

Modern Misconceptions on the Wall of Separation:  
An Analysis on the Influence and Misinterpretation of Jefferson's Separation of Church  
and State

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## Abstract

The symbolic concept of separation between church and state defines the relationship between government and religion. While Jefferson did not author the phrase, the third President of the United States promoted the philosophy of a wall of separation between church and state in his letter to the Danbury Baptists in 1802. Jefferson's support for a wall of separation stemmed from a strong belief in liberty of conscience and relied heavily upon the conviction to protect religious liberty. Through an analysis on the contextual history of the phrase, the original intent and application of separation of church and state becomes evident. By examining Jefferson's original intent behind the concept of a wall of separation, a proper interpretation of this philosophy will demonstrate appropriate protection for both religion and government.

Later paraphrased "separation of church and state," this political concept has been misconstrued from Jefferson's original meaning. Recent Supreme Court interpretations have misinterpreted the concept as freedom from religion, instead of freedom of religion. The Supreme Court has mistakenly categorized the wall of separation as a summary of the First Amendment and cited Jefferson's phrase as judicial precedent in numerous cases, resulting in a misrepresentation of Jefferson's concepts. This misrepresentation subsequently affected the judicial rulings of succeeding courts.

## Modern Misconceptions on the Wall of Separation:

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and State

On October 7, 1801, the Danbury Baptist Association of Connecticut composed a letter to the newly elected President Thomas Jefferson expressing concern that freedom of religion was not recognized as an inalienable right, but as a liberty protected through laws and constitutions.<sup>1</sup> Fearing that religion would be considered an object of legislation rather than an absolute right, the Danbury Baptists stressed that “religion is at all times and places a matter between God and individuals, that no man ought to suffer in name, person, or effects on account of his religious opinions, [and] that the legitimate power of civil government extends no further than to punish the man who works ill to his neighbor.”<sup>2</sup> Revealing a firm belief in liberty of conscience, the Danbury Baptists expressed their overall distress within the content of the letter. As the religious alliance continued to stress their concerns, they feared that an individual could abuse the power of the government in an attempt to “make laws to govern the Kingdom of Christ.”<sup>3</sup> For these reasons, the Danbury Baptist Association appealed to Jefferson for clarification on his views on religious freedom, in an effort to quell their amassing anxieties.

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<sup>1</sup> “The Danbury Baptists Association was an alliance of approximately two dozen churches located primarily in the Connecticut Valley.” Daniel L. Dreisbach and Mark David Hall, ed., *The Sacred Rights of Conscience: Selected Readings on Religious Liberty and Church-State Relations in the American Founding* (Indianapolis: Liberty Fund, 2009), 525.

<sup>2</sup> Nehemiah Dodge, Stephen S. Nelson, and Ephraim Robbins, “From the Danbury Baptist Association,” October 7, 1801, *The Papers of Thomas Jefferson: 1 August to 30 November 1801*, 35 (Princeton University Press, 2008) 407-9.

<sup>3</sup> Ibid.

On January 1, 1802, Jefferson compiled a response to their letter. Jefferson begins his response by acknowledging a core concern of the Danbury Baptists – that religion would become an object under government control. After agreeing that religion is a personal matter between an individual and his God, Jefferson proceeded to address the main concern of the Danbury Baptists in the following statement: “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 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.”<sup>4</sup>

Jefferson’s response to the Danbury Baptists was the first and only situation in which he utilized the phraseology relating to “building a wall of separation between Church and State.”

Since 1802, the political concept of separation of church and state has been misconstrued from its intended interpretation. Daniel Dreisbach accurately notes in “The Mythical ‘Wall of Separation’: How a Misused Metaphor Changed Church – State Law, Policy, and Discourse” that “no metaphor in American letters has had a more profound influence on law and policy than Thomas Jefferson’s ‘wall of separation between church and state’.”<sup>5</sup> Jefferson’s single notary use of the phrase has become synonymous with the

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<sup>4</sup> Thomas Jefferson, “To the Danbury Baptist Association,” January 1, 1802. *The Papers of Thomas Jefferson 1 December 1801 to 3 March 1802*, 36 (Princeton University Press, 2009), 258.

<sup>5</sup> Daniel Dreisbach, “The Mythical ‘Wall of Separation’: How a Misused Metaphor Changed Church – State Law, Policy, and Discourse,” The Heritage Foundation, June 23, 2006, <https://www.heritage.org/political-process/report/the-mythical-wall-separation-how-misused-metaphor-changed-church-state-law>.

