INTRODUCTION: THREE TALES ABOUT SEPARATION OF CHURCH AND STATE

Here are three competing stories about how the idea of separation of church and state relates to the First Amendment clause that provides that "Congress shall make no law respecting an establishment of religion."1

A. Separation as a Core Constitutional Concept

In 1802, Thomas Jefferson wrote to the Danbury Baptist Association of "a wall of separation between Church & State."2 This concept of "separation," dating back to an earlier giant of religious liberty, Roger Williams, captured the essence of the Establishment Clause of the First Amendment. A growing consensus in the United States embraced the phrase’s fundamental idea, and legislators dismantled all the remaining state establishments of religion by 1833. In 1878, the Supreme Court treated the phrase as almost “an authoritative declaration of the scope and effect” of the First Amendment’s religion clauses.3 When the Court—relying on the Fourteenth Amendment to make the First Amendment operate as a restriction on state power—first applied the Establishment Clause to the states in Everson v. Board of Education in 1947, the Court adopted the separation metaphor as its guide.4 The notion of separation of church and state, which the Court continues to enunciate, thus stretches over more than two centuries of American history as a core principle of American
political democracy for organizing relations between religion and government.

B. Separation as a Deviation from Disestablishment, the Genuine Constitutional Norm

At the time the Framers adopted the Bill of Rights, almost no one embraced the idea of separation of church and state and its radical disjunction of religion and government. Religious dissenters supported the more modest concept of disestablishment—the idea that no religion should be established or supported—although defenders of establishment sometimes accused their opponents of favoring separation. Jefferson used the “wall of separation” metaphor, which was decidedly unfaithful to the First Amendment, as a ploy to prevent Federalist clerics who were attacking him from continuing their political involvement.

The concept of separation achieved prominence in the nineteenth century, in large part, because of nativist fears of immigration from Catholic lands and the growing authority of the Roman Catholic Church. Proponents of separation, through either ignorance or hypocrisy, claimed a historical pedigree for separation that simply did not exist. Most of them indefensibly envisioned separation as circumscribing Catholic power without impeding Protestant connections between religion and government.

By the mid-twentieth century when it decided Everson, the Supreme Court, influenced by the nativist ideas pervasive in the wider culture, accepted the Jeffersonian metaphor as its key to understanding the Establishment Clause. Whether the Justices had been deceived or themselves sought to deceive the public about the historical soundness of the separation approach, they constructed a foundation of sand upon which the Court has subsequently tried to build its Establishment Clause jurisprudence. If the Court is to develop sound constitutional principles to regulate the relation of religion and government in our liberal democratic society, it must abandon the concept of separation of church and state.

C. Separation as Normal Evolutionary Development

At the time of the founding, advocates of disestablishment rarely phrased their claims in terms of a separation of church and state, although their notions of disestablishment included significant elements of the concept of separation. During the nineteenth century, those who opposed close connections between government and religion employed separation as their central metaphor. The reasons why these individuals substituted separation for disestablishment are complex, but they proposed legal restrictions that reached beyond traditional notions of disestablishment, and they advanced claims about appropriate behavior by individuals and religious organizations that did not directly concern proposals for legal restraint.
Whatever their rhetoric, the vast majority of separationists never favored the complete separation of government and religion. Because they explicitly or implicitly proposed only limited legal restraints, they could justifiably claim that they were essentially faithful to the Founders' vision of disestablishment. Similarly, the Supreme Court could defend its version of separation as yielding constitutional restrictions that were fully consonant with a modern understanding of what disestablishment requires.

Consequently, were disestablishment to replace separation as the governing concept in law and political discourse today, that shift alone might not make much difference. The theoretical lesson that the shift in metaphor from disestablishment to separation teaches us is that large political and legal concepts are highly flexible; their connotations and applications change over time. Later generations may remain faithful to the ideals of earlier ones even when dominant concepts, and the vocabulary used to express them, change.

The first story I have told—that separation is a core constitutional concept—is the standard historical account or myth that Philip Hamburger successfully demolishes in his important book *Separation of Church and State*. The second story—that separation deviates significantly from disestablishment—sketches the main narrative of Hamburger's own account; at the very least, it is the story that the incautious reader will take away from the book. The third story—that separation is the product of natural evolutionary development—is quite different from the second and is also a story we might build from the facts that Hamburger presents. But we need to do a good bit of conceptual work to render the third story plausible. That work is the main ambition of this essay.

The title of this Review Essay is double-edged. Philip Hamburger's *Separation of Church and State* teaches us that the history of the concept of separation of church and state is a history of ideology. Hamburger's underlying thesis is that a robust concept of separation is historically distinct from the more constitutionally legitimate ideal of disestablishment. The ideology of anti-Catholicism particularly, and of anti-clericalism more generally, has driven historical understanding of separation and has grossly distorted historical reality. But by emphasizing certain facts, by treating the historical record in a way that understates close connections between disestablishment and separation, and by giving separation of church and state a solidity and decisive logic that it lacks in actuality, Hamburger's account

5. I put the point this way because those who now advocate such a change believe the Supreme Court has been too separationist. A successful scrapping of the "separation" metaphor in the near future would almost certainly be a signal of important revision in what is allowed constitutionally.


7. Id.
masks, or, at least, serves, an anti-separationist ideology about relations of church and state.

This Review Essay is less a challenge to Hamburger's study than a caution against its predictable uses and a plea for a richer understanding than the book provides of how the concept of separation developed. *Separation of Church and State* is a remarkable achievement. Its searching scholarship will indelibly alter how people think about the subject of separation; the book's disturbing demonstration of the nativist influence on the acceptance of separation must give pause to everyone who considers separation an American ideal.

I

**DISESTABLISHMENT AND SEPARATION AND HISTORICAL DEVELOPMENT**

A. The Trouble with Hamburger's Analysis

The topic of the separation of church and state is as controversial and relevant now as it has ever been. In recent years the Supreme Court has dismantled large chunks of Establishment Clause restrictions built up over the past half century that were grounded on a separationist approach. Although I do not think Hamburger consciously wrote to achieve particular legal and political conclusions, his book affords scholarly support for critics who contend that the separationist interpretation of the Establishment Clause since *Everson* has been misconceived. Hamburger's narrative lends itself to an overly simple rejection of the separationist ideal. Because this book has the potential to influence the law's development, it is urgent that readers understand why we should not flee from one oversimplification to embrace another.

To evaluate Hamburger's thesis, we need to develop a sophisticated theoretical sense of how fuzzy, general political concepts like disestablishment can develop over time, and to understand how dominant concepts may alter without a large shift in what government practices are accepted as legitimate. We must also discern more precisely than Hamburger the differences between reasonable modern conceptions of disestablishment and separation. Writing as a legal historian, Hamburger need not have undertaken a careful conceptual analysis of disestablishment and

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9. See, e.g., Hadley Arkes, *Separation Anxiety*, Nat'l Rev., Oct. 14, 2002, at 58 (reviewing HAMBURGER, supra note 6). I have heard the book cited as authority for things it does not even try to show. In conversation, someone told me it demonstrates that the Establishment Clause was only an allocation of power to the states, leaving nothing to be “incorporated” against the states via the Fourteenth Amendment. Hamburger does not deny that the clause had disestablishment content for federal government activities: his challenge to incorporation, which I discuss at the end of this Review Essay, is to the whole idea of making provisions of the Bill of Rights applicable against the states, not to anything unique about the Establishment Clause.
separation, but such an analysis is a cornerstone for drawing any practical conclusions from his study.\textsuperscript{10} My Review Essay concentrates mainly on this issue of the paradigm shift from disestablishment to separation, saving broader theoretical implications of the distinction for the Conclusion.

Hamburger paints separation as having vastly different implications for the constitutional law of church and state than the much more modest notion of disestablishment. He generates this picture by a number of discrete steps, which have a cumulative effect of leaving a substantially misleading impression. First, Hamburger does not adequately distinguish beliefs about what legal restraints should be imposed from broader political ideals that do not concern legal coercion. Second, he condemns as illogical sensible distinctions between the law of church and state and broader social relations between religion and government. Third, Hamburger attributes to separationists certain ideals that virtually no modern believer in separation would support. Fourth, in contrasting separation with disestablishment, he underemphasizes the separationist elements of original disestablishment ideas. Fifth, he disregards certain respects in which separation actually serves to support various governmental benefits for religion. Finally, and most importantly, in contrasting the two basic concepts of separation and disestablishment, Hamburger neglects to consider how original ideas of disestablishment have, or would have, developed over time. Only when we grasp a concept of separation that is stripped of the excesses Hamburger gives it and a concept of disestablishment that fairly reflects how that concept probably would have developed up to the present will we be ready to evaluate the extent to which a shift in the prevailing metaphor from disestablishment to separation represents a real difference in legal substance.

