REVIEW

The Many Meanings of Separation

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Separation of Church and State, Philip Hamburger. Harvard, 2002. Pp xiii, 514.

Separation of Church and State is a learned, informative, and fascinating book, a must-read for anyone interested in religious liberty in the United States. The broad religious and political movements Professor Hamburger reviews have been described before for other purposes, but they are little known and under-appreciated. Many of his illuminating details are new, and his focus on the evolving meaning of separation of church and state is new and important.

The book is also frustrating, maddening, and ultimately flawed. It treats its central concept as a term of art without seriously defining it. When Hamburger's definition of separation is finally teased out, it is extreme and unusual, with hostility to religion as a central element. For Hamburger, separation of church and state means hostile efforts to control religion and limit its influence. Under this definition, there were no separationists among the supporters of the First Amendment. In Hamburger's view, separation is a nineteenth-century movement, originating in anti-Catholicism, later expanding or shifting to include hostility to all organized religion, and finally becoming the dominant understanding of church-state relations both in the Supreme Court and in public opinion.

Hamburger offers ample support for something like his meaning of separation. Hundreds of pages detail hostile, anti-Catholic, or anti-religious usages of separation in the nineteenth and early twentieth centuries. When he then repeatedly asserts that the Supreme Court and most Americans have adopted "separation" as their constitutional understanding of church-state relations today, he plainly means that they adopted one of these earlier understandings that he docu-

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ments in such detail. But he gives us no reason to believe in that equivalence.

There is the same slippage looking back in time. When he says the founding generation did not intend separation, he is plainly right as he uses the term. But he will inevitably be read to claim, and he does nothing to dispel the implication, that they did not intend separation at all—not as anyone uses the term. The book's dominant themes thus depend on a persistent slippage between Hamburger's meaning and more common meanings. He carefully documents a widely used nineteenth-century meaning, but he simply asserts, or assumes, that the concept had the same meaning in the eighteenth century, when he says it was rejected, and has that meaning at the turn of the twenty-first century, when he says it is dominant.

Hamburger's meaning of separation is wildly implausible as an interpretation of the Religion Clauses of the First Amendment; he and I agree on that much. But if we are both right about that, then it is also wildly implausible to impute Hamburger's meaning to all those contemporary Americans who use "separation of church and state" as a shorthand summary of what the Religion Clauses require. Hamburger's undefended presentist claim is that the Supreme Court and the American people have all been taken in by an obvious and flagrant misrepresentation. He asserts this presentist claim repeatedly, prominently, and emphatically, but he never even considers the possibility of alternate understandings more consistent with the First Amendment.

Many people talk about "separation of church and state" without meaning anything more specific than if they had just said "religious liberty." The most plausible connection between the two phrases is that the religious choices and commitments of the American people should be separated from the power of government. This straightforward meaning better explains the Supreme Court's cases than Hamburger's meaning, and surely comes closer to describing popular usage.

Part II of this Review summarizes Hamburger's history of the concept of separation, supplementing and criticizing that story in places. Part I explores the conflicting meanings of separation just enough to make Part II comprehensible. Part III compares Hamburger's meaning to more plausible meanings, and concludes that Hamburger's meaning is not what separation has meant for the last half century, either in Supreme Court opinions or in popular usage.

The book's analytic flaws inevitably raise a question about the reliability of its factual history, but I have no reason to doubt Hamburger's facts. I knew important parts of this story in broad outline, scattered parts of it in detail, but none of it in remotely the detail that

Hamburger brings to bear. From that knowledge base—limited compared to Hamburger's but substantial compared to the average reader's—I encountered no asserted facts that seem suspect. I disagree with some of his interpretations, and I wonder what he left out, but I do not doubt what he chose to include. Despite what seem to me important flaws, the book will stay on my shelf as an important reference work.

I. THE MEANING OF SEPARATION—A PREVIEW

Hamburger repeatedly acknowledges that "the phrase 'separation between church and state' has had a range of meanings" (p 2; see also pp 21, 185, 391). Different religious groups "tended to understand separation differently" (p 399). "Separation seemed to have an inexorable logic, albeit a very different logic for Liberals and nativists" (p 312 n 63). Some Americans thought separation required taxation of churches (pp 300–01, 336, 401–02), and others thought separation precluded taxation of churches (pp 7, 305 n 45). Many Americans simply "adopted the phrase 'separation of church and state' as a label for religious liberty" (p 276).[1]

Yet Hamburger himself uses "separation" to mean something much more specific. He repeatedly summarizes arguments that sound like forms of separation, and then insists that they are not separation. In Hamburger's view, to argue against a religious establishment is not to argue for separation.[2] To argue for religious liberty is not to argue for separation.[3] To oppose the "union" of church and state is not to argue for separation of church and state.[4] To argue that government

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1 See also p 303 (noting the tendency "to treat the phrase 'separation of church and state' as a generic label for religious liberty"); p 358 (noting the tendency to view "all American arguments for religious liberty as varying formulations of a more or less consistent principle of separation"); pp 246, 346, 359, 395.

2 See p 19 ("Almost none of the dissenters who struggled for their liberty from religious establishments revealed any desire for a separation of church and state."); p 191 ("Parts I and II have traced the development of separation as a perspective distinct from the antiestablishment religious liberty protected by the First Amendment."); pp 479–80 ("Underlying the story recorded here is a distinction between the separation of church and state and the constitutional freedom from a religious establishment."). See also pp 3, 76, 94–95, 126, 171, 185.

3 See p 19 ("Although today it is often assumed that eighteenth-century American religious dissenters sought a separation of church and state, they in fact struggled for a very different type of religious liberty."); p 78 ("[T]hese dissenters had every reason to seek religious liberty and no reason to demand a disconnection of religion and government."); p 144 ("Separation had not been and would not soon become their goal. . . . Baptists, like other dissenters, stuck to their traditional claims of religious liberty."). See also pp 107, 492.

4 See p 28 ("[E]ven as dissenting Protestants objected to the 'adulterous union' of church and state and attempted to 'sever' any 'unnatural alliance,' they did not thereby clearly endorse a separation of these institutions."); p 177 ("Baptist churches and associations seem to have gone no further than to denounce the union between church and state."); p 181 (stating that after 1802, Jefferson "continued to denounce the union of church and state, but he seems not to

may take no cognizance of religion is not to argue for separation.[5] To argue that government has no jurisdiction over religion is not to argue for separation.[6] Even to argue that church and state are "absolutely separate and distinct" is not to argue for separation.[7] Early chapters contain many sentences like "None of them, however, came even close to separation" (p 79).[8]

Earlier historians understood some of these arguments as arguments for separation of church and state, but according to Hamburger, they were all wrong. "Throughout the twentieth century even professional historians have in various ways perpetuated such misperceptions about separation" (p 353). This is the topic sentence to a remarkable paragraph that condemns a distinguished roster of famous and not-so-famous historians—Bernard Bailyn, H.J. Eckenrode, Leonard Levy, William McLoughlin, Sydney Mead, Edmund Morgan, William Sweet, and Gordon Wood—all of whom erroneously believed that eighteenth-century arguments for religious liberty urged a separation of church and state.

So what would it take to argue for separation of church and state? Hamburger assumes the answer is so obvious that it requires no formal definition and no elaboration. If you miss it the first time through, as I did, the book becomes something like a *Where's Waldo* volume.[9] I was constantly searching for clues that would support an in-

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have expressly urged separation").

5 See p 12 ("[S]eparation has often been taken to imply that even if legislation does not take cognizance of religion, such legislation is suspect if it has a religious purpose or if it substantially benefits religion."); p 85 ("Strikingly, however, Leland's theory on this matter was not one of separation. Instead, it was a version of the usual dissenting demands for equality and for laws that did not take cognizance of religion."); p 279 ("Separation had not been a Baptist position earlier in the century. Instead, as already discussed, Baptist associations had typically opposed establishments by requesting that the laws not take cognizance of religion.").

6 See p 167 n 44 ("Leland opposed religious proclamations and Sabbath laws . . . not because such laws violated separation but rather because these were beyond the power of civil government."); p 171 (quoting a Baptist petition arguing "that the christian religion is not an object of civil government, not any ways under its controul"; Hamburger says that this did not urge separation); pp 279–80 (quoting a Baptist resolution that any interference with clergy "on the part of civil rulers transcends their legitimate authority" and saying that this describes "an utterly traditional division of jurisdictions," and is not "remotely like separation of church and state"). See also pp 68, 100.

7 See p 54 (arguing that by this phrase, John Locke did not mean separation of church and state). See also p 171 (characterizing as "hardly [ ] the language of separation between church and state" a Baptist petition arguing that Christianity "is best situated, when left . . . where the constitution of the United States, and most of the States in the union consider it, *distinct from the laws of state*") (emphasis in Baptist original).

8 See also p 63 ("[D]issenters . . . clearly did not make separation one of their demands."); p 107 ("[T]heir demands typically had little to do with a separation of church and state."); pp 88, 177, 236.

9 See Martin Handford, *Where's Waldo?* (Candlewick 1997). *Where's Waldo* is a series of children's books in which every page contains a small and colorful picture of Waldo, hidden among hundreds of equally small and colorful pictures of other characters and objects. Waldo is

ference as to Hamburger's definition of separation. My copy of the book is full of underlinings, a list of page numbers that contain possibly defining attributes of separation, and marginal notations such as, "Is this it?"

In retrospect it is possible to see that he gives some idea of it in three scattered sentences early on. Hamburger says that "the separation of church and state was an old, anticlerical, and, increasingly, antiecclesiastical conception of the relationship between church and state" (p 10). "[T]he conception of the First Amendment in terms of separation directly constrains church as much as state" (p 14). "[I]n all of its diverse contexts, this image of separation lent itself to portrayals of extreme demarcation" (p 21).

