the 1980s, Burger again softened the strength of the metaphor by referring to it as "a useful signpost"<sup>60</sup> and as "a reminder that the Establishment Clause forbids an established church or anything approaching it."<sup>61</sup>

In *Gillette v. United States*, a case dealing with conscientious objection, Justice Marshall, in apparent agreement with Chief Justice Burger, challenged excessive reliance on the Jeffersonian metaphor.<sup>62</sup> He wrote, "The metaphor of a 'wall' or impassable barrier between Church and State, taken too literally, may mislead constitutional analysis . . ."<sup>63</sup> He continued, however, to state a test for Establishment Clause cases that relied on no metaphors: "[B]ut the Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact."<sup>64</sup>

The 1971 case of *Lemon v. Kurtzman*, dealing with state aid to religiously affiliated schools, proved to be a turning point.<sup>65</sup> Writing for the majority, Chief Justice Burger noted the limitations of the wall as a metaphor: "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."<sup>66</sup> He faulted the ambiguous wording of the First Amendment's text:

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59. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (opinion of Frankfurter, J.).

60. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982).

61. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

62. 401 U.S. 437, 450 (1971) (citations omitted).

63. *Id.* (citation omitted).

64. *Id.* (citing *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 222 (1963); *id.* at 231 (Brennan, J., concurring); *id.* at 305 (Goldberg, J., concurring)).

65. 403 U.S. 602 (1971).

66. *Id.* at 614. Chief Justice Burger also referred to the wording of the religion clauses as "at best opaque." *Id.* at 612.

Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be “no law *respecting* an establishment of religion.” A law may be one “respecting” the forbidden objective while falling short of its total realization. A law “respecting” the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but nevertheless be one “respecting” that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.<sup>67</sup>

Perhaps the ambiguity of the Constitution’s wording promoted the attraction of a metaphor that would give definition to the underlying ill-defined concept. To better define the meaning of the Establishment Clause, Chief Justice Burger metamorphosed the blurred wall metaphor into the familiar three-part *Lemon* test: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”<sup>68</sup>

The third part of the test, however, introduced a new metaphor: excessive entanglement.<sup>69</sup> Perhaps the reliance on that metaphor stems from the inherent imprecision of the word “respecting” in the constitutional amendment—a word that troubled Chief Justice Burger. Despite the leeway that the new metaphor might have given for a more accommodationist view, subsequent cases make clear that the Court has read this metaphor, and consequently the *Lemon* test, as favoring the strict separationist interpretation of the Establishment Clause at least into the 1980s, after which the accommodationist interpretation sometimes prevailed.<sup>70</sup>

In subsequent cases, the Court has typically employed the *Lemon* test or some variant;<sup>71</sup> however, it has still discussed the

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67. *Id.* at 612.

68. *Id.* at 612–13. Justice Burger found support for the second prong in *Board of Education v. Allen*, 392 U.S. 236, 243 (1968), and support for the third prong in *Walz v. Tax Commission of New York*, 397 U.S. 664, 674 (1970).

69. See *Lemon*, 403 U.S. at 614–15.

70. See WITTE & NICHOLS, *supra* note 17, at 158–59 (stating that the “accommodationist reading’ of the *Lemon* test fell into desuetude” until *Mueller v. Allen*, 463 U.S. 388 (1983), another school aid case).

71. The primary variant or revision is *Agostini v. Felton*, 521 U.S. 203 (1997). For a discussion of the case, see *infra* notes 87–91 and accompanying text.

wall metaphor, although with decreasing frequency. For example, in 1973, in *Committee for Public Education & Religious Liberty v. Nyquist*, a school aid case, Justice Powell's opinion for the Court struck down a New York statute by applying the *Lemon* test.<sup>72</sup> He acknowledged that "[i]t has never been thought either possible or desirable to enforce a regime of total separation, and as a consequence cases arising under these Clauses have presented some of the most perplexing questions to come before this Court."<sup>73</sup> Yet he still offered some deference to the wall metaphor: "Neither, however, may it be said that Jefferson's metaphoric 'wall of separation' between Church and State has become 'as winding as the famous serpentine wall' he designed for the University of Virginia."<sup>74</sup>

In 1977, in *Wolman v. Walter*, another school aid case, Justice Blackmun clashed with Justices Stevens and Marshall over the meaning of the wall metaphor.<sup>75</sup> Justice Blackmun quoted approvingly Justice Burger's description of the wall in *Lemon* as being "a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."<sup>76</sup> Justices Stevens<sup>77</sup> and Marshall<sup>78</sup> took a different view. In the words of Justice Stevens, "What should be a 'high and impregnable' wall between church and state, has been reduced to a 'blurred, indistinct, and variable barrier.' The result has been, as Clarence Darrow predicted, harm to 'both the public and the religion that [this aid] would pretend to serve."<sup>79</sup>

In the 1980s, the most extensive and sharpest criticism of the wall metaphor appeared in Justice Rehnquist's dissent in *Wallace v. Jaffree*, a case rejecting a moment of silence in public schools:

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72. 413 U.S. 756, 759, 773–83 (1973).

73. *Id.* at 760.

74. *Id.* at 761 (quoting *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 238 (1948) (Jackson, J., concurring)).

75. 433 U.S. 229 (1977), *overruled in part by Mitchell v. Helms*, 530 U.S. 793 (2000).

76. *Id.* at 236 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

77. *See id.* at 266 (Stevens, J., concurring in part and dissenting in part) ("Corrosive precedents' have left us without firm principles on which to decide these cases." (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 63 (1947) (Rutledge, J., dissenting))).

78. *See id.* at 257 (Marshall, J., concurring in part and dissenting in part) (declaring that Court decisions had rendered the wall "incapable of performing its vital functions of protecting both church and state").

