pose alternative structures that might be equally effective or even more effective in protecting free expression overall, though less protective in certain implementational details. Imagine, for example, a congressional statute that tightly caps punitive damages for libel (thereby providing more financial protection for printers), but allows persons falsely defamed to recover token money damages and declaratory judgments that disparaging publications are false without having to prove actual printer malice (thereby providing more reputational vindication for libel victims). Had the Court itself tried to announce such rules for federal libel suits, perhaps the justices' efforts to restrain jury damages might have set off Seventh Amendment alarm bells about judges improperly limiting juries. More generally, the Court might have worried that it was democratically unseemly for unelected judges to limit the domain of juries. Congress, however, has long been understood to have broad legal authority to limit juries in the process of creating new "equitable" statutory systems replacing traditional common-law causes of action; elected members of Congress also enjoy a stronger democratic mandate to limit jury power. Thus, even though our hypothetical congressional statute in some ways would offer publishers less than *Sullivan* does, if Congress actually were to enact such a law the Court should not reject it out of hand, if indeed it would protect the core of the First Amendment as well as—or perhaps even better than—the Court was able to do acting purely on its own steam in *Sullivan*.

IN THE REALM OF RELIGIOUS RIGHTS, the Warren Court once again aced the question of constitutional meaning—affirming full religious liberty and equality against both state and federal officials—and then sensibly fashioned implementing rules to make that meaning a reality. Alas, post-Warren cases went further, laying down troubling doctrinal sub-rules organized around a poorly defined metaphor of "separation of church and state." Some of these sub-rules led to outlandish results. More recent cases have properly trimmed back some of these sub-rules, thereby returning America to the more sensible approach of the Warren Court itself.[8]

Recall that in two early 1960s cases, *Engel v. Vitale* and *Abington v. Schempp*, the Warren Court struck down organized worship services in the public schools in situations where public employees had either com-

posed or blessed an official government prayer. In the 1985 case of *Wallace v. Jaffree,* by contrast, the post-Warren Court repeatedly invoked *Engel* and *Abington* to strike down a state law mandating a moment of classroom silence that enabled students to pray individually or simply to engage in quiet contemplation. Unlike the governments in *Engel* and *Abington*, however, the state in *Wallace* had neither written nor endorsed any kind of prayer whatsoever. Nor had the state separated children along religious lines or forced any student to opt out or stand apart. Agnostic children were free to sit at their desks in this silent moment and think about baseball. More subversive kids were even free to silently indulge atheist, heretical, or anti-government thoughts.

In principle, a moment of silence was one way to communicate that the public schools aimed to be religiously neutral, not antireligious—to reach out to include those who had experienced *Engel* and *Abington* as assaults on and insults to their religious identities. The silent moment was meant to accommodate observance in a manner that was nevertheless wholly neutral and nonsegregative.

Some of the *Wallace* Court's hostility to moments of silence may be explained by understandable—though not admirable—institutional defensiveness. *Engel* and *Abington* provoked massive popular backlash, and in many places outright defiance of the Court's rulings. The Court responded by defending its turf, and in the process, overreacting.

More generally, post–Warren Court religion law subtly shifted away from religious equality toward separation as an organizing concept. The separation concept had been visible even before the Warren Court. The 1947 school-bus case, *Everson v. Board of Education*, had famously invoked Jefferson's 1802 metaphor of "a wall of separation" between church and state. This metaphor became an increasingly common trope in later opinions, appearing in roughly twenty Court cases in the second half of the twentieth century. But "separation" was an ambiguous concept, susceptible to profound misinterpretation and perversion of the proper principles at stake.[9]

Consider the "separation of powers." One version of this separation simply means that election to one branch of government does not automatically entitle the winner to hold a position in a different branch of govern-

ment. Thus, in America—unlike England—the person elected to lead the legislature does not thereby become the chief executive. But a stronger version of separation of powers is also easily imaginable: Membership in one branch of government *disqualifies* the member from holding a position in a different branch of government. This, too, is part of the American Constitution: The incompatibility clause of Article I, section 6, prohibits any sitting member of Congress from holding a federal executive or judicial office.

Now consider analogous issues raised by the so-called "wall of separation between church and state." Under a sensibly modest version of this metaphor, no church official would automatically be entitled to sit in government. Thus, in America—unlike England—an Anglican archbishop is not automatically a member of any official legislative body, such as the "Lords Spiritual." But under a stricter version of separation, the fact that a person is a clergyman might actually disqualify him for a position in government.

Jefferson himself at times leaned in this anticlerical direction, and most states in the Founding era did indeed embrace formal disqualifications of clergymen. However, the modern Court has made clear (in a unanimous 1978 decision, *McDaniel v. Paty*) that such discrimination against religious officials is unconstitutional—a profound violation of proper principles of religious liberty and equality.

But so long as some justices use the metaphor of separation as their polestar, it becomes easier to think that rules like the one excluding the clergy are permissible, and perhaps even required, rather than being obvious affronts to America's post-Reconstruction Constitution of liberty and equality for all.

To return to the school system for a handy hypothetical, suppose that the government decides to give every child a computer so that, truly, no child will be left behind. In this hypothetical government program, every child attending public schools receives this computer, as does every child who attends a private school that is either aggressively secular or merely religiously indifferent. But what about children who attend private religious schools—schools whose curricula are otherwise comparable to the private nonreligious schools but that also add religion to the educational experience? *May* children at such schools receive the computers? *Must* they?

Anyone whose organizing metaphor is separation might be inclined to answer no to both questions. Thus, several post–Warren Court cases from the mid-1970s, when talk of Jefferson's wall reached its peak on the Court, actually held that this sort of discrimination against religious schools was not merely constitutionally permissible but constitutionally required. Fortunately, over the past decade the Court has returned to its senses, overruled several of these cases, and begun to see and say clearly that of course private religious schools should not be treated worse than otherwise comparable private nonreligious schools. The schools should be treated equally, as should the children. So long as a private school meets proper educational standards for teaching the basic 3 Rs and so on, it is simply none of the government's business whether religion is taught pervasively or in a special part of the curriculum or whether the kids are praying in school-sponsored ways.[10]

The proper touchstones are religious liberty and equality, not separation as such. If everyone else is receiving a government benefit, then so must religious folk—not because they are religious but regardless of whether they are religious. A private secular academy should never lose its government benefits merely because it later decides to add a daily prayer to its classroom regimen. Such a tax on prayer—for that is what a funding cutoff would be—would constitute an obvious violation of the ideals of liberty and equality at the heart of the Fourteenth Amendment.

To see the same point in the context of public-school education—the context that generated *Brown*, *Bolling*, *Engel*, and *Abington*—note that while governments may not properly organize prayer, *private citizens may*. If a student-organized and student-run stamp club is allowed to meet in a classroom after school, as is a student chess club, a student baseball-card club, and any other student club, then a student-organized and student-run Bible study must be allowed equal access. The key concept is not that religion must in every way be walled out of and separated from school space, but rather that religious students must be treated equally with all others. In short, the watchword is not "separate"—but "equal."

THE PROBLEM WITH THE POST-WARREN COURT'S doctrine governing church and state was not that various sub-rules were prophylactic and overprotective. As we have seen, the same could be said of *Brown*'s sub-