

## **The Supreme Court's Misuse of Thomas Jefferson's Phrase "A Wall of Separation of Church and State"**

There have been very few phrases used in Supreme Court decisions that have made the leap from the legal field to the public arena. One such phrase, which has arguably become a household expression, is "the wall of separation between church and state". Daniel Dreisbach's statement correctly assessed the situation when he said that few metaphors have evoked more passionate debate (805). The reason for the controversy centers on the role that the government plays in the religious sphere and vice versa. Because of the plethora of ideologies related to church and state in this country, the Supreme Court has been forced to make decisions concerning the specific role of government when dealing with religion.

What I intend to show is that the Supreme Court case of *Everson v. Board of Education* 1947 was a major turning point because they began to use this phrase in a way that was dramatically different than Thomas Jefferson's original use of it while ignoring historical precedence. David Barton wrote concerning this case that "this idiom was used only twice in the Court's previous 150 years while now has become the contemporary standard for judicial policy being cited seemingly countless numbers of Court decisions" ("Original Intent" 13). I will address the evidence in this order: First, I will examine the source and historical surroundings of the origination of the phrase by Thomas Jefferson. Second, I will examine the Constitutional Convention debates encompassing the framing of the First Amendment. Third, I will briefly analyze the use of Thomas Jefferson's letter prior to 1947 and how it compares with the *Everson* case. Finally, I will give some examples of the implications in recent Court decisions that stemmed from the *Everson* case.

## **Historical Context of the Letter**

Thomas Jefferson originally spoke the phrase that has caused so much controversy in a private letter to the Danbury Baptists in 1802. James Hutson has summed up this turbulent time of our country's past when he said that "Jefferson and his triumphant followers launched what they regarded as the 'second American revolution' to undo the work of the Federalist Party...who according to Jefferson had been scheming for years to impose a British-style monarchy on the United States" (777). The Federalists were the party that favored a strong central government. Jefferson, being a self-described Anti-Federalist, detested a strong federal government in favor of maintaining the individual States' sovereignty. One of the desires of the Federalist Party was to incorporate religious activities and expressions whenever possible with the platform being the newly formed Federal government. Some examples of these hopes were evident in the Federalist Presidents George Washington and John Adams declaring public days of fasting and prayer while in office. Jefferson resented these religious proclamations, not because he was irreligious, but because of their resemblance to the way the British monarchical system was setup with the King being the head of the Anglican church. Jefferson himself had declared a day of fasting and prayer while governor of Virginia (Federer, 323), but strictly opposed the chief executive of the newly formed Federal government from doing the same. His opposition wasn't because these actions were deemed unlawful or that it violated the Constitution, but instead because of the similarity to the British system (Hutson, 783). It is extremely important at this point to convey the recognized distinction between the rights and roles of the individual States versus that of the Federal government. Jefferson saw things much different than today whereas in his day the individual States had certain rights and freedoms that were prohibited for the Federal

government. The individual States' governments were not simply an extension of the Federal system, which is what is assumed today. It's also important to understand the historical and political background at this time so as to have a greater appreciation for the *context* of when the phrase occurs.

The election of campaign for the 1800 presidency was one that pitted the extreme religious Federalists against the religious but Anti-Federalist Jefferson. His opponents vilified Jefferson of being an uninformed Jacobin, libertine, atheist (Dreisbach, 809). Another aspect of this campaign was the different religious denominations seeking an ally in the presidency. This is where the Danbury Baptists come into play. Thomas Buckley, S.J. wrote, "The Baptists had just launched a vigorous campaign against the church-state system under which they lived in Connecticut. State law mandated taxes to support Congregational worship and ministers" (796). This situation put them under persecution for their faith. Due to the state sponsored and support of the Congregational denomination by the state government of Connecticut, the Baptists were alienated and thus were not receiving any monetary support. It is essential to realize that the Bill of Rights and the first amendment had been ratified in 1791. What this means is that there was no violation of the Constitution or these foundational rights in having the State of Connecticut mandate taxes for Congregational worship and pastors. There was no outcry of "separation of church and state" as it related to the individual State's freedoms of government-sponsored religion. We will see what Jefferson meant by his statement as we further examine the historical context of the times.