\hspace{1cm} \textbf{B. Disestablishment's Modern Scope}

I need to pause for a moment to say a word about my reading of Hamburger and my suggestion that disestablishment should be given a fair modern scope for this analysis. Passages in Hamburger's book suggest that our modern ideas of limits on government should be determined by the kinds of limits envisioned by eighteenth-century advocates of religious liberty.\textsuperscript{11} One might take Hamburger to be proposing a kind of strict originalism, in which the practices deemed acceptable at the time of the Bill of Rights should be accepted now. Were this Hamburger's intent, he would (or should) object as much to a modern, expanded notion of disestablishment as to a shift in metaphor from disestablishment to separation.

\hspace{1cm} \textsuperscript{10} \textit{See} Marci A. Hamilton, "Separation": From Epithet to Constitutional Norm, 88 Va. L. Rev. 1433 (2002) (book review) (cautioning that one cannot draw simple constitutional conclusions from Hamburger's historical account).

\hspace{1cm} \textsuperscript{11} \textit{Hamburger, supra note 6, at} 12-13.
I do not take Hamburger to be endorsing such a strict originalism. Hamburger's book suggests that a Supreme Court that remained faithful to a core idea of disestablishment would be acting within appropriate constraints, whereas a Court that abandoned the basic idea of disestablishment for the distinctly different idea of separation would be exceeding its authority. For example, the Framers may have considered any preference for one Christian group over another an unconstitutional establishment while accepting preferences for Christians over non-Christians; but a Court could be faithful to the core of the concept of disestablishment and still adopt a modern understanding of the concept that would forbid favoring Christians over non-Christians. One needs no shift in metaphor to extend the protection in this way.

Hamburger is well aware that virtually all the protections in the Bill of Rights have undergone such extensions. The modern understanding of freedom of speech, freedom of the press, and the privilege against self-incrimination forbids many laws and practices the Framers would have accepted. And, of course, the Supreme Court has read the Equal Protection Clause of the Fourteenth Amendment to forbid certain racially discriminatory practices and to protect groups, like women, that the enacting legislators did not envision. Because Hamburger offers no complaint about such extensions, I conclude that it is the crucial shift in metaphor from disestablishment to separation to which he objects; he thinks "separation" involves a radical disjunction from "disestablishment," rather than the normal, appropriate development of a constitutional conception over time.

Thus, if we are to evaluate the practical significance of the shift in metaphor to "separation," we must compare modern ideas of separation with what we would expect to be modern ideas of "disestablishment," had disestablishment developed free of the infection of separation, but undergone the kind of growth characteristic of ideas of free speech. It is this development I have in mind when I refer to a concept of disestablishment that is given its fair modern scope. I do not assume that people could agree on the exact parameters of that scope any more than they agree on what the Free Speech Clause should protect; but I do assume that the modern scope would not replicate precisely an eighteenth-century sense of what counted as forbidden establishment.

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12. I do not suggest that he actually rejects that view; rather, he offers a critique that does not depend on it.
II
Disestablishment and Separation: What Is the Difference?

Never denying that disestablishment should be taken as a core American political ideal, Hamburger develops the pervasive theme that disestablishment was much less radical in its implications than separation of church and state. Furthermore, Hamburger argues, advocates of separation in the nineteenth and twentieth centuries inaccurately attributed the more radical concept of separation to the founding generation. If we accept Hamburger’s premise that separation was not the prevailing metaphor before 1800, we must develop as clear a sense as possible of how much further separation goes than disestablishment in order to assess the practical significance of the shift in dominant concept.

In his Introduction, Hamburger sets out “contrasting implications” of disestablishment and separation. The most obvious aspects of early undoubted establishments were an official church undergirded by laws imposing penalties and disabilities on dissenters. By the late eighteenth century in America, few penalties remained, and critics of establishment focused their objections instead against privileges for “established denominations—notably, salaries for the established clergy.” Dissenters sought “guarantees against the unequal distribution of government salaries and other benefits on account of differences in religious beliefs. Some dissenters even demanded assurances that there would not be any civil law taking ‘cognizance’ of religion.” State constitutions responded to these “anti-establishment” demands with limits on legal discrimination and on the appropriate subject matter of civil laws.

Hamburger suggests that separation, in contrast to disestablishment, implies that “legislation is suspect if it has a religious purpose or if it substantially benefits religion,” particularly institutional religion; that religious groups should not exercise full political rights; and that government and religion should not have too much contact.

Part of the difficulty in evaluating Hamburger’s thesis that separation has usurped the rightful place of disestablishment is figuring out just how to distinguish the two concepts. Many regard them as synonymous, but

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13. Someone might reject such a place for disestablishment on the basis that the First Amendment undoubtedly permitted states to maintain established churches and that about half the states then did have supports of religion that might be regarded as establishments. See, e.g., THOMAS J. CURRY, THE FIRST FREEDOMS 11-13, 70-72, 123-24, 136-37, 147-49, 174-76, 191, 197-98, 209-10 (1986) (cautioning that some schemes of support we would identify as establishments may not have been so regarded by most people in the colonies and states where they existed).
14. HAMBURGER, supra note 6, at 11-13.
15. Id. at 11-12.
16. Id. at 12.
17. Id.
18. Id.
19. Id. at 12-13.
Hamburger aims to correct that misconception. As a rough approximation, we can think of disestablishment as requiring the elimination of favoritism toward people or groups because of their religious identity. Separation involves a disconnection between the activities of religion and government. Of course, many laws and practices would violate both ideals. For example, federal government grants to the Southern Baptists specifically for evangelical efforts would be a form of establishment and would fail to respect separation. On the other hand, if the government funds hospitals according to criteria that have nothing to do with religion, and some hospitals run by religious groups happen to benefit, the funding would not seem to establish any religion, but might be at odds with a vigorous principle of separation. Similarly, political activities by religious associations might be thought to connect religion and politics in an undesirable way, although these activities do not involve an establishment of religion.

According to this dichotomy, we can quickly see that some laws and practices the Founders might not have regarded as establishments we might perceive differently without deviating from the basic principle of disestablishment. Most notably, many of the adopters of the Bill of Rights may have accepted favoritism toward Christianity; we would now suppose that preferences towards Christian groups would impermissibly establish Christianity. Much of what follows is an attempt to discern just what laws and practices would look more suspicious under an ideal of separation than under a principle of disestablishment.

Over the course of his book, Hamburger mentions various aspects of separation, as some of its proponents have understood it. In order to understand more precisely how an ideal for separation may diverge from an ideal of disestablishment, we may place these aspects into seven broad, somewhat overlapping, categories: (A) constitutional limits on executive acts and nonlegislative acts of the legislature, (B) separation of functions and personnel between religious institutions and the state, (C) no laws supporting religion, (D) no legal protection of religious groups and activities, (E) no religious tests for offices or benefits and rejection of the idea that the United States is officially a Christian nation, (F) no laws with a religious purpose and no republican dependence on religion, and (G) opposition to the engagement of clergy and institutional religions—especially Roman Catholicism—in political affairs.

In reviewing these categories and Hamburger’s specific historical illustrations, we will consider which separationist ideas concern legal restraint and which do not, which ideas are commonly incorporated into modern concepts of separation, and which ideas might also be required by a modern principle of disestablishment. Concentrating on subjects of greater difficulty and importance, we will find that for a narrow range of important issues, the rhetoric of separation does, as Hamburger suggests,
have a resonance different from the rhetoric of disestablishment. However, the implications of the distinction between the two metaphors for the development of constitutional law are much less sweeping than Hamburger supposes.

A. Constitutional Limits on Executive Acts and Nonlegislative Acts of the Legislature

Hamburger indicates that separation goes further than disestablishment, as disestablishment was understood by eighteenth-century dissenters, because separation covers executive acts and nonlegislative acts of the legislature. He comments that, while the First Amendment apparently places limits only on civil legislation, by providing, “Congress shall make no law,” courts have applied the entire First Amendment to executive actions. However, this application is not necessarily inconsistent with the broad purposes of the Founders. In 1789, when the First Congress proposed the Bill of Rights, legislators may not have imagined that the federal executive might have sufficient regulatory power to impinge on liberty of religion or freedom of the press. Had the members of Congress considered such a possibility, they would likely not have conferred more power on the President to interfere with these freedoms than they granted to themselves. More precisely, those proposing and adopting the First Amendment did not suppose that any branch of the federal government had such power under the original Constitution. The language “Congress shall make no law” confirmed that understanding with respect to the branch that would have been regarded as the likely threat. With the advent of widespread regulation and delegations by legislatures to administrators of discretionary authority, personnel in executive branches can pose a substantial threat to First Amendment liberties. In modern times, construing the First Amendment to apply only to statutes adopted by legislatures would be unthinkable.

