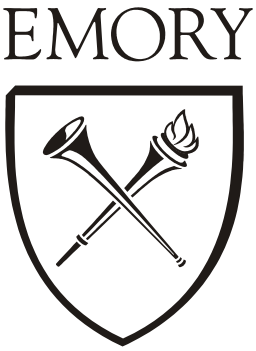

THAT SERPENTINE WALL OF SEPARATION

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That Serpentine Wall of Separation

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THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE. By *Daniel L. Dreisbach*. New York and London: New York University Press. 2002. Pp. x, 283. Cloth, $42.00

SEPARATION OF CHURCH AND STATE. By *Philip Hamburger.* Cambridge and London: Harvard University Press. 2002. Pp. xiii, 514. Cloth, $49.95

I. Introduction

"The task of separating the secular from the religious in education is one of magnitude, intricacy, and delicacy," Justice Jackson wrote, concurring in *McCollum v. Board of Education* (1948), the Supreme Court's first religion in public school case.[2] "To lay down a sweeping constitutional doctrine" of absolute separation of church and state "is to decree a uniform, unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes." If we persist in this experiment, Justice Jackson warned his brethren, "we are likely to make the legal 'wall of separation between church and state' as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded."[3]

While a majority of the United States Supreme Court embarked on a four-decade project of building this "serpentine wall,"[4] Justice Jackson took little further part

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[2] McCollum v. Board of Education, 333 U.S. 203, 237 (1948)(Jackson, J. concurring).

[3] Id., at 237-8. See also Daniel L. Dreisbach, Thomas Jefferson and the Wall of Separation of Church and State 109 (2002).

[4] See summaries in id., 100-06; Philip Hamburger, Separation of Church and State 463-78 (2002). The most recent Supreme Court cases where the separationist principle dominated the Court's reasoning were Larkin v.

in the effort. He continued to regard the separation of church and state as essential to the protection of religious liberty, along with the freedoms of conscience,[5] exercise, and speech.[6] But he had no patience with unilateral or extreme applications of any of these First Amendment principles,[7] not least the principle of separation of church and state. Imprudent application of this latter principle, he wrote, would draw the Court into "passionate dialectics" about "nonessential details" that were often better left to state and local governments to resolve.[8] In his last years on the bench, Jackson thus led the Court in a case that denied standing to a party who argued that religious instruction in a public school violated the separation of church and state.[9] He was the sole dissenter in a church property dispute case, where the Court read the principle of separation to require a state to defer to the internal religious law of the disputants rather than apply its own state laws.[10] He dissented again from the Court's decision to uphold a public school program that gave students release time to participate in religious events

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Grendel's Den, 459 U.S. 116 (1982); Aguilar v. Felton, 402 (1985); and Texas Monthly v. Bullock, 489 U.S. 1 (1989).

[5] See, e.g., West Virginia State Board of Education v. Barnette, 319 U.S. 642 (1943)(Jackson, J. writing for the majority exempting Jehovah's Witnesses from compulsory flag salute); U.S. v. Ballard, 322 U.S. 78, 92 (1944)(Jackson, J. dissenting from decision to use the truth of a professed religious belief to question a party's sincerity); Prince v. Massachusetts, 321 U.S. 158, 176 (1944)(Jackson, J. dissenting from decision to uphold child labor laws against distribution of religious literature by a minor).

[6] See summaries in Robert H. Jackson, The Supreme Court in the American System of Government 76-77 (1955); Paul A. Freund, Mr. Justice Jackson and Individual Rights, in Mr. Justice Jackson: Four Lectures in His Honor 20, 36-43 (1969).

[7] See, e.g., Saia v. New York, 334 U.S. 558, 566 (1948)(Jackson, J. dissenting from holding that banning religious broadcasts without a license violates free speech); Termeniello v. Chicago 337 U.S. 1, 13 (1949)(Jackson, J. dissenting from holding that free speech protects anti-Semitic hate speech that causes riot); Kunz v. New York, 340 U.S. 290, 295 (1951)(Jackson, J. dissenting from holding that a city may not deny a license to a Baptist preach in a public park); Murdock v. Pennsylvania, 319 U.S. 105, 117 (1943)(Reed and Jackson, JJ., dissenting from holding that free exercise rights prohibit laws requiring religious solicitors to procure a license in advance).

[8] Zorach v. Clauson, 343 U.S. 306, 325 (1952)(Jackson, J. dissenting). See further Robert H. Jackson, The Supreme Court in the American System of Government 65-83 (1955) (on role of Supreme Court in state and local disputes).

[9] Doremus v. Board of Education, 342 U.S. 429 (1952).