The Danbury Baptists found great delight in Jefferson being elected president because of his views on religious expression. They wrote him a letter congratulating him and then

expressed concern that the Constitution's First Amendment was not clear enough because it didn't delineate between granted rights by government versus inalienable or natural rights of religious expression and exercise given by the Creator. Jefferson wrote back to the Danbury Baptists his letter that I have included in its entirety:

“The affectionate sentiments of esteem and approbation which you are so good as to express towards me, on behalf of the Danbury Baptist association, give me the highest satisfaction. My duties dictate a faithful and zealous pursuit of the interests of my constituents, & in proportion as they are persuaded of my fidelity to those duties; the discharge of them becomes more and more pleasing. Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate 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 the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties. I reciprocate your kind prayers for the protection & blessing of the common father and creator of man, and tender you for yourselves & your religious association, assurances of my high respect & esteem.”

(from Library of Congress Website).

Jefferson was clearly siding with the Baptists who had been persecuted for their faith by

the majority denomination in their state and in their struggle to enjoy the rights of the conscience (Dreisbach, 809). Although he had no power to do anything about it through his role as United States President, the Baptists were seeking to gain respect and influence with those who had an open mind now that Jefferson sided with them, (Buckley, 796). Thomas Jefferson was stating that the government at the “federal level”, because of the first amendment, was prohibited from interfering in religious expression and/or exercise unless it disrupted good social order. It will be shown how the Supreme Court interpreted Jefferson’s meaning relating to “good social order” in the subsequent “The Phrase 1947 and Beyond” section. Jefferson’s wall of separation also stipulated that religion was not allowed to gain control of the Federal Government. Notice carefully that Jefferson focused his agreement with the *whole* of the American people declaring that *their* legislature (the broader Federal government) was not allowed to establish any religious preferences.

Another backdrop of the Danbury Baptist letter was his opposition to religious control of the State governments. He understood it was legal at this time for there to be State sponsored religion, but nonetheless opposed it because of the risks to limiting religious expression. He became governor of Virginia in June of 1789. During this time certain denominations were gaining control of differing state legislatures. In his state of Virginia it was the Anglican Church. Seeking to limit any specific denomination from gaining sole influence he authored the “Virginia Bill of Religious Liberty” to secure equal access of religious expression. Thomas Jefferson wasn’t concerned with eliminating religion from government but only the usurping of government by any sole denomination (Gaustad, 804). We know this because while governor he helped organize a Calvinistic Reformed Church and directed its minister to preach every 4<sup>th</sup>

Sabbath or more at the newly built Albermale County Courthouse. Also, while U.S. President he was a regular attendee at the church services in the Hall of the House of Representatives and participated in Bible studies held at the Capitol Building. (Hutson, 786-787). These actions speak much louder than modern words about what Jefferson believed or didn't believe. The facts of history speak for themselves.

There are those who say that Jefferson advocated that government never have any influence from the religious sphere. Kramnick and Moore sum this line of reasoning up best when they wrote "Nonetheless, no American statesman has ever more strictly followed the principle that religion would best flourish if the state and politicians left it alone" (822). Other groups such as the ACLU and Americans United for the Separation of Church and State encourage this thinking concerning Jefferson and the "wall" phrase.