None of these is a definition, let alone an explanation. He does not say what "old" anticlerical idea he is referring to, but apparently it is the self-imposed isolation in search of religious purity associated with Roger Williams.[10] That is very different from either the virulent anti-Catholicism or the virulent hostility to all organized religion that Hamburger documents in prominent nineteenth-century versions of separation. Moreover, self-imposed isolation is very different from the legally imposed constraints on religion that Hamburger identifies as an element of separation even in his Introduction. So these three early sentences are neither a definition nor entirely coherent, but they identify features that make sense of many of Hamburger's later applications of separation. According to Hamburger, separation is anticlerical, antiecclesiastical, extreme, and aimed as much at limiting the church as at limiting the state. He repeatedly emphasizes this last point—that separation constrains the liberty of churches, and especially their liberty to express views on political issues (pp 13, 93, 107, 120, 178, 280, 308, 490).

No wonder Hamburger so confidently concludes that separation has nothing to do with the First Amendment. That Amendment limits "Congress," not churches, and its Religion Clauses were adopted at the insistence of minority religions. If "separation" means extreme, anticlerical constraints on churches, then of course the First Amendment does not require separation. In contrast to the First Amendment, Hamburger's definition of separation adds the element of hostility to religion, and it removes or fundamentally changes the element of state action.

The First Amendment limits the power of government, not the rights of churches. This is explicit in the constitutional text and inher-

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on every page; the challenge is to find him. Hamburger's meaning of separation is not on every page, but the challenge of guessing it is.

[10] See p 32 ("The wall separating church and state evolved from the wall separating the garden and the wilderness.").

ent in the constitutional structure; all the provisions in the Bill of Rights protect the people from the government, not the government from the people. State action plays a further and unique role in the Religion Clauses: State action is the difference between government religious activity, restricted by the Establishment Clause, and private religious activity, explicitly protected by the Free Exercise Clause. Once Hamburger conceives of separation as restricting church as much as state, he is discussing a concept utterly alien to the First Amendment. Undoubtedly there are Americans who use separation to restrict churches, but that is not enough to make the usage plausible, let alone to make it the self-evident and only possible meaning, which is how Hamburger treats it.

Hamburger's Introduction also contains a somewhat more extensive discussion—three paragraphs, arguably four—of familiar modern arguments that "separation has often seemed to imply" (p 12). But readers cannot induce any implied principle that underlies these examples, and certainly not with enough precision to distinguish Hamburger's idea of separation from disestablishment or from depriving government of jurisdiction over religion. Readers would expect the underlying principle to be explicitly elaborated in an early chapter, but the subsequent elaboration is not about what counts as separation for Hamburger. It is about how the word has been used in political and religious discussion by others.

II. HAMBURGER'S HISTORY OF SEPARATION[11]

A. Before the American Founding

Separation of church and state has antecedents, at least in retrospect. Jesus is quoted as saying, "My kingdom is not of this world" (p 22), and perhaps more famously, "Render therefore unto Caesar the things which are Caesar's, and unto God the things that are God's" (p 351). From the beginning, Christians conceived of church and state as separate institutions (pp 21–22). The Reformation elaborated the distinction. Martin Luther taught that the "two kingdoms" of church and state should be "sharply distinguished" and "kept apart" (p 22). John Calvin taught that church officials should not be government officials, and vice versa (p 24), and that no Calvinist community should "unwisely mingle these two, which have a completely different nature" (p 22).

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[11] Most of this Part summarizes points from Hamburger that I endorse. Statements about events after 1948, statements cited to a source other than Hamburger, and evaluative statements not cited to any source, are my supplement to Hamburger's account. My disagreements and reservations are noted in the text.

This institutional separation implied neither disestablishment nor religious liberty. The state could and often did support the established church and suppress religious dissent, and the established church generally expected it to do so. Institutional separation sometimes served religious liberty indirectly; like any separation of powers, it created the possibility that the secular arm might pursue its own agenda or decline to persecute when asked. But institutional separation long predates religious liberty and was not designed to promote it.

The English Reformation made the King the head of the church,[12] thus ending institutional separation of church and state. When later English dissenters urged Calvin's separation of clerical and governmental offices (p 35), Richard Hooker replied that the dissenters assumed that "the Church and the Commonwealth are two both distinct and separate societies," and that "the walles of separation between these two must for ever be upheld" (p 36). Hamburger uses Hooker to illustrate one of his themes, that the language of separation was used early on by defenders of the establishment, accusing dissenters of some form of separationism; thus separation was viewed as a bad thing, not a good thing (pp 32, 65–78).

In a pamphlet of 1644, Roger Williams famously argued for a "wall of Separation between the Garden of the Church and the Wilderness of the world" (p 45). For Williams, the wall protected the purity of the separated church; when Williams published his compilation of arguments for religious liberty, he did not mention the wall of separation (p 43). Hamburger infers that Williams saw little relationship between the two concepts, but that debatable point may be moot. Williams was forgotten for more than a century, and when eighteenth-century Baptists revived his teachings on religious liberty, they apparently did not mention his wall of separation (pp 52, 350). It is thus a bit of a puzzle why Hamburger also says, without explanation, that separation evolved from Williams's use of the phrase (p 32).

John Locke wrote in 1690 that ecclesiastical authority must be "confined within the bounds of the church" and not extended to civil affairs, "because the church itself is a thing absolutely separate and distinct from the commonwealth" (p 54). Locke accepted the established church,[13] and opposed toleration for atheists, the intolerant, and any religion loyal to a foreign power (read Catholics),[14] so his conception of separation was far from modern. Still, it was a substantial advance on any predecessor save Williams, and unlike Williams, Locke

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[12] See the Supremacy Act, 26 Hen VIII, ch 1 (1534), in 3 *Statutes of the Realm* 492 (Hein 1993).

[13] See John Locke, *A Letter Concerning Toleration*, in 6 *Works of John Locke* 1, 11, 29 (Tegg 1823, repr Scientia Verlag 1963).

[14] See id at 45–47.

explicitly joined his arguments for separation and toleration. And unlike either Hooker or Williams, Locke was a substantial influence on the American Founders.[15]

Hamburger reads Locke as stating the traditional understanding of church and state as separate institutions, but not as arguing for separation of church and state (pp 54–55). This says more about Hamburger's conception of separation than it says about Locke; there is little hostility to organized religion in Locke's writings. But Locke appears to have urged the most fundamental principle of separation—separation of the church from the coercive power of the state. In elaborating on why the clergy should not exercise governmental powers, Locke wrote: "No man, therefore, with whatsoever ecclesiastical office he be dignified, can deprive another man that is not of his church and faith either of liberty or of any part of his worldly goods upon the account of that difference between them in religion" (p 54).

Separation of church and state as an explicit protection for religious liberty begins here. The institutional separation of two kingdoms theology had done little for religious liberty, because the state had too often been willing to persecute religious dissenters. But in Locke's vision of toleration, the church could not call on the coercive power of the state, and the state could not use its coercive power for religious purposes. This is far from a rule against financial support, further still from a rule against endorsements. This is not late twentieth-century separation, certainly not Hamburger's separation, but it is the most important step. It is surely the most important point for millions of Americans who use separation as a shorthand or synonym for religious liberty.

B. The Founding

Hamburger reports that the eighteenth-century dissenters who argued for religious liberty did not use any form of the word "separation" (pp 58–59, 64, 74). The principal supporters of disestablishment were the leaders and members of the evangelical churches, so there was little anticlericalism in the movement and still less hostility to religion. Jefferson was anticlerical, but only in private, and rarely even there before the election of 1800 (pp 147–48). In any event, he was in France during the crucial debates on disestablishment, the Constitution, and the First Amendment. With no one publicly anticlerical, there was no demand for separation under Hamburger's definition.

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[15] See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv L Rev 1409, 1430–31 (1990) (tracing Locke's influence on religious liberty through Jefferson, Madison, and Isaac Backus).

Yet even in Hamburger's summary of the familiar eighteenth-century debates, it is easy to see arguments that others might characterize as separation. "From the dissenting side came the accusation that the establishment churches 'united' or 'blended' church and state" (p 65). The dissenters argued "that civil government should not have jurisdiction over religion" (p 68), and that "[r]eligion is wholly exempt from its cognizance" (p 100). Hamburger concludes that the dissenters' demands "can be understood as variations on two basic requests" (p 94). One was equal treatment of all faiths, and the other was for "freedom from legislation that took cognizance of religion" (p 94).

Hamburger repeatedly insists that these demands did not amount to separation (pp 85, 94–95, 279). The dissenters' position does not fit his conception of separation, because they "did not attempt to limit churches or to deprive government of the moral influence of Christianity. Instead, they hoped to constrain governmental and especially legislative power" (p 94). When defenders of the establishment argued that religion was necessary to republican government (pp 69–73), the dissenters did not disagree. They conceded or insisted on the beneficial effects of religion on morals, and argued that religion flourished better without an establishment (p 76).

C. A Digression on Madison and Exemptions

There is to this point nothing unfair in Hamburger's characterizations of historical developments. He accurately summarizes the position of each side and simply insists that under his definition, neither side was arguing for separation. But now he strangely overreaches. He argues that Madison retreated between the 1785 debates in Virginia and the 1789 debates in the First Congress. In 1789, he settled for free exercise and disestablishment (p 105). But in 1785, "he emphasized the unqualified character of his claim" when he wrote that "in matters of Religion, no mans right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance" (p 105).[16]

Yet the claim that religion is exempt from government cognizance was, as Hamburger has already told us, one of the two central demands of the religious dissenters generally. "[T]he notion that civil government had no cognizance of religion—or at least no cognizance of establishments of religion—was understood as a substantive claim against establishments" (p 106 n 40). If "no cognizance" was extreme when Madison said it in 1785, then the whole dissenting movement was extreme. Conversely, if "no cognizance" was not extreme, and if it

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[16] The first quotation is Hamburger's characterization of the second, which is from Madison.

was understood as a demand for disestablishment, then Hamburger has documented no Madisonian shift between "no cognizance" in 1785 and "no establishment" in 1789.