First Amendment as a summary of the Religion Clauses in modern constitutional interpretation. Furthermore, Jefferson's concept of separation of church and state holds immense legal significance as the phrase was utilized and expounded upon in Justice Hugo Black's interpretation in *Everson v. Board of Education* in 1947.<sup>6</sup> While the phrase originally began as a metaphor to maintain freedom of religion, one modern interpretation of separation of church and state is freedom from religion.<sup>7</sup> On the other hand, Jefferson's actions and policies have been misconstrued as anti-religious, due to his separationist stance.<sup>8</sup> However, neither perspective accurately summarizes Jefferson's original intent behind a wall of separation. Jefferson advocated for a wall of separation between church and state to protect government from religion and to protect religion from government; furthermore, Jefferson associated the wall of separation to be a barrier of protection for individual, religious rights and freedom of conscience.

### **Constructing Jefferson's Wall of Separation**

The concept of separation of church and state possesses a rich contextual history that reveals its intended application. While the phrase originates from Roger Williams, Jefferson popularized the philosophy of a wall of separation between church and state in his letter to the Danbury Baptists in 1802. Jefferson's views expressed within that letter built upon the foundation of the separation philosophy of Roger Williams and John

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<sup>6</sup> *Everson v. Board of Education*, 330 U.S. 18 (1947).

<sup>7</sup> The Freedom From Religion Foundation exists to "promote nontheism and defend the constitutional separation between religion and government." While the organization claims to protect the constitutional principle of separation of church and state, the Freedom From Religion Foundation distorts Jefferson's original intent behind his wall of separation metaphor. Freedom From Religion Foundation, "Getting Acquainted," <https://ffrf.org/about/getting-acquainted>.

<sup>8</sup> *Ibid.*

Locke. Another contributor with regards to separation history is James Madison, who provides both context and a comparison to Jefferson's interpretation. The political setting also impacted Jefferson's beliefs concerning the need for a wall of separation. Religious tensions in America surrounding the election of 1800 and the fear of repeating the religious oppression of England greatly affected Jefferson's views on religion and government.<sup>9</sup> While separation of church and state remains both the product of outside influences and the result of historical tension, Jefferson always intended for the structure to serve as a wall of protection.

### **Roger Williams**

Although Jefferson is credited for popularizing the phrase "separation of church and state," the concept previously appeared in Roger Williams' *The Bloudy Tenent of Persecution* in 1644. In this source, Williams emphasized the need for a "hedge or a wall of separation between the garden of the church and the wilderness of the world" and further argued for the necessity of the wall's protection when breached.<sup>10</sup> Due to his aforementioned stance, Williams has been credited as "America's first church-state 'separationist'."<sup>11</sup> William's beliefs on separation between religion and government, as well as his perspectives on the necessity of liberty of conscience are echoed throughout the works of Thomas Jefferson.

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<sup>9</sup> *Gazette of the United States*, September 11, 1800.

<sup>10</sup> Roger Williams, *The Bloudy Tenent of Persecution for Cause of Conscience Discussed: and Mr. Cotton's Letter Examined and Answered*, (London: 1848), 435.

<sup>11</sup> Derek H. Davis, "Editorial: The Enduring Legacy of Roger Williams: Consulting America's First Separationist on Today's Pressing Church-State Controversies," *Journal of Church and State* 41, no. 2 (1999): 201.

The central difference between Williams' position on separation of church and state to Jefferson's beliefs is which entity needed more protection: "Scholars are fond of stressing that Williams was concerned about protecting the church from the state, whereas Jefferson felt the 'wall' was necessary to protect the state from the church."<sup>12</sup> However, Derek Davis notes that while this assumption is generally accurate, "both believed that a flexible boundary between the institutions of religion and government preserved the health and integrity of both."<sup>13</sup> While differing slightly in application, both Jefferson and Williams supported the application of separation between church and state as a form of protection for both the church and government.

As a visionary, Williams also crafted arguments in support of separation of church and state that are still utilized today. These arguments detail "that government officials are not competent judges of religious truth and that forcing people to take part in religion against their will lessens genuine interest in faith and that religious freedom."<sup>14</sup> Williams' recognition that religion must be a choice in order to ensure authenticity and preserve freedom reveals his belief in freedom of conscience.<sup>15</sup> As Davis notes, both Williams and Jefferson carried the belief that "conscience is fundamentally something between God and man and it must therefore be left free of interference by human

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<sup>12</sup> Ibid., 201.

<sup>13</sup> Ibid.

<sup>14</sup> Rob Boston, "*The Forgotten Founder*," Americans United for Separation of Church and State, Church and State Magazine, April 2003, <https://www.au.org/church-state/april-2003-church-state/featured/the-forgotten-founder>.