79. *Id.* at 266 (alteration in original) (internal citation omitted).



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. . . .

. . . 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>80</sup>

#### D. *Decline of the Metaphor*

Since 1990, in only five Supreme Court cases have Justices referenced the wall metaphor: three dissents by Justice Stevens,<sup>81</sup> one dissent by Justice Souter,<sup>82</sup> and one concurring opinion by Justice Blackmun.<sup>83</sup> In each case, the respective Justice took a separationist stance, asserting a violation of the Establishment Clause.<sup>84</sup> In each case, however, the metaphor exemplified the respective Justice’s position, but did not receive anything resembling an extensive treatment.<sup>85</sup> Rather, the Justices each engaged in a traditional legal argument that examined cases and tested proposed rules for deciding the cases.<sup>86</sup>

In several recent cases, the members of the Court have employed variations on the *Lemon* test that reduce the emphasis on the entanglement metaphor. It cannot be said that a majority of the Court has reached a consensus on exactly what the appropri-

80. 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

81. See *Van Orden v. Perry*, 545 U.S. 677, 708, 709, 711, 730, 735 (2005) (Stevens, J., dissenting); *Zelman v. Simmons-Harris*, 536 U.S. 639, 686 (2002) (Stevens, J., dissenting); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 797, 814 (1995) (Stevens, J., dissenting).

82. See *Mitchell v. Helms*, 530 U.S. 793, 873 (2000) (Souter, J., dissenting) (quoting *Everson*, 330 U.S. at 16).

83. See *Lee v. Weisman*, 505 U.S. 577, 600–01 (1992) (Blackmun, J., concurring) (quoting *Everson*, 330 U.S. at 16 (1947)).

84. See *Van Orden*, 545 U.S. at 708, 735 (Stevens, J., dissenting); *Zelman*, 536 U.S. at 685–86 (Stevens, J., dissenting); *Mitchell*, 530 U.S. at 867–68 (Souter, J., dissenting); *Pinette*, 515 U.S. at 797, 815 (Stevens, J., dissenting); *Lee*, 505 U.S. at 599 (Blackmun, J., concurring).

85. See *Van Orden*, 545 U.S. at 708, 709, 711, 730, 735 (Stevens, J., dissenting); *Zelman*, 536 U.S. at 686 (Stevens, J., dissenting); *Mitchell*, 530 U.S. at 873 (Souter, J., dissenting) (quoting *Everson*, 330 U.S. at 16); *Pinette*, 515 U.S. at 797, 815 (Stevens, J., dissenting); *Lee*, 505 U.S. at 600–01 (Blackmun, J., concurring).

86. See *Van Orden*, 545 U.S. at 707–35 (Stevens, J., dissenting); *Zelman*, 536 U.S. at 684–86 (Stevens, J., dissenting); *Mitchell*, 530 U.S. at 867–913 (Souter, J., dissenting); *Pinette*, 515 U.S. at 797–815 (Stevens, J., dissenting); *Lee*, 505 U.S. at 599–609 (Blackmun, J., concurring).

ate test should be. However, the Court's ruling in *Agostini v. Felton* has proven the most enduring.<sup>87</sup>

In the 1985 decision *Aguilar v. Felton*, a school aid case, the Court invalidated a federally funded program that permitted public school teachers to provide remedial education, counseling, and guidance counseling services in parochial schools.<sup>88</sup> In a dissent, Justice O'Connor expressed her strong reservations about the entanglement prong: "If a statute lacks a purpose or effect of advancing or endorsing religion, I would not invalidate it merely because it requires some ongoing cooperation between church and state or some state supervision to ensure that state funds do not advance religion."<sup>89</sup>

Then, in 1997, in *Agostini v. Felton*, the Court reversed its decision in *Aguilar*.<sup>90</sup> Writing for the majority, Justice O'Connor developed her argument in *Aguilar* and modified the Court's *Lemon* test.<sup>91</sup> Although she found that the government program satisfied all three prongs, she described the entanglement prong "as an aspect of the inquiry into the statute's effect" and arguably reduced that third prong as a hurdle for state aid programs.<sup>92</sup>

In 2000, Justice O'Connor's revision of the *Lemon* test in *Mitchell v. Helms* found extensive support.<sup>93</sup> In upholding a government program providing instructional equipment to parochial schools, Chief Justice Rehnquist and Justices Scalia and Kennedy joined Justice Thomas's opinion which read *Agostini* as recasting the *Lemon* test's "entanglement inquiry as simply one criterion relevant to determining a statute's effect."<sup>94</sup> In her concurring opinion joined by Justice Breyer, Justice O'Connor agreed with this understanding of the effects prong.<sup>95</sup>

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87. 521 U.S. 203 (1997).

88. See 473 U.S. 402, 406, 414 (1985), *overruled by Agostini*, 521 U.S. at 236.

89. See *id.* at 430 (O'Connor, J., dissenting). Earlier, Justice O'Connor had suggested some concern over the entanglement prong when she declared that it should be limited to institutional entanglement. See *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring).

90. 521 U.S. at 208–09.

91. *Id.* at 232–35.

92. *Id.* at 233–35.

93. See 530 U.S. 793, 807–08 (2000).

94. *Id.* at 801, 808.