[10] Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 126 (1952)(Jackson, J. dissenting).

off site. Arguing that this was precisely the kind of case where the principle of separation did apply, he complained: "The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected."[11]

For all his growing misgivings about separationism, however, even this bold early dissenter on the Court,[12] well trained in legal history,[13] never once questioned the historical foundation or constitutional imperative of strict separationism. In *Everson v. Board of Education* (1947), the Supreme Court for the first time applied the First Amendment disestablishment guarantee to the states. Justice Black, Jackson's nemesis,[14] wrote for the *Everson* majority. After a lengthy historical recitation, Black quoted Thomas Jefferson's famous 1802 Letter to the Danbury Baptist Association as dispositive evidence that the "First Amendment has erected a wall of separation between church and state" that must be kept "high and inpregnable."[15] Though Jackson dissented from the *Everson* holding, he accepted the Court's account of the history and meaning of the First Amendment. "I cannot read the history of the struggle to separate political from ecclesiastical affairs" otherwise, he wrote.[16] Jackson was concerned about the rhetorical "undertones" of "advocating complete and uncompromising separation of Church from state."[17] He was not concerned about the historical underpinnings of separationism itself. Indeed, Jackson thought his views to be in full accord with the intent of the founders -- not least his hero President Thomas Jefferson.[18]

Justice Jackson might well have come to a different opinion had he enjoyed the luxury of reading the two exquisite books here under review. He would have learned

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[11] Zorach v. Clauson, 343 U.S. 306, 325 (1952)(Jackson, J. dissenting).
[12] See Eugene C. Gerhart, America's Advocate: Robert H. Jackson 294-300 (1958). Of Justice Jackson's 324 Supreme Court opinions, 109 were dissents, 63 concurrences. Id., at 504 n.95; Bibliography: The Judicial Opinions of Justice Robert H. Jackson in the Supreme Court of the United States, 8 Stanford L. Rev. 60 (1955).
[13] See Robert H. Jackson, The Struggle for Judicial Supremacy (1941)(a detailed history of constitutional law).
[14] Dennis J. Hutchinson, The Black-Jackson Feud, 1998 Sup. Ct. Rev. 203.
[15] Everson, 330 U.S. at 18 (quoted infra at note).
[16] Id., at 28.
[17] Id., at 19.
[18] Jackson, supra note __ , at 315 (on Jefferson).

that the history of separationism was far more "serpentine" than the straightforward history lesson of *Everson* had led him to believe. And he would have learned that the wall of separation metaphor was itself potentially "serpentine" -- now in the sense of the ancient serpent in the garden of Eden who offered access to enduring wisdom by means of a seductively simple formula.[19] "Metaphors in law are to be narrowly watched," Benjamin Cardozo had warned in 1926, "for starting as devises to liberate thought, they end often by enslaving it."[20] So it has been with the metaphor of a wall of separation.[21] What started as one of several useful principles of religious liberty eventually became a mechanical test[22] that courts applied bluntly, even slavishly, in a whole series of cases. What started as one of many images[23] of a budding new national law of religious liberty, became for many the mandate and measure of the First Amendment itself.

While the United States Supreme Court has, of late, abandoned much of its earlier separationism,[24] and overruled some of its harshest applications in earlier cases,[25] the wall of separation metaphor has lived on in popular imagination as the salutary source and summary of American religious liberty.[26] Even popular imagination might change, if the findings of Professors Dreisbach and Hamburger are taken seriously.[27]

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[19] Genesis 3:1-7.

[20] Berkeley v. Third Ave. Railway Co., 244 N.Y. 84, 94. 155 N.E. 58, 61 (1926).

[21] See Dreisbach, supra note __, at 107-28; Hamburger, supra note__, at 487-90 on the virtues and vices of the wall metaphors.

[22] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[23] For other images that were current, including "barriers," "fences," and "lines" of separation, see Dreisbach, supra note __, at 83-94.

[24] Zelman v. Simmons-Harris, 122 S.Ct. 2460 (2002); Rosenberger v. Rectors of Univ. of Va., 515 U.S. 819 (1995); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Bd. of Educ. of the Westside Community Schools v. Mergens, 496 U.S. 226 (1990); Bowen v. Kendrick, 487 U.S. 589 (1988), and cases cited infra note __.

[25] Mitchell v. Helms, 530 U.S. 793, 808 (2001), overruling Meek v. Pittenger, 421 U.S. 329 (1975) and Wolman v. Walter, 433 U.S. 229 (1977); Agostini v. Felton, 521 U.S. 203, 235 (1997), overruling Aguilar v. Felton, 473 U.S. 402 (1985).

[26] Hamburger, supra note __, at 1-8; Dreisbach, supra note __, at 1-8, 107-28.