<sup>15</sup> Williams' beliefs on separation were not well received by his Massachusetts Congregation. In the events that led to his exile, William's freedom of conscience was infringed upon, which fostered his devotion to religious liberty.



authorities.”<sup>16</sup> Jefferson also valued freedom of conscience and allowed that freedom to influence his perspective on religious liberty.<sup>17</sup> In his *Notes on Virginia*, Jefferson details the function of government and the responsibility of rulers in a free society: “But our rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit.”<sup>18</sup> Due to a shared reverence for rights of conscience, several foundational concepts for Jefferson’s separation of church and state are grounded in the philosophy of Roger Williams.

### **John Locke**

Enlightenment thinker John Locke was also instrumental in applying freedom of conscience to religious freedom and utilized a form of separation in defense of toleration.<sup>19</sup> In “A Letter Concerning Toleration,” Locke effectively connected the idea of freedom of conscience to the concept of separation of church and state:

The toleration of those that differ from others in matters of religion is so agreeable to the Gospel of Jesus Christ, and to the genuine reason of mankind, that it seems monstrous for men to be so blind as not to perceive the necessity and advantage of it in so clear a light...I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other. If this be not done, there can be no end put to the controversies that will be always arising between those that have, or at

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<sup>16</sup> Davis, “Editorial: The Enduring Legacy of Roger Williams,” 205.

<sup>17</sup> In the Virginia Statute for Religious Freedom, Jefferson reveals that true religious freedom cannot exist without liberty of conscience – man’s ability to choose his own god. Thomas Jefferson, “A Bill for Establishing Religious Freedom,” June 18, 1779, Founders Online, National Archives, <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082>.

<sup>18</sup> Thomas Jefferson, *Notes on the State of Virginia: Query XVII: Religion*, 1781, Teaching American History, <http://teachingamericanhistory.org/library/document/notes-on-the-state-of-virginia-query-xvii-religion/>.

<sup>19</sup> Philip Hamburger, *Separation of Church and State* (Cambridge: Harvard University Press, 2002), 53.

least pretend to have, on the one side, a concernment for the interest of men's souls, and, on the other side, a care of the commonwealth.<sup>20</sup>

The conclusion of the aforementioned excerpt from Locke's letter outlines the necessity for a wall of separation between church and state.

The influence of Locke's "A Letter Concerning Toleration" on the political philosophy of Jefferson is apparent. Additionally, Jefferson drafted extensive reading notes on Locke's letter, demonstrating the impact of the scholar on Jefferson's thoughts.<sup>21</sup> Jefferson's notes on Locke's letter effectually establishes a connection between the philosophies of the two men and affirms Locke's influence on Jefferson's "Bill for Establishing Religious Freedom." Furthermore, in "Absolutism and the Separation of Church and State in Locke's *Letter Concerning Toleration*," Christopher Nadon acknowledges Jefferson's immense admiration of Locke and asserts that "on religious questions, for him, Locke's authority was supreme."<sup>22</sup>

Additionally, Jefferson's notes on Locke's article affirm the integration of Lockean concepts into his Bill for Establishing Religious Freedom. S. Gerald Sandler reveals a fundamental similarity between Locke and Jefferson's writings in his article "Lockean Ideas in Thomas Jefferson's Bill for Establishing Religious Freedom": "Because the domains of church and state are separate, a citizen's (religious) opinions

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<sup>20</sup> John Locke, "A Letter Concerning Toleration and Other Writings," The Online Library of Liberty, 2010, [http://files.libertyfund.org/files/2375/Locke\\_1560\\_EBk\\_v6.0.pdf](http://files.libertyfund.org/files/2375/Locke_1560_EBk_v6.0.pdf).

<sup>21</sup> Thomas Jefferson, "Notes on Locke and Shaftesbury," 11 October – 9 December 1776, <https://founders.archives.gov/documents/Jefferson/01-01-02-0222-0007>.

<sup>22</sup> Christopher Nadon, "Absolutism and the Separation of Church and State in Locke's Letter Concerning Toleration," *Perspectives on Political Science* 35, no. 2, (2006): 99.

should have no effect upon his civil capacities.”<sup>23</sup> This concept stressed earlier within the excerpt from Locke’s letter is also apparent in Jefferson’s Bill for Establishing Religious Freedom: “that the opinions of men are not the object of civil government, nor under its jurisdiction; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy.”<sup>24</sup> Jefferson adopted Locke’s emphasis on the freedom of conscience and incorporated the importance of that freedom into his Bill for Establishing Religious Freedom.

