



Separation of Church And State *Fact, Myth or Misleading Metaphor?* by Kurtis J. Ward

In Jimmy Carter's new book, *OUR ENDANGERED VALUES*, former President Carter voices his concern with evangelical Christians whom he claims are improperly exerting influence over the political process, specifically referring to the overwhelming evangelical participation in deciding the 2004 presidential election in favor of George W. Bush. Carter somehow believes this to be a violation of Separation of Church and State. Yet, like others who invoke the Separation of Church and State phraseology, he offers no evidence to support such a conclusory opinion.

The Separation of Church and State doctrine has always intrigued me because on the surface it sounds so fundamentally rooted in American History yet in reality is rather obscure. In law school, I was disappointed that after two full semesters of Constitutional Law, the topic of Separation of Church and State never came up even once. Instead, months were spent on the more recently created judicial doctrines of the 14th Amendment. Subsequently, I decided to conduct my own research into this allusive topic frequently mentioned by the media and some politicians yet never really defined. My attempt has been to publish an unbiased, truthful, and accurate account of the origin of Separation of Church and State. But first, let's review the main issues of this topic by answering and elaborating on the next four questions.

(1) True or False. Did the Founding Fathers and Framers of the U.S. Constitution in 1787 insert into the final text of the Constitution the literal phrase "Separation of Church and State"? **FALSE**

(2) True or False. When the Bill of Rights (first Ten Amendments) became effective in 1791, was the phrase "Separation of Church and State" an expressed term in one of those Ten Amendments? **FALSE AGAIN.**

(3) If the *Separation of Church and State* is not an expressed Constitutional term, then surely the often quoted phrase was an *implicit* constitutional theme? **NOT REALLY.**

On the surface, one familiar with early American history of how the Thirteen Colonies became populated as a safe haven from religious persecution might reach the conclusion that it was an implied theme. Likewise, it was well known to the framers that each colony soon became over-zealous for their own Christian denomination and often discriminated against others who held different beliefs, doctrines, traditions, and religious observances. Indeed, Religion was very much on the minds of the Constitutional State delegates as well as the constituents that the delegates represented. Consequently, there was an underlying fear that the newly formed *federal* government (through its elected officials) might one day come to favor a particular denomination to the detriment of the other denominations. Therefore, the state delegates wanted to forever prevent the new federal lawmakers (Congress) from "establishing" one religious denomination and to preclude them from interfering with the religious practices of the other denominations. However, noticeably missing in the final textual construction for both "Religion Clauses" of First Amendment are the words "separation", "church", and "state".

Now, when Americans talk about First Amendment rights, it is usually in the context of "free speech" or "freedom of the press." However, the First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble..." Under constitutional jurisprudence, this *first clause* (containing the first ten words) has become known as the "Establishment Clause" (Congress shall make no law respecting an establishment of religion) while the *second clause* has become known as the "Free Exercise Clause" (or prohibiting the free exercise thereof). Notice how the First Amendment begins, CONGRESS SHALL MAKE NO LAW. The prohibition is upon the newly created U.S. Congress. However, the prohibition is not upon the States, not the people, not the church, not a religion, and not upon a group of voters. Only the U.S. Congress is restricted from making laws that would "establish religion" and only Congress is restricted from passing laws that would interfere with the "free exercise of religion".

(4) So then is the "Separation of Church and State" phrase a complete fabrication and hoax? **NOT REALLY.** Indeed, there is a brief historical origin of the phrase. However, it has been somewhat corrupted and misapplied.

In the fall of 1801, (over a decade after the Constitution and Bill of Rights were ratified) the Danbury Connecticut Baptist Association sent a short letter to the recently elected President of the United States, Thomas Jefferson. The Danbury Baptist letter congratulated Jefferson on his new position and expressed their concern that complete religious liberty was yet to be established in the constitutions of all the states, including their own state of Connecticut. Jefferson, a staunch advocate of states rights and a weak judiciary, understood that states could fashion their own laws since the Constitution reserved to the states powers that were not delegated to the federal government. While serving as Vice President, Jefferson had encouraged other states to adopt the religious freedom model of the 1st Amendment. In a brief *private letter response* to the Danbury Baptist Association, Jefferson wrote, "...Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative 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 would make no law respecting an establishment of religion, or prohibiting the free exercise thereof thus building a wall of separation between church and state."

Jefferson (who was also a lawyer) attempts to console the Baptists by citing the text of the First Amendment and pointing to the Establishment Clause and the Free Exercise Clause as a basis for alleviating their fears from governmental interference in religion. Jefferson then concludes the brief legal citation of the two religious clauses with a *visual metaphor* (which has degenerated over time). **Strange how the metaphor has become more cherished in the minds of some who attempt to alter and perpetuate the elevation of the metaphor above the substantive text of the First Amendment.** Even the actual words Jefferson used are condensed to change the meaning further. The illusory phrase "separation of church and state" is really just a shortened version of Jefferson's actual words which more accurately stated the first two clauses of the First Amendment were responsible for "building a wall" of separation between church and state.