95. See *id.* at 845 (O'Connor, J., concurring).

In *Zelman v. Simmons-Harris*, a case upholding a tuition voucher plan, the Court confirmed the *Agostini* revision by considering only the purpose and effects prong of the *Lemon* test.<sup>96</sup> Justice O'Connor, concurring, further confirmed the revision, stating that *Agostini* "folded the entanglement inquiry into the primary effect inquiry. This made sense because both inquiries rely on the same evidence, and the degree of entanglement has implications for whether a statute advances or inhibits religion."<sup>97</sup> Yet, in his plurality opinion in *Van Orden v. Perry*, dealing with a Ten Commandments monument on public grounds, Chief Justice Rehnquist referenced entanglement as a separate prong of the *Lemon* test.<sup>98</sup>

In many recent decisions, the Justices have written joint and separate opinions that disclose both their views on church-state relationships and on the proper judicial test to apply. In some cases, the Court decisions have turned on deciding whether the contested government action was religiously neutral.<sup>99</sup> Justices have also used a "coercion test" to invalidate government action that coerces anyone to participate in any religion or religious exercise.<sup>100</sup> Some Justices, particularly Justice O'Connor, have asked whether the government action appeared to endorse certain religious beliefs.<sup>101</sup> Still others would determine whether the government action stemmed from the country's historic ways of treating religious matters.<sup>102</sup>

A review of the case law discloses many sharply divided opinions among the Justices and a resulting uncertainty about the status of the law. However, from the viewpoint of rhetoric, the use of the metaphor has declined. The early dominant use of the

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96. See 536 U.S. 639, 648–49 (2002).

97. *Id.* at 668–69 (citations omitted).

98. 545 U.S. 677, 686 n.6 (2005) (plurality opinion) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)). However, Chief Justice Rehnquist stated that the *Lemon* test was unhelpful in deciding this type of case. See *id.* at 686.

99. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102, 114 (2001) (citation omitted) (rejecting an Establishment Clause challenge and deciding the case on free speech grounds).

100. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (citations omitted) (invalidating prayer at a high school graduation).

101. See, e.g., *McCreary Cnty. v. ACLU*, 545 U.S. 844, 883 (2005) (O'Connor, J., concurring) (invalidating a courthouse posting of the Ten Commandments).

102. See *Van Orden*, 545 U.S. at 686–92 (validating a Ten Commandments monument on state grounds).

wall metaphor reflected the heavily separationist leanings of the Court.<sup>103</sup> The shift to the *Lemon* test and its variants demonstrated a shift from reliance on general policy to reliance on a rule. However, the inclusion of the entanglement metaphor as a prong of the rule offered potential room for ambiguity. Yet, it proved an opportunity for the separationist argument to continue to dominate, though perhaps not to such a great degree as before. With the decrease in emphasis on entanglement in recent cases,<sup>104</sup> the reliance on metaphor is receding.<sup>105</sup> Nevertheless, although the Court remains divided, the rhetorical tools do not so greatly favor one set of advocates.

Despite the decline of the wall metaphor in Supreme Court cases, it rears up in the opinions of the lower courts<sup>106</sup> and in a plentiful number of law review articles.<sup>107</sup> An electronic search of a commercial database will disclose over one thousand law review articles in the last ten years that reference the wall metaphor.<sup>108</sup> Thus, despite its decline in the nation's highest court, it still haunts.

### III. PRIVACY IN THE PENUMBRA

#### A. *The Metaphor Before Griswold*

In legal circles, the metaphor of the penumbra is identified with Justice William O. Douglas's definition of privacy as a constitutional right in *Griswold v. Connecticut*, the case that invalidated a Connecticut statute prohibiting the use and distribution of contraceptives.<sup>109</sup> However, the judicial use of the metaphor

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103. See *supra* notes 43–54 and accompanying text.

104. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 233 (1997).

105. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) (citations omitted) (basing its decision on whether the government action was religiously neutral); *Lee*, 505 U.S. at 587 (relying on a coercion test).

106. See, e.g., *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1290 n.14 (11th Cir. 2008) (Middlebrooks, J., dissenting); *Skoros v. City of New York*, 437 F.3d 1, 15 (2d Cir. 2006) (citations omitted); *Koenick v. Felton*, 190 F.3d 259, 264 (4th Cir. 1999) (citation omitted); *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 383 (6th Cir. 1999).

107. See, e.g., *Dreisbach*, *supra* note 16; *Oseid*, *supra* note 17.

108. Search Query for “Wall of Separation,” LEXISNEXIS, [www.lexisnexis.com](http://www.lexisnexis.com) (select “Search” hyperlink; then select “Secondary Legal” hyperlink; then select “Law Reviews, CLE, Legal Journals & Periodicals, Combined” hyperlink; then search for “Wall of Separation” and date aft 10/1/2000”; then follow “Search” hyperlink).

109. 381 U.S. 479 (1965). The literature on the case is extensive. See, e.g., A

goes back to Justice Stephen Field's 1871 circuit court opinion in *Montgomery v. Bevans*.<sup>110</sup> In that case, John Montgomery's father had accepted a deed to property on his son's behalf.<sup>111</sup> However, Montgomery, a captain in the United States Navy, had left the area before the delivery to serve on a ship docked in San Francisco.<sup>112</sup> According to the prevailing law, a person was presumed dead after not being heard from for seven years.<sup>113</sup> After seven years, Montgomery's father claimed the property as his son's heir.<sup>114</sup> The father's claim could prove successful if the son had died only after the deed had been delivered.<sup>115</sup> Justice Field summarized the argument:

[H]ence counsel argue that there is no presumption in favor of the continuance of life during the penumbra, or death period, of seven years, for if such presumption prevailed for one day after disappearance proved, it would necessarily prevail for six years and three hundred and sixty-four days, and the whole basis upon which the presumption of death rests would become absurd.<sup>116</sup>

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DOCUMENTARY HISTORY OF THE LEGAL ASPECTS OF ABORTION IN THE UNITED STATES: *GRISWOLD V. CONNECTICUT* (Roy M. Mersky & Jill Duffy eds., 2001); CHEMERINSKY, *supra* note 15, § 10.3.2; DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 131-270 (Univ. of Cal. Press 1998) (1994); JOHN W. JOHNSON, *GRISWOLD V. CONNECTICUT: BIRTH CONTROL AND THE CONSTITUTIONAL RIGHT TO PRIVACY* (2005); 2 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 15.7, at 810-12 (4th ed. 2007); *Symposium on the Griswold Case and the Right of Privacy*, 64 MICH. L. REV. 197 (1965); Stephen C. Veltri, *Fowler V. Harper and the Right of Privacy: Twenty-Five Years*, 16 OHIO N.U. L. REV. 359 (1989).