However, the evidence shows the contrary. Jefferson was strictly opposed to any governmental control or interference with religion because this was the norm under the British way of life. He did however believe that government and religion could be friends. He showed through his actions that government could even be used to advance religious principles as long as it was not at the expense of denying any other specific religion from doing so. Some examples are: 1) While a Virginia legislator he introduced a resolution for a Day of Fasting of Prayer; 2) Soon after writing the Declaration of Independence he proposed for the seal of the newly formed Union to be: 'The children of Israel in the wilderness led by a cloud by day and pillar of fire by night'; 3) While governor he decreed a public day of thanksgiving to 'Almighty God'; 4) He gave public credit to God for getting rid of governmental religious intolerance in both of his inaugural addresses as president; 5) While chairing the school board for the District

of Columbia during his Presidency he authored the first plan of education adopted by the city in which he advocated using the Bible and “Isaac Watts’ Psalms, Hymns, and Spiritual Songs”, 1707, as the principal books for teaching reading to students; 6) As President he signed treaties with certain Indian tribes (ie. Kaskaskia) where Christian Missionaries were to be paid \$100 annually out of the Federal Treasury (Federer, 166; 322-326). Can you imagine the situation today if a President recommended almost any of these proposals? There would be a screaming outcry that we need to return to the thinking of Jefferson in keeping Church and State separate. Yet this is not the case at all. Jefferson himself advocated and promoted using the Bible in public schools! He was clearly not an advocate of a strictly secular government.

James Hutson sums up Jefferson’s view on the wall phrase by writing “...the wall of separation is still an acceptable metaphor, if it is understood as a wall of the kind that existed during the cold war, impenetrable through most of its length but punctuated with checkpoints. Jefferson would have no objection, if, at these checkpoints, government invited religion to pass through and make itself at home in the use of its spaces, structures, and facilities, provided it treated equally everyone who wanted to come along” (790).

### **Constitutional Convention Debates of the First Amendment**

The reason the evidence will be presented in regard to the framing of the First Amendment is because in Jefferson’s letter he quotes part of it in relation to the phrase “wall of separation of church and state”. To understand the intent of the framers of the First Amendment we will heed the advice of Thomas Jefferson himself when on June 12, 1823 he wrote to Justice William Johnson “On every question of construction, carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying

what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed” (qtd. by Federer, 330). Anyone who dares to quote the phrase “separation of church and state” would do well to heed the advice of the author of that phrase. Let’s indeed go back to the time of the debates and recollect the spirit of what these words meant then, but also the words of the establishment clause in the Bill of Rights.

As mentioned before, there was much religious jockeying within the governments of the States during the last three decades of the 18<sup>th</sup> century. This was also a time of increasing persecution from the British followed by the Revolutionary War of Independence. The Continental Congress made their first official act a call for prayer which was recorded in the *Journals of the Continental Congress*, after receiving the news that the British troops had attacked Boston (Federer, 136). I mention this only to set the stage. The *Journals of the Continental Congress* record that one of the many things those who made up the Continental Congress did, was call for public prayer. For anyone to assert that secular people founded our country is not accurate in the least. These were Christian men who sought to pray to the God of the Bible. It is true that not all of them were part of the same denomination, but they all were theists and 54 of 56 signers of the Declaration of Independence were regular churchgoers.

After the Articles of Confederation were adopted and up until the beginning of the Constitutional Congress prayer to God was a constant occurrence. Religion played a fundamental role in the lives of the signers of the Declaration of Independence and Constitution. According to the book “Origins of American Constitutionalism” a statement read that “Political scientists now know that the greatest single source of political inspiration for our founding fathers was the Bible, which was cited in 34% of the quotations from the founding era of 1760-

1805" (qtd. by Barton in "Thomas Jefferson" tract). The men who were instrumental in the founding of this country claimed often the importance of religion in public life. One such founding father was John Jay who was the first Supreme Court Chief Justice appointed by President Washington. He also was a member of the first and second Continental Congress and served as its President. John Jay along with the other Founding Fathers James Madison and Alexander Hamilton wrote the Federalist papers. John Jay is quoted as saying, "Providence has given to our people the choice of their rulers, and it is the duty, as well as the privilege and interest of our Christian nation to select and prefer Christians for their rulers" (Federer 318).