The suggestion that disestablishment might preclude only official acts that coerce ordinary citizens—a limit suggested by Hamburger’s specific illustrations of Thanksgiving proclamations and the appointment of legislative chaplains, actions then deemed acceptable—is more plausible, but it too is untenable. Suppose the Rhode Island legislature appoints as its chaplain “The Right Reverend John Smith, who represents the one and true religion, the Roman Catholic Church,” and that all invocations Smith offers are specifically Roman Catholic. Or suppose the President issues as part of his official Thanksgiving proclamation: “All citizens should be

20. Hamburger, supra note 6, at 12.
22. For example, many cases involving freedom to demonstrate are challenges to restrictions imposed by mayors or other local executives.
thankful for the Lord Jesus Christ, and anyone who has not been born again in Christ should fervently pray for that manifestation of God’s special grace, on pain of eternal damnation.” Even though neither of these official acts would coerce ordinary citizens, they would still be unacceptable under a modern understanding of disestablishment. Whatever may be true about vague references that may be viewed as mild supports to religion, like “under God” in the Pledge of Allegiance, 24 a defensible notion of disestablishment would now reach noncoercive actions of executives and legislatures that formally place the government on the side of highly specific religious understandings that do not enjoy nearly unanimous acceptance. 25 In our world, the fact that separation covers executive actions and nonlegislative actions of legislatures does not mark a difference from disestablishment.

This truth exemplifies the more general lesson about constitutional interpretation I have already noted. Concepts and their applications are far from static: they change over time as social assumptions and external conditions change. 26 I believe such flexibility of interpretation is desirable, even necessary, with a Constitution that is hard to amend and that has powerful symbolic significance. 27 Whether it is wise or unwise, this development of concepts over time is a reality that Professor Hamburger does not challenge. Given the way all constitutional concepts develop, Hamburger cannot fairly contrast 1789 concepts of disestablishment with modern concepts of separation to show that the latter lack legitimacy. Rather, we must try to imagine what a modern concept of disestablishment would look like if it had evolved free from any corruption by modern ideas of separation.

B. Separation of Functions and Personnel Between Religious Institutions and the State

1. Modest and Ambitious Understandings of Separation

The basic idea that the state and religious institutions have different functions has been a consistent theme of all major branches of Christianity. That state and church have different functions does not necessarily condemn participation in both by the same individuals, as when the king is head of the church or bishops are members of the legislature. But, according to John Calvin, this distinction of function does imply that different

25. These examples do not represent a serious effort to delimit supportive, noncoercive actions that are unacceptable from those that are acceptable. One might believe the separation metaphor tips toward unacceptability more than does the concept of disestablishment.
26. See Hamilton, supra note 10 (emphasizing this evolution).
personnel should exercise religious authority and political power. Nonetheless, Calvin believed, the state should support religion closely, and the church should guide and support the state.\textsuperscript{28} Calvin’s model was adopted by Puritan New England. Hamburger suggests that one “modest” understanding of Jefferson’s phrase “separation of church and state” is simply an allusion to Calvin’s differentiation of function and personnel. Hamburger also writes that the separation may go further “to denote a freedom from laws instituting, supporting, or otherwise establishing religion.”\textsuperscript{29} He treats this, in effect, as a second modest understanding, one also embraced by eighteenth-century supporters of disestablishment.

Hamburger distinguishes both of these modest understandings of separation from a more ambitious prohibition of contact between religious and civil authorities:\textsuperscript{30} avoidance of entangling relations.\textsuperscript{31} Referring to this expansive sense of separation, Hamburger remarks that “the phrase ‘separation of church and state’ has lent itself to a notion very different from disestablishment.”\textsuperscript{32} By the end of the book’s nearly five hundred pages, an ordinary reader may not recall that Hamburger has acknowledged two very important elements of separation embodied in the original idea of disestablishment: distinctions of function and personnel and freedom from laws establishing religion. Only in respect to a more ambitious notion of separation does Hamburger claim that separation exceeds the coverage of disestablishment.

To support his position that sharply variant understandings of the state’s relation to religion existed between the period up to the Bill of Rights and the nineteenth and twentieth centuries, Hamburger engages in some contestable exercises of textual interpretation. The most important of these is his treatment of John Locke’s \textit{A Letter Concerning Toleration}.\textsuperscript{33} Locke spoke of the church as “absolutely separate and distinct from the commonwealth.”\textsuperscript{34} Given the profound influence of Locke’s views about religious freedom on many eighteenth-century colonials, this language might seem to pose a serious problem for Hamburger, yet Hamburger makes disturbingly short work of Locke. He comments that Locke “made no direct objection to government support for religion.”\textsuperscript{35} For Hamburger, Locke’s explanation—that the church and commonwealth “are in their original, end, business, and in everything perfectly distinct and infinitely

\begin{thebibliography}
  \bibitem{28} Hamburger, \textit{supra} note 6, at 19-24.
  \bibitem{29} \textit{Id.} at 2.
  \bibitem{30} \textit{Id.} at 3.
  \bibitem{31} \textit{Id.} at 13.
  \bibitem{32} \textit{Id.} at 3.
  \bibitem{33} \textsc{John Locke}, \textit{A Letter Concerning Toleration} (Patrick Romanell ed., Macmillan Publ’g Co. 1950) (1689).
  \bibitem{34} \textit{Id.}
  \bibitem{35} Hamburger, \textit{supra} note 6, at 53.
\end{thebibliography}
different from each other”\footnote{Locke, supra note 33.}—helps to “reinforce[] the impression” that Locke was merely expressing “his pervasive and hardly original argument about the difference between religious and civil jurisdiction.”\footnote{Id. at 54.}

However, Locke’s language certainly sounds stronger to modern ears than a mere distinction of function and personnel, with religious authority working hand in glove with political authority in a manner that Calvin or the Puritans would approve. Moreover, although Locke does not explicitly argue that government should refrain from supporting religion, he does insist that churches should be regarded as voluntary societies and that civil authority should concern itself only with civil matters. Furthermore, according to Locke’s social contract theory of the origins of government, political authorities have legitimate power only over those matters for which people require government.\footnote{See generally John Locke, Second Treatise of Government (Thomas P. Peardon ed., Prentice Hall 1952) (1690) (reflecting a position similar to that expressed in A Letter Concerning Toleration, supra note 33).} This formulation does not include religion.\footnote{Locke would have denied toleration for atheists and Roman Catholics: he thought those who did not believe in God could not be trusted to keep promises, and he worried that Catholics were loyal to an external sovereign. Hamburger quotes Locke’s general language about this in a way that suggests that Locke was willing to limit religious toleration more than he actually was. Hamburger, supra note 6, at 53-54. In any event, the belief that a limited class of dangerous opinions could be suppressed does not entail the belief that other religious views should be positively supported.} Locke strongly emphasizes that the purity of religion can be compromised if the government interferes with it. In short, much in A Letter Concerning Toleration points toward an ideal of a highly limited government involvement with religion, a far more radical abstention from contact than any Calvin conceived. With respect to colonists persuaded by Locke, the divide between their views of separation and the more ambitious views that subsequently developed in the nineteenth and twentieth centuries may have been much narrower than Hamburger suggests.\footnote{However, Thomas Curry discusses a 1744 defense of religious liberty by Elisha Williams that relies on Locke but does not doubt that government support of religion is desirable. Curry, supra note 13, at 97-98. Also, Locke’s view does part significantly with a later, more ambitious view of the gulf between church and state on at least one important point that Hamburger emphasizes. Locke did not say that churches should disregard political affairs altogether, and Hamburger is right that disestablishment alone has few implications for how religious groups should conduct themselves in regard to politics. This crucial issue, directly raised by the seventh category, is one to which I shall return. See discussion infra Part II.G.}