Hamburger tries to create some space between Madison and the dissenters by noting that some dissenters had begun to clarify that "no cognizance" did not prevent legislation protecting the free exercise of religion (pp 101–03). Hamburger himself speculates that a strict reading of the no-cognizance standard would preclude religious exemptions from regulatory laws, laws protecting church property, and recognition of religious marriages (p 107). He reads Madison's unqualified statement that "Religion is wholly exempt from [government] cognizance" as adopting such implications (p 105).

This is hardly a credible reading. If "no cognizance" had included such implications, it would have embodied much of the hostility to religion that Hamburger associates with separation. There is not the slightest evidence that Madison would have precluded states from protecting the free exercise of religion; no one was arguing that existing regulatory exemptions were a form of establishment;[17] and no inference can be drawn from Madison's failure to disclaim such a strained misinterpretation.

This whole digression seems to be a weak attempt to create a vague impression of First Amendment minimalism. Whatever strong view of religious liberty Madison intended at the state level in 1785, Hamburger seems to say, he demanded much less at the federal level in 1789. Such arguments are conducive to Hamburger's apparent view that the Religion Clauses provide quite narrow protections for religious liberty.[18] That larger argument is well beyond the scope of the book and certainly beyond the scope of this Review. But the difference between "no cognizance" and "no establishment" is not much evidence one way or the other.

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[17] See generally Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo Wash L Rev 915 (1992). Hamburger argues that the Founders did not consciously intend to create a right to regulatory exemptions in the First Amendment, and that "a constitutional right of religious exemption was not even an issue in serious contention among the vast majority of Americans." Id at 948.

[18] For Hamburger's understanding of the Free Exercise Clause, see id. His views of the Establishment Clause are less defined, but he apparently would permit government to support religion in any way that does not require a statute (pp 12–13); this would largely eliminate constitutional restrictions on government-sponsored prayer and endorsements of religious faith. More plausibly in my view, he also appears to reject constitutional restrictions on financial aid, so long as that aid is offered on equal terms to secular and religious institutions (pp 458–59 n 165).

D. Thomas Jefferson, the Election of 1800, and the Danbury Baptists

Something like Hamburger's meaning of separation burst on the American scene in 1800. The Federalist clergy attacked the Republican presidential candidate, Thomas Jefferson, as a deist and an infidel (pp 112–17). Republicans defended Jefferson's Christianity (pp 117–20), but more important for present purposes, they attacked the right of the clergy to talk about politics (pp 120–26). The argument appears to have resonated with public opinion (p 129), at least among Jefferson's supporters.

The idea did not spring out of nowhere; even Hamburger, who claims that separation was not an argument in eighteenth-century debates on religious liberty, concedes that "the Republicans played upon earlier establishment arguments about the necessary connection between religion and government" (p 120). But the words "separate" and "separation" may have been new, and the specific claim—that clergy should not preach on politics—was certainly new. A concerted movement of clergy denouncing a prominent candidate by name may also have been new. As so often happens, a novel and arguably abusive use of a constitutional right—in this case, freedom of speech—provoked a novel and arguably abusive argument to limit the scope of the right.

Here is an application where the language of separation matters. Only omission or reversal of the state action requirement can turn the First Amendment into a limit on the speech of citizens.[19] Constitutional text here is consistent with constitutional history; the eighteenth-century dissenters demanded that government take no cognizance of religion, not that religion take no cognizance of government.

But if you think only about "separation" in the abstract, this mistake becomes somewhat plausible. "Separation of church and state" does not mention state action; "separation" lends itself to the argument that any contact or influence is problematic, no matter which side is influencing the other. The argument that churches cannot address political issues continues down to the present day,[20] and is often associated with pursuit of short-term political advantage, as it was in 1800. The Republicans in 1800 were making their own religious arguments even as they condemned the Federalist clergy for uniting church and state (pp 133–43). To note a simple modern example, the people who object when the Catholic bishops oppose the death penalty are rarely the same people who object when they oppose abor-

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[19] See generally Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 29 UC Davis L Rev 793 (1996).

[20] See id at 793 nn 1–5 for academic versions of the argument.

tion. Hamburger and I fully agree that some people have inferred from separation a ban on religion addressing politics, and that this inference is erroneous as an interpretation of the First Amendment. Our disagreements begin when he accepts this inference as the only possible meaning of separation (pp 13, 93, 107, 120, 178, 280, 308, 490).

The arguments of 1800 were the background to Jefferson's famous exchange of correspondence with the Danbury Baptist Association. The Danbury Baptists congratulated Jefferson on his election and rehearsed their arguments for a guarantee of free exercise in Connecticut (p 158 n 28). Jefferson responded with a letter crediting the Religion Clauses with "building a wall of separation between Church & State" (p 161). "Some Republican newspapers" published Jefferson's letter, but the Danbury Baptists themselves did not publish it, circulate it, or even note it in their minutes (p 164). Jefferson's letter was not published in any permanent or generally available form until an edition of his papers in 1853 (p 259).

There is no direct evidence on why the Baptists suppressed Jefferson's letter. Hamburger speculates that they did not like the wall of separation metaphor, which was then associated with the claim in the recent election that clergy should not address political questions (pp 177–79). This speculation is certainly plausible and might be right, but other speculations are also plausible. Jefferson's letter might simply have seemed more likely to antagonize than persuade the established Congregationalists who would have to be persuaded to guarantee free exercise in Connecticut.

Whether or not the exchange shows Baptist resistance to separation, the publication history shows that Jefferson's letter had little impact. In our time, it has become Exhibit A for separation as the meaning of the First Amendment, but Hamburger convincingly shows that in Jefferson's time, it was a non-event.

E. Anti-Catholic Separation

Protestant-Catholic conflict raged episodically through the last three quarters of the nineteenth century and the first half of the twentieth. Protestants came to understand this conflict partly in terms of separation of church and state, and they demonstrated a capacity to make "separation" mean whatever served their interests.

The phrase itself got important boosts when popes denounced it in 1832 and 1884 (pp 230–31, 397). If popes opposed separation, then Protestants must support it; "the pope did more than Jefferson to popularize the idea of separation of church and state in America" (p 482).

Rising Catholic immigration provoked Protestant nativism and increased the salience of Protestant-Catholic conflict. Papal opposi-

tion to democracy in Europe, and Catholic statements opposing religious liberty in countries controlled by Catholics, both inflamed anti-Catholic bigots and gave grounds for quite unbigoted opposition to official Catholic positions (pp 209–10). It mattered little that the Catholic laity generally did not adhere to these positions (pp 206–09); the Catholic Church could be portrayed as loyal to a foreign sovereign who would abolish religious liberty if given a chance. "Clergymen from almost all denominations joined the assault on Catholicism in one way or another, making anti-Catholicism the shared religious expression of an otherwise increasingly fragmented Protestant majority" (pp 214–15). In this context, separation took on a new meaning, roughly but fairly summarized as restricting Catholic influence.

Catholics first demanded equal funding for their schools in New York City in the early 1820s (pp 220–21). Protestants opposed funding for "sectarian" schools on grounds of separation (pp 219–29). By 1840, this dispute had grown into a major political issue (pp 219–20). Catholics argued that the New York City public schools were in fact publicly funded Protestant schools (pp 220–21). The Public School Society proclaimed its commitment "to inculcate the sublime truths of religion and morality contained in the Holy Scriptures," required children to read the King James Bible (the Protestant translation), and assigned textbooks "in which Catholics were condemned as deceitful, bigoted, and intolerant" (p 220). John Hughes, soon to be the Roman Catholic Bishop of New York, organized a slate of candidates on this issue in 1841 (p 227). This horrified Protestants with the prospect of a Catholic political party (p 227), and thus for a time united the issue of religion in schools with the issue of religion in politics.

The Protestant position that emerged by the mid-nineteenth century was that Protestants could participate in politics and teach their religion in the schools, but that Catholics could not. One can imagine many ways of rationalizing discrimination against Catholics, but separation of church and state seems one of the least likely. The key step in the Protestant argument was this: "Protestants tended to assume that, whereas Catholics acted as part of a church, Protestants acted in diverse sects as individuals" (p 228; see also pp 229, 256, 266, 276, 283–84, 364, 372–74, 376, 481). Thus, Catholic instruction or political action violated separation, because it was the work of an authoritarian church, but Protestant instruction and political action did not violate separation, because it was the work of free individuals. Some of the more aggressive anti-Catholic organizations eventually took the position that even Catholic *individuals* should be excluded from holding public office (pp 366, 404–06), teaching in public schools (p 442 n 122), or participating in politics (pp 234–40, 366).

The distinction between churches and individuals "explained" why Catholic priests could not discuss politics, but it was not allowed to restrict political activity by the Protestant clergy. "Protestant ministers tended to view themselves as the moral light of the nation, and vast numbers of them did not hesitate to participate in politics in ways Catholics could not afford" (p 243). Most famously, Protestant ministers preached 3,200 sermons against the Kansas-Nebraska bill, and 3,000 signed petitions opposing the bill (pp 244–45), leading Stephen A. Douglas to complain without effect that they were violating the separation of church and state.[21] Reviewing Baptist political activity in the early twentieth century, Hamburger says that Baptists "typically resolved the incompatibility simply by applying separation to Catholics but not to Baptists" (p 379).

No version of the Protestant distinction could have been based on constitutional text or structure. It is wildly implausible to interpret guarantees of religious liberty to provide such radically different protections for the two largest faith groups, or to disadvantage particular churches based on their theology and governance. And assuming there could be some viable distinction between church and religion for First Amendment purposes, the Protestants had it backwards. They said government must be separated from the church, not from religion, but the constitutional text prohibits an establishment of "religion," not establishment of "a church." The phrase "separation of *church* and state" was thus more conducive than the constitutional text to the principal Protestant rationalization.

