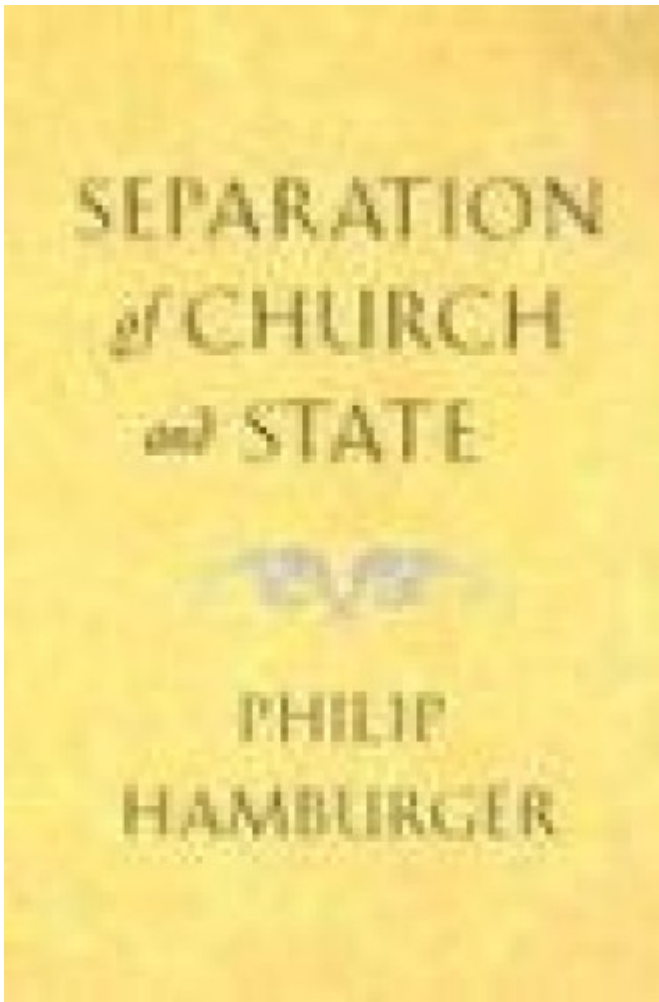


# Toppling the wall

By [Andrew Murphy](#) in the [July 3, 2002](#) issue

## In Review



### **Separation of Church and State**

Philip Hamburger

Harvard University Press

Most Americans assume that the separation of church and state is a fundamental principle deeply rooted in American constitutionalism; that the First Amendment was

intended to ensure that government does not involve itself with religion (and vice versa); and that contemporary debates over such vexing issues as school prayer, voucher programs, government funding of faith-based organizations, and the rights of religious minorities represent ongoing attempts to realize the separation intended by the Founders and like-minded early Americans.

None of these views is true, argues Philip Hamburger in his provocative new account of American religious liberty. Though the language of separation traces back to Thomas Jefferson—whose 1802 letter to the Danbury Baptist Association described the First Amendment as “building a wall of separation between church and state”—and still further to Roger Williams and early Baptists, the notion that such separation prohibited contact between church and state appears in only a few of the most radical voices in the nation’s past. Virtually no one called for separation in the way that the Supreme Court understands it today: that legislation must evince secular purposes and effects, and foster no “excessive government entanglement with religion” (see Chief Justice Warren Burger’s 1971 opinion in *Lemon v. Kurtzman* ). In fact, a mutually supportive connection between religion, politics and society was acknowledged and endorsed almost without reservation during the nation’s early years.

Not only is the metaphor of separation historically erroneous, Hamburger argues, but Americans from Jefferson to the Ku Klux Klan have used separationist language for discriminatory, exclusionary or narrowly partisan ends. For that reason, Hamburger suggests, “the idea of separation should, at best, be viewed with suspicion.” When Americans—whether presidents, Supreme Court justices or ordinary citizens—refer to the “wall of separation” desired by the Founders, they not only perpetuate a historical inaccuracy; they unwittingly revive some of the most distasteful episodes in American history. The rhetoric of separation has been directly and repeatedly implicated in anti-Catholic, indeed antireligious, political movements. By limiting the actions of government and religious institutions, as well as the degree of contact between them, this rhetoric actually undermines religious freedom.

How can this be? How could the separation of church and state represent something undesirable and downright dangerous? There are a number of villains in this story, and Hamburger goes out of his way to portray them not only as mistaken about constitutional meanings but also as disingenuous or morally suspect. Prominent among these is Jefferson, whom Hamburger describes as “bolder with a pen than a

sword” (no doubt a reference to Jefferson’s disastrous military career as governor of Virginia during the Revolution, in which he fled Monticello on horseback just ahead of British troops), and as “so bold on paper, yet so timid in life.” Jefferson “[took] delight in his own creativity” yet remained “as cautious in person as he was bold in imagination.”