110. 17 F. Cas. 628, 632 (C.C.D. Cal. 1871) (No. 9735). For histories of the metaphor's use in Supreme Court decisions, see Henry T. Greely, *A Footnote to "Penumbra" in Griswold v. Connecticut*, 6 CONST. COMMENT. 251 (1989); Burr Henly, *"Penumbra": The Roots of a Legal Metaphor*, 15 HASTINGS CONST. L.Q. 81 (1987). I have relied heavily on these articles for tracing the metaphor's judicial history. For an excellent rhetorical analysis, see Rideout, *supra* note 9.

111. *Montgomery*, 17 F. Cas. at 629.

112. *Id.*

113. *Id.* at 632.

114. *Id.*

115. *Id.*

116. *Id.* Justice Oliver Wendell Holmes had previously used the metaphor in a law review article:

The growth of the law is very apt to take place in this way: Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around opposite poles, and begin to approach each other, the distinction becomes more difficult to trace . . . and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally well have been drawn a little further to the one side or to the other. The distinction between the groups, however, is philosophical, and it is better to have a line drawn somewhere in

Field thus used “penumbra” to describe the period during which the law might or might not determine that the missing individual was dead. His use of the word deviated from Johannes Kepler’s original astronomical definition: “a partially shaded region around the darker shadow of an opaque body.”<sup>117</sup>

The metaphor again appeared in judicial opinions, but not until thirty years had passed, when Justice Oliver Wendell Holmes used it, first in three opinions of the Massachusetts Supreme Judicial Court,<sup>118</sup> and then in four opinions of the Supreme Court of the United States.<sup>119</sup> In three of the Supreme Court of the United States’s opinions, Holmes employed “penumbra” to describe situations in which it is difficult to engage in line drawing.<sup>120</sup> Thus in one case, a dissent, he wrote, “The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a

the penumbra between darkness and light, than to remain in uncertainty.

Note, *The Theory of Torts*, 7 AM. L. REV. 652, 654 (1873). In a later writing, he used the metaphor to convey the same meaning. See OLIVER WENDELL HOLMES, *THE COMMON LAW* 127 (Dover Publications 1991) (1881).

117. The Oxford English Dictionary traces the word to its origination in Kepler’s AD VITELLIONEM PARALIPOMENA (1604). See 11 Oxford English Dictionary 502 (2d ed. 1989). The updated online version of the dictionary offers this primary definition:

The partially shaded region around the shadow of an opaque body, when the light source is larger than a point source and only part of its light is cut off (contrasted with the full shadow or umbra); . . . that of the shadow cast by the moon on the earth in a solar eclipse, or by the earth on the moon in a lunar eclipse, resulting in an area that experiences only a partial eclipse.

OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com/> (search for “penumbra”; then follow “Find Word” hyperlink) (last visited Dec. 3, 2010). The dictionary also offers a definition for an “extended use” in United States law: “Esp. in constitutional jurisprudence: the scope of a legal provision, esp. the range of its application extending beyond the rights, privileges, or immunities it enumerates explicitly.” *Id.* (search for “extended use”; then follow “Find Word” hyperlink).

118. See *Driscoll v. Towle*, 63 N.E. 922, 923 (Mass. 1902); *Kerslake v. Cummings*, 61 N.E. 760, 761 (Mass. 1901); *Danforth v. Groton Water Co.*, 59 N.E. 1033, 1034 (Mass. 1901).

119. See *Olmstead v. United States*, 277 U.S. 438, 469 (1928) (Holmes, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347, 353 (1967); *Springer v. Gov’t of the Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting); *Schlesinger v. Wisconsin*, 270 U.S. 230, 241 (1926) (Holmes, J., dissenting); *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 426 (1916) (Holmes, J., concurring), *superseded by statute*, Lanham Act, Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified as amended in scattered sections of 15 U.S.C.), *as recognized in Park ‘N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 299 (1985).

120. See *Springer*, 277 U.S. at 209; *Schlesinger*, 270 U.S. at 241; *Hanover Star Milling Co.*, 240 U.S. at 426.

penumbra shading gradually from one extreme to the other."<sup>121</sup> In another dissent, he employed the metaphor in a manner similar to Justice Douglas in *Griswold* in describing the extended reach of a constitutional amendment.<sup>122</sup> In declaring that federal courts should not admit evidence obtained through wire-tapping, but reserving judgment on whether the Constitution mandated exclusion, he wrote:

While I do not deny it, I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them.<sup>123</sup>

Although other judges employed the "penumbra" metaphor, Judge Learned Hand used it most frequently—eleven times—usually to emphasize the ambiguity of words and concepts.<sup>124</sup> For example, in his dissent in *Commissioner v. Ickelheimer*, concerning a statutory tax provision, he wrote:

[T]he colloquial words of a statute have not the fixed and artificial content of scientific symbols; they have a penumbra, a dim fringe, a connotation, for they express an attitude of will, into which it is our duty to penetrate and which we must enforce ungrudgingly when we can ascertain it, regardless of imprecision in its expression.<sup>125</sup>

At the Supreme Court, prior to 1941, Justice Benjamin Cardozo employed the metaphor three times,<sup>126</sup> and Justices Louis Brandeis,<sup>127</sup> Felix Frankfurter,<sup>128</sup> Harlan Stone,<sup>129</sup> and Chief Jus-

121. *Springer*, 277 U.S. at 209.