### **James Madison**

Madison entered the realm of separation of church and state politics with the creation of his “Memorial and Remonstrance Against Religious Assessments.” Within this document, Madison asserts that “the preservation of a free government requires not merely, that the metes and bounds which separate each department of power may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people.”<sup>25</sup> The “great Barrier” depicted by Madison in the aforementioned excerpt arguably represents Jefferson’s wall of separation.<sup>26</sup> Furthermore, both men shared a passion for freedom of religion, which

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<sup>23</sup> Gerald S. Sandler, “Lockean Ideas in Thomas Jefferson’s Bill for Establishing Religious Freedom,” *Journal of the History of Ideas* 21, no. 1 (1960): 113.

<sup>24</sup> Thomas Jefferson, “A Bill for Establishing Religious Freedom,” June 18, 1779, Founders Online, National Archives, <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082>.

<sup>25</sup> James Madison, “Memorial and Remonstrance Against Religious Assessments,” June 20, 1795, Founder’s Archives, <https://founders.archives.gov/documents/Madison/01-08-02-0163>.

<sup>26</sup> Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State* (NYU Press, 2002), 86.

stemmed from a fear of persecution.<sup>27</sup> As Madison notes, “Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion.”<sup>28</sup> Madison seemingly echoes the words of Williams’ *Bloody Tenet of Persecution* within the aforementioned excerpt of “Memorial and Remonstrance.”

While Jefferson, Madison, and Williams share many similar perspectives, no evidence indicates that Jefferson or Madison read the works of Roger Williams.<sup>29</sup> However, Locke undoubtedly read the works of Williams.<sup>30</sup> Additionally, Jefferson’s notes on Locke’s article affirm that Jefferson read the philosophies of Locke.<sup>31</sup> The similarities ingrained within the political thoughts of Williams, Locke, Jefferson, and Madison reveal several consistent themes relating to separation philosophy, namely a shared devotion to freedom of conscience and religious liberty.

While Madison and Jefferson undoubtedly shared several similar beliefs, they differed slightly in application specifically during each of their respective presidencies. For example, Jefferson refused to mandate national prayer days while in office; on the other hand, Madison issued a proclamation declaring a Day of Prayer and Fasting in 1812. Jefferson valued privacy, both in his personal and spiritual life. Gordon-Reed and

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<sup>27</sup> Irving Brant, "Madison: On the Separation of Church and State," *The William and Mary Quarterly* 8, no. 1 (1951): 4.

<sup>28</sup> Madison, “Memorial and Remonstrance Against Religious Assessments.”

<sup>29</sup> Edwin S. Gaustad, *Sworn on the Altar of God: A Religious Biography of Thomas Jefferson* (Grand Rapids, MI: William B. Eerdmans Publishing Company, 1996), 72.

<sup>30</sup> *Ibid.*

<sup>31</sup> Jefferson, “Notes on Locke and Shaftesbury.”

Onuf contend that Jefferson's core beliefs on religious freedom are best exemplified following his retirement from presidency, when he was no longer bound by the strains of public scrutiny:

The religious quest he embarked upon was inextricably connected to his political philosophy, which emphasized the importance of individual autonomy and self-determination; his engagement with the ultimate questions of life underscored the deeply rooted personal implications of his commitment to the separation of church and state and the 'illimitable' nature of free inquiry.<sup>32</sup>

While Jefferson's belief in freedom of conscience led him to refrain from any religious endorsement, Madison, however, did not share the same conviction.

### **Historical Tension Surrounding the Election of 1800**

The election of 1800 was another factor which contributed to the political thought and public opinion of Thomas Jefferson. In order to fully comprehend the application of the Danbury Baptists Association to Jefferson, the political state at the time must be considered. The election of 1800 has been labelled as "one of the most bitterly contested presidential elections in American history" with religion at the forefront of the tension.<sup>33</sup> Due to his separationist stance, Federalist opponents "vilified" Jefferson as an atheist: "His ardent advocacy of the rights of conscience and disestablishment in revolutionary Virginia first raised the suspicion of religious traditionalists that Jefferson was not an orthodox Christian."<sup>34</sup> While the Federalists initiated the atheistic accusations aimed at misrepresenting Jefferson's beliefs on religious freedom, Federalist media outlets, such as

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<sup>32</sup> Annette Gordon-Reed and Peter S. Onuf, *"Most Blessed of the Patriarchs": Thomas Jefferson and the Empire of the Imagination* (New York: Liveright Publishing Corporation, 2016), 278.

<sup>33</sup> Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State*, 18.

<sup>34</sup> *Ibid.*

the *Gazette of the United States*, published propaganda that depicted Jefferson as the “ungodly” candidate: “THE GRAND QUESTION STATED. At the present solemn and momentous epoch, the only question to be asked by every American, laying his hand on his heart, is ‘Shall I continue in allegiance to GOD--AND A RELIGIOUS PRESIDENT [John Adams]; Or impiously declare for JEFFERSON--AND NO GOD!!!’.”<sup>35</sup> During the election of 1800, Jefferson faced severe defamation through exorbitant attempts of mockery.