The Constitutional Convention began on May 14, 1787 with the intention of creating a new document that would supersede the Articles of Confederation and address more of the issues that were lacking related to individual States representation. The debates were so intense between the larger and smaller states that Benjamin Franklin, governor of Pennsylvania, declared that they were foolish to suppose that they, after receiving victory in the war with Britain through the divine hand of Providence, could dare to establish a national government without the aid of God Almighty. He then suggested that they leave all deliberations and that prayers should be made for the assistance of heaven every morning over the next few days. This is exactly what occurred until they reconvened five days later. The newly formed Constitution was signed by the delegates on September 17, 1787 and ratified by the minimum number of nine states on June 21, 1788. Thus making it the law of the land and inducting George Washington as the first President on April 30, 1789. I will note that virtually all of the 55 writers and signers of the Constitution were members of at least six different Christian denominations (Federer, 151-153). This fact is important to keep in mind as we examine the background to the framing of the First

Amendment, which today is such a crucial interpretive contribution to the overall debate.

One of the concerns of the Anti-Federalists was that of a Bill of Rights. Therefore, the next thing the newly formed Constitutional Congress began, was the drafting of the First Amendment along with the other amendments that make up the Bill of Rights. The first proposal for the First Amendment occurred in June of 1789. There were many different drafts that were proffered during the next few months. However, all of the proposals had one concern in the forefront. They were all worded to restrict the Congress (of the Federal Government) from establishing a national religion or denomination. It had nothing to do with Congress encouraging or furthering religion in general. Remember that the men of Congress were involved with many different “denominations” and many of these men had just fought in a war that sought to throw off the British Monarchy with its established government church of Anglicanism. This is the key to understanding the debates. The word “religion” had at least two different nuances at this time, which included that of religion in general, but also it was used as a synonym for “denomination.” The only way to understand which nuance is preferred is to examine the context of the debate, but also the context of the written material being considered.

The first proposal of the First Amendment that was seeking limits on the actions of the Federal Government (Congress) was by James Madison. It read, “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed” (qtd. by Federer, 158-159). The debate continued to sway back and forth. There were those who were concerned that the law would tend for people to think that religion might be abolished altogether. Congressman Benjamin Huntington stated his concern that the law needed

to read clearly that no specific religion would be enforced by the new Federal Government which in turn would coerce men to worship God in a way that was contrary to their conscience. James Madison agreed with Huntington and stated "...he believed that the people feared one sect might obtain a preeminence, or two [Congregational and Anglican] combine and establish a religion to which they would compel others to conform" (qtd. by Federer 160). As the many different proposals moved between the House and the Senate it is interesting to note that they all focused on the one single purpose when relating to religion. That of prohibiting Congress from passing any law that would create a specific national denomination. Again... let's remember that there existed State sanctioned denominations at this time. The main issue was Congress being prohibited from this power of the individual States.

One of the proposals given by the Senate shows clearly the intent of the First Amendment. It read, "Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of the conscience be infringed" (qtd. by Federer, 160). The First Amendment's final wording and the rest of the Bill of Rights were ratified on December 15, 1791, which reverted to using the more broad nuance and word "religion". This makes sense because, even though this word contains the nuance of denomination, the word denomination is more suited to those sects within the umbrella of Protestantism. By using "religion" to broadly include both nuances, they were able to include other prominent religions such as Catholicism, Judaism, Islam, etc. that were not allowed to be established by the Congress as being nationally sanctioned.

The word "religion" was so well understood to include both nuances that during the time the First Amendment's wording was being debated, the Congress re-passed the Northwest

Ordinance that was first passed in 1787. This law established requirements for those territories that would later seek Statehood within the Union. One of the requirements contained in article III stated that Religion, Morality, and knowledge (schools) are necessary for any good government and should be encouraged (“Patriot Post” website). They had no trouble using the word “religion”. They understood the limit they placed on themselves and future Congress’ when passing the First Amendment. Congress had the authority (and responsibility) to promote different forms of religion, but not to make any “Law” that established a specific national religion or denomination.