122. *Compare* *Griswold v. Connecticut*, 381 U.S. 479, 483–84 (1965), *with* *Olmstead*, 277 U.S. at 469 (Holmes, J., dissenting).

123. *Olmstead*, 277 U.S. at 469 (Holmes, J., dissenting) (citation omitted).

124. *See* *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951); *Int'l Bhd. of Elec. Workers, Local 501 v. NLRB*, 181 F.2d 34, 40 (2d Cir. 1950), *aff'd*, 341 U.S. 694 (1951); *United States v. Rabinowitz*, 176 F.2d 732, 735 (2d Cir. 1949), *rev'd*, 339 U.S. 56 (1950), *overruled by* *Chimel v. California*, 395 U.S. 752 (1969); *United States v. Heine*, 151 F.2d 813, 817 (2d Cir. 1945); *Andrews v. Comm'r*, 135 F.2d 314, 319 (2d Cir. 1943) (Hand, J., dissenting); *Comm'r v. Ickelheimer*, 132 F.2d 660, 662 (2d Cir. 1943) (Hand, J., dissenting); *Landers, Frary & Clark v. Universal Cooler Corp.*, 85 F.2d 46, 48 (2d Cir. 1936); *Wachs v. Balsam*, 38 F.2d 50, 51 (2d Cir. 1930); *Van Vlaanderen v. Peyet Silk Dyeing Corp.*, 278 F. 993, 994 (S.D.N.Y. 1921); *The Poznan*, 276 F. 418, 428 (S.D.N.Y. 1921); *Lambert Pharmacal Co. v. Bolton Chem. Corp.*, 219 F. 325, 327 (S.D.N.Y. 1915).

125. 132 F.2d at 662 (citing *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908)).

126. *See* *Helvering v. Davis*, 301 U.S. 619, 640 (1937); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring); *Dayton Power & Light v. Pub. Utils. Comm'n*, 292 U.S. 290, 309 (1934).

127. *See* *Untermeyer v. Anderson*, 276 U.S. 440, 451 (1928) (Brandeis, J., dissenting)

tice Charles Evans Hughes<sup>130</sup> each employed it once. After that date and until the *Griswold* opinion,<sup>131</sup> Justice Douglas employed it eight times,<sup>132</sup> and Justices William Brennan,<sup>133</sup> Robert Jackson,<sup>134</sup> Wiley Rutledge,<sup>135</sup> and Chief Justice Harlan Fiske Stone<sup>136</sup> each employed it once.

Yet, the various Justices gave the metaphor different meanings in different cases. In some instances, they used “penumbra” to refer to an area of indeterminacy in the law. For example, in *A.L.A. Schechter Poultry Corp. v. United States*, Justice Cardozo wrote, “There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere.”<sup>137</sup> In other instances, they gave the word a meaning that bore some connection to its conventional meaning. For example, in *Coleman v. Miller*, a group of Kansas state legislators challenged Kansas’s ratification of a federal constitutional amendment.<sup>138</sup> In a concurring opinion, Justice Frankfurter argued that the legislators lacked the individualized legal interest necessary for standing.<sup>139</sup> Frankfurter observed, “No doubt the bounds of such legal interest have a penumbra which gives some freedom in judging fulfillment of our jurisdictional requirements.”<sup>140</sup>

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(quoting *Schlesinger v. Wisconsin*, 270 U.S. 230, 241 (1926) (Holmes, J., dissenting)).

128. See *Coleman v. Miller*, 307 U.S. 433, 465 (1939) (Frankfurter, J., concurring).

129. See *Arrow-Hart & Hegeman Elec. Co. v. FTC*, 291 U.S. 587, 607 (1934) (Stone, J., dissenting), *superseded by statute*, Act of Dec. 29, 1950, ch. 1184, §§ 7, 11, 64 Stat. 1125 (1950).

130. See *Cont’l Baking Co. v. Woodring*, 286 U.S. 352, 370 (1932).

131. *Griswold v. Connecticut*, 381 U.S. 479, 479 (1965) (decided June 7, 1965).

132. See *Fed. Power Comm’n v. Texaco, Inc.*, 377 U.S. 33, 39 (1964); *Wilson v. Schnettler*, 365 U.S. 381, 392 n.5 (1961) (Douglas, J., dissenting); *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 317 (1958), *superseded by regulation*, *Acquiring of Commercial or Industrial Products and Services Needed by the Government, Policy Revision*, 44 Fed. Reg. 20,556 (Apr. 5, 1979); *Smith v. Sperling*, 354 U.S. 91, 97 (1957); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957); *Gen. Box Co. v. United States*, 351 U.S. 159, 169 (1956) (Douglas, J., dissenting); *Gen. Comm. of Adjustment v. Mo.-Kan.-Tex. R.R. Co.*, 320 U.S. 323, 336 (1943); *United States v. Classic*, 313 U.S. 299, 331–32 (1941) (Douglas, J., dissenting).

133. See *Uphaus v. Wyman*, 360 U.S. 72, 99 (1959) (Brennan, J., dissenting).

134. See *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 315 (1945) (citing *Camfield v. United States*, 167 U.S. 518, 523–24 (1897)).

135. See *Screws v. United States*, 325 U.S. 91, 130 (1945) (Rutledge, J., concurring).

136. See *Fernandez v. Wiener*, 326 U.S. 340, 360 (1945).

137. 295 U.S. 495, 554 (1935) (Cardozo, J., concurring).

138. 307 U.S. 433 (1939).

139. *Id.* at 464 (Frankfurter, J., concurring).

140. *Id.* at 465.