To claim Separation of Church and State is even a constitutional doctrine based on Jefferson's private Baptist letter many years after the Constitution and Bill of Rights were ratified is at best mistaken and at worst intellectually dishonest (although an argument could be made that it is a judicially created dogma). Jefferson, who has the reputation of being a deist and the least religious of the founding fathers, (although he labeled himself as a Christian in a letter to Benjamin Rush and also saw to it that Bibles were to be used as children's textbooks in schools) closes his letter to the Danbury Baptists by saying, "I reciprocate your kind prayers for the protection and blessings of the common Father and Creator of man, and tender you for yourselves and your religious association, assurances of my high respect and esteem." Jefferson's own words point to the Establishment Clause and Free Exercise Clause of the First Amendment as the bedrock for the guarantee of religious freedom from governmental interference and not "the metaphor." Now, contrast Jefferson's words to former President Carter's proposition that Americans with certain religious beliefs are violating some constitutional doctrine (the metaphor) when expressing their vote by indicating a preference for one candidate or political party more in line with their religious beliefs. To summarize the writings of both Presidents, Jefferson writes to a religious group to not be afraid because the Constitution protects its citizens from governmental violations on their worship while Carter writes to the public to be afraid because citizens who may be affiliated with a religious group are violating the Constitution when voting for government officials in mass.

Another historical reference exists seemingly to support the alleged separation of church and state theme although those exact words were not used by its author. It was penned sometime after 1816 by Jefferson's protégé and political confidant, James Madison, after Madison completed two terms as the 4th President of the United States. Prior to the Constitutional Convention of 1787, Thomas Jefferson and James Madison collaborated to defeat Patrick Henry's attempt in 1784 to require the State of Virginia to assess its

citizens for the financial support of all Christian ministers in Virginia. Madison authored an article entitled "Memorial and Remonstrance Against Religious Assessments" while Jefferson authored the "Statute for Religious Freedom" which ultimately was the successful result that defeated Henry's proposal when Jefferson's statute was enacted by the Virginia Legislature in 1786. It was to this focal point that James Madison referred to in this un-circulated memorandum written after 1816 but which was not discovered and published until the mid-1940's when found among Madison's presidential papers. Madison wrote, "...Strongly guarded as is the separation between Religion and Government in the Constitution of the United States." Madison's post-1816 reflective statement in his memorandum occurred some 30 years after the actual event itself and the words he used were inextricably linked to the belief that citizens should not be forced by legislators to financially support the clergy. Madison is considered the "Father of the U.S. Constitution" and no one equaled his contribution except Alexander Hamilton. However, even in Madison's submitted draft for the Religion Clauses of the 1st Amendment (which was not adopted) he did not use the separation of church or state language.

Jefferson's own words in his Statute for Religious Freedom begins, "Whereas Almighty God has created the mind free, that all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in His almighty power to do; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions... that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical; that even forcing him to support this or that teacher of his own religion persuasion is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern and whose powers he feels most persuasive to righteousness." It is undisputable that Jefferson was among the Founding Fathers (albeit only 33 years of age in 1776 compared to Washington who was 43, Adams 40, Madison 25, Hamilton 21). However, Jefferson did not sign or contribute to the Constitution nor did he work on drafting the First Amendment as he was in France during these events.

To conclude, Jefferson frequently voiced his disapproval of the Supreme Court and would not have approved of the judicial activism to come. Eighty-eight years would pass after the Religion Clauses were enacted before the Supreme Court had occasion to "interpret" them. In 1879, the Court held in *Reynolds v. U.S.* that the Free Exercise Clause did not give protection from a federal law that forbade polygamy and revisited the pre-Constitutional History of Virginia as well as Jefferson's Baptist letter. The Court suggested in "*dicta*" (*dicta* means *verbiage* not *part of the Court's legal holding*) that the *Establishment Clause* erected a "wall of separation" between church and state while ruling the federal law in question did not violate the Free Exercise Clause. The next two important Supreme Court cases were not until the 1940's, *Cantwell v. Connecticut* (Free Exercise Clause) and *Everson v. Board of Education* (Establishment Clause). These cases are significant because of the judicially created doctrine of "Incorporation" (using the 14th Amendment to make 1st Amendment applicable to the States). *Everson* repeated the Jefferson metaphor in its "*dicta*." Perhaps the late Chief Justice William Rehnquist summed up this whole controversy best in his 1985 dissenting opinion in *Wallace v. Jaffree*. Rehnquist said that referring to the Establishment Clause while focusing on the *wall of separation* was a "**misleading metaphor.**" I believe Thomas Jefferson would agree.

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