Jefferson’s Republican allies used the language of separation to denounce New England clergy for speaking against him from the pulpit, thereby introducing separationist claims “for the transient purposes of an election contest.” One of Jefferson’s supporters, Nehemiah Dodge, deployed anti-Semitic rhetoric and “the violent sexual imagery of anti-Catholicism.”

Other advocates of separation included anti-Catholics (e.g., the Know-Nothings) as well as businessmen like P. T. Barnum and the nameless gentleman who, outraged at his inability to find a cigar on the Sabbath, donated 50 dollars to help repeal Sunday closing laws. As Hamburger puts it, “by the end of the [19th] century, this flood of desires—even merely the need for a smoke—carried increasing numbers of Americans toward the separation of religion, especially a separation of church and state.”

The 19th century also witnessed the growth of the Liberal movement, which campaigned for a separationist constitutional amendment but was undone in part by the unpopularity of its equivocal position on obscenity. “For many atheists among the Liberals, sexual freedom seemed of almost religious importance,” Hamburger writes. He goes on to present a litany of unsavory 20th-century separationists: anti-Catholic groups, including the Masons; the Ku Klux Klan (and various outgrowths thereof); the True Americans; and the Prohibition Party. The historical account culminates in a consideration of the Klan career of Supreme Court Justice Hugo Black.

This book is controversial because its central thesis, that “the First Amendment has been interpreted to limit religion in ways never imagined by the late 18th-century dissenters who demanded constitutional guarantees of religious liberty” and that “the constitutional authority for separation is without historical foundation,” challenges the widely held view that separation is a necessary corollary to disestablishment. It is unsettling because the depth and breadth of Hamburger’s scholarship (he is John Wilson Professor of Law at the University of Chicago) make it impossible for critics to dismiss his arguments as an ideologue’s pining for “Christian

America,” or as a case of shrill partisanship.

More broadly, Hamburger’s intriguing historical account raises a number of important questions about church and state, not merely in the American past but in the present and for the future as well. If an erroneous, and indeed pernicious, metaphor has dominated American jurisprudence and public discourse for years, then correcting that error would yield real-world changes in law, politics and society.

Yet Hamburger does not take up this practical question. Indeed, the contemporary ramifications of Hamburger’s historical argument are the dogs that don’t bark in this book. (I must admit that pointing out what is not covered in a nearly 500-page book opens a reviewer to charges of masochism. But if a strict separation of church and state is not justified historically, we may reasonably ask what some of the implications of repairing such a misconception might be.)

In other words, if Hamburger is right, what difference should it make in the day-to-day relationships between religious individuals, religious communities, religious institutions and the state? He rightly points out that “there are myriad connections between religion and government that do not amount to an establishment. . . . [Separationists] have mistakenly assumed that such connections infringe upon their constitutional freedom.” But certainly at least some of these potential connections do impinge on religious freedom, and deciding which do and which do not deserves a bit of attention after the thought-provoking narrative that makes up the bulk of the book.

One possible approach to the issue is to replace “separation” with a better metaphor, one more faithful to the intentions of those who drafted the First Amendment. A number of scholars who resist the metaphor of separation are attracted to that of “accommodation.” Indeed, something akin to Hamburger’s own argument, directed explicitly to contemporary church-state issues, has appeared in the pages of this magazine (Michael McConnell, “Why ‘Separation’ Is Not the Key to Church-State Relations,” *Christian Century*, January 18, 1989). But this too is a metaphor into which a wide variety of political content can be poured, and whose adherents display a remarkably wide variety of perspectives and programs. One ends *Separation of Church and State* wishing that its author had at least suggested a few elements of an alternate jurisprudence or public philosophy to take the place of misguided separationism.

Lurking behind the scenes in this story are important questions about constitutional interpretation. Hamburger makes two implicit, related claims: 1) we can know with relative certainty what early American Founders or dissenters intended regarding church and state, and speak about those intentions as a coherent body of thought; and 2) continuing decisions about church-state relations ought to remain faithful to the intentions of those groups. Many of Hamburger's critics would agree with his first claim. Witness, for example, Isaac Kramnick and R. Laurence Moore's *The Godless Constitution: The Case Against Religious Correctness* (1996). Despite calling the idea that we can know what the Founders really thought on religious issues "an illusion," Kramnick and Moore criticize those who view the U.S. as a Christian state: "The principal framers of the American political system wanted no religious parties in national politics. They crafted a constitutional order that intended to make a person's religious convictions, or lack of religious convictions, irrelevant in judging the value of his political opinion or in assessing his qualifications to hold political office."