Why these Justices gave deviant meanings to “penumbra” is a puzzlement. Perhaps they did not know what the word meant. The dictionary definitions are technical and not easy to understand.<sup>141</sup> And perhaps they could think of no metaphors that accurately conveyed the meaning that they wished to convey. Yet, there are serviceable words available. For example, if a statute is ambiguous, a court might state that the statute is ambiguous and that the policy considerations dictate giving its meaning an expansive interpretation. But perhaps among wordsmiths, the love for rhetoric is so powerful that the passion for metaphor triumphs over more pedestrian phraseology.

Prior to *Griswold*, Justice Douglas employed the penumbra metaphor in eight opinions and in each instance employed it to mean “periphery” or “fringe.”<sup>142</sup> For example, in his dissent in *United States v. Classic*, he concurred with the majority that the Federal Constitution permitted Congress to regulate certain primary elections and nomination procedures of political parties.<sup>143</sup> However, he declined to find that the United States Criminal Code criminalized the conduct in question:

It is not enough for us to find in the vague penumbra of a statute some offense about which Congress could have legislated, and then to particularize it as a crime because it is highly offensive. Civil liberties are too dear to permit conviction for crimes which are only implied and which can be spelled out only by adding inference to inference.<sup>144</sup>

## B. *Griswold and the Metaphor*

In *Griswold*, Justice Douglas’s opinion for the Court used the penumbra metaphor to establish a constitutional right to privacy that invalidated the Connecticut statute banning the use and distribution of contraceptives.<sup>145</sup> Because he did not want to ground the right of privacy on a substantive due process akin to the outdated analysis of *Lochner v. New York*, Douglas needed to find a

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141. See *supra* note 117 (providing the definition in the online version of the OXFORD ENGLISH DICTIONARY).

142. See cases cited *supra* note 132.

143. 313 U.S. 299, 330 (1941).

144. *Id.* at 331–32 (citation omitted).

145. *Griswold v. Connecticut*, 381 U.S. 479, 480, 483–85 (1965) (discussing various cases that suggest specific guarantees in the Bill of Rights, especially the First Amendment, which recognize zones of privacy).

basis elsewhere in the Constitution.<sup>146</sup> However, because the Constitution provided no firm textual basis for finding a right to privacy, Douglas found the right implicit in the First, Third, Fourth, Fifth, and Ninth Amendments.<sup>147</sup> He wrote, “The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”<sup>148</sup> With respect to the First Amendment, he stated, “In other words, the First Amendment has a penumbra where privacy is protected from government intrusion.”<sup>149</sup>

In a concurring opinion, Justice Goldberg gave support to Douglas’s metaphor: “In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment. I add these words to emphasize the relevance of that Amendment to the Court’s holding.”<sup>150</sup>

In his concurring opinion, Justice John Harlan also used the metaphor to describe his disagreement with the majority’s refusal to find a violation of the Due Process Clause of the Fourteenth Amendment: “[The] approach to this case [is] very much like that taken by my Brothers Black and Stewart in dissent, namely: the Due Process Clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate

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146. *Id.* at 481–82 (citing *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating state legislation setting maximum hours for bakers as interfering with the workers’ freedom of contract and not furthering a valid police purpose)). By 1937, the Court had clearly rejected *Lochner*. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a statute mandating minimum wages for female employees); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) (upholding a statute prohibiting the interstate shipping of “filled milk”—a combination of skimmed milk and nonmilk fat). In *Griswold*, Justice Douglas wrote:

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York* should be our guide. But we decline that invitation . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.

381 U.S. at 481–82 (citations omitted).

147. See 381 U.S. at 484.

148. *Id.* (citing *Poe v. Ullman*, 367 U.S. 497, 516–22 (1961) (Douglas, J., dissenting)).

149. *Id.* at 483.

150. *Id.* at 487 (Goldberg, J., concurring) (internal citation omitted).

some right assured by the letter or penumbra of the Bill of Rights.”<sup>151</sup>

Thus following the precedent of many of their predecessors, Douglas, Goldberg, and Harlan gave “penumbra” a meaning that deviates from its dictionary definition.<sup>152</sup> While “penumbra” is a shadowy area created when one body partially obscures a source of light,<sup>153</sup> the Justices used the word to analogize to light emanating from a light source.<sup>154</sup> For them, the light sources are various constitutional amendments, and the “light” that emanates from them protects a right that flows from the “light.”<sup>155</sup>

This transformation of meaning is understandable. Finding a right to privacy in the shadows lacks a persuasive rhetorical ring. Bright auras are more attractive than shadows. Yet, establishing a fundamental right only by locating it in the fringes of an aura is bound to accentuate the weakness of the argument.

From the perspective of rhetorical analysis, Justice Douglas’s metaphor violates a “rule” that effective metaphors must be both internally and externally coherent and thus correspond to our conventional understanding of how the world works.<sup>156</sup> The metaphor lacks internal coherence, because placing a right in a penumbra—given that the true source of light is the constitutional amendment—is inconsistent with the definition of a penumbra as a shaded area remote from a light source.<sup>157</sup> The metaphor lacks external coherence because it locates the right of privacy in the penumbra and thus contradicts the well-accepted metaphor that “ideas are light sources.”<sup>158</sup>

Perhaps Justice Douglas would have improved his argument by describing the amendments in the Bill of Rights as bright stars in the constitutional firmament with the right of privacy at

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151. *Id.* at 499 (Harlan, J., concurring in judgment).

152. To be clear, Justice Harlan rejected the analysis of Justice Douglas and relied on a substantive due process analysis. *See id.* at 500.

153. *See supra* note 117.

154. *Cf. Griswold*, 381 U.S. at 484 (Douglas, J., delivering the opinion of the Court); *id.* at 487 (Goldberg, J., concurring); *id.* at 499 (Harlan, J., concurring in judgment).