In addition to negative newspaper coverage, Jefferson’s devotion to his faith was also called into question. On July 4, 1798, Timothy Dwight, president of Yale College and a Congregationalist minister, proclaimed a warning against Jefferson from the pulpit.<sup>36</sup> Dwight’s cautionary tale reveals the general hysteria associated with Jefferson’s campaign and attempted to portray a world in which Jefferson was elected: “we may see the Bible cast into a bonfire, the vessels of the sacramental supper borne by an ass in public procession, and our children, either wheedled or terrified, uniting in the mob, chanting mockeries against God, and hailing in the sounds of...the ruin of their religion, and the loss of their souls.”<sup>37</sup>

Another opponent of Jefferson, William Linn, a Dutch Reformed clergyman, attempted to destroy Jefferson’s credibility by publically denouncing Jefferson as a

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<sup>35</sup> *Gazette of the United States*, September 11, 1800.

<sup>36</sup> Timothy Dwight, *The Duty of Americans, at the Present Crisis*, (New Haven: Thomas and Samuel Green, July 4, 1798), <https://quod.lib.umich.edu/cgi/t/text/textidx?c=evans;cc=evans;rgn=main;view=text;idno=N25378.0001.00>

<sup>37</sup> *Ibid.*

candidate “on account of his disbelief in the Holy Scriptures, and his attempts to discredit them.”<sup>38</sup> Linn continued to besmirch Jefferson’s religious beliefs by stating that “the effects of the election of any man avowing the principles of Mr. Jefferson would be to destroy religion, introduce immorality, and loosen all the bonds of society.”<sup>39</sup> The slanderous accusations aimed at Jefferson during the campaign for the election of 1800 created apprehension toward Jefferson and his views on religious liberty. For this reason, the Danbury Baptists Association appealed to Jefferson for clarification on the rights of conscience. Sensing an opportunity to explain his positions on freedom of conscience and clarify his stance on religious freedom, Jefferson replied to the Danbury Baptist’s inquiry, penning the infamous phrase “separation of church and state.”

### **The Memory of Religious Persecution**

A core, motivating factor behind Jefferson’s belief in separation of church and state is the memory of religious persecution. Kevin Gutzman notes in *Thomas Jefferson – Revolutionary* that America’s third president was “born into a colonial society in which the Church of England theoretically commanded the adherence and support of all.”<sup>40</sup> Jefferson’s fear of a return to a state-established religion informed several of his political decisions and affected his actions during his presidency. Jefferson recognized the fine line between a political figure misusing authority to endorse a specific religion and acting

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<sup>38</sup> William Linn, *Serious Considerations on the Election of a President* (New York: John Furman, 1800), 21.

<sup>39</sup> *Ibid.*, 24.

<sup>40</sup> Kevin R.C. Gutzman, *Thomas Jefferson Revolutionary: A Radical’s Struggle to Remake America* (New York: St. Martin’s Press, 2017), 98.

upon personal, religious convictions while in office. Specifically, Jefferson expressed these views by “refusing to designate a day for public fasting, thanksgiving, and prayer” and utilized his response to the Danbury Baptists to defend his reasoning.<sup>41</sup>

While some saw Jefferson’s decision to refrain from utilizing the office of president to establish a national, religious holiday as dedication to separation of church and state, others viewed his actions as contradictory. This accusation was based upon Jefferson’s sponsorship of a resolution designing a “Day of Fasting, Humiliation, and Prayer” during his time as a member of the house of Burgesses in 1774. In his *Autobiography*, Jefferson attempts to elaborate on the apparent contradiction between his positions as president and as a member in the house of Burgesses: “We were under the conviction of the necessity of arousing our people from the lethargy into which they had fallen...and thought that a day of general fasting and prayer would be most likely to call up and alarm their attention.”<sup>42</sup>

While Jefferson’s justification within his *Autobiography* does not adequately explain the shift in his views, Dreisbach offers a solution that may reconcile these contradictory aspects of Jefferson’s political views. Following a thorough examination into Jefferson’s political career, Dreisbach theorizes that “as a matter of federalism...the national government had no jurisdiction in religious matters, whereas state governments were authorized to accommodate and even prescribe religious exercises.”<sup>43</sup> Dreisbach

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<sup>41</sup> Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State*, 56.

<sup>42</sup> Thomas Jefferson, *The Life and Letters of Thomas Jefferson: Being His Autobiography and Select Correspondence, From Original manuscripts* (New York: Edwards, Pratt, & Foster, 1858), 6.

