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The Metaphor as Wrecking Ball

Separation of Church and State

by Philip Hamburger

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One might borrow the famous phrase from Karl Marx and say that a specter is haunting the modern American mind, the specter of *separationism*. During the twentieth century, the “wall of separation between Church and State” became a pervasive cultural assumption. So ubiquitous is this understanding that most Americans simply take it to be a bedrock principle of constitutional law, even though the phrase—originally appearing in a once obscure 1802 letter of Thomas Jefferson to the Danbury Baptist Association—is nowhere to be found in the U.S. Constitution. More mantra than myth, the phrase has become inextricably entwined with all facets of modern American discourse concerning the role of religion in public life. While some have rejected the phrase as ahistorical, most judges, lawyers, academics, and journalists routinely speak of the “separation of church and state” as if it were required by the Constitution.

The disparity between Jefferson’s words and those of the Constitution is not an insignificant one. Yet the phrase “the separation of church and state” has taken on such a variety of meanings that it has proven all but useless as a guide to principled con-

stitutional adjudication. Does it merely call for a differentiation or distinction between the spheres of the church and the state, much as Christ himself did in the Gospels? Does it mandate governmental “neutrality” between denominations? Does it point to a guaranteed freedom from laws directly instituting, supporting, or otherwise “establishing” religion? Or does it refer to something much more dramatic, a wholesale severance of any contact between religious practice and public life—in effect, a doctrine of practical state atheism? It is this last interpretation that has prevailed in recent decades among lay and legal minds alike.

If few Americans have proven capable of viewing their own religious liberties in any other light, fewer still have seriously pondered the implications that erecting such a wall will likely have on the public square once every brick is firmly set in place. For as Justice Douglas so candidly conceded in *Engel v. Vitale* (1962), there can be no logical stopping point until the last vestige of

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religious expression or aid to religion is erased from the public realm. Taken at face value, a wall of separation between church and state would seem to require, among other things: the abolition of chaplains in both houses of Congress and in the armed forces; an end to the use of the Bible for administering oaths; the elimination of Presidential proclamations of thanksgiving; no mention of God in the Pledge of Allegiance; the effacement of “In God We Trust” from our currency and coinage; the end of property tax exemptions for churches and religious groups; and, arguably, the cutting off of municipal police and fire services to houses of worship. It might even rule out the recitation of the preamble of the Declaration of Independence in public schools, since that document refers to the Creator. Religious faith and practice would be collapsed entirely into an ever-dwindling private sphere.

What is left for the “free exercise” of religion if the “establishment” clause in fact means all that the Supreme Court has deemed it to? In the past several years, an impressive phalanx of conservative legal scholars—from Gerard Bradley and Douglas Kmiec to Stephen Presser and Michael McConnell—has arisen to expose the extra-constitutional novelty inherent in such an understanding of the First Amendment. As they tell it, the Supreme Court has willfully abandoned constitutional tradition, substituted its own impoverished understanding for that of the Framers, and emerged with a wholly arbitrary view of religion’s role in American life. These scholars also point out, quite persuasively, that the First Amendment did not itself set any limits on the religious involvements of the *states*. Although the First Amendment forbade a *national* establishment, it also forbade federal interference with existing *state* establishments, and many states kept religious tests for public offices long after the

federal Constitution was ratified. In reminding us that strict separation is not the only alternative to establishment, such critics have called into question perhaps the most widely held assumption concerning the role of religion in American civic life.

How did America’s majority culture come to equate its own religious liberty, guaranteed by the First Amendment, with the strict separation of church and state? And why did separation, let alone a *wall* of separation, become the dominant metaphor for describing the proper relationship between God and Country in a nation founded amidst an overwhelmingly Christian consensus? Such questions have long preoccupied Phillip Hamburger, who is John P. Wilson Professor of Law at the University of Chicago. In *The Separation of Church and State*, Hamburger proffers an exhaustively rich and detailed answer. Although his formal training is in the law, he writes with all the nuance of a first-rate intellectual historian. What Hamburger has managed to produce is intellectual history at its very best, tracing the intellectual pedigree of an idea not merely as disembodied abstraction, but as historically embodied in various social, cultural, and political antecedents. His work presents the fullest and most plausible account yet of the evolution of Americans’ understanding of church-state relations, and is sure to reshape the debate for many years to come.

While the story Hamburger tells is a nuanced one, the conclusion he draws is far from ambiguous: “As should be clear from the contrast between separation and the religious liberty [originally] guaranteed by the First Amendment,” he writes, “the constitutional authority for separation is *without historical foundation*.” Through a darkly ironic series of historical developments, the constitutional provisions originally designed to protect religious liberty

came to be understood in ways that substantially curtailed this freedom. This was particularly true of those Americans whose religious beliefs led them to worship and act as part of an organized, hierarchical religious group placing communal demands upon its members.

Separation, Hamburger insists, was never a social ideal widely embraced by the Framers of the Constitution, or even by the various dissenting religious minorities like the Quakers and Baptists who chafed under the demands of established churches in early Virginia, Massachusetts, and Connecticut. The metaphor of separation suggested a stark distance, an incompatibility, even an antagonism between government and religion that seemed far too severe for these believers. "Whereas the religious liberty demanded by most dissenters was a freedom from the laws that created these establishments, the separation of church and state was an old, anticlerical, and increasingly anti-ecclesiastical conception of the relationship between church and state," Hamburger writes.