### **The Phrase Prior to 1947**

Moving on to examination of the Supreme Court’s use of Jefferson’s letter, we will explore the sole time prior to 1947 that his letter, along with the “wall” phrase, were used. It was in the case of *Reynolds v. United States* 1878. This case involved a Mormon Utah resident who was convicted for knowingly violating the law that forbade polygamy. He challenged his conviction saying that the Federal Government could not interfere in his religious practices because of the U.S. Constitution’s First Amendment section of not prohibiting the free exercise of religion.

Justice Waite gave the leading opinion for the court. He put specific emphasis on the historical aspects regarding the framing of the First Amendment. He then quoted Jefferson’s entire letter to the Danbury Baptists (including the context) and said, “The rightful purposes of civil government are for its officers to interfere only when religious principles break into overt acts against peace and good order. In this is found the true distinction between what properly belongs to church and what to the state” (“Caselaw” website). He then went to list some things

of religious nature that violated good order. These included human sacrifice, injury to children, polygamy, incest, et al. The court in this case stated very clearly that government could only interfere or prohibit certain actions that were disruptive to social disorder but had no authority over those that were not disruptive, regardless of place. These could include practices such as praying, Bible reading, or the spreading of religious faith whether in the public schools or any other place. Remember, this was 1878 and the above-mentioned practices being part of public schools at this time is a fact of history. The point being that Justice Waite and the Court didn't object to prayer in schools, etc. as being a violation of the "separation of church and state." They demonstrated their familiarity with the phrase and its context and concluded that there was no violation. The Court in this case, using the events of history as precedence, was quite consistent with Jefferson when they invoked his phrase. However, the activities mentioned above would cause a change in the Court's use two generations later.

### **The Phrase 1947 and Beyond**

The next case that used Jefferson's "wall" phrase from the Danbury letter was *Everson v. Board of Education 1947*. This case involved a New Jersey law that reimbursed local taxpayers money expended by them for the bus transportation of their children on regular busses operated by the public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools. That is where the alleged problem arose for a local taxpayer named Arch Everson. He sued stating that because public money was being used for Catholic students getting to a private school it violated the First Amendment.

Justice Hugo Black gave the opinion of the Court. He expressed that the New Jersey

statute did not violate the Constitution's establishment clause. He reasoned that the New Jersey law was not supporting the private institutions and in no way was New Jersey establishing a religion. However, he then went on to say Jefferson played a leading role in the drafting and adoption of the First Amendment and that we should take heed to the clear words of Jefferson that there is indeed a "wall of separation of church and state" which must be kept high and impregnable ("CaseLaw" website). In addition he took the Constitution's denial of the Federal government (Congress shall make no law...) from establishing a religion and applied it to the State governments by the 14<sup>th</sup> amendment (This amendment adopted in 1868 disallowed States from denying citizenship to any of its residents regardless of race). The idea of an individual State being prohibited by the Bill of Rights was a first in Supreme Court history and set a standard by which religious clauses were to be interpreted (Hall, 262). Thus Justice Hugo took the context of not just the phrase, but also the First Amendment and imbued them with meaning they never originally had.

Justice Hugo's use of the phrase was quite different than Justice White's use in the *Reynolds* case in 1878. White explained that there was indeed a wall of separation spoken by Jefferson that related to the First Amendment, but that it limited the Federal government only from establishing a national religion (thus creating religious opinion). It did allow the Federal Government to get involved only when social order was disrupted in the name of religion. It's extremely important to note and emphasize that just three years earlier to this case, and seven years after the adoption of the 14<sup>th</sup> amendment, the Congress rejected a proposed Constitutional Amendment that would have prohibited an individual State of the Union from establishing or respecting a State denomination or forbidding reading of any kind of religious tenets or creeds in

public schools (Barton, “Original Intent”, 201). If that amendment would have been adopted Justice Hugo would be correct, but it didn’t and no amendment of this kind has since been adopted. Thus history shows a clear distinction that the First Amendment was strictly limited to “Congress” or the Federal Government and not the individual states. The Supreme Court case of *Barron v. Baltimore 1833* understood this many years earlier (Hall, 65). This case affirmed that the Bill of Rights were limited in their jurisdiction to the Federal Government. Chief Justice Marshall wrote that the Bill of Rights, “contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them” (“FindLaw” website). This again reiterates that the First Amendment was understood as only restricting the Federal Government and not the individual States. Jefferson concurred in his understanding of the First Amendment by stating that only the Federal Government was restricted and the States did have the authority (albeit he didn’t necessarily like it) to establish State-sanctioned denominations (qtd. by Federer, 328).

Justice Hugo (quoted above), using Jefferson as precedence, stated that Jefferson played a leading role in the framing of the First Amendment. Justice Hugo was seeking to associate Jefferson’s “separation” phrase with framing of the First Amendment in order for him to force the connection and instill the First Amendment with a meaning foreign to the context. Yet Jefferson was an ambassador to France at the time and distinctly denied having any influence whatsoever in the framing of the Constitution or First Amendment. He wrote a letter to Dr. Priestly denying Priestly’s claim that he had a role in it. He said “I was in Europe at the time the Constitution was planned and never saw it until after it was established” (qtd. by Barton in “America” tract).

The Supreme Court, using the *Everson v. Board of Education* as precedent, began to systematically strike down religious activities and expressions. Some examples are school prayer in 1962, Bible reading 1963, prayer at graduation ceremonies 1994, posting of Ten Commandments 1980, school songs with religious content 1982, and public teachers being seen with Bible, 1990. Daniel Dreisbach has written that the Supreme Court's recent decisions have failed to examine the text and context of the letter (Jefferson's) they are invoking and that they are more interested in defending the wall Justice Hugo Black built in *Everson* than in understanding the true intent of either Jefferson's metaphor or the historical context of the framing of the First Amendment. The use they currently advocate is one that Jefferson himself probably wouldn't even recognize or most likely even repudiate (805, 813).

### **Conclusion**

I have demonstrated that Jefferson's understanding that the First Amendment restricted only the Federal Government from establishing a national denomination, while leaving that option open for States, was consistent with Constitutional history. I have also shown that the Supreme Court in *Everson* began using Jefferson's phrase in way that was contrary to previous Court decisions; and in ways that ignored the historical context and meaning of Jefferson's original use.

I feel that I am in good company. The late Chief Justice William Rehnquist, after an extended analysis of the intent of the Framers of the First Amendment, wrote an opinion in *Wallace v. Jaffree* 1985. He concluded that the Establishment Clause merely forbids Federal establishment of a national church and that any Court decision using *Everson* as its basis is wrong (qtd. by Hall, 908).

In closing, I find it interesting that the Court would eliminate Bible reading from public schools using *Everson* and Jefferson's letter as precedent. Only because Jefferson himself, while U.S. President and chairing the District of Columbia school board, proposed legislation for the Bible to be used in D.C. public schools. He knew his local legislation would be promoting Christian religious principles in the schools, but he understood that having the Bible in the public schools did not violate the First Amendment prohibition of establishing a national denomination.

Jefferson, in true Ant-Federalist fashion, prophetically said, "The Constitution is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please" (qtd. by Federer, 330). Isn't it ironic that this same Judiciary has chosen him as their hero of separation?

It's important for all of us to stand firm when courts and people proclaim that this country was founded upon separation of church and state. Most of them unfortunately don't even realize the context of this phrase nor do they understand that what they are proposing is a complete contradiction to the facts of history.

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