<sup>43</sup> Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State*, 60.



contends that Jefferson's wall of separation was erected not between the church and all government, but between the federal and state governments: "the 'wall' metaphor was not offered as a general pronouncement on the prudential relationship between religion and all civil government; rather, it was, more specifically, a statement delineating the legitimate constitutional jurisdictions of the federal and state governments on matters pertaining to religion."<sup>44</sup> Although Jefferson opposed federal religious establishments, he still attended public church services in the Capitol throughout his service as the nation's head of state, effectively encouraging and supporting religion through personal actions, yet not requiring or mandating religion on anyone else.<sup>45</sup> The distinction regarding the location of Jefferson's wall of separation – between state and federal governments – is crucial to understanding the modern misinterpretation of Jefferson's politics.

### **Modern Misinterpretations on a Wall of Separation**

The concept of separation of church and state first entered the judicial realm in *Reynolds v. United States*, 98 U.S. 145, 164 (1879). Interestingly, the Supreme Court's interpretation of the concept was also the first recorded misinterpretation of the wall of separation. In a case determining whether religious duty or belief was a defense to criminal charges, Chief Justice Morrison Waite applied Jefferson's concept of church and state as a summary of the First Amendment: "[Mr. Jefferson's response to the Danbury Baptists] may be accepted almost as an authoritative declaration of the scope and effect of the [first] amendment thus secured."<sup>46</sup> Chief Justice Waite desired to define the

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<sup>44</sup> *Ibid.*, 60.

<sup>45</sup> *Ibid.*, 23.

<sup>46</sup> *Reynolds v. United States*, 98 U.S. 145, 164 (1879).

concept of religion since a clear definition is not incorporated into the First Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>47</sup> However, Jefferson’s concept of separation of church and state is different in application than the protection of the First Amendment. According to Joseph Dawson, most authorities agree that the First Amendment protects the freedom of religion for all – “That is to say, freedom of conscience is beyond the control of any civil authority.”<sup>48</sup>

Conversely, Jefferson’s separation of church and state concerns the protection of both the church and the state through the use of a barrier. The First Amendment encompasses a wider scope than Jefferson’s separation of church and state: “equality of all religions as far as federal patronage is concerned.”<sup>49</sup> In fact, the First Amendment says nothing about separation of church and state. Jefferson’s original intent behind the wall of separation introduces the protection of government and the church, as well as religious freedom. For this reason, Dreisbach contends that Chief Justice Waite utilized Jefferson’s theory that the powers of civil government concern men’s actions and not just their opinions: “The Reynolds Court was focused on the legislative powers of Congress to criminalize the Mormon practice of polygamy and was apparently drawn to this passage because of the mistranscription of ‘legitimate powers’ as ‘legislative powers’.”<sup>50</sup>

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<sup>47</sup> First Amendment, U.S. Constitution (1791).

<sup>48</sup> Joseph M. Dawson, "The Meaning of Separation of Church and State in the First Amendment," *Journal of Church and State* 50, no. 4 (2008): 677.

<sup>49</sup> Milton R. Konvitz, "Separation of Church and State: The First Freedom," *Law and Contemporary Problems* 14, no. 1 (1949): 48.

<sup>50</sup> Daniel Dreisbach, "How Thomas Jefferson's 'Wall of Separation' Redefined Church-State Law and Policy," The Philadelphia Society Regional Meeting, Williamsburg, Virginia, October 4, 2003,

Dreisbach notes that the Reynolds Court based its interpretation of Jefferson from a flawed transcription of the Danbury letter.<sup>51</sup> This erroneous misinterpretation of Jefferson's intent serves as the foundation for faulty elucidation by succeeding Supreme Courts. Philip Hamburger also emphasizes the impact of this misinterpretation of separation philosophy on the role of religion in America and contests that the Justice Waite did not consider the potential broad application of separation.<sup>52</sup> This oversight marked the beginning of Supreme Court of modern misinterpretations of Jefferson's wall of separation.

### ***Everson v. Board of Education***

Jefferson's concept of church and state did not reappear in the judicial law until the case of *Everson v. Board of Education* in 1947. Chief Justice Black delivering the opinion of the majority further expanded Jefferson's version of a wall: "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>53</sup> Black added a description of height into Jefferson's creation of a wall; under Black's application, the wall of separation would serve as an unbreakable, impenetrable boundary. Furthermore, Black's

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<https://phillysoc.org/dreisbach-how-thomas-jeffersons-wall-of-separation-redefined-church-state-law-and-policy/>.

<sup>51</sup> Ibid.

<sup>52</sup> Philip Hamburger, *Separation of Church and State* (Cambridge: Harvard University Press, 2002), 260.