When Hamburger addresses separationist positions taken in the two centuries following the Bill of Rights, he tends to assume that they represent a highly ambitious version of separation. To illustrate, Hamburger writes that even Presbyterians made claims to be responsible for the origins of a strong sense of separation, as if such an assertion was strikingly, misconceived.\footnote{Hamburger, supra note 6, at 345.} In support of his claim, Hamburger cites Rev. Thomas

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\footnote{36. Locke, supra note 33.} \footnote{37. Id. at 54.} \footnote{38. See generally John Locke, Second Treatise of Government (Thomas P. Peardon ed., Prentice Hall 1952) (1690) (reflecting a position similar to that expressed in A Letter Concerning Toleration, supra note 33).} \footnote{39. Locke would have denied toleration for atheists and Roman Catholics: he thought those who did not believe in God could not be trusted to keep promises, and he worried that Catholics were loyal to an external sovereign. Hamburger quotes Locke’s general language about this in a way that suggests that Locke was willing to limit religious toleration more than he actually was. Hamburger, supra note 6, at 53-54. In any event, the belief that a limited class of dangerous opinions could be suppressed does not entail the belief that other religious views should be positively supported.} \footnote{40. However, Thomas Curry discusses a 1744 defense of religious liberty by Elisha Williams that relies on Locke but does not doubt that government support of religion is desirable. Curry, supra note 13, at 97-98. Also, Locke’s view does part significantly with a later, more ambitious view of the gulf between church and state on at least one important point that Hamburger emphasizes. Locke did not say that churches should disregard political affairs altogether, and Hamburger is right that disestablishment alone has few implications for how religious groups should conduct themselves in regard to politics. This crucial issue, directly raised by the seventh category, is one to which I shall return. See discussion infra Part II.G.} \footnote{41. Hamburger, supra note 6, at 345.}
Smyth, who in 1843 told alumni of the Princeton Theological Seminary that Calvin taught "the spiritual independence of the Church, its entire separation from civil government" and that this "grand truth" helped draw the "lovers of freedom to Geneva" and "colonized New England, and founded this great and growing republic."\textsuperscript{42} A well-known cleric and scholar chosen to address the alumni of the country's leading Presbyterian seminary, Smyth had more than passing familiarity with Calvin's life and theology. Contrary to what Hamburger intimates, perhaps Smyth was faithful to Calvin's theology, concentrating on the freedom of the church from the state, not the church's lack of influence on the state or the state's lack of support for the church. A substantial portion of Smyth's account occupies itself with minimizing Calvin's role in the condemnation of Servetus as a heretic, but Smyth acknowledges that "Calvin thought heresies to the Church and to the State deserved to be punished, and he gave evidence to prove that Servetus was such an heretic."\textsuperscript{43} Smyth, an unequivocal partisan of Calvin, was under no illusion that Calvin accepted an ambitious version of separation,\textsuperscript{44} and I do not find any effort by him intentionally to obscure the divide between Calvin's conception of separation and the conception that developed through the nineteenth century.

However modest or ambitious may have been the notions of separation accepted at the founding or asserted by nineteenth-century advocates, the relevant question today is whether our modern ideas of separation of church and state encompass restrictions on relations of government officials and religious personnel greater than the restrictions of mere disestablishment.

Hamburger notes one possible implication of an ambitious separation that clearly has no modern relevance. During the late nineteenth century, the Central Committee for Protecting and Perpetuating the Separation of Church and State "came close to suggesting that to remain separate from the church, government had to refrain from acts of charity."\textsuperscript{45} To generalize such a limit, one might suppose that if religion and government have separate functions, government should not undertake social activities in which religious groups traditionally, and suitably, engage. Although the degree of tax support for private charities is controversial, no one now believes that

\begin{footnotes}
\item[42.] Id. (quoting Thomas Smyth, Calvin and His Enemies: A Memoir of the Life, Character, and Principles of Calvin 79 (1856)). The two sentences Hamburger quotes follow three pages of praise by Smyth for Calvin's republicanism. The "grand truths" that Smyth asserted drew "lovers of freedom" seem mainly to refer to republicanism, not church independence of the state.
\item[43.] Smyth, supra note 42, at 105.
\item[44.] "Lovers of freedom," who cared about liberty of the true religion from state interference, could well have regarded Geneva or Puritan New England as freer than the many countries in which secular political considerations bore down heavily on the established church, including, notably, England as well as states ruled by Roman Catholic monarchs.
\item[45.] Hamburger, supra note 6, at 307-08.
\end{footnotes}
governments and religious groups performing parallel activities—running adoption agencies, welfare programs, and drug rehabilitation centers—itself threatens a principle of separation.  

2. **Nonentanglement**

Over the last three decades, the Supreme Court has suggested that excessive entanglement between government and religious institutions is unconstitutional. Would disestablishment allow for a higher degree of entanglement than separation?

The Justices' opinions reveal three fundamentally different modes of entanglement. The first form, the most important in the cases, is administrative entanglement: intrusion by government officials in the affairs of religious groups, which threatens the integrity of those groups. The second kind of entanglement is political divisiveness: fights between religious groups over government support, which can be unhealthy for the political process. The third kind of entanglement is the exercise of political authority by religious groups and leaders. We can examine the extent to which each of these forms of entanglement derives distinctly from the ambitious version of separation.

Laws that create the third form of entanglement—that is, laws that confer on religious leaders the power to make government decisions—are the simplest to analyze in this respect. In the leading case, the Supreme Court declared unconstitutional a law granting churches the right to veto requests for liquor licenses within 500 feet of their premises. The Court concluded that religious bodies cannot have the final say about whether the government grants a license. For this rule, it is unlikely that separation would have different implications than disestablishment since, even in a regime in which religion is “merely” disestablished, religious organizations should not exercise the power of government.

46. Some libertarians do believe that government should not provide social welfare benefits, and while they may implicitly rely on private charity to replace government involvement, their arguments do not depend on any special view about the functions of religious groups.

47. Laws might also exclude religious leaders from exercising power permitted to ordinary citizens. At the time of the founding, a number of states had laws excluding clergy from political office. Because a unanimous Supreme Court held a clergy exclusion law invalid in *McDaniel v. Paty*, 435 U.S. 618 (1978), and no modern proponent of separation argues that such laws are now wise or constitutional, we need not pause over whether such restrictions might reasonably be seen as aspects of disestablishment. According to Hamburger, clergy exclusion hardly represented “a conception of separation of church and state.” HAMBURGER, supra note 6, at 80. Hamburger himself thinks such laws might have been regarded as aspects of a disestablishment that included only a modest conception of separation.


49. *Id.*

50. However, if one regards disestablishment as barring only preferences among religious groups, conferring a power on all religious groups could be regarded as acceptable.
Hamburger's principal thesis—that separation entails greater restrictions than does disestablishment—has more relevance for the second form of entanglement, political divisiveness. An ideal of separation, but not disestablishment, might suggest that religious groups should not fight political battles among themselves, for example over shares of government funds. Disestablishment alone might seem to have little to do with how religious groups comport themselves. But two related cautions powerfully diminish the force of this possible difference between separation and disestablishment for modern law. The first is that one reason for disestablishment may be to avoid just such political conflicts among religious groups. The second point is that more recent Supreme Court decisions have rejected any notion that the potential for political divisiveness, taken alone, could be the basis to invalidate a law. Thus, although according to some understandings of separation, a potential for divisiveness might be a basis for invalidation of some law, that is not the Court's approach. At most, the concern about divisiveness is a minor background theme in the present law of the Establishment Clause—hardly a major component that owes its status to misguided ideas of separation.

The first form, administrative entanglement, exemplified, for instance, by intrusive government supervision of the activities of religious schools, seems entirely at odds with a separation of government and religion. However, disestablishment may apply here as well. A powerful rationale for disestablishment is that government should not control, and indeed should keep itself out of, the affairs of religious groups. We could easily regard government interference that threatens the religious mission of churches or parochial schools as threatening a principle of disestablishment. Thus, while the chain of argument against administrative entanglement is more direct and simpler from a starting point of separation than one of disestablishment, the end result may not differ.

At this juncture, an astute reader of Hamburger's book might note that Hamburger himself has recognized this very point in a more general way. He writes in an early footnote, "Of course, other standards or ideals of religious liberty can also suggest the three implications [of separation] recited here, but none has done so more consistently than the separation of church

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51. The question may be not whether such political divisiveness is harmful, but whether avoiding it is a direct aspect of a constitutional principle (separation) or a justification for a constitutional principle (disestablishment). Even if avoiding divisiveness figures only as a justification, it could influence how one understands the principle and its applications.