Some statements of the Protestant position juxtaposed separation and state-supported Protestantism in ways that are truly astonishing from a modern perspective. A New York political pamphlet of 1845 urged "a barrier high and eternal as the Andes" to "forever separate the Church from the State," and in the very next sentence, endorsed the Bible as "the single basis of all good government" (pp 228–29). An 1855 book exhorted, without irony or any sense of contradiction (p 229 n 92):

> We must maintain our Christian character as a nation. We must still enforce the observation of the Christian Sabbath. We must continue scrupulously to preserve the Church and the State separate from each other. We must again avow and maintain the Christianity of our public education.

The more extreme anti-Catholic activists eventually used "separation" to mean almost anything that was bad for Catholics. They pushed bills to impose distinctively Protestant forms of governance

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[21] Cong Globe App, 33d Cong, 1st Sess 656 (May 8, 1854).

on Catholic churches (p 242), demanded government inspection of convents (pp 215–16, 401), and opposed allowing Catholic orphans and prisoners in state custody to attend Catholic services instead of generic Protestant services (p 339)—all in the name of separation.

Anti-Catholic separation made for strange allies; U.S. Grant and the Ku Klux Klan each pushed anti-Catholic separation of church and state. When Grant and the Republicans needed a new issue after Reconstruction became unpopular, they adopted anti-Catholic separation with considerable success (pp 322–26). This episode led to the Blaine Amendment, an unsuccessful attempt to enshrine in the federal Constitution a ban on any money to sectarian schools, with a savings clause protecting Bible reading in the public schools (pp 324–26). This would have constitutionalized the Protestant position on both issues. At the other end of the two-party political continuum, the anti-Catholic Klan also became a vigorous proponent of separation. New members in Alabama swore an oath to support "white supremacy" and "separation of church and state" (p 426); the Rhode Island chapter called itself the Roger Williams Klanton (p 419).

Opposition to Catholic schools peaked after World War I, with Klan-supported efforts to require all children to attend public schools. Such a law actually passed in Oregon, and the Supreme Court struck it down in *Pierce v Society of Sisters*.[22] Hamburger reports similar movements in at least eleven states (p 414), and he has uncovered the wonderful detail that in Oregon, "secular and Protestant private schools received quiet assurances that they would be accommodated" (p 418 n 65). Supporters of the movement saw Catholic schools as a threat to separation of church and state and to religious liberty (pp 412–21). A 1922 letter to the editor argued that Catholic schools unconstitutionally deprived their students of religious liberty by permanently instilling "their peculiar church doctrines" (p 418).

Hamburger has compiled a fascinating account of Hugo Black's role in the religious work of the Klan (pp 422–34).[23] The Grand Dragon of the Alabama Klan first hired Black in 1921 to defend a Methodist minister who had killed a Catholic priest. The minister's daughter had converted to Catholicism and married a Puerto Rican; the priest performed the wedding (pp 424–26). Black got an acquittal by emphasizing the husband's dark skin and blaming the priest for the daughter's apostasy. He told the jury: "A child of a Methodist does not suddenly depart from her religion unless someone has planted in her mind the seeds of influence. . . . When you find a girl who has been

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22 268 US 510 (1925).

23 Hamburger's account draws heavily but not exclusively from Roger K. Newman, *Hugo Black: A Biography* (Pantheon 1994).

reared well persuaded from her parents by some cause or person, that cause or person is wrong" (pp 425–26). Compare the contemporaneous argument in Oregon that Catholic schools permanently instilled their denominational teachings, and that this violated their students' religious liberty.

When Black ran for the Senate in 1925, the Klan became his unpaid campaign organization. The Grand Dragon said he "arranged for Hugo to go to Klaverns all over the state, making talks on Catholicism. . . . Hugo could make the best anti-Catholic speech you ever heard" (p 427). Although the Protestant version of separation was supposed to preclude church participation in politics, Black gave campaign speeches in churches (p 427). When Black's Klan membership was revealed, after his confirmation, he gave a radio speech that is plausibly read—and was interpreted at the time—as threatening Klan retaliation against Catholics if his opponents continued to press the issue (pp 430–34). The Klan's views of Catholics may be easily seen in Black's dissent in *Board of Education v Allen*.[24]

Hamburger shows that one of the old anti-Catholic nativist organizations initiated the litigation in *Everson v Board of Education*[25] (pp 455–57). Separationists condemned Black's opinion, which upheld a government program to pay bus fares for students attending either public or private schools (pp 463–68). But Black himself correctly viewed the case (in Hamburger's paraphrase) as "an opportunity to make separation the unanimous standard of the Court while reaching a judgment that would undercut Catholic criticism" (p 462).

The long Protestant-Catholic conflict was central to the development of American law and attitudes on religious observances in the public schools and on government money for private schools. The broad outlines of this history are reasonably well known to scholars in the field, and brief references have appeared in Supreme Court opinions,[26] but its importance remains greatly underappreciated. Hamburger has performed a valuable service in gathering so much of that history in one place, with so much supporting detail, and in focusing attention on the use (or misuse) of arguments from separation.

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[24] 392 US 236, 251 (1968) ("The same powerful sectarian religious propagandists who have succeeded in securing passage of the present law to help religious schools carry on their sectarian religious purposes can and doubtless will continue their propaganda, looking toward complete domination and supremacy of their particular brand of religion.").

[25] 330 US 1 (1947).

[26] See *Mitchell v Helms*, 530 US 793, 828–29 (2000) (plurality) ("[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow."); *Lemon v Kurtzman*, 403 US 602, 628–29 (1971) (Douglas concurring) ("The story of conflict and dissension is long and well known.").

F. Liberal Secular Separation

When the Republicans revived anti-Catholic separation in 1875, they hoped also to attract a smaller block of separationist votes. This group was a volatile coalition of atheists, non-Christian theists, and theologically liberal Christians, loosely united by hostility to religious authority (pp 287–89). The movement's newspaper, the *Index*, "quickly became the most distinguished heterodox paper in America—supported by Wendell Phillips, William Lloyd Garrison, Rabbi Isaac M. Wise, and even Charles Darwin" (p 289).

Francis Abbot, the editor of the *Index*, soon found that separation of church and state was the one theme that united his diverse readers (pp 289–90). Beginning in 1874, the *Index* proposed a separation amendment to the Constitution (p 296), and by 1875, Abbot had formed an organization, the National Liberal League, devoted to "the ABSOLUTE SEPARATION OF CHURCH AND STATE" (p 295). Following Hamburger, I will call this movement and similar ideas "Liberal" or "secular" separationism (p 287).

The Liberal League's 1874 amendment would have made the First Amendment and the Test Oath Clause applicable to the states, and would have protected all religious opinions from any discrimination by government at any level. An 1876 draft added clauses designed to prohibit tax exemption for churches, Bible reading and other religious observances in the public schools, and government aid to secular functions (such as teaching math or feeding the homeless) in religious institutions (pp 299–300).

The Liberals argued that separation was implicit in the Constitution, but that it needed to be explicit (pp 301–02). Most of them opposed the Blaine Amendment because it was inadequate to the task and would "leave the Protestant sects undisturbed in their present collective mastery over the public school system" (p 298). The Liberals rejected the Protestant distinction between church and religion, and thus rejected any distinctions in the rules applicable to Protestants and Catholics (pp 308, 364). They denounced political statements by clergy of any faith (pp 308–09).

The Liberals also had a platform of nine demands (pp 294–95):

1. Taxation of church property.
2. No government-paid chaplains in the military, prisons, or other public institutions.
3. No government funds for "sectarian educational [or] charitable institutions."
4. No government-sponsored religious services, specifically including no Bible reading in the public schools.
5. No religious proclamations by governors or the President.

6. Abolition of judicial oaths, and substitution of affirmations under penalty of perjury.
7. No laws "directly or indirectly enforcing the observance of Sunday as the Sabbath."
8. No laws "looking to the enforcement of 'Christian' morality."
9. "No privilege or advantage" to "Christianity or any other special religion," and that "our entire political system" be "founded and administered on a purely secular basis."

The Liberal League's influence peaked in 1876; the League broke in half in 1878, and it splintered further through the 1880s (pp 331–33). Descendant organizations continued to promulgate variations on the nine demands; Hamburger found versions from 1885, 1901, and 1937 (pp 361–62). Protestant anti-Catholic separation remained dominant, but Liberal ideas survived, and a minority of Protestant separationists adopted at least some of them. W.C. Brann, an atheist in Waco, Texas, published the *Iconoclast*, a newspaper that promoted a Liberal version of separation (pp 365–67). His brief career ended with his assassination in 1898, but he significantly influenced Texas Baptists, including J.M. Dawson, who enrolled at Baylor University in 1899 (pp 365–66).

Dawson became a Baptist minister "who preached the social gospel, liberal theology, racial tolerance, and ecumenical relations with other denominations and religions" (p 387)—in Texas in the early twentieth century! In 1946, he became the first Executive Secretary of the Joint Conference Committee on Public Relations (p 388). Now called the Baptist Joint Committee on Public Affairs, it takes strongly separationist positions with no hint of anti-religious rhetoric.[27]

In 1947, Dawson "took the lead" in organizing Protestants and Other Americans United for Separation of Church and State (p 470), designed to be free of denominational influence that might resist Dawson's more secular version of separation (pp 470–71). The organization later dropped the first three words of its name, and today, Americans United for Separation of Church and State proclaims itself "proud of its role as the nation's leading opponent and watchdog of the Religious Right."[28]

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[27] The Committee's positions are summarized online at http://www.bjcpa.org (visited Apr 21, 2003). See also John C. Jeffries, Jr. and James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich L Rev 279, 313–15, 346–47, 352–54 (2001) (further elaborating the history of the Baptist Joint Committee).

[28] See Americans United's "Religious Right Research" page, online at http://www.au.org/relright.htm (visited Apr 21, 2003). See also Jeffries and Ryan, 100 Mich L Rev at 315–20, 354–55 (cited in note 27).

G. The Triumph of Anticlerical Separation?

Hamburger repeatedly insists that separation became both dominant ideology and constitutional law. "Americans called for a separation of church and state, and eventually the U.S. Supreme Court gave their new conception of religious liberty the force of law" (p 17).