[27] But note the tenacity of the separationist lobby as reported in Daniel L. Dreisbach, Thomas Jefferson and the Danbury Baptists Revisited, 56 Wm. & Mary Q., 3d ser. 805 (1999).

II. Enter Hamburger and Dreisbach

Between the two of them, Daniel Dreisbach[28] and Philip Hamburger[29] tell much of the American history of the (wall of) separation of church and state in its genesis, exodus, and deuteronomy -- (1) its origins in seventeenth- and eighteenth-century writings; (2) its migration and manipulation in nineteenth- and early twentieth-century American lore and law; and (3) its second legal life (its "deutero-nomos") in *Everson* and its immediate progeny.

Philip Hamburger's *Separation of Church and State* is a riveting and recondite intellectual history of American separationism. The heart of the book analyzes developments from Thomas Jefferson's 1802 Danbury Baptist Letter to Justice Black's opinion in the 1947 *Everson* case (pp. 111-492). While Hamburger inevitably covers some of the same ground broken earlier by Anson Stokes,[30] Leo Pfeffer,[31] Leonard Levy,[32] and others,[33] his book breaks much new ground and blows much thick dust from long forgotten archives. Particularly novel and valuable is his treatment of separationism in the last two-thirds of the nineteenth century, and his detailed analysis of the shifting and sometimes overlapping views of separationism among American Protestants, Unitarians, secularists, the National Liberal League, the Ku Klux Klan, and sundry other groups (pp. 193-390). Hamburger's volume brings to light and life scores of long obscure pamphlets, speeches, and sermons on separationism, many of which have been known only to denominational specialists and church historians.

Hamburger's writing throughout is lean, learned, and lively. Convenient forecasts and summaries open and close each of the four major sections of the book -- on "Late Eighteenth Century Religious Liberty," "Early Nineteenth Century Republicanism," "Mid-Nineteenth Century Americanism," and "Late Nineteenth- and Early Twentieth-

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[28] Professor, Department of Justice, Law, and Society, American University.
[29] John P. Wilson Professor of Law, University of Chicago.
[30] Anson P. Stokes, Church and State in the United States (3 vols. 1950).
[31] Leo Pfeffer, Church, State, and Freedom (1953; rev. ed. 1967).
[32] Leonard W. Levy, The Establishment Clause: Religion and the First Amendment (2d ed. 1994).
[33] Stephen M. Feldman, Please Don't Wish Me a Merry Christmas: A Critical History of the Separation of Church and State (1997); The Wall Between Church and State (Dallin H. Oaks ed., 1963).

Century Constitutional Law." Crisp summaries again open and close most of the fourteen meaty chapters. A detailed index allows novices and experts alike to mine the book with profit. While I have some ample reservations about parts of Professor Hamburger's analysis,[34] I believe his book will rightly become the standard intellectual history of nineteenth-century American separationism for years to come.

While Hamburger pans with a binocular to paint his panorama, Dreisbach probes with an x-ray machine to exegete his texts. Quite literally. In 1998, James Hutson, chief archivist at the Library of Congress, had sent the original manuscript of Jefferson's 1802 Letter to the Danbury Baptists, with all of its scratch outs and penned over sections, to the FBI laboratory. Using x-rays and other techniques, the FBI uncovered the full original letter with all its stops and starts, thoughts and rethoughts spelled out.[35] For Dreisbach, this is precisely the sort of evidence that is needed to understand what Thomas Jefferson intended by his reference to a "wall of separation between church and state." Dreisbach's analysis ripples out from this core 1802 text -- reaching back to colonial and earlier European formulations of separationism (pp. 9-24, 71-82), and forward to selected nineteenth- and twentieth-century interpretations, including those of the United States Supreme Court (pp. 95-128).

This book is vintage Dreisbach.[36] A neatly trimmed and tightly written text of 128 pages is built on a scholarly foundation of even greater thickness: 90 pages of dense notes, 35 pages of bibliography, and nine appendices with

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[34] See infra notes __ and accompanying text.

[35] James H. Hutson, "A Wall of Separation": FBI Helps Restore Jefferson's Obliterated Draft," 57(6) Library of Congress Bulletin 136-39, 163 (June, 1998). The original Jefferson letter is reprinted in Dreisbach, supra note __, at 144-6. It was the subject of a major conference, anthology, and literary forum that Hutson, Dreisbach, and others helped to organize. See Religion and the New Republic: Faith and the Founding of America (J.H. Huston ed. 2000) (based on papers of a June 18-19, 1998 conference at the Library of Congress); Forum: Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined, 56 Wm. & Mary Q. 3d ser. 775-824 (1999).