53. For some years the Supreme Court wrote as if excessive entanglement was an independent element of an Establishment Clause test of unconstitutionality, under which a law was invalid if it (1) lacked a secular purpose, (2) had a primary effect of advancing or inhibiting religion, or (3) involved an excessive entanglement of government and religion. Lemon v. Kurtzman, 403 U.S. 602 (1971). But within the last decade entanglement has been folded back into an "effects" standard, as one relevant element in that standard. Agostini v. Felton, 521 U.S. 203, 232-33 (1997).
and state.\textsuperscript{54} This is fine, but if we fail to keep his own cautionary note in mind and do not examine carefully the likely range of a modern concept of disestablishment, we are ill positioned to evaluate Hamburger’s consistent claim that the separation metaphor has indeed made a great difference.

C. No Laws or Executive Acts Supporting Religion

We turn now to the most important general category for Hamburger’s thesis that the metaphor of separation profoundly affects the Supreme Court’s jurisprudence. We can break down the broad category of government support of religion into the following subdivisions: (1) formal recognition of religious rituals, in particular, marriage; (2) financial assistance to religion as such; (3) financial assistance given on a basis unrelated to religion; (4) laws and practices that benefit religion, such as prohibitions against blasphemy and against doing business on Sunday; (5) laws and practices that acknowledge the importance of religion, such as declarations of Thanksgiving, the appointment of legislative chaplains, and devotional Bible reading in public schools; and (6) classification of prisoners, soldiers, and orphans according to religion. In most of these categories, a modern concept of disestablishment might lead one to the same conclusions as would a concept of separation.

1. Marriage

In inquiring whether the separation metaphor has restrictive implications that differ from those of disestablishment, we may begin with an analysis of marriage. The state’s treatment of religious marriage as having binding civil effect is anomalous by more than one standard of judgment. States do not give religious groups the authority to divorce couples, and in most Western European countries, couples wishing to marry must have a civil ceremony (church weddings do not carry civil authority). If clerics are given the right to marry couples, church officials are making government determinations that, in strict principle, are no different from the denial of a liquor license. One might, of course, contrast the marriage “decision” with the decision to deny a liquor license because the marriage decision is straightforward and is unopposed. One might also argue that the state sensibly gives authority to marry to the kinds of persons most couples would choose for that purpose. But such authority for clerics could not be justified in a world of complete separation or a world of complete disestablishment. Clerical marriage links government and religion and serves to “establish” religious officials by giving them rights other private citizens do not ordinarily enjoy.\textsuperscript{55}

\textsuperscript{54} Hamburger, supra note 6, at 13 n.22.  
\textsuperscript{55} I put aside whatever power captains of private vessels may have to perform marriages and any special rules that permit other private citizens to conduct civil marriages.
This particular comparison of separation and disestablishment highlights the danger of Hamburger’s inclination to contrast disestablishment, as understood at the founding, with separation of church and state, taken in its most uncompromising and ambitious form.\textsuperscript{56} Part of the flexibility of political and overarching legal concepts is that they are accepted through time with varying degrees of absoluteness. The crucial issue about clerical marriage is one of degree: a moderate view of either separation or disestablishment permits our present practice; an absolutist version of either condemns it.\textsuperscript{57} At present, almost no one is an absolutist on the subject of marriage, and clerical marriage is uncontroversial. One can imagine the controversy over gay marriage leading to a divide between clerical marriage and civil marriage, but not because people are deeply disturbed by the present authority of clerics.

2. Financial Assistance to Religion as Such

A similar truth about degree concerns financial support for religion as such. Present constitutional doctrine forbids outright government grants for religious activities because they are religious (aside from institutional settings such as prisons and military posts), but our laws contain various tax exemptions, deductions, and other financial benefits that go specifically to religious groups and their leaders. Many of these, but not all, may be defended on the basis that religious groups provide social benefits and therefore fall naturally within a broader class that is not limited to such groups. However, in \textit{Walz v. Tax Commission}, the Supreme Court declined to rely on this broader-class rationale when it sustained the longstanding property tax exemptions for churches, instead treating these exemptions as benefiting religious bodies as such.\textsuperscript{58} Although the financial boost an exemption provides may far exceed that of a direct grant, the symbolism of not taking differs from that of giving. Furthermore, tax exemptions tend to be on or off, given or not given, rather than formulated in terms of amounts that may vary from year to year and that could easily become the subject of continuing political struggle. As Chief Justice Burger’s opinion emphasizes, valuing church property on a periodic basis could entangle the state officials with churches to a greater extent and more frequently than does providing an exemption.\textsuperscript{59}

\textsuperscript{56} See Hamilton, supra note 10, at 1442-44 (arguing that Hamburger tends to depict separation as complete separation).

\textsuperscript{57} What would be condemned is the singling out of clerics to possess this authority. If any private citizen, by following certain formalities, could marry couples, allowing clerics to do so would not be a problem.

\textsuperscript{58} 397 U.S. 664, 671-74 (1970).

\textsuperscript{59} \textit{ld.} at 674. One obvious problem is that officials might value property according to their approval or disapproval of the religious group holding it.
Separation as a concept seems no less threatening than disestablishment for tax exemptions and other forms of financial assistance given explicitly for religious purposes. Full disestablishment might well imply that religion should not be favored by the state. Hamburger mentions that some early dissenters (who, according to him, did not accept an ambitious view of separation, but rather believed in disestablishment) argued that legislation should "not take cognizance of religion." Conferring benefits on religious groups and clerics as such is taking cognizance of religion. Thus, for property tax exemptions, disestablishment could be even more restrictive than separation. The exemptions carry forward a feature of earlier religious establishments—state support of religious organizations—and they might be condemned on that basis. But, because the valuation of church property could intertwine the state more with religious bodies than a simple exemption, one strand of separation theory (no entanglement) may actually favor exemptions. For this particular form of assistance, separation could be more permissive than disestablishment.

3. Financial Assistance According to Nonreligious Criteria

Government assistance rendered to groups and individuals according to criteria other than religion provides the greatest support to Hamburger's thesis that the separation metaphor is more restrictive than disestablishment. From a strict separationist view, the state should not aid activities that religious groups run. But if these groups participate like other private organizations in managing hospitals, adoption agencies, and schools, assisting them on the same terms as nonreligious organizations hardly establishes any one religion or all religions. Aid to schools involves significant First Amendment complexities, among which are the religious character of the vast majority of private schools, the fact that they are designed to inculcate religious ideas in addition to teaching "ordinary" educational subjects, and the near inevitability that increased state support will increase state regulation. But with schools, as with religious hospitals and adoption agencies, we can at least perceive that a challenge that emphasizes separation is much simpler than one that concentrates on disestablishment. Because neutral aid does not evidently establish any particular kind of beneficiary, the burden of opposing "neutral" aid becomes greater if one eschews the language of separation.

60. HAMBURGER, supra note 6, at 12.
61. However, colonies and early states without any direct financial support of religion did provide tax exemptions.
62. This point does not apply to tax deductions.
4. Other Laws Benefiting Religion

Let us now turn to laws that benefit religion in other ways. Prohibitions on blasphemy forbid speech that offends dominant religious beliefs. Sunday closing laws restrict activities that compete with church attendance and, historically, have also suggested that certain activities are unsuitable for the Christian Sabbath. The Supreme Court has held that Sunday closing laws are constitutional only if based on the secular justification that they offer a uniform day of rest, and the modern Court would regard a blasphemy law as a violation of free speech. In this respect, then, we may say that the separation argument has succeeded.

However, these judicial results and doctrines need not depend on separation. A modern disestablishment argument against these laws is just as strong. A law against blasphemy establishes the religions whose faith may not be blasphemed. Similarly, if a state forbids Sunday work to encourage worship or to impose Christian ideas about when people should rest, has it not established that form of Christianity against other religions that have a different Sabbath or no “day of rest”?

5. Practices that Reflect a Religious Perspective

Government practices such as devotional Bible reading, the appointment of legislative chaplains, and official days of Thanksgiving reflect a religious perspective without involving significant coercion. Because devotional Bible reading in public schools does not necessitate any contact between government employees and institutional religion, disestablishment is at least as powerful a basis for opposition as separation. Interestingly, many nineteenth-century Protestants who were the strongest advocates of separation did not think it barred Bible reading and nonsectarian Protestant teaching in public schools. Insofar as these advocates had a coherent and defensible position, it may have been that these endeavors required no contact between the state and organized religious groups. Yet, the practice serves to establish or support a particular religious point of view. It is a milder version of attaching the government to a religion’s creed; it tends to make a government religion of the religious faiths that use the Bible. Consequently, the Supreme Court’s more recent decisions that Bible reading and oral prayer in public schools are unconstitutional do not seem to

64. I am avoiding judgment about whether the uniform “day of rest” rationale is a sufficient basis for most modern Sunday closing laws.
65. I think the position is minimally coherent (a concession Hamburger does not make) but, on balance, indefensible. The position’s minimal coherence lies in considering the main evil of establishment as the close relations between institutional religion and political life.
depend peculiarly on the triumph of the separation metaphor rather than a development of a modern concept of disestablishment.