Hamburger traces this view only as far as 1948, concluding his chronological account with *McCollum v Board of Education*.[29] *McCollum* struck down a "released-time" program, in which children were released from class to attend religious instruction offered by churches in public school classrooms. Hamburger highlights a little noticed fact: *Everson* (in 1947) involved an anti-Catholic plaintiff challenging indirect aid to Catholic schools, but in *McCollum* an atheist plaintiff challenged mostly Protestant religious instruction in public schools (pp 476–77). Hamburger views the judicial step from *Everson* to *McCollum* as the step from Protestant anti-Catholic separation to Liberal secular separation. "Many relatively traditional Protestants felt stunned, leading them slowly to reconsider separation" (p 477). But according to Hamburger (p 478):

> Of course, it was much too late.
>
> By the middle of the twentieth century, the idea of separation between church and state had become an almost irresistible American dogma. In the decades that followed, the justices of the U.S. Supreme Court and myriad other Americans would continue to develop this American freedom. They would explore its application to school prayer, to religious displays on public land, and to government subsidies for private schools and charities. Some Americans would recognize that they could not take separation literally and would question the breadth of its application, but they would rarely reject or altogether abandon the metaphor. Even as Americans wondered about separation's meaning, they treated its constitutional legitimacy as sacrosanct. Having enshrined the doctrine of separation in their Constitution, they deferred to it with reverence and viewed any dissent from it as profoundly un-American.

III. THE MEANING OF SEPARATION REVISITED

A. Hamburger's Presentist Claims

Hamburger stops his history in 1948, but he prominently and repeatedly asserts broad conclusions about the present. In his Introduc-

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[29] 333 US 203 (1948), discussed at pp 472–78.

tion, Conclusion, and major transitions, Hamburger asserts that separation dominates American public opinion and the opinions of the Supreme Court of the United States.

This claim appears repeatedly in his Introduction (pp 9, 10, 17), once in its final sentence.[30] It appears in the opening sentence of part IV,[31] in the opening sentence of a section on the more intellectual anti-Catholicism of the mid-twentieth century,[32] and in the concluding paragraph of Hamburger's chronological history (p 478).[33] It appears repeatedly in the Conclusion (pp 479, 481, 486, 487), and in the final two sentences that conclude the entire book (p 492):

> In the transfiguring light of their fears, Americans saw their religious liberty anew, no longer merely as a limitation on government, but also as a means of separating themselves and their government from threatening claims of ecclesiastical authority. Americans thereby gradually forgot the character of their older, antiestablishment religious liberty and eventually came to understand their religious freedom as a separation of church and state.

In all these prominent statements, Hamburger is using "separation" in his sense of the word—separation as anticlerical and aimed as much at controlling churches as at controlling the state. This is explicit in the final two sentences, with their references to "threatening claims of ecclesiastical authority" and to our "forgot[ten] . . . antiestablishment religious liberty." It is explicit a few pages earlier when he says, "In one version or another—whether Protestant, secular, or some combination of these—separation became an increasingly pervasive cultural assumption" (p 481). And it is unambiguously implicit in every assertion that contemporary Americans or the Supreme Court have adopted separation. Hamburger sometimes acknowledges that not everyone carries separation to the full extremity of what he thinks are its logical conclusions,[34] but he never acknowledges the possibility that when the Supreme Court or public opinion endorses separation today, they might mean something entirely different from anticlerical efforts to suppress Catholics or even all religion. Hamburger stops his

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30 The sentence quoted in the first paragraph of section II.G is the final sentence of Hamburger's Introduction.

31 See p 285 ("In the twentieth century the popular conception of religious liberty as a separation of church and state acquired the status of constitutional law.").

32 See p 449 ("In the late 1940s—when the U.S. Supreme Court would eventually establish separation as a First Amendment freedom—many Protestants were participating in yet another surge of anti-Catholicism.").

33 The paragraph quoted at the end of section II.G is the final paragraph of Hamburger's chronological history.

34 See p 478 ("Some Americans would recognize that they could not take separation literally and would question the breadth of its application.").

history in 1948 and offers no evidence for the asserted equivalence between contemporary separationism and what he so carefully documents in the nineteenth and early twentieth centuries.

B. Competing Meanings of Separation

No doubt there is an important sector of public opinion that is hostile to religion and thinks of "separation" in something like the National Liberal League's sense of the term.[35] But this body of anti-religious opinion has never come close to constituting a majority, and its hostility cannot be imputed to millions of other Americans who profess support for separation of church and state. As Hamburger occasionally acknowledges—in places less prominent than his claims of separationism triumphant—most Americans have used "separation" as a shorthand for vague notions of religious liberty as guaranteed in the First Amendment (pp 2, 21, 185, 391). For some the word probably has no very specific content; for many, it means no government funding for religious schools, and no prayer in public schools, because these are the two issues that have been widely reported in the press under the label of separation. John Jeffries and James Ryan simply equate modern separationism with these two issues.[36]

Other scholars have ascribed a range of meanings to separation. Carl Esbeck distinguishes strict separationists, pluralistic separationists, and institutional separationists, none of them necessarily hostile to religion.[37] In a later work focused on more specific issues, he adds "no-aid separationism" and "structural" or "historic" separationism.[38] Steven Green, long-time counsel to Americans United and now a law professor, writes that separation "has always lacked a coherent defini-

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[35] See generally James Davison Hunter, *Culture Wars: The Struggle to Define America* (Basic 1991) (describing a broad range of cultural conflicts in terms of underlying conflict between "progressive" and "orthodox" views of religion); Phillip E. Johnson, *Reason in the Balance* (InterVarsity 1995) (arguing that "scientific naturalism and liberal rationalism" seek to relegate traditional religious views to a position of social irrelevance); Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 Minn L Rev 1047, 1069–89 (1996) (surveying contemporary religious conflict in terms of Hunter's and Johnson's categories).

[36] Jeffries and Ryan, 100 Mich L Rev at 281 (cited in note 27).

[37] Carl H. Esbeck, *Five Views of Church-State Relations in Contemporary American Thought*, 1986 BYU L Rev 371, 379–94. In Esbeck's terms, "Strict separationists desire a secular state," id at 379, but are often religious themselves, id at 380. "Pluralistic separationists desire a neutral state." Id at 385. "Institutional separationists envision a theocentric state," id at 389, but not a theocracy, id at 390.

[38] Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 Notre Dame J L, Ethics, & Pub Pol 285, 288 & n 13 (1999). "No-aid" separationists "hold that most forms of governmental assistance to religious organizations are prohibited by the Establishment Clause"; "structural" or "historic" separationists would simply require "equal treatment of all educational and social service providers—including all faith-based providers." Id.

tion. At its most basic level, separationism means the singling out of religion for distinctive treatment."[39] Green and Frederick Gedicks both acknowledge the ban on government aid to religion as one of separationism's fundamental commitments,[40] but each also emphasizes that separation protects religion from government interference across a wide range of applications.[41]

Ira Lupu came somewhat closer to Hamburger's usage, describing separationism as "a doctrine of secular privilege at its heart,"[42] but consistent with "a strong doctrine of free exercise rights."[43] I have acknowledged the existence of a faction that "may call itself separationist," committed to "secular supremacy and religious subordination, or at least to religious marginalization," but I found "little basis for that version of separation in constitutional text, history, or structure."[44] Thomas Berg thought that faction was larger and more influential than I realized, but he also recognized the more liberty-enhancing version of separation I offered as an alternative.[45]

A policy statement by five religious organizations grounds separation "in the belief that (1) no citizen's rights or opportunities should depend on religious beliefs or practices, . . . and (2) authentic faith must be free and voluntary."[46] They offer separation as the desirable middle ground between a "Judeo-Christian nation," without separation of church and state, on the one hand, and a nation where "religion and religious groups [are] barred from . . . the vital public discourses we carry on as a democracy."[47] This second rejected alternative is of course a central element of Hamburger's conception of separation.

The diversity of definitions means that neither Hamburger nor I can assume that readers share our understanding of separation. Ham-

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39 Steven K. Green, *Of (Un)Equal Jurisprudential Pedigree: Rectifying the Imbalance between Neutrality and Separationism*, 43 BC L Rev 1111, 1118 (2002).

40 Id at 1121; Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 BC L Rev 1071, 1094 (2002).

41 Gedicks, 43 BC L Rev at 1098–1101 (cited in note 40); Green, 43 BC L Rev at 1112 (cited in note 39).

42 Ira C. Lupu, *The Lingering Death of Separationism*, 62 Geo Wash L Rev 230, 249 (1994).

43 Id at 236.

44 Douglas Laycock, *The Underlying Unity of Neutrality and Separation*, 46 Emory L J 43, 47 (1997).

45 Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 Loy U Chi L J 121, 122 & n 5 (2001).

46 The American Jewish Committee, Baptist Joint Committee on Public Affairs, The Interfaith Alliance Foundation, National Council of the Churches of Christ in the U.S.A., and Religious Action Center of Reform Judaism, *A Shared Vision: Religious Liberty in the 21st Century* 3 (2d ed 2002), online at http://www.ajc.org/upload/pdf/ASharedVision.pdf (visited Apr 21, 2003). An earlier version, with additional signatories, was published in 1994.

47 Id at 1.

burger defines separation in terms that are obviously inconsistent with the Religion Clauses, and thus he necessarily rejects the concept as an erroneous interpretation of those clauses. I have tried instead to define separation in a way that makes it consistent with the text and purpose of the Religion Clauses, and thus to make sense of the widespread belief that the Religion Clauses require separation of church and state.

To me, "[t]he central meaning of separation is to separate the authority of the church from the authority of the state,"[48] so that "religion is . . . left as wholly to private choice and private commitment as anything can be."[49] Separation thus minimizes government influence on religion, a goal I prefer to describe in terms of "substantive neutrality."[50] This meaning is consistent with the text of the Religion Clauses and with the arguments and interests of the eighteenth-century dissenters who successfully demanded the Religion Clauses. It protects all religions from the state; it does not discriminate among religions or attempt to reduce the influence of any religion. This comes much closer to the views of those citizens who vaguely think that separation protects religious liberty, although of course not all those citizens would agree with all my applications of the concept.