Justice Harry Blackmun himself cited the Founders' intentions in his dissent in the 1990 Smith case: "I do not believe the Founders thought their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty." The notion that the Founders possessed a coherent set of "intentions" seems deeply entrenched among commentators and judges alike.

Then again, what does it say about the coherence of those intentions when, by Hamburger's own account, at least three of our first seven presidents, including an influential drafter of the Constitution and the author of the Declaration of Independence, seem to have held separationist views outside the mainstream of their time? Hamburger admits that Roger Williams, along with Jefferson, Madison and Jackson, departed radically from the views of their contemporaries. Should we perhaps reconsider the coherence of such "intentions"?

If instead, as Hamburger at times suggests, we should look to the intentions of those early religious dissenters so active in the disestablishment movement, why should we transform the views of unelected citizens who held no governmental office into constitutional orthodoxy? The whole task of identifying intentions seems fraught with peril; for a sophisticated attempt to grapple with these problems, and a forthright account of the difficulties involved in speaking of such intentions, a reader could do no better than to consult the first chapter of Jack Rakove's Pulitzer Prize-winning *Original Meanings: Politics and Ideas in the Making of the Constitution*

(1997).

Out of the claim that we can ascertain what the Founders (or their allies) intended about church and state grows the notion that we have our standard of constitutional interpretation ready-made. But why assume that the religious intentions of early Americans ought to direct contemporary jurisprudence? If the American religious landscape has changed radically since the 18th century, why should we expect to replicate the intentions of Founders in our legal decisions? In other words, might it be possible that Jefferson's "wall of separation"—though neither appropriate nor a dominant opinion in 1802, nor intended by constitutional authors or early American dissenters—might be precisely what an increasingly religiously pluralistic nation needs 200 years later?

Taking such a possibility seriously would suggest that we worry less about whether our political discourse fits the purported intentions of our Founders, and more about whether our political or legal practices accord with an evolving notion of the requirements of religious liberty. This possibility, I suspect, may lie close to the reason why Jefferson comes in for such criticism from Hamburger: if anyone in early American history embodies an unwillingness to defer to the past, and embodies the notion that a constitution needs to serve the living rather than remaining bound by the intentions of the dead, it is Jefferson.

Of course, my claim that the Founders' intentions are not the constitutional gold standard is hardly uncontroversial. Consider, for example, Chief Justice William Renquist's dissent in *Wallace v. Jaffree* (1985), perhaps the most explicit presentation of his views on both constitutional interpretation and issues of church and state.

It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the establishment clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years. Thomas Jefferson was of course in France at the time the constitutional amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the amendments were passed by Congress . . . There is simply no historical foundation for the proposition that the framers intended to build the "wall of separation" that was constitutionalized in *Everson*.

Rehnquist continued:

The greatest injury of the “wall” notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. No amount of repetition of historical errors in judicial opinions can make the errors true. The “wall of separation between church and state” is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.

The First Amendment is packed with political and legal content: in just one sentence, it attempts to secure the freedoms of religion, speech, press, assembly and petition. With regard to religion, it is helpful to recall that this phenomenon we call “American religious liberty” has always been made up of two general areas: establishment and free exercise. Hamburger is clearly correct in his claim that disestablishment, historically speaking, did not imply a strict notion of separation. Yet it may still be true that making free exercise a reality for Americans of all religious affiliations requires a minimization of contact between church and state, and that separation might be helpful as a metaphor in those contexts. There is very little about the free-exercise clause in Hamburger’s book, and the seeming equation of the disestablishment/separation issue with “American religious freedom” more generally seems to leave out one half of a complex and at-least-two-sided constitutional reality. Indeed, many of the contemporary activists and academics most concerned about the marginalization of religion in American public life frame their critiques as issues of free exercise and not establishment.

Hamburger has provided the most eloquent and richly documented account of the argument against separationism in its contemporary guise. His cogent profiles of important figures in the history of American religious liberty are themselves reason enough to read the book. I have attempted to raise some questions that linger as the nation (through its citizen activists, legislatures and courts) seeks to articulate a robust religious liberty for the 21st century. But whether one affirms or questions the appropriateness of separation as a metaphor; whether one looks to the original intent of our constitutional authors and their allies or views the law as an evolving entity; whether one points to establishment or free exercise as the key to American religious liberty, Hamburger’s *Separation of Church and State* is a book destined to ensure that the argument continues. This is perhaps the highest praise of all.