The Court has not struck down declarations of Thanksgiving or the phrase “In God We Trust” imprinted on coins, and various opinions have assumed that these are not unconstitutional. In the 2003 term, the Court did consider “under God” in the Pledge of Allegiance recited by children at a public school.\[6\] Reviewing a decision of the Ninth Circuit Court of Appeals that “under God” impermissibly supports and endorses a religious view, a majority of the Supreme Court dismissed the atheist father’s challenge on standing grounds because, as a noncustodial parent, he lacked authority to make decisions about his daughter. The three Justices who did reach the merits would have sustained the pledge,\[6,8\] and it seems likely they will pick up two more votes if the same Justices address the issue a second time.\[6,9\] Once we get over the threshold that a modern notion of disestablishment could apply to noncoercive government actions,\[7,0\] we can see that the idea of disestablishment seems at least as promising as that of separation as a vehicle to challenge various official references to God.

The Supreme Court has actually sustained the payment of legislative chaplains.\[7,1\] A separation argument against legislative chaplains has considerable force because that practice involves government officers hiring and being led in prayer by a leader of organized religion. Still, one could also fairly characterize the practice as an establishment of the chaplain’s form of religion.\[7,2\] As with official references to God, the idea of disestablishment seems at least as promising a vehicle for future attack as separation.

6. Classifications

The appropriateness of classifying prisoners, soldiers, and orphans according to religion depends largely on the purpose of the classification. It makes obvious sense for a government that allows prisoners one worship service a week to classify prisoners by their religion so they need not all

\[68\] Chief Justice Rehnquist and Justice O’Connor concluded that “under God” had historical and civic significance and did not really endorse a religious view. Id. Justice Thomas thought there was an endorsement but rejected constitutional doctrine that endorsements are necessarily unconstitutional. Id.
\[69\] Justice Scalia did not sit because he had criticized the court of appeals ruling. If he does participate in a future case, he will almost certainly sustain the constitutionality of the language “under God.” Based on his votes and opinions in prior cases, I think Justice Kennedy will probably reach a similar result.
\[70\] See supra text accompanying notes 23-25. It is arguable whether children are indirectly coerced by peer pressure, even if legally free not to say the Pledge of Allegiance. See, e.g., id.
\[72\] Of course, the Founders did not regard this as a forbidden establishment, as the Supreme Court emphasized in allowing it. Id. But, as I have said, we have no reason to cabin disestablishment within the exact parameters the Framers envisioned.
attend the same service. Orphans who are old enough to have developed an allegiance to a particular religion should be able to continue observing their faith. A practice of classifying religious preferences for newborns is more debatable. Whether birth parents—both or just one—should be able to have their children raised in an adoptive home of their religion is controversial. But challenging such classification in terms of separation or disestablishment makes little difference, because the law that connects the state to religion also tends to impose (or establish) the parent’s religion for the child.

7. Summary

For laws that support religion but do not involve a connection of the state with institutional religion and for laws that support religious groups, the separation metaphor seems no more powerful a threat than a modern concept of disestablishment. Rather, what matters is how uncompromisingly either concept is understood. Is one urging “absolute” separation or “absolute” disestablishment, or a restriction that is less absolute, perhaps reaching only as far as most of its proponents conceive it at a particular stage in history?

As mentioned, Hamburger notes that some dissenters at the founding believed that laws should “not take cognizance of religion.” According to Hamburger’s own account, therefore, the idea of disestablishment contains the seeds of broad challenges to any laws that favor particular religious groups and individuals. In marking the separation metaphor as having uniquely restrictive implications, Hamburger is on the strongest ground with respect to laws that happen to afford support to religious bodies only because they fall within a larger class of groups, including nonreligious ones, that confer social benefits such as education and medical care. Undoubtedly, this is a crucial category for modern law. But we should not mistake a sound argument about this particular form of support for a valid generalization about the comparative restrictive force of separation and disestablishment.

D. No Legal Protection of Religious Groups

At certain early stages of the country’s history, some who opposed connections between church and state doubted whether secular law should

73. To be a bit more precise, truly absolute separation is impossible. By “absolute” I mean a separation that is as absolute as is feasible.
74. HAMBURGER, supra note 6, at 12.
75. It is also true that religious educational institutions were a source of intense controversy in the nineteenth century, when the separation metaphor emerged as dominant. However, the antiseparationist argument that Catholics should have support for religious schools to protect their religious convictions and because the public schools were really Protestant differs from the claim that all private nonprofit schools are equally deserving of support, whether religious or not.
even protect religious groups.\textsuperscript{76} James Madison, for example, did not believe that churches should be able to incorporate and thus hold property beyond the lifetimes of individuals.\textsuperscript{77} These particular issues are red herrings for contentions that a modern separation approach has unacceptable practical implications. No separationist today proposes that religious groups be refused basic legal protections given to everyone else. Courts may settle disputes over church property, so long as they employ standards of interpretation that do not call for religious judgments,\textsuperscript{78} and state incorporation of religious organizations is now uncontested.

We should note that the idea of separation provides a reason to allow religious groups to engage in discrimination when other groups may not. For example, Title VII allows religious organizations to discriminate on religious grounds in employment, even for non-leadership positions.\textsuperscript{79} In this respect, an ideal of separation can bolster free exercise as a basis to afford religious groups special, favorable treatment. Were legislators and judges to focus only on a principle of disestablishment, they might conclude that religious groups should be treated just like other groups: any singling out of religion for favorable treatment would "establish" religion in relation to other human endeavors.\textsuperscript{80} The metaphor of separation helps sustain the notion that the government should refrain from regulating certain interactions within religious bodies that are appropriately restricted for nonreligious bodies.\textsuperscript{81}

\textbf{E. No Religious Tests or Official Christian Nation}

Although many early states maintained oaths of office that effectively excluded non-Christians or even Catholics, banning religious tests for office is now a well-settled aspect of Establishment Clause (and Free Exercise Clause) law.\textsuperscript{82} Given that the original federal Constitution (pre-Bill of Rights) bars such tests for federal offices,\textsuperscript{83} and given that any such

\textsuperscript{76} HAMBURGER, supra note 6, at 101-07.
\textsuperscript{77} In John Noonan's account, Madison's objections to incorporation related directly to an aim to prevent churches from amassing property. JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 83-84 (1998).
\textsuperscript{79} See Corp. of the Presiding Bishop of the Church of Jesus Christ v. Amos, 483 U.S. 327 (1987). It is generally assumed that in choosing clerics, religious groups may discriminate even on grounds of gender or race.
\textsuperscript{80} Of course, this would be a problem only if "disestablishment" included disestablishing religion in general as well as particular religions.
\textsuperscript{81} The concept of separation also supports the principle that civil courts should not make even "detached" judgments about what features particular religions take as fundamental. I think this circumspection promotes free exercise, although it can sometimes interfere with the ability of religious groups to achieve their purposes. See Greenawalt, supra note 78.
\textsuperscript{83} U.S. CONST. art. VI.
tests tend to establish the religious views to which the officeholders must subscribe, disestablishment justifies a bar on religious tests for office as comfortably as does separation. The same conclusion holds if other privileges besides office are conditioned on subscribing to religious propositions.

A modern concept of disestablishment, as well as separation, also precludes official recognition that we are "a Christian nation"84 beyond the general acknowledgment that most citizens are Christians and that Christian ideas have powerfully influenced our history and our laws. Many members of the founding generation assumed that our country was Christian in the stronger sense that the law should reflect and support Christian (or Protestant) perspectives. In the nineteenth century, judges sometimes wrote that Christian understandings guided the common law. We can now say that these early citizens and later judges did not recognize the full implications of disestablishment.85 For a government to become officially Presbyterian or Episcopalian, even if Presbyterians or Episcopalians constituted a substantial majority of its population, would have been a forbidden establishment. Particularly in light of the wide diversity of faiths in the United States of 2005, any effort to make our nation Christian in a similar sense would impermissibly establish Christianity.