The Supreme Court's understanding of separation has not been so specifically articulated, has not been consistent over time, and has not been so protective of religious liberty, but on the whole it has been closer to my view of separation than to Hamburger's. Until very recently, the Court always spoke of separation and neutrality as though they were interdependent means of serving the same end of private religious choice. From *Everson* forward, the Court's condemnation of government support for religion was always embedded in a strong commitment to government neutrality: Government could not seek to "influence . . . a belief or disbelief in any religion";[51] it could "neither advance[] nor inhibit[] religion."[52] Even the ban on aid to religious schools was conceived as a form of neutrality,[53] a conception that left the ban vulnerable to multiple exceptions in its heyday in the 1970s and to progressive overruling as the Court adopted a different baseline for measuring neutrality in the 1990s.[54]

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48 Laycock, 46 Emory L J at 46 (cited in note 44).

49 Douglas Laycock, *Religious Liberty as Liberty*, 7 J Contemp Legal Issues 313, 319 (1996).

50 Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality toward Religion*, 39 DePaul L Rev 993, 1001–02 (1990).

51 *Everson*, 330 US at 15 (1947).

52 *Lemon v Kurtzman*, 403 US 602, 612 (1971).

53 See Laycock, 46 Emory L J at 53–56 (cited in note 44).

54 Id at 48, 63–68.

The Supreme Court's decisions restricting government aid to religious schools were plainly influenced by Protestant anti-Catholic separationism,[55] and political opposition to aid to religious schools today includes a large element of hostility at least to conservative or intensely felt religion. Score this issue in Hamburger's favor; it is the only plausible example of a triumph of anticlerical separationism. But the fit is far from perfect. Hamburger claims that the Liberal vision of separation had triumphed by 1952, yet the Supreme Court did not actually strike down an aid program until 1971,[56] and it has not struck down another since 1985.[57] The influence of the anti-aid position lasted much longer than these fourteen years, but actual invalidations were confined to that period, and even at the height of those invalidations, the Court let states provide bus transportation,[58] textbooks,[59] standardized testing,[60] diagnostic services,[61] and remedial and therapeutic services delivered off the property of the religious school.[62] Restrictions on aid have been steadily unraveling since 1986;[63] four decisions invalidating aid programs have been expressly overruled.[64] To the extent that Hamburger's meaning of separation ever prevailed at the Supreme Court, it no longer does. But my claim that Hamburger's meaning never generally prevailed does not depend on these overrulings.

A second set of religious liberty issues relates to religious speech in public places or with government sponsorship. The Court has in-

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55 In addition to Hamburger, see id at 57–61; Jeffries and Ryan, 100 Mich L Rev at 281–82, 297–305 (cited in note 27); John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928–1960*, 84 J Am Hist 97, 122–25 (1997).

56 See *Lemon*, 403 US 602 (1971).

57 The Court last invalidated school aid programs in *Aguilar v Felton*, 473 US 402 (1985), overruled in *Agostini v Felton*, 521 US 203 (1997), and in *Grand Rapids School District v Ball*, 473 US 373 (1985), partially overruled in *Agostini*.

58 See *Everson*, 330 US 1.

59 See *Meek v Pittenger*, 421 US 349, 359–62 (1975) (plurality); id at 385 (Burger concurring); id at 396 (Rehnquist concurring); *Board of Education v Allen*, 392 US 236 (1968).

60 See *Committee for Public Education & Religious Liberty v Regan*, 444 US 646 (1980); *Wolman v Walter*, 433 US 229, 238–41 (1977).

61 See *Wolman*, 433 US at 241–44.

62 Id at 244–48.

63 The Court upheld school aid programs in *Zelman v Simmons-Harris*, 536 US 639 (2002) (vouchers); *Mitchell v Helms*, 530 US 793 (2000) (equipment loans); *Agostini*, 521 US 203 (1997) (remedial instruction on the property of a religious school); *Zobrest v Catalina Foothills School District*, 509 US 1 (1993) (sign language interpreters). See also *Rosenberger v Rector and Visitors of University of Virginia*, 515 US 819 (1995) (requiring a state university to subsidize a student religious publication equally with other student publications); *Witters v Washington Department of Services for the Blind*, 474 US 481 (1986) (upholding the use of a state scholarship for the blind to attend seminary).

64 See *Mitchell*, 530 US at 835–37 (plurality and concurring opinions) (overruling invalidations of aid to religious schools in *Wolman*, 433 US at 248–55, and *Meek*, 421 US at 362–73); *Agostini*, 521 US at 235 (overruling invalidations of aid to religious schools in *Aguilar*, 473 US 402, and the "shared time" holding in *Ball*, 473 US at 384–98).

validated government-sponsored observances in the public schools,[65] and Hamburger's treatment of *McCollum* implies that he considers this a victory for Liberal separationism. Undoubtedly, there is an anti-religious faction today that supports those decisions for reasons that track Liberal separationism. That view may have had some votes on the Court over the years and may even have had some influence in *McCollum* (pp 474–76). But other and better reasons have commanded more support. The decisions banning school-sponsored prayer are better seen as the collapse of majority imposition on religious minorities in the public schools.[66]

It takes no hostility to religion to support vigorous enforcement of the rule against government-sponsored religious observance. One of the earliest religious liberty principles to achieve consensus is that government cannot force anyone to attend a religious service. The simplest explanation of the school prayer cases is that this rule applies no matter how short the service.[67] This explanation sounds in coercion, but that does not limit its scope, because the Court has been sensitive to the practical realities of coercion in the public school environment.[68]

The endorsement test reaches further and dispenses with proof of coercion in any form. It may be explained on the ground that government should not interfere with private religious choices and commitments even if it does so noncoercively; religion should be separated even from government's persuasive influence. This does not require adopting the Liberal League's view that religion is irrelevant to government, but only the view of the eighteenth-century dissenters that religion would flourish best without government support (p 76). The rule against endorsements can also be explained by the even more fundamental principle that we do not vote on religious questions; it is no business of government to select appropriate religious

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65 See *Santa Fe Independent School District v Doe*, 530 US 290 (2000) (prayer at football games); *Lee v Weisman*, 505 US 577 (1992) (prayer at graduation); *Abington School District v Schempp*, 374 US 203 (1963) (prayer and Bible reading in classroom); *Engel v Vitale*, 370 US 421 (1962) (prayer in classroom).

66 See text accompanying notes 105–07.

67 See *Lee*, 505 US at 587 ("[G]overnment may not coerce anyone to support or participate in religion or its exercise."); id at 594 (rejecting the argument that graduation prayers "are of a *de minimis* character").

68 See *Santa Fe*, 530 US at 311 (noting the "immense social pressure . . . to be involved in the extracurricular event that is American high school football"); *Lee*, 505 US at 592–96 (recognizing coercive pressure to attend graduation ceremonies and to stand with everyone else for invocation and benediction); *Engel*, 370 US at 431 ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.").

observances or religious leaders for the American people,[69] and there is no legitimate political mechanism for making such decisions.[70]

The argument that government should not impose or meddle in religious observances explains the Supreme Court's prayer decisions better than does hostility to religion. The indicator is the set of cases on private religious speech in public places. Some public schools and some separationist litigators have tried to suppress even privately sponsored religious speech, and they have uniformly lost.[71] With unusual consistency, the Court has applied the same basic principle for forty years: "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[72] The second half of this rule, protecting private religious speech, goes back sixty years to the Jehovah's Witness cases.[73] And there is not a single exception—not once has the Court held that separation requires or even permits limits on religious speech that has not been sponsored or preferred by government. The school prayer cases reflect the view that government should not support or sponsor religion, not the view that government should restrict religion or keep it out of public view.

The third set of modern religious liberty issues is regulatory exemptions for religiously motivated behavior. This was not an issue in the Protestant-Catholic battles of the nineteenth century, and it was not an explicit part of the Liberal separationist agenda. The issue

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[69] See *Lee*, 505 US at 587–90 (holding that a school may not select a person to lead prayer or give him guidelines on how to pray); *Engel*, 370 US at 425 ("[I]t is no part of the business of government to compose official prayers for any group of the American people.").

[70] See *Santa Fe*, 530 US at 316–17 (invalidating a student election to select a speaker who would deliver a message or prayer at high school football games).

[71] See *Good News Club v Milford Central School*, 533 US 98 (2001) (holding that a school could not deny an elementary school Bible club the right to meet on the same terms as other clubs); *Lamb's Chapel v Center Moriches Union Free School District*, 508 US 384 (1993) (holding that a school could not refuse to rent its premises to a church on the same terms it rented to other community groups); *Board of Education v Mergens*, 496 US 226 (1990) (upholding and broadly construing the Equal Access Act, 20 USC §§ 4071–74 (2000), as applied to religious clubs in public high schools); *Widmar v Vincent*, 454 US 263 (1981) (holding that a state university could not deny a religious group the right to meet on the same terms as other groups).

[72] *Santa Fe*, 530 US at 302, quoting *Mergens*, 496 US at 250 (plurality).

[73] See, for example, *Fowler v Rhode Island*, 345 US 67 (1953) (protecting a religious service in a public park); *Cantwell v Connecticut*, 310 US 296 (1940) (protecting religious speech on a public street). In this period, governments mostly relied on grounds other than separation in their efforts to suppress unpopular religious speech. But in the wake of *McCollum*, the separationist objection to religious speech on public property was fully briefed in *Niemotko v Maryland*, 340 US 268 (1951) (protecting "Bible talks" in a public park), and appeared in a dissent in a companion case, *Kunz v New York*, 340 US 290, 311 n 10 (1951) (Jackson dissenting) ("[T]he Constitution will not suffer tax-supported property to be used to propagate religion.").

arose prominently in the nineteenth century only in the Mormon cases, where hostility to polygamy dominated the discussion.[74]

Hamburger repeatedly suggests, without elaboration, that separation precludes exemptions (pp 93, 101, 107, 260, 304, 327, 436, 455).[75] This would follow from the view that separation means whatever is bad for religion, but it does not follow either from the ordinary English meaning of separation, or from the word's use as a synonym or proxy for religious liberty. Government regulation of religious practices is a highly intrusive contact between church and state; exemption, or failure to regulate, separates religious practice from the coercive power of government regulation. Exemptions also enhance liberty; they leave more choices about religious observance to individuals and churches, and fewer such choices to government.

