Clanking Chains: Jefferson's "Wall": Context; Shackles for the Chains: Jipping's Rules for Interpretation; Jefferson Was Not a Framer

6- The reason for the Jefferson's letter and the context in which the "wall of separation" comment appears is extremely important. We get the details from:

Barton, David. *The Myth of Separation: What is the Correct Relationship between Church and State?* 7th ed. (Aledo: WallBuilders Press, 1992), 41-46:

The Origin of the Phrase "Separation of Church and State"

Most people are surprised when they find that the Constitution does not contain the words "separation of church and state." Since this phrase does not appear in the Constitution, what is its origin?

At the time of the Constitution, although the states encouraged Christianity, no state allowed an exclusive state-sponsored denomination. However, many citizens did recall accounts from earlier years when one denomination ruled over and oppressed all others. Even though past abuses were not current history in 1802, the fear of a recurrence still lingered in some minds.

It was in this context that the Danbury Baptist Association of Danbury, Connecticut, wrote to President Jefferson. The Danbury Baptists expressed their concern over a rumor that a particular denomination was soon to be recognized as the national denomination. On January 1, 1802, President Jefferson responded to the Danbury Baptists in a letter. He calmed their fears by using the now infamous phrase to assure them that the federal government would not establish any single denomination of Christianity as the national denomination:

> I contemplate with solemn 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 and State.

Since this phrase was not recorded in the discussions of the Constitutional Convention nor in the records of the subsequent Congress that produced the First Amendment and the Bill of Rights, why did Jefferson select this particular phrase to reassure them?

Recall that he was addressing a group of Baptists, a denomination of which he was not a member. In writing to them, he sought to establish the common ground necessary between an author and the group he is addressing. By using the phrase "a wall of separation," he was actually borrowing the words of one of the Baptists' own prominent ministers: Roger Williams:

> … when they have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made his garden a wilderness, as at that day. And that there fore if He will eer please to restore His garden and paradise again, it must of necessity be walled in peculiarly unto Himself from the world …. [Eidsmoe, John. *Christianity and the Constitution: The Faith of Our Founding Fathers.* (Grand Rapids: Baker Book House, 1987), 243.]

That "wall" was originally introduced as, and understood to be, a one-directional wall protecting the church from the government. This was also Jefferson's understanding, as conveyed through statements he made concerning the First Amendment—statements now ignored by the Court:

- *Kentucky Resolutions of 1798*: No power over the freedom of religion … is delegated to the United States by the Constitution.

- *Second Inaugural Address, 1805*: In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the General Government.

- *Letter to Samuel Miller, 1808*: I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. Certainly, no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government. It must then rest with the States, as far as it can be in any human authority.

Contrary to Jefferson's explanation of the intent, such power no longer rests with the states. In 1947, in *Everson v. Board of Education*, the Court reversed 150 years of established legal practice under the Constitution and decided that it *did* have the right to rule on an individual state's decisions regarding religious practice. State legislatures had been passing laws since the 1600s allowing the free exercise of religious practices in schools and public affairs: voluntary prayer, Bible readings, the use of the Ten Commandments, etc.

In the 1947 *Everson* case, the Court excerpted eight words out of Jefferson's [1802] letter ("a wall of separation between Church and State") and announced for the first time the *new* meaning of separation of church and state—a separation of basic religious principles from public arenas. Those eight words, now taken out of context, concisely articulated the Court's plan to divorce Christianity from public affairs.

Once the Court adopted the portion of Jefferson's words with which it agreed and ignored their intent, it began declaring state laws unconstitutional. Statutes allowing religious practice in public affairs were overturned in nearly every state in the Union. Laws no longer were being enacted or removed by the people through their elected representatives; it was now occurring through unelected Justices. If as few as five Justices agreed, they could overturn the people's will that had been expressed through constitutionally correct legislative means.

V. "Wall of Separation": Shackles for the Chains:

1- Justice Stanley Reed in *McCollum v. Board of Education*, 333 U.S. 203,247 (1948), dissenting:

> A rule of law should not be drawn from a figure of speech.

Justice William Rehnquist in *Wallace v. Jaffree*, 472 U.S. 38, 99 (1985), dissenting:

> Repetition of this error … does not make it any sounder historically.

2- The use of Jefferson's 1802 quote by the 1947 Court to apply the Establishment Clause to the states violates every principle of "judicial review," the power of the Supreme Court to invalidate the acts of government officials as disallowed by the Constitution.

3- Important concepts on the subject of judicial review are provided by:

> **Jipping, Thomas L. *Does the First Amendment Violate Itself: Reflections on the Constitution and Judicial Review.* (Washington: Free Congress Research & Education Foundation, 1997), 3-8:**
>
> Judicial review is a particularly powerful tool because it requires determining the meaning of the Constitution.
>
> Judges can derive the meaning of constitutional provisions from two basic sources. The first is **external**, outside the Constitution. Under this approach, the Constitution means what the judge wants it to mean based on the prevailing political culture. This is called "judicial activism."
>
> The second source of constitutional meaning is **internal**, inside the Constitution itself. The judge determines the meaning already given to constitutional provisions by those who framed and ratified them. This is called "judicial restraint."
>
> The very act of "interpreting a document *means* to attempt to discern the intent of the author.
>
> **Rules for Constitutional Interpretation:**
>
> - **Start with the constitutional text:** The first rule is that the plain language used by the authors in the document is the most authoritative guide to the authors' intention and thus controls the meaning of the document.
> - **Stay inside the Constitution if the text is ambiguous:** If the plain language is ambiguous, the interpreter may consult various *intrinsic* aids, which include the context of the language or the subject matter.
> - **Consult the framers outside the Constitution if it remains ambiguous:** If the plain meaning or intrinsic aids prove ambiguous, extrinsic aids may also be consulted. These extrinsic aids include an examination of the preexisting problem from which the provision was adopted, the legislative history of the provision, or contemporaneous expositions on the meaning of the provision.
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> The opponents of judicial restraint argue that the Constitution should adapt, evolve, or grow with the times. Their error, however, lies in failing to distinguish between the dual judicial tasks of **determining** meaning and **applying** meaning. The Constitution itself does not change in its meaning; it certainly does, indeed it must, adapt and evolve in its application to different facts, circumstances, and cases.
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> Meaning is what the Constitution's framers provided; application of that meaning is what today's judges do.
>
> Courts can thus, for example, decide how the Fourth Amendment's prohibition against unreasonable searches and seizures might apply to a wiretap or drug test that never existed at the time the Fourth Amendment's framers lived.

4- The problem with Justice Black's majority opinion in *Everson* is that he **determined** the meaning of the Establishment Clause not from internal evidence in the Constitution or the external writings of the Framers of the Constitution but from the "external" writings of Jefferson who was not a Framer.

Eidsmoe, John. *Christianity and the Constitution: The Faith of Our Founding Fathers*. (Grand Rapids: Baker Book House, 1987), 242-43:

The phrase "separation of church and state" appears nowhere in the Constitution or Bill of Rights. Jefferson made the statement in 1802, thirteen years after Congress passed the First Amendment. Jefferson was not a delegate to the 1787 Constitutional Convention, nor was he a member of Congress in 1789, nor was he a member of any state legislature or ratifying convention at any time relevant to the passage of the First Amendment; he was serving as U.S. Minister to France throughout this time.