F. No Laws with a Religious Purpose and No Republican Dependence on Religion

My strongest misgivings about Hamburger's account are with regard to his treatment of the influence of religion on lawmaking. Hamburger is on solid ground in suggesting that separation has broader implications for the subject of laws with religious purposes and for civic dependence on religion than does disestablishment; but he fails to emphasize adequately that here the distinction in these respects has few practical legal consequences.

Hamburger treats as a common thesis of separation the idea that laws should not have a religious purpose,86 a thesis sometimes linked to the notion that republican government does not depend on religion.87 Whether or not they personally accepted Christian ideas, most articulate members of the founding generation assumed that republican government depends on a religious citizenry. They believed that religion is the foundation of morality, and that morality is crucial for obedience to law and the exercise of

84. Hamburger, supra note 6, at 273 (discussing Protestant clergy who did not view separation as requiring a renunciation of Christianity on the nation).
85. The text fails to acknowledge distinctions between federal and state authority. When states were free to have established religions, but the federal government was not, state courts could, of course, rely on Christian principles to develop the common law.
86. Hamburger, supra note 6, at 12-13, 304-05.
87. Id. at 67-73, 294-95.
civic virtue. By contrast, some nineteenth-century advocates of separation viewed political and religious matters as entirely distinct, thus rejecting the common understanding that religious perspectives should pervade all areas of life.

Questions about how religious understanding and practice relate to political understanding and to the exercise of civic virtue have deep significance for the life of liberal democrats. However, proposed answers to these questions, standing alone, have little bearing on what practices violate the Constitution. The claim that laws should not have a religious purpose promises more in the way of practical implications. Although Hamburger equivocates over whether a disjunction between religion and politics is actually a component of a strong version of separation of church and state, he treats as illogical arguments in favor of separation that do not endorse a disjunction of religion and politics. Thus, he treats Baptists who favored separation but who also believed in the Social Gospel message that a religious sense of justice should guide political life, as falling into serious tension. He makes similar remarks about abolitionists and advocates of prohibition who simultaneously favored church-state separation but asserted underlying religious grounds for their causes. Having long believed in a substantial legal separation of church and state, while strongly resisting the exclusion of all religious judgments from political life, I was disquieted by Hamburger's suggestion that embracing both positions involves a kind of incoherence.

To unpack the issue about religious purposes for laws, we need to consider what might count as a religious purpose. As a rough categorization, we may distinguish (1) laws that are aimed specifically at promoting particular religious groups or religious views (for example, the Sunday closing laws, if they are adopted to promote Sunday religion); (2) laws that enforce a religious morality (for example, laws against homosexual relations based on the view that the Bible considers such relations sinful); (3) laws that reflect a religious view about entities we should value (for example, laws protecting animals because they are God's creatures);

88. Id. at 66.
89. Id. at 151-55, 253-59, 274.
90. Even if religion is a necessary underpinning of republican government, or if religious notions should ideally influence political judgments, it still does not follow that governments must have contact with religion or support religion. Perhaps religion supports civic virtue and influences political decisions best if it is unsupported by government action.
91. Compare Hamburger, supra note 6, at 155 (describing the disjunction of religion and politics as a related thesis), with id. at 379 (implying that the disjunction is one aspect of separation).
92. Id. at 378-80.
93. Id. at 243-46, 265-67.
and (4) laws that reflect a religious sense of justice about how secular benefits should be distributed (for example, laws that aid people in need based on a biblical understanding of society’s obligations to the poor).

We have already examined the first category—laws that support religion in some form. My own view about laws in the second category, those that enforce a purely religious morality, is that they unacceptably impose religion on others. On the other hand, laws in the third and fourth categories—laws adopted because people rely on religious bases to assign entities a value or to determine what justice requires in the allocation of secular benefits—do not impose religion in the same way. Scholars with widely variant positions agree at least that this subject is complex. But we should certainly not assume that every reliance on religious convictions to formulate political conclusions is necessarily at odds with a defensible ideal of separation of church and state.

Another crucial point concerns any principle that laws should not have a religious purpose. Such a principle can directly guide legislators and citizens not to vote for or advocate proposed laws they conceive as serving such purposes, and the principle may help citizens evaluate their representatives. But what the principle signifies for laws that are adopted, at least in part, to serve (improper) religious purposes is less evident. Is their status as laws undermined? Outside the realm of laws that promote religious groups and religious views, we will, in this diverse society, virtually never have laws adopted exclusively to serve religious purposes. Religious purposes will always mix inextricably with secular ones. Consider, for example, the following plausible secular justification for welfare that might mix with a religiously based concern: “We should support the poor because they are equal citizens and because a culture of poverty is bad for the economy and breeds crime.” Given the typical mixture of religious and secular rationales and the opacity of the deep underlying judgments that lead people to form opinions about welfare, a principle that laws should not serve religious purposes is rarely, if ever, a helpful constitutional guide for courts if it goes beyond a ban on the promotion of religious groups and ideas. Thus, the

95. See GREENAWALT, PRIVATE CONSCIENCES, supra note 94; GREENAWALT, RELIGIOUS CONVICTIONS, supra note 94.
96. See GREENAWALT, PRIVATE CONSCIENCES, supra note 94; GREENAWALT, RELIGIOUS CONVICTIONS, supra note 94.
97. For example, Thurgood Marshall, one of the strongest separationists among recent Supreme Court Justices, never disparaged clergy involvement in the civil rights movement (in which he was directly engaged for most of his legal career) or arguments for civil rights grounded in religious notions.
98. Even in this limited domain, the “no religious purpose” principle does not help very much. One can identify a law as promoting a religious point of view without worrying too much about why legislators adopted it, and when the Supreme Court has struck down laws because they were adopted for religious purposes, e.g., Edwards v. AgUILARD, 482 U.S. 578 (1987) (law requiring teaching of creationism if evolution taught), it could have relied on the laws’ effects.
more expansive versions of the separationist idea that laws should not have religious purposes relate more to contested ideals of political behavior than to practical constitutional law, and they have had little influence on the Supreme Court.\footnote{Hamburger, supra note 6, at 111-17. However, it has been suggested that laws prohibiting homosexual behavior are invalid because they were adopted to enforce a religious morality. See Bowers v. Hardwick, 478 U.S. 186, 211-12 (1986) (Blackmun, J., dissenting).}

G. Opposition to the Engagement of Clergy and Institutional Religions—Especially Roman Catholicism—in Political Affairs

Hamburger suggests that Jefferson’s original use of the metaphor of separation was designed to quell the vicious attacks on him by federalist clerics.\footnote{But cf. Leonard W. Levy, The Establishment Clause 247 (2d ed. 1994) (arguing that Jefferson expressed himself in the letter to the Danbury Baptists “with deliberation and precision”).} Hamburger is right that an ideal of separation lends itself more directly to criticism of religious participation in politics than does the concept of disestablishment, which has little bearing on whether religious leaders should circumscribe their political efforts. But any appraisal of the political activities of religious leaders has slight relevance to constitutional law. Certainly the Establishment Clause itself, focused as it is on what the government can and cannot do, does not address the rights of clergy to preach about politics or political candidates. And, for the reasons we explored in connection with laws based on religious purposes, holding laws or elections invalid because organized religious groups take stands on issues or candidates would be impractical. One might fantasize about a separation argument that would underpin a law making it a crime for clergy to preach politics, but Congress would never adopt such a law. And such a law would, in any event, clearly violate basic modern conceptions of free speech and free exercise.

According to Hamburger, in the nineteenth century, separation was significantly linked to anti-Catholic sentiment. Hamburger’s selection of sources, however, does not allow us to discern the main basis of this sentiment or just how dominant it was.\footnote{At least three forces were at work to create this sentiment: outright prejudice against Catholic immigrants; the residue of an older conception in England and the colonies that the Catholic Church was the anti-Christ; and the general movement toward liberal individualism, which produced antagonism to the Catholic Church because popes in various encyclicals strongly resisted that movement. See George M. Marsden, Jonathan Edwards: A Life, 311-16 (2003); Noonan, supra note 77, at 26-28.} Although Protestant individualism was strongly at odds with the Episcopal authority of the Catholic Church in their competing conceptions of religious community, separation of church and state alone has nothing to say about how a religious group understands its community and chooses to govern itself. Those who believed that church officials unduly influenced Catholic voters in their political decisions could see this as violating a healthy separation of church and
state. 102 But, barring radical proposals to control internal church organization or to disqualify Catholics from voting (which would violate the religious clauses), this aspect of separation concerns social ideals, not legal restraint and constitutional law. 103 Certainly, today, no separationist proposes special legal restrictions on the Catholic Church or Catholic voters. Thus, even if it is true that some ambitious version of separation may, in contrast to disestablishment, have negative implications for particular political activities of strongly hierarchical churches and of religious leaders more generally, these are not matters of legal consequence.