Paradoxically, the idea's emergence stemmed primarily from the exaggerated fears of establishment ministers rather than as the desire of religious dissenters. From the late-sixteenth century through the late-eighteenth, establishment clergymen occasionally accused dissenters of desiring to separate church and state. As Hamburger points out, this was a caricature of the religious liberty sought by the dissenters: "[M]ost dissenters did nothing to deserve either the establishment accusation of separation or the later historical attribution of it." Later, during the presidential election of 1800, the Jeffersonians used the idea to browbeat Federalist clergy who were publicly denouncing Jefferson as irreligious. Unlike the religious liberty actually sought by the dissenters, though, separation of church and state implied limitations not

only upon government but also directly upon religions and churches.

By the mid-nineteenth century, many Americans bristled against traditional institutional authorities, and American churches were hardly exempt from this leveling democratic wind. As "true" religion became at once more individualistic and anti-dogmatic, politics turned inward as well. The Roman Catholic Church, itself the epitome of structure, hierarchy, and dogma, quickly emerged as a natural target for American nativist sentiment, as did Orthodox Jewish synagogues. Thus, in 1840, when Catholics began asserting their right to equal access to public school funds in New York City, "this presumptuous demand shocked Protestants, many of whom responded by asserting separation of church and state as a constitutional principle." In other words, the public success of separationism was fueled by bigotry.

For most American Protestants in that period, the idea of separation did not require an end to Bible reading in public schools, Sabbath "blue laws," and other interminglings of government with religion. Since such "nondenominational" practices were those of individuals rather than churches, they were viewed as less threatening. Ultimately, however, many nonreligious and openly anti-Christian secularists began to point out these inconsistencies. Hamburger retrieves a virtually unknown history of how these aggressively secularist groups began to call for the abolition of chaplains in legislatures, prisons, and the armed forces, a ban on Bible reading in schools, an end to Sabbath restrictions on commerce, and the taxation of church property. Significantly, these secularists did *not* at first claim the First Amendment as the constitutional warrant for their ideal of separation. On the contrary, they believed that the actual text of the Constitution provided a far too friendly an ac-

commodation between government and religion. Thus, with the support of President Ulysses Grant in the 1870s, separationists campaigned for the “Blaine Amendment” to the Constitution in order to implement their agenda. It was only after that effort failed that they altered their strategy to the more familiar modern method of constitutional “reinterpretation.”

In favoring concrete history over abstraction, Hamburger also points to the Ku Klux Klan as a leading catalyst for separation in the first half of the twentieth century. The Klan, he writes, “exerted profound political power in states across the country and, probably more than any other national group...drew Americans to the principle of separation.” Like many of its earlier nativist predecessors, the Klan advocated separation as part of its vision of Americanism, and as a central element in its strident anti-Catholicism and anti-Semitism. Eventually, these implications of the doctrine of strict separation evolved into a more general suspicion of all religious organizations. Hamburger here is not making a tendentious case against separation by *ad hominem* associations. Instead, he is introducing a healthy corrective to a historical whitewash that has gone virtually unchallenged: “[The] modern myth of separation omits any discussion of nativist sentiment in America and, above all, omits any discussion of the Ku Klux Klan.”

As historically grounded and compelling as Hamburger’s analysis is, one cannot imagine that it will prove very persuasive for those who openly reject the hermeneutics of constitutional originalism: the Lawrence Tribes or Ruth Bader Ginsbergs of the world. Moreover, Hamburger may

have unwittingly given some powerful ammunition to his detractors. Starting in 1965 with *Griswold v. Connecticut*, the Supreme Court began appealing to the “traditions and collective conscience of the people” in order to justify its activist decisions. Most recently, the Court utilized this approach in *Lawrence v. Texas* to invalidate a state law criminalizing homosexual sodomy: “Far from possessing ‘ancient roots,’” Justice Kennedy wrote, “American laws targeting same-sex couples did not develop until the last third of the twentieth century.” In light of the Court’s creative use of recent history, the implications for the doctrine of separation are obvious. By providing such richly documented and cogently argued a piece of scholarship, Hamburger has paved the way for an activist Court to claim that, far from being derived out of whole cloth, the separation of church and state has a long cultural pedigree and is thus embedded in the “traditions” and “collective conscience” of the nation. Indeed, only last year in the *Zelman* case Justice Stephen Breyer cited extensively from Hamburger’s book in voting to strike down Ohio’s school voucher program, albeit relying on a tortured (and rather shoddy) understanding of Hamburger’s main thesis.

Nevertheless, it would be a mistake not to emphasize the significance of Professor Hamburger’s contribution to our understanding of American history. By providing the first exhaustive historical account of the separation of church and state, he has aptly demonstrated all the ways in which that metaphor has simplified and impoverished discussions of religious liberty. Unlike so many other legal scholars, Hamburger substantially deepens our understanding of the necessarily complex and textured relationship between civil and religious society.