Here, too, there is a modern faction that opposes regulatory exemptions for religious practices on grounds that suggest hostility to religion, but that is not the view of the Supreme Court, which has unanimously upheld regulatory exemptions when enacted by legislatures to relieve burdens on religious exercise.[76] From 1963 to 1990, the Court held that the Free Exercise Clause required such exemptions, subject to an exception for compelling government interests.[77] These decisions did not use the rhetoric of separation, but they enforced a theory of religious liberty fully consistent with my meaning of separation. The Court repudiated the rationale of these decisions in 1990, holding that the Constitution does not require regulatory exemptions of its own force.[78] This was not based on anything like Hamburger's view of separation, but rather on allowing other values to override separation entirely. The opinion says nothing about separation of

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74 See *Reynolds v United States*, 98 US 145 (1878) (upholding a criminal prosecution for polygamy). See also *Mormon Church v United States*, 136 US 1 (1890) (upholding the forfeiture of both property and the corporate existence of the Mormon Church); *Davis v Beason*, 133 US 333 (1890) (upholding a test oath that excluded Mormon voters).

75 This suggestion does not appear in Hamburger's earlier article arguing that the Constitution does not *require* regulatory exemptions. Hamburger, 60 Geo Wash L Rev 915 (cited in note 17).

76 See *Corporation of the Presiding Bishop v Amos*, 483 US 327 (1987) (upholding the exemption of religious employers from religious discrimination provisions of the Civil Rights Act of 1964); *Board of Education of Kiryas Joel Village School District v Grumet*, 512 US 687, 705–06 (1994) (reaffirming *Amos* in dictum). Compare *Texas Monthly, Inc v Bullock*, 489 US 1, 18–19 n 8 (1989) (reaffirming *Amos* in dictum, approving exemptions "designed to alleviate government intrusions that might significantly deter adherents of a particular faith from [protected] conduct" or that do not "impose substantial burdens on nonbeneficiaries").

77 See *Frazee v Illinois*, 489 US 829 (1989) (exempting claimant from the obligation to work on his Sabbath or forfeit unemployment compensation); *Sherbert v Verner*, 374 US 398 (1963) (same); *Wisconsin v Yoder*, 406 US 205 (1972) (exempting Amish parents from the obligation to send their children to high school).

78 *Employment Division v Smith*, 494 US 872 (1990) (holding that "neutral and generally applicable laws" may be applied to restrict religious practices without further justification).

church and state; it is entirely about conservative judicial methodology and hostility to judicial balancing. In the Court's view, a regulatory exemption may be "desirable," but that is "not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts."[79] Serious burdens on minority religions "must be preferred to a system . . . in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[80]

To sum up, on financial aid and regulatory exemptions, the Court is no longer writing in terms of separation at all. Hamburger's thesis has been overtaken by events. The Court's decisions on religious speech are far better explained by my meaning of separation than by Hamburger's. Before the recent doctrinal changes, the exemption decisions reflected my meaning of separation, and the implausible distinctions of the older financial aid decisions reflected an impossible attempt to straddle elements of both my meaning and Hamburger's. At this broad conceptual level, there are elements of Hamburger's meaning in the Supreme Court's cases, but more elements of mine. At more detailed levels of analysis, Hamburger's claims fare much worse.

C. Some Details of the Anticlerical Separationist Agenda

1. In the Supreme Court.

In Hamburger's account, the Supreme Court committed to the Liberal version of separation in *McCollum v Board of Education*, and the implications of that commitment have been unfolding ever since (p 478). This is nonsense, made superficially tenable only by the artful device of ending his chronology with *McCollum*. Four years later, in *Zorach v Clauson*,[81] the Court distinguished *McCollum* over the dissent of its author, Justice Black—Hamburger's prime example of a justice committed to a nineteenth-century meaning of separation. *McCollum* held that the state could not use its power to compel school attendance to induce children to attend religious instruction;[82] *Zorach* held that the state could do precisely that so long as the religious instruction occurred off the school grounds.[83] *Zorach* has been much criticized but is still good law;[84] "*McCollum* did not have lasting

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79 Id at 890.

80 Id.

81 343 US 306 (1952).

82 333 US at 209–10 ("Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes.").

83 See *Zorach*, 343 US at 324 (Jackson dissenting) (arguing that the school "serves as a temporary jail for a pupil who will not go to Church").

84 See *Lanner v Wimmer*, 662 F2d 1349 (10th Cir 1981) (upholding "released-time" program of religious instruction under *Zorach*); *Smith v Smith*, 523 F2d 121 (4th Cir 1975) (same);

impact."[85] Justice Jackson, in a remarkable letter to Frankfurter, complained that "[a]s a legal doctrine, separation is gone."[86] He blamed *Everson* and *Zorach*; he could have been responding to Hamburger. Given the triumphal 1948 conclusion to the chronological portion of Hamburger's history, it is simply deceptive not to mention *Zorach*.

More generally, Hamburger never compares modern constitutional doctrine—before or after the recent doctrinal shifts—to the demands of the various separationists he has chronicled in such detail. For if he did that, it would be clear that they got only a small part of their agenda. Consider, as one relatively complete statement of Hamburger's view of separation, the nine demands of the National Liberal League:

Item 1, taxation of church property, was never obtained. The Court upheld church tax exemption,[87] in part on the ground that tax exemption promotes separation of church and state.[88]

Item 2, abolition of government-paid chaplains in the military, prisons, or other public institutions, was never obtained. The Supreme Court upheld legislative chaplains,[89] and the courts of appeals have upheld military, prison, and hospital chaplains.[90]

Item 3, no government funds for "sectarian educational or charitable institutions," was obtained only in part, as already discussed, only temporarily, and only for schools. The Court imposed few restrictions on aid to religious higher education,[91] and government funds to other religious charities were rarely an issue until the second Bush

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Moore v Metropolitan School District, 2001 US Dist LEXIS 2722 (SD Ind 2001) (treating *Zorach* as good law but invalidating religious instruction on school property and with more coercion to participate than in *Zorach*).

85 Jeffries and Ryan, 100 Mich L Rev at 319 (cited in note 27).

86 The letter is quoted at length in J. Woodford Howard, Jr., *The Robe and the Cloth: The Supreme Court and Religion in the United States*, 7 J L & Polit 481, 496–97 (1991).

87 *Walz v Tax Commission*, 397 US 664 (1970). This result is not called into doubt by *Texas Monthly*, 489 US 1, where the Court struck down, without a majority opinion, a content- and viewpoint-discriminatory sales tax exemption that benefited only publications promoting religions.

88 *Walz*, 397 US at 676 (finding that the tax exemption "restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other"). See also *Lemon*, 403 US at 614 (stating that *Walz* "tended to confine rather than enlarge the area of permissible state involvement with religious institutions").

89 *Marsh v Chambers*, 463 US 783 (1983).

90 See *Carter v Broadlawns Medical Center*, 857 F2d 448 (8th Cir 1988) (hospital chaplains); *Katcoff v Marsh*, 755 F2d 223 (2d Cir 1985) (military chaplains); *Theriault v Silber*, 547 F2d 1279 (5th Cir 1977) (prison chaplains).

91 See *Roemer v Maryland Public Works Board*, 426 US 736 (1976) (upholding financial aid to religious colleges so long as funds are restricted to secular purposes and colleges are not pervasively sectarian); *Hunt v McNair*, 413 US 734 (1973) (same); *Tilton v Richardson*, 403 US 672 (1971) (same). The Fourth Circuit has held that the "pervasively sectarian" half of these limits is no longer good law. See *Columbia Union College v Oliver*, 254 F3d 496, 501–08 (4th Cir 2001).

Administration pushed the political envelope with its high-profile proposals to both aid and deregulate faith-based charities.[92]

Item 4, a ban on government-sponsored religious observances, was substantially achieved in the public schools, but not in legislatures or other government programs directed to adults.[93] And as noted, the Court has repeatedly rejected the demand to exclude from public schools even religious observances that are privately sponsored and attended only by genuine volunteers.

Item 5, a ban on religious proclamations by governors or the President, was never taken seriously.

Item 6, abolition of judicial oaths, was never obtained. American courts permit the alternative of affirming under penalty of perjury, but that exemption for dissenters was well established in colonial times,[94] and thus cannot be the achievement of any movement that Hamburger would recognize as separation.

Item 7, a ban on laws "directly or indirectly enforcing the observance of Sunday as the Sabbath," was never obtained. The Court upheld Sunday closing laws on the ground that they functioned more as a restraint of trade than as an establishment of religion,[95] and their subsequent decline has had far more to do with cultural and economic trends than with separation of church and state.

Item 8, a ban on laws "looking to the enforcement of 'Christian' morality," was never obtained. The Court has held that laws that coincide with the moral teachings of a particular religion do not thereby establish that religion.[96]

Item 9, "no privilege or advantage" to "Christianity or any other special religion" and a requirement that "our entire political system" be "founded and administered on a purely secular basis," is a bit vague, but however it is interpreted, it is hard to find a win for Liberal separationism. No privilege or advantage to any particular religion is certainly the rule,[97] but the demand for equal treatment of all faiths goes back to colonial times, and Hamburger insists that equal treatment is not separation (p 85). It is also the rule that government may not support religion generally, but that has been far less rigorously en-

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92 See generally Faith-Based Solutions: What Are the Legal Issues?, Hearing before the Senate Committee on the Judiciary, 107th Cong, 1st Sess (2001).