<sup>53</sup> *Everson v. Board of Education*, 330 U.S. 18 (1947).

barrier differs in function and location compared to Jefferson's wall by "separating religion and civil government at all levels – federal, state, and local."<sup>54</sup>

IMAGE REMOVED FOR COPYRIGHT<sup>55</sup>

*Figure 1.* A comparison of Jefferson and Black's location of the wall of separation reveals the difference in Black's interpretation of Jefferson's separation philosophy.

These important distinctions demonstrate how Jefferson's intent can be misconstrued. Additionally, the change in location of the wall between Jefferson and Black's versions explains the recent shift in interpretation.

Finally, recent controversy surrounding the concept of separation of church and state centers around Justice Black's interpretation of the wall as "high and impregnable" rather than Jefferson's original intent behind the phrase. As Dreisbach notes, modern judicial interpretation is "less about Jefferson's metaphorical landmark and its place in history than it is about the legitimacy of the wall that Black built."<sup>56</sup> For this reason, the majority of judicial rulings build upon Black's interpretation of a wall, instead of Jefferson's.

***Trinity Lutheran Church of Columbia, Inc. v. Comer***

In 2017, the Supreme Court heard the case of *Trinity Lutheran Church of Columbia, Inc. v. Comer*. When the Trinity Lutheran Church of Columbia applied for a grant to make playgrounds safer for children, the state of Missouri denied its application citing Article 1 Section 7 of Missouri's Constitution: "no money shall

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<sup>54</sup> Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State*, 125.

<sup>55</sup> Justin Taylor, "The Urban Legend that Thomas Jefferson Believed in a Wall Separating Church and State," The Gospel Coalition, July 16, 2015, <https://www.thegospelcoalition.org/blogs/justin-taylor/the-urban-legend-that-thomas-jefferson-believed-in-a-wall-separating-church-and-state/>.

<sup>56</sup> *Ibid.*

be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion.”<sup>57</sup> The Trinity Lutheran Church of Columbia subsequently sued, arguing violations of the Equal Protection Clause of the Fourteenth Amendment and freedom of religion and speech under the First Amendment.<sup>58</sup> After being denied reconsideration, Trinity appealed to the Supreme Court and was granted certiorari.<sup>59</sup>

The Supreme Court ultimately found Missouri’s actions as unconstitutional and ruled in favor of Trinity Lutheran Church in a 7-2 decision. However, the opinions of the court reveal the drastic misinterpretation of Jefferson’s concept of separation of church and state. Dissenting Justice Sotomayor joined by Justice Ginsburg asserts the following:

If this separation means anything, it means that the government cannot, or at the very least need not, tax its citizens and turn that money over to houses of worship. The Court today blinds itself to the outcome this history requires and leads us instead to a place where separation of church and state is a constitutional slogan, not a constitutional commitment. I dissent.<sup>60</sup>

While Sotomayor constructs a passionate plea for a return to the original intent of separation of church and state, her version of that concept does not align with

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<sup>57</sup> Article 1, Section 7, Constitution of the State of Missouri.

<sup>58</sup> Tiffany Bates, “Misusing ‘Separation of Church and State,’” The Heritage Foundation, September 7, 2016, <https://www.heritage.org/civil-rights/commentary/misusing-separation-church-and-state>.

<sup>59</sup> An order by a higher court to review the decision of a lower court.

<sup>60</sup> Sonia Sotomayor, Dissenting Opinion of *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 3, (2017).

Jefferson's understanding on two fronts. First, the concept of separation of church and state was not intended to become an extension of the First Amendment. While that precedent was outlined in *Reynolds v. United States*, Jefferson outlined the protection of separation of church and state to offer equal protection for both the church and state. In the case of *Trinity*, Sotomayor's dissent does not offer the necessary protection for the church. Second, Jefferson's wall of separation was drawn between federal and state governments, not between the church and all government. Again, court precedent established in *Everson v. Board of Education* relocated the barrier from Jefferson's intended placement.

### **And the Wall Came Tumbling Down...**

Justice Black's version of Jefferson's wall as a "high and impregnable" boundary was not the only interpretation of the metaphor. In fact, several commentators have described the wall separating church and state in manners agreeable to Jefferson's original intent. For example, James H. Hutson condones the use of separation of church and state as a metaphor within constitutional law "if it is understood as a wall of the kind that existed during the Cold War, impenetrable through most of its length but punctuated by checkpoints."<sup>61</sup> Hutson expounded upon his assertion by stating that "Jefferson would have had 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 that it treated equally everyone who wanted to come along."<sup>62</sup> Considering

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<sup>61</sup> James H. Hutson, and Thomas Jefferson, "Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined," *The William and Mary Quarterly* 56, no. 4 (1999): 790.

<sup>62</sup> *Ibid.*

Jefferson's committed belief in freedom of conscience, he would logically support whatever route advocated for the individual's right to choose and protected the institutions of church and state.