155. *Cf. id.* at 484 (Douglas, J., delivering the opinion of the Court); *id.* at 487 (Goldberg, J., concurring); *id.* at 499 (Harlan, J., concurring).

156. *See Rideout, supra* note 9, at 187–88.

157. *Id.*

158. *Id.* at 187 (citing STEVEN L. WINTER, A CLEARING IN THE FOREST 173 (2001); LAKOFF & JOHNSON, *supra* note 33, at 48).

their cores. To be sure, this metaphor, like the “penumbra” metaphor, deviates from the correct reading of the Bill of Rights as limiting government’s power to interfere with individual rights.<sup>159</sup> Still, it conforms to our popular understanding of these constitutional amendments as sources of rights, as opposed to constitutional limitations on government.

This failure to find a firmer textual basis for the right explains the reservations that some of the Justices and their clerks, not to mention the later academic commentators, had about the Douglas opinion. According to the recollections of the clerks, some clerks and Justices were disappointed with Justice Douglas’s analysis and his failure to fully develop this “penumbra” argument.<sup>160</sup> However, efforts to persuade him to revise his opinion proved only partially successful.<sup>161</sup>

One critic wrote: “In sum, the reasoning in *Griswold* is utterly incomprehensible. It hints that a constitutional right may be discovered outside the Constitution if its verbal formulation is a ‘second cousin’ of an express constitutional guarantee. By that logic, virtually any claimed right is a plausible candidate for constitutional recognition.”<sup>162</sup>

The dilemma of lacking an express text for a new constitutional right cannot be solved by creating a compelling metaphor. The dilemma is too profound to admit of such a comparatively easy solution. Here, any argument is suspect when it looks to the periphery of a constitutional right as the location for a fundamental right. The right has to find its home in a more central textual location. Perhaps Douglas might have reduced the criticism if he had forgone any metaphor and declared that the right of privacy was implicit in a particular constitutional provision, such as the First Amendment or the Ninth Amendment. Although the argument may still be vulnerable to objection, it is a stronger argument.

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159. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

160. See GARROW, *supra* note 109, at 245–49 (recounting the frustrations of both justices and clerks); JOHNSON, *supra* note 109, at 159–61 (same).

161. See, e.g., GARROW, *supra* note 109, at 245–51 (recounting these efforts and their results); JOHNSON, *supra* note 109, at 157–65, 170 (same).

162. Bruce Fein, *Griswold v. Connecticut: Wayward Decision-Making in the Supreme Court*, 16 OHIO N.U. L. REV. 551, 554 (1989).

No doubt the weakness of the metaphor may help explain why the Supreme Court has employed it sparingly in subsequent cases. According to an electronic data search, since the 1965 *Griswold* case, the metaphor has appeared in only thirty-nine Supreme Court cases,<sup>163</sup> and of these, only eleven dealt with the constitutional right of privacy.<sup>164</sup> In most of the remaining cases, the Justices used “penumbra” to refer to indeterminacy in the reach of a statute.<sup>165</sup> Of the eleven cases dealing with privacy, in only six of them did a Justice using the metaphor argue in favor of finding a violation of the right of privacy, with Justice Douglas dissenting in three of those cases.<sup>166</sup> And in only one majority opinion did a Justice invoke the metaphor—Justice Blackmun in *Roe v. Wade*.<sup>167</sup> In the state and lower federal courts, an electronic search discloses that the metaphor still enjoys wide usage.<sup>168</sup>

163. Search Query for “Penumbra,” LEXISNEXIS, [www.lexisnexis.com](http://www.lexisnexis.com) (select “Search” hyperlink; then select “Legal” hyperlink; then select “Cases-U.S.” hyperlink; then select “U.S. Supreme Court Cases, Lawyers’ Edition” hyperlink; then search for “penumbra and date aft 10/1/1965”; then follow “search” hyperlink).

164. See *Lawrence v. Texas*, 539 U.S. 558, 594–95 (2003) (Scalia, J., dissenting) (majority invalidating statute criminalizing same-sex sexual conduct); *Ferguson v. City of Charleston*, 532 U.S. 67, 92–93 (2001) (Scalia, J., dissenting) (citation omitted) (majority invalidating drug testing policy); *Bowers v. Hardwick*, 478 U.S. 186, 208 (1986) (Blackmun, J., dissenting) (majority upholding the prosecution of a homosexual couple for sodomy), *overruled by Lawrence*, 539 U.S. 558; *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 773 (1986) (Stevens, J., concurring) (citation omitted) (invalidating statute regulating abortion), *overruled by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870 (1992); *Whalen v. Roe*, 429 U.S. 589, 598–99 nn.23 & 25 (1977) (upholding a statute requiring maintenance of records of persons receiving prescriptions for controlled substances); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66–67 (1973) (upholding injunction against showing obscene films in a movie theater to consenting adults); *Roe v. Wade*, 410 U.S. 113, 129 (1973) (invalidating anti-abortion statute); *Eisenstadt v. Baird*, 405 U.S. 438, 471–72 (1972) (Burger, C.J., dissenting) (majority rejecting statute criminalizing distribution of contraceptives to unmarried people); *Warden v. Hayden*, 387 U.S. 294, 322, 324 (1967) (Douglas, J., dissenting) (citation omitted) (majority upholding police seizure of clothing while searching defendant’s home); *Osborn v. United States*, 385 U.S. 323, 341 (1966) (Douglas, J., dissenting) (citation omitted) (majority upholding use of hidden recording device to record incriminating statements); *Schmerber v. California*, 384 U.S. 757, 778–79 (1966) (Douglas, J., dissenting) (majority permitting drawing blood for an alcohol analysis test without consent of the party arrested for driving while intoxicated).