[36] It is much in the style of Daniel L. Dreisbach, Religion and Politics in the Early Republic: Jasper Adams and the American Church-State Debate (1996) and Daniel L. Dreisbach, Real Threat and Mere Shadow: Religious Liberty and the First Amendment 55-76 (1987). It also echoes and elaborates some of his earlier articles, cited in Dreisbach, supra note __, at 250-51.

critical editions of Jefferson's letters to and about the Danbury Baptists as well as several other key documents on religious liberty that Jefferson wrote as Virginia's Governor and as America's President and aged savant. Anyone studying Jefferson's views of separation would be wise to use Dreisbach's primary texts and to ponder his sage interpretation of them. Anyone studying the history of separation in America will find all manner of literary leads in Dreisbach's hefty bibliography and detailed notes (pp. 155-269). This is a book that can be read in an evening, but pondered for a career.

These two books inevitably overlap somewhat in topics and texts covered, but they are by no means duplicative. While the two authors cite each other regularly and favorably,[37] their interpretations differ markedly at critical points.

First, Hamburger views Jefferson's 1802 letter as the first full statement of separationism in America, deeply informed by Jefferson's anti-clericalism, religious individualism, Republican politics, and scientific positivism. Both the term and the concept of separationism, Hamburger argues, were notably absent from earlier American and European writings, and conspicuously absent from the debates over the First Amendment.[38] By contrast, Dreisbach argues that Jefferson maintained a common Western view that religious and political authorities had to keep separate jurisdictions, a view that he repeated many times in formal and informal writings before and after 1802. More importantly, Jefferson's 1802 letter simply repeated what the American founders commonly understood the First Amendment to be: It was a declaration that the federal government ("Congress") had no jurisdiction over questions of religion and religious liberty; these were left to the states to resolve in accordance with their own state constitutions.[39]

Second, Hamburger argues that, in the course of the nineteenth century, strict separation of church and state

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[37] Dreisbach gave Hamburger's book a handsome jacket endorsement and cited him several times throughout. Id. at 7, 29, 52, 200, 202-03, 225. Hamburger kindly sent Dreisbach his draft manuscript (see id., at 272), and discussed his views generously. See Hamburger, supra note __, at 1-2, 4, 55-56, 159, 164, 259.

[38] See infra notes __ and accompanying text.

[39] See infra notes __ and accompanying text.

became an American ideal. It was the product of a growing conspiracy among "nativist Protestants," theological liberals, anti-Christian secularists, and radical groups like the Know Nothings and Ku Klux Klan. These groups adopted the principle of separation of church and state as a weapon first against Catholics, then against clerics and religious groups altogether. Because they feared religious organizations and authorities, these groups argued that religious liberty was principally an individual right that required a separation of church from state.[40] By contrast, Dreisbach sees little evidence of any sustained strict separation of church and state in nineteenth-century law.[41] Separationism did gather ample rhetorical currency among some groups but garnered little legal change. The dominant reality of the nineteenth century was that church and state officials were formally separated but functionally cooperated in a variety of ways, particularly at the local level.[42]

Third, Dreisbach condemns *Everson's* separationism as an abruptly revisionist statement of constitutional law, and a fundamental misreading of the history and original intent of the eighteenth-century founders, not least the views of Thomas Jefferson himself. For Dreisbach, it was ultimately Justice Black, not Thomas Jefferson, who raised strict separationism to a constitutional mandate.[43] Hamburger almost shrugs off *Everson* and its progeny as the inevitable triumph of Jefferson's relentlessly separationist logic that had gradually gained adherence and adherents in the nineteenth and early twentieth centuries. For Hamburger, *Everson* merely codified and culminated common American sentiments, catalyzed more than a century before by Jefferson and anticipated in many popular movements and legal developments beforehand.[44]

What follows is a few of the high points of the long story of the genesis, exodus, and deuteronomy of the principle of separation of church and state. I focus first on earlier materials not included in either volume. I then turn to a few topics and texts on which these two learned authors differ markedly in interpretation or where my own

[40] See infra notes __ and accompanying text.
[41] See infra notes __ and accompanying text.
[42] See infra notes __ and accompanying text.
[43] See infra notes __ and accompanying text.
[44] See infra notes __ and accompanying text.

interpretation of the sources differs from one or both of theirs.

III. Genesis: The Roots of American Separationism

A. Biblical Roots

Though it makes only modest appearance in these two volumes,[45] the Bible was the starting point for a good deal of Western speculation on the (wall of) separation of church and state. In the Hebrew Bible, the chosen people of ancient Israel were repeatedly enjoined to remain separate from the Gentile world around them[46] and to separate the Levites and other temple officials from the rest of the people.[47] The Hebrew Bible also made much of building and rebuilding "fortified walls"[48] to protect the city of Jerusalem from the outside world and to separate the temple and its priests from the commons and its people[49] -- an ancient tradition still recognized and symbolized in the Jewish rituals and