Hutson was not the only political theorist who incorporated a comparison to the Cold War within his analysis. In *Zorach v. Clauson*, the Court of Appeals in the State of New York utilized a reference to the "iron curtain" when issuing their verdict on the constitutionality of a school district which permitted students to leave early through a "released time" program to receive religious instruction. The New York Court of Appeals conferred the following:

It is thus clear beyond cavil that the Constitution does not demand that every friendly gesture between church and State shall be discountenanced. The so-called "wall of separation" may be built so high and so broad as to impair both State and church, as we have come to know them. Indeed, we should convert this "wall," which in our "religious nation" (*Church of Holy Trinity v. United States*, 143 U.S. 457, 470) is designed as a reasonable line of demarcation between friends, into an "iron curtain" as between foes, were we to strike down this sincere and most scrupulous effort of our State legislators, the elected representatives of the People, to find an accommodation between constitutional prohibitions and the right of parental control over children. In so doing we should manifest "a governmental hostility to religion" which would be "at war with our national tradition" (Illinois ex rel. *McCullum v. Board of Educ.*, supra, p. 211).<sup>63</sup>

The New York Court recognized the dangers that a "high and impregnable" wall could have upon both the church and state respectively.

Additionally, the New York Court also highlighted the two different types of separation. Peter Lillback outlines the two types of separation as either friendly

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<sup>63</sup> *Zorach v. Clauson*, 303 N.Y. 172, N.E.2d 463 (1951).

or hostile relations: “Separation of church and state – friendly: Religious and political institutions are legally separate but not hostile to each other” and “Separation of Church and state – unfriendly: Religious and political institutions are legally separate and in an antagonistic relationship.”<sup>64</sup> Lillback clarifies the difference between the “blending of church and state” and the “cooperation of church and state.”<sup>65</sup> According to Lillback, blending of the church and state is evidenced under any nation with a state established religion, while cooperation of church and state references Jefferson’s original intent behind the wall of separation.<sup>66</sup>

Increasingly, commentators have adopted the description of “permeable” to the wall of separation. Chief Justice Malcolm M. Lewis of the California Supreme Court espoused this concept in his opinion on *Sands v. Morongo Unified School District*: “the religion clauses represent not a ‘wall of separation’ but a permeable membrane.”<sup>67</sup> Additionally, Mark Wheldon Whitten introduced the metaphor of a “barbed-wire fence” in replace of a wall or firm barrier. In describing the fences, Whitten wrote that such fences “are erected for a purpose, a part of which is to warn against, and to impede, passage and trespass between

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<sup>64</sup> Peter A. Lillback, *Wall of Misconception: Does the Separation of Church and State mean the Separation of God and Government?* (Conshohocken, PA: Providence Forum Press, 2007), 81.

<sup>65</sup> *Ibid.*, 82.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Sands v. Morongo Unified School District*, 53 Cal.3d 863, (1991).



certain areas.”<sup>68</sup> Whitten declares that “barbed wire fences are far from impregnable or impassable barriers for one may with some care go over, under, or through them, and one may do so for good reasons.”<sup>69</sup> While Jefferson’s perspective on the wall as a permeable barrier is unknown, many scholars identify that Black’s “high and impregnable” wall of separation appears to be breaking down to Jefferson’s intended height. Perhaps, the “high and impregnable” wall erected by Black appears to be crumbling simply because the metaphor “separation of church and state” was never intended to be interpreted in that manner.

An analysis into the influence and misinterpretation of Jefferson’s separation of church and state reveals his original intent on supporting the concept – to protect both the government and the church. Concerning Jefferson’s influence in his principles on religious freedom, philosophers and political theorists like Roger Williams, John Locke, and James Madison greatly influenced Jefferson through their respective works and opinions. Furthermore, the historical tension surrounding the election of 1800 combined with the memory of religious persecution under a state established religion sparked determination into Jefferson to secure religious freedom for future generations and to prevent the rise of mandated religion.

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<sup>68</sup> Mark Wheldon Whitten, *The Myth of Christian America: What you Need to Know about the Separation of Church and State* (Macon, GA: Smyth & Helwys, 1999), 54.

<sup>69</sup> *Ibid.*

Jefferson's phrase entered into constitutional law discourse with *Reynolds v. United States*. This landmark decision combined with Justice Black's decision of *Everson v. Board of Education* effectively erected a new barrier, modeled after Jefferson's but differing in scope, location, and purpose. Due to the misrepresentation of Jefferson's concepts, a misguided version of the wall of separation became judicial precedent, and, subsequently affected the succeeding court's interpretation in matters of religious freedom and church/state relations.

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