165. See, e.g., *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 150 (1985) (Brennan, J., concurring in judgment).

166. See *Bowers*, 478 U.S. at 208 (Blackmun, J., dissenting); *Thornburgh*, 476 U.S. at 773 (Stevens, J., concurring) (citation omitted); *Roe*, 410 U.S. at 129; *Hayden*, 387 U.S. at 322, 324 (Douglas, J., dissenting); *Osborn*, 385 U.S. at 341 (Douglas, J., dissenting) (citation omitted); *Schmerber*, 384 U.S. at 778–79 (Douglas, J., dissenting).

167. *Roe*, 410 U.S. at 129.

168. Search Query for “Penumbra,” LEXISNEXIS, [www.lexisnexis.com](http://www.lexisnexis.com) (select “Search” hyperlink; then select “Legal” hyperlink; then select “Federal & State cases, combined” hyperlink; then search for “penumbra and date aft 10/1/1965”; then follow “search” hyper-

Thus, although the metaphor of the penumbra played a role in establishing a constitutional right of privacy, it has played a minimal role in developing the content of that right.

#### IV. CONCLUSION

In *Illinois ex rel. McCollum v. Board of Education*, the case rejecting a school policy permitting students to be released from school in order to receive religious instruction, Justice Stanley Reed responded to Justice Hugo Black's reliance on the "wall of separation" metaphor to justify the ruling.<sup>169</sup> Justice Reed wrote, "A rule of law should not be drawn from a figure of speech."<sup>170</sup> Whatever the merits of Justice Reed's pronouncement, metaphors shape judicial holdings and give content to statutory and constitutional provisions, even when the metaphors are questionable. For example, the "wall" metaphor supports a First Amendment stricture that appeals to only one side on a controversial issue. Justice Reed dissented, because he disagreed with the side of the argument that the metaphor endorsed.<sup>171</sup> Yet, many cases have employed the metaphor in making law favorable to that figure of speech. The "penumbra" metaphor offers an unsatisfying justification for the right of privacy. Yet, it continues to appear in the case law.

An important question is why do these faulty metaphors survive? To be sure, they enjoy less prominence than they once did; however, they are still in use. Two reasons suggest themselves: their visual and physical appeal and their power as precedent.

First, they are visually and physically appealing. The notion of a wall separating church and state is easy to grasp and lends itself to simple decisionmaking. For those accepting the wall metaphor, rarely are there close decisions about nativity scenes, monuments to the Ten Commandments, or aid to religiously affiliated schools. There is no place for interplay between church and state. Yet the case law speaks otherwise. As Judge Posner

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link) (displaying nearly three thousand results).

169. 333 U.S. 203, 211–212 (1948). For a discussion of the case, see *supra* notes 59–61 and accompanying text.

170. *McCollum*, 333 U.S. at 247 (Reed, J., dissenting) (noting that the University of Virginia, which Jefferson helped found, provided for religious education, despite Jefferson's assertion of the "wall" metaphor).

171. *Compare id.* at 211 (majority opinion), *with id.* at 247 (Reed, J., dissenting).

has written, "The danger is that a metaphor may elide the reasoning process that would reveal the limits of the analogy . . . that the metaphor conveys."<sup>172</sup>

Because astronomical penumbras are relatively rare and can be awe inspiring, their appeal is hard to gainsay. Even though the metaphor's use in privacy cases is intellectually confusing, the nature of a penumbra and the limited use of the word in common parlance make it alluring and enhance its staying power.

Second, once an appealing metaphor begins to appear in cases, the metaphor enjoys the power of precedent. The drafters of future judicial opinions are likely to continue to use the reasoning and metaphors that appeared in prior cases. As a result, the metaphors begin to develop a life of their own. In the case of the "penumbra" metaphor, after its use by Justice Field,<sup>173</sup> the Justices who revived its usage were Justices Holmes<sup>174</sup> and Hand.<sup>175</sup> Certainly their prominence helped make the metaphor acceptable to other opinion writers.

To be clear, legal metaphors can contribute to legal discourse.<sup>176</sup> One scholar has identified five functions of legal metaphors: (1) they serve a decorative function, which adds to the persuasiveness of argument; (2) they operate as a form of analogical reasoning, which makes abstract concepts more concrete; (3) they compare one concept to another and may encourage the reader to find similarities in different events and legal theories; (4) by linking unrelated ideas, they can unleash creative thought; and (5) they can express concepts in a few words as opposed to a few pages.<sup>177</sup> For example, a strict separationist may find the wall metaphor perfectly satisfactory on all these counts. And, in general, the "marketplace of ideas" metaphor works reasonably well as a me-

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172. RICHARD A. POSNER, *LAW AND LITERATURE* 357 (3d ed. 2009).

173. See *supra* notes 110, 116 and accompanying text.

174. See *supra* notes 118–23 and accompanying text.

175. See *supra* notes 124–25 and accompanying text.

176. See David T. Ritchie, *Who Is On the Outside Looking In, and What Do They See?: Metaphors of Exclusion in Legal Education*, 58 *MERCER L. REV.* 991, 993–94 (2007) (stating that metaphors are "fundamental" in "forming and expressing our intellectual imagination in the context of legal reasoning and communication").

177. See Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 *CONN. L. REV.* 17, 20–24 (1994).

taphor advancing an underlying principle of First Amendment jurisprudence.<sup>178</sup>

From these examples come two lessons. First, before using a metaphor, a court should seriously consider whether it is an apt metaphor that, within limits, helps describe and create the law. Second, courts should abandon the use of a poor metaphor before it takes root. Metaphors do create law, and poor metaphors inhibit law's progress.

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178. *See supra* notes 2–3 and accompanying text. *But see* Oldfather, *supra* note 177, at 26–28 (noting that the metaphor fails to acknowledge that the marketplace of ideas sometimes fails to exalt truth).



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