93 See *Marsh*, 463 US 783.

94 See McConnell, 103 Harv L Rev at 1467–68 (cited in note 15). The early settlement of this solution is reflected in the Constitution's repeated provisions for "Oath or Affirmation." US Const Art I, § 2, cl 6; Art II, § 1, cl 8; Art VI, cl 3; Amend IV.

95 *McGowan v Maryland*, 366 US 420, 434–35 (1961) (relying on support for Sunday laws among labor groups and trade associations).

96 See *Harris v McRae*, 448 US 297, 319–20 (1980) (upholding government's refusal to fund abortions); *McGowan*, 366 US at 442 (upholding Sunday closing laws).

97 *Larson v Valente*, 456 US 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

forced than the Liberal League hoped. If "no privilege or advantage" meant no tax exemptions, or no regulatory exemptions for religious observances, it has never been obtained. Our political system is founded and administered on a secular basis in many important senses: There are no religious tests for voting or office holding; government generally does not pursue overtly religious ends or use overtly religious means to pursue secular ends. But this was largely true in the nineteenth century when the demand was made.

Another way to understand this final demand is that churches, clergy, and religious arguments be excluded from political debate. Whether or not this was one of the nine demands, it was part of the Liberal agenda and it is central to Hamburger's view of separation (pp 13, 107, 280, 308, 490). And it plainly has not been obtained.

The Supreme Court has affirmed the constitutional right of religious organizations to make political arguments[98] and of clergy to serve in legislatures.[99] Religious movements have exercised their right to political free speech throughout our history. Considering only the period after Hamburger's version of separation supposedly triumphed, think of the black civil rights movement, the religious opposition to war (from Vietnam to Iraq), the letters of the Catholic bishops on economic justice and nuclear disarmament, Catholic and conservative Protestant opposition to abortion and advocacy of other "social issues," and Jewish support for Israel.[100]

The Internal Revenue Code prohibits certain tax-exempt organizations from directly supporting candidates or engaging in substantial lobbying.[101] Enforcing these restrictions against churches is a principal activity of Americans United, but the restrictions apply to secular charities as well as religious and are principally defended on the ground that overtly political activity should be conducted with after-tax dollars.[102] They have not stopped churches from addressing political issues with moral or religious implications, and as a purely legal matter, they do not even prevent churches from creating political af-

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98 See *Lemon*, 403 US at 623 ("'[A]dherents of particular faiths and individual churches frequently take strong positions on public issues.' We could not expect otherwise."), quoting *Walz*, 397 US at 670.

99 See *McDaniel v Paty*, 435 US 618 (1978).

100 For samples of religious argument on political issues in all eras of American history, see Edward McGlynn Gaffney, Jr., *Politics Without Brackets on Religious Conviction: Michael Perry and Bruce Ackerman on Neutrality*, 64 Tulane L Rev 1143, 1158–88 (1990); Laycock, 29 UC Davis L Rev at 801–03 (cited in note 19).

101 See 26 USC § 501(c)(3) (2000).

102 See *Branch Ministries v Rossotti*, 211 F3d 137, 144 (DC Cir 2000) ("Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets."), quoting *Cammarano v United States*, 358 US 498, 513 (1959).

filiates or Political Action Committees.[103] They certainly do not preclude citizens from making religious arguments in political debate or from voting with religious motivations. Neither secular nor anti-Catholic separationists can claim much progress here.

To sum up, secular separationists achieved substantial but incomplete legal success on Liberal demands 3 and 4; no substantial legal success on demands 1, 2, 5, 6, 7, 8, or 9; and no constitutional success on the definitionally critical effort to exclude religion from politics. This is not Liberal separationism enshrined as constitutional law. It is not even close.

Nor is it Protestant anti-Catholic separationism. Anti-Catholic separationists supported only one of the Liberals' nine demands—no aid to religious schools. They actively supported religious observances in public schools, and these two issues were equally central to their agenda. The anti-Catholic separationists mostly won on the school aid issue, at least until very recently, but they mostly lost on the school prayer issue. They entirely lost on the effort to exclude Catholics from politics or public institutions, or to maintain one set of rules for Protestants and a different set for Catholics.

2. In public opinion.

Hamburger fares no better in his claims about modern public opinion. He largely assumes that most Americans support separation of church and state. I share that assumption, but with somewhat less confidence. I found no opinion poll more recent than 1981, when two-thirds of Americans agreed that separation of church and state was at least somewhat important, and nearly half said "very important."[104] Whatever they meant by that, it was not what Hamburger means.

Protestant anti-Catholicism is, for all practical purposes, dead. Immigration rates declined sharply after World War I;[105] thereafter, each successive generation of Catholics and Jews became more assimilated and seemed less threatening to the Protestant majority. When a Roman Catholic was elected President in 1960, when he and his family were popular and personally attractive, and when the Second Vatican Council endorsed religious liberty and reformed the

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[103] See *Branch Ministries*, 211 F3d at 143 (holding that these alternatives eliminated any burden on religious exercise).

[104] See American Religion Data Archive, online at http://www.thearda.com (visited July 7, 2003). To access response data, click "Search Files; enter "separation of church" as a search term; find question "CSSIMP"; click "Analyze" to see results; click "ANTSEM81" for a description of the survey.

[105] See United States Bureau of the Census, *Statistical Abstract of the United States: 2001* 10 table 5 (GPO 121st ed 2001).

Catholic Church in other ways,[106] American anti-Catholicism collapsed with astonishing speed. The school prayer decisions, beginning with *Engel v Vitale*[107] in 1962, coincided with this collapse; they reflect increased respect for religious minorities more than hostility to all religions.

Old-style Protestant anti-Catholicism is confined to the disreputable fringes of public opinion, widely condemned on its occasional public appearances. Liberal and intellectual anti-Catholicism has survived and evolved, reinforced by the Church's teachings on sex and abortion, but this has much more in common with Liberal hostility to all culturally conservative religion than with Protestant anti-Catholicism.

Anti-Catholicism's impact on separation of church and state lives on in the widespread belief that separation precludes government funding of religious schools; here, as at the Supreme Court, this is the principal element of truth in Hamburger's claim about the triumph of anticlerical separationism. Yet the many Americans who oppose aid to Catholic schools now oppose funding for evangelical Protestant schools just as vigorously, and in my experience, most of them are genuinely surprised by the anti-Catholic history of their idea.

The rest of the agenda of anti-Catholic separationism is dead. There are no remaining public proponents for any explicit effort to minimize Catholic influence, or to maintain a permissive set of rules for Protestant connections to government and a restrictive set of rules for Catholic connections to government; if such arguments were still being made, they would have no credibility.

A form of Liberal separationism has survived into contemporary times, fueled by a general hostility to all religions that oppose themselves to the secular culture. There is a widespread sense that secularism and disbelief have become more common and more influential, although that belief is surprisingly hard to document. Whether or not hostility to religion has increased, it certainly exists.

But it is absurd to think that hostility to religion represents majority opinion. Eighty-eight percent of Americans say religion is at least fairly important in their own lives; 61 percent say very important.[108] Even the organizations that seek the most aggressive enforcement of the Establishment Clause generally deny any hostility to religion, cultivate religious supporters, and claim to support religious liberty for all. Some of their opponents treat this solicitude as mere posturing, but whether genuine or posturing, their efforts to support

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[106] See generally Walter M. Abbott, gen ed, *The Documents of Vatican II* (Herder 1966).

[107] 370 US 421 (1962).

[108] David W. Moore, *Two of Three Americans Feel Religion Can Answer Most of Today's Problems*, Gallup Poll Monthly 53, 54 (March 2000).

the rights of religious believers show their assessment of public opinion: To be hostile to religion is a losing strategy. If Hamburger is right that most Americans support separation of church and state, then they must mean something quite different from extreme anticlericalism or hostility to all organized religion.

CONCLUSION

When I was young and presumptively naive, I endorsed the view that separation is a "misleading metaphor."[109] When I was older and grayer and should have known better, I said that despite its misleading tendencies, separation represents "a long and honorable tradition" with important benefits, and that it is better to work within the tradition than to repudiate it.[110]

The long and honorable tradition is the separation of government power from the religious choices and commitments of the people. This is a plausible paraphrase of the First Amendment's broad prohibitions on government interference with religion, but it is ambiguous on the critical element of state action. Condensing it further to "separation of church and state" accentuates the ambiguity.

Hamburger shows conclusively that separation has equally long and *dishonorable* traditions as a rationalization for Protestant suppression of Catholics and for attempted secular suppression of all organized religion. Each of these usages turns a guarantee of religious liberty on its head, but it is impossible to deny their reality. If substantial political movements use a concept for more than a century, then however bizarre and distorted their usage, it is hard to deny that that usage has become one meaning of the concept. Hamburger surely errs in taking that meaning for granted and in imputing that meaning to everyone else who invokes the same concept. But it seems undeniable that Hamburger's meaning of separation is one meaning.

If to some people separation means protection of religious activity from government, and to other people it means suppression or subordination of religious activity by government, then the phrase has no agreed core of meaning that will enable anyone to communicate. The phrase is deeply entrenched in American society and people will not quit using it. But the apparent lesson of Hamburger's book is that the phrase has no sufficiently agreed meaning to be of any use, and until we develop vocabulary that communicates distinct theories of separation, we should give up the phrase altogether. Thanks to Ham-

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[109] Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum L Rev 1373, 1379 (1981), quoting Arlin M. Adams and William R. Hanlon, Jones v. Wolf: *Church Autonomy and the Religion Clauses of the First Amendment*, 128 U Pa L Rev 1291, 1336–37 (1980).

[110] See Laycock, 43 Emory L J at 46–47, 65, 73–74 (cited in note 44).

burger's careful history of actual usage, we now know that from the phrase alone, without an analysis of context, we have no idea what people mean by it.

VOLUME 70
2003

PUBLISHED WINTER, SPRING, SUMMER, AND FALL 2003
BY THE UNIVERSITY OF CHICAGO, THE LAW SCHOOL

CHICAGO, ILLINOIS, U.S.A.