III

NATIVISM'S INFLUENCE ON INCORPORATION OF THE ESTABLISHMENT CLAUSE UNDER THE FOURTEENTH AMENDMENT

Professor Hamburger's discussion of the incorporation of the First Amendment's Establishment Clause under the Fourteenth Amendment is a sideshow to his central message that ideologues managed to substitute separation for disestablishment; but, of course, if incorporation itself is fundamentally misconceived, courts are wrongly imposing federal constitutional restraints on states and localities around the country. Because of that practical implication, a brief response to his discussion is needed.

Hamburger describes the controversies swirling around the proposed Blaine Amendment to the federal constitution, 104 a late nineteenth-century proposal that would have forbidden public financial backing of religious institutions. The wide support that this amendment drew signaled the strength of anti-Catholic sentiment. It also suggested, Hamburger believes, that at that time virtually no one assumed that the Establishment Clause applied to the states.

Hamburger's main challenge to incorporation, however, is not with respect to the Establishment Clause in particular, but to the whole concept of incorporation, which he suggests was largely driven by nativist sentiment. 105 Why the Supreme Court has decided to incorporate almost all of the Bill of Rights through the Fourteenth Amendment is a vast topic beyond the scope of this Review Essay, but Hamburger's treatment of the issue raises some substantial questions.

In contrast to various other scholars, Hamburger does not contend that the Establishment Clause is peculiarly unsuited for incorporation either

103. However, someone might have relied on the anti-democratic character of the Roman Catholic Church as one reason not to provide it with support that would otherwise be available.
104. HAMBURGER, supra note 6, at 321-28.
105. Id. at 434-35, 447-48.
because the original clause permitted states to have established religions or because establishments do not violate individual rights. Nor does Hamburger argue that the near success of the Blaine Amendment itself showed that people regarded the Establishment Clause as distinctively inap apt for application against the states. The only reason that we had a near amendment about religion rather than free speech or the privilege against self-incrimination was because many more citizens were concerned about support to religion, especially religious schools, than about interferences with speech or techniques of criminal investigation.

Hamburger assumes the adopters of the Fourteenth Amendment did not mean to incorporate provisions of the Bill of Rights and that people of that time and in the decades thereafter did not believe the amendment had this effect.\(^\text{106}\) He does not try to add to the literature on that controversial topic. And he does not address the highly plausible argument that, regardless of original Intent, a country that has become increasingly close-knit economically and culturally should have the same basic standards apply to individual liberties against the national and regional governments and that the obvious place from which to draw such standards is the Bill of Rights. Instead, Hamburger suggests that a nativist sentiment permeating American culture was a major impetus toward incorporation.\(^\text{107}\) Hamburger's assertion seems to me both inadequately supported and unpersuasive. I shall mention here only my major doubts.

First, one must distinguish nativism from an ethos of individualism, although distaste for Roman Catholic authority connected the two sentiments. Liberal individualism was a powerful political ideology in the nineteenth century in the United States and in much of Europe. The Supreme Court's first decision applying a provision of the Bill of Rights—the Just Compensation Clause of the Fifth Amendment—to the states\(^\text{108}\) is explicable in terms of economic laissez-faire, not in terms of nativism. Similarly, when the Free Speech clause was first employed against the states, it was mainly to protect political subversives or activists on the left—hardly the darlings of nativists.\(^\text{109}\) The first free exercise decision protected a Jehovah’s Witness—again not a nativist favorite.\(^\text{110}\) Incorporation of the Establishment Clause, which in its separationist version Hamburger ties most closely to nativism, came much later in the day, indeed half a century after the Just Compensation Clause constrained the states. All in all, Hamburger provides us little basis to conclude that nativism, as distinct from a more generalized individualism, was a major force in the march

\(^{106}\) Id. at 436-39.

\(^{107}\) Id. at 434-35.

\(^{108}\) Chicago, Burlington and Quincy R.R. v. Chicago, 166 U.S. 226 (1897).


toward incorporation. If individualism and an emphasis on rights played
the dominant part, we should decline to see nativism as soil ing the grounds
of incorporation of the Bill of Rights.

CONCLUSION

Philip Hamburger has suggested a fascinating history of how
“separation of Church and State” supplanted disestablishment as the domi-
nant metaphor for church-state relations and the application of the
Establishment Clause. However, his claim that this substitution has radia-
cally affected the course of constitutional law is more complicated than he
acknowledges. Hamburger tends to compare a historically grounded notion
of what disestablishment entailed with the most expansive versions of
separation. A fairer comparison would be between what we might expect
from contrasting an evolving notion of disestablishment with a reasonable
modern version of separation.

This Review Essay has attempted just such a comparison and suggests
that many legal consequences arising from separation are equally support-
able from the standpoint of disestablishment. Many ways in which
Hamburger’s notion of separation seems genuinely to depart from disestab-
lishment either have little, if anything, to do with constitutional law, or are
founded on a version of separation that would not be defended by modern
separationists. Indeed, there are few practical legal issues in which separa-
tion supports a different conclusion than “mere” disestablishment. Aid to
religious institutions, such as parochial schools, given on a neutral basis,
represents the most important of these situations. Contesting this type of
aid with a separation metaphor is simpler than arguing from a disestab-
lishment perspective. But one cannot generalize from this example to con-
clude that Establishment Clause law as a whole has been much affected—
Hamburger might say infected—by the substitution of separation for dises-
establishment.

We also need to recognize three broad theoretical points that
Hamburger largely neglects. First, all political and legal ideas shift over
time, both in how people understand the ideas and in what they regard as
their proper applications. These shifts are caused in part by a fluid social
reality against which the ideas are applied and by changing values that may
be concealed by continuity in verbal formulations.

Second, all political and legal concepts overlap with other political
and legal concepts. Dominant concepts may shift, but newly emerged
dominant concepts usually connect significantly to their predecessors, and
many of their applications may be similar. To take just one salient exa-
ample, the right of a woman to choose an abortion may be phrased as a right
to control one’s own body, a right of privacy, or a right to autonomy. These
ideas carry somewhat different connotations, but people who use them may
not be far apart in their values. The fact that the term "separation of church and state" largely replaced "disestablishment" does not itself indicate a radical change in perspective, especially since the original idea of disestablishment in this country contained substantial components of separation.

Finally, related to the significance of these shifts in dominant concepts is the reality that at any stage of history, people advance versions of ideals that are more or less uncompromising, depending on the other values these people hold. At the founding, most fervent proponents of equality did not believe in social equality for women or slaves, but that does not mean they did not believe in equality at all. Many ideals are compromised because of limited vision or as a concession to what can be achieved at the time. But ideals that are constrained rather than absolute may instead be based on coherent justifications. Hamburger too quickly concludes that any separationists who fall short of the strongest versions of separation are trapped in incoherence. I have objected in this Review Essay to his apparent assumption that strong legal separation of church and state implies an absolute disjunction of religion and politics. In this respect, I believe that the people he challenges for not seeing that politics should be free of religion had available a justification that was not only coherent but persuasive.

Hamburger also explores the failure of many separationist Protestants to realize that their position should have led them to object to all the manifestations of Protestantism in public schools. Here Hamburger is right that a persuasive theory cannot on the one hand attack involvement between Roman Catholicism and the state and, on the other, approve public instantiations of Protestantism. But perhaps serious people free of prejudice might have conceived that the main dangers of establishment concerned the relations between government and institutional religion, not the state purveying religious principles in public schools. Although I do not accept that view, I wish Hamburger had tried harder to understand whether people who held this view had any rationale beyond mere prejudice and willful blindness.

In summary, Hamburger oversimplifies the relation between the logic of separation and disestablishment, and his mode of historical analysis glosses over subtleties in the way political and legal concepts develop. It also glosses over the reality that two people who hold competing understandings of broad ideals they share may be able to offer coherent, reasonable defenses of their own particular positions. So it has been with people who have embraced the ideals of disestablishment and its offspring, separation.

111. Seeing abortion as an aspect of equality rights involves a more distinctive departure from "privacy" or "autonomy."