

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 almost 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 the Justices began to use this phrase in a way that was dramatically different than Thomas Jefferson's original use of it and ignored historical precedence. David Barton wrote concerning this case that "this idiom was used only twice in the Court's previous 150 years while now it 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 look at 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.

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 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 were 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 monarchial system was setup with the King being the head of the Anglican church. Jefferson had declared a day of fasting and prayer while governor of Virginia (Federer, 323), but strictly opposed the chief executive of the Federal government from doing the same. Not because it wasn't lawful, but instead because of the similarity to the British system (Hutson, 783).

The election campaign for the 1800 presidency was one that pitted the devout 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. They 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, “...believing with you that religion is a matter which lies solely between man and his God...that the legitimate powers of government reach actions only and not opinions. I contemplate with sovereign reverence that act of the whole American people which declared their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof’, thus building a wall of separation between Church and State. I shall see with sincere satisfaction...to restore man to all of his natural rights” (“FACT” 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 U.S. 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 *Reynolds v. United States* section. Jefferson's wall of separation also stipulated that religion was not allowed to gain control of the Federal Government.

Another link to the Danbury Baptist letter was his opposition to religious control of the State governments. He understood it was lawful, 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 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 4th Sunday (often more frequently) at the newly built Albermale County Courthouse. Also, while U.S. President he was a regular attender 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).

There are those who say that Jefferson advocated that government never have any influence from the religious sphere. Isaac Kramnick and Laurence 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: While a Virginia legislator he introduced a resolution for a Day of Fasting of Prayer; 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'; While governor he decreed a public day of thanksgiving to 'Almighty God'; He gave public credit to God for getting rid of governmental religious intolerance in both of his inaugural addresses as president; 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; 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). 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).

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).

As mentioned before, there was much religious jockeying within the governments of the States during the last three decades of the 18th 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 frequent actions those who made up the Continental Congress did, was call for public prayer. 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 reads 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 quoted by Federer wrote “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” (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 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. It should be noted 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 the framing of the first amendment was undertaken.

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 offered 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 legislators of Congress represented numerous different “denominations” and many of these men had just fought in a war that sought to throw off the British Monarchy with its established “federal” government church of Anglicanism. This is the key idea of the political background surrounding the framing of the 1st amendment.

As we address the various drafts of the 1st amendment it is imperative to understand that the terms “religion” and “denomination” were often used interchangeably. The first proposal was by James Madison and read “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion [denomination] 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 specific wording in the debate continued to be addressed by various perspectives, but note well in Madison’s quote above the word “national”. There were those who were concerned that the proposed amendment had the potential to cause people to think that the amendment might allow for religion to be abolished altogether. Congressman Benjamin Huntington stated his concern that the amendment needed to read clearly that no specific religion would be enforced by the new federal government that 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 [denomination] might obtain a preeminence, or two [Congregationalism and Anglicanism] combine and establish a religion [denomination] 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 binding to all Americans. One of the draft 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 and retained the “religion” wording.

It has been seen that during this time period, the word “religion” was often used synonymously to “denomination”. The key to understanding the specific nuance is to examine the context. Interestingly, 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 (“Federalist” 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 to promote different forms of religion, but not to make any “Law” that established a

specific national denomination. I have spent much time in this section showing the background of the wording in order to demonstrate the historical context to Jefferson's letter to the Danbury Baptists. The background to this phrase and Jefferson's letter is of utmost importance as we now address how it was quoted officially by the Supreme Court.

Moving on to the 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 Mormon Utah resident George Reynolds who was criminally convicted for knowingly violating the Morrill Anti-Bigamy Act of 1862 that forbade polygamy. He challenged his conviction saying that the 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.

Chief Justice Morrison 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" (qtd. at "USSC+" 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 order but had no authority over those that were not disruptive, regardless of place. These religious practices that did not disrupt social order were: praying, Bible reading, or the spreading of

religious faith whether in the public schools or any other place. Remember, this was the year 1878 and the above-mentioned religious practices being part of public schools at this time is a fact of history. The Court in this case, using the events of history as precedence, was quite consistent with Jefferson when they invoked his phrase. There was no objection to religion in general or those religious practices, which did not disrupt social order, as being in violation of historical precedence or inconsistent with Jefferson's views of the separation of church and state. However, the religious activities mentioned above would cause a change in the Court's use of Jefferson's phrase just two generations later.

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 didn't violate the Constitutions' 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 (“USSC+” 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 14th amendment (This amendment adopted in 1868 disallowed States from denying citizenship to any of its residents regardless of race). This ruling by Justice Black was one of three in the 1940s binding the use of the 14th amendment to the first. It was unprecedented and the idea of an individual State being limited by the 1st Amendment set a standard by which religious clauses were to be subsequently interpreted (Hall, 262).

Justice Black’s use of the phrase was quite different than Chief Justice Waite’s use in the *Reynolds* case in 1878. Chief Justice Waite explained that there was indeed a wall of separation spoken by Jefferson that related to the First Amendment, but that it limited only the Federal government from establishing a national religion/denomination (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 interesting to note that just three years earlier to this 1878 case and seven years after the adoption of the 14th amendment the Congress rejected a proposed Constitutional Amendment (the Blaine Amendment proposed in 1875) that would have prohibited a 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 Black would be correct, but it was rejected by Congress and no amendment of this kind has since been adopted. Interestingly and ironically, the following year the *McCullum* Court (1948) acknowledged that the Blaine Amendment along with five other proposed amendments which would have applied the Bill of Rights to the States were rejected by the Congress of 1875. Barton writes, “The intent of the

legislators who framed the Fourteenth [amendment] was clear: it was *not* to be coupled to the First [amendment] (ibid., 201, emphasis his).

Thus, a full understanding of history as well as Supreme Court precedent prior to the 1940s shows a clear distinction that the First Amendment was strictly limited to “Congress” or the Federal Government and not the States. The Supreme Court case of *Barron v. Baltimore 1833* understood this years earlier (Hall, 65). 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). For a full discussion of this issue and how later Supreme Court rulings have distorted historical context and Supreme Court precedent see Barton, “Original Intent”, chapter 10.

Justice Hugo Black (quoted above), using Jefferson as precedence, stated that Jefferson played a leading role in the framing of the First Amendment. 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. Joseph Priestley denying Priestley’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). If Justice Black could be so inaccurate in his understanding of the history of Jefferson’s lack of involvement in the framing of the First Amendment, is it possible he is unable to speak authoritatively on the historical context of Jefferson’s letter to the Danbury Baptists? The evidence definitely points to the affirmative.

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 said 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).

I have shown 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 1947* began using Jefferson's phrase in way that was contrary to the precedent set in the *Reynolds 1878* Court decision; and in ways that ignored the historical context and meaning of Jefferson's original use. I feel that I am in good company. 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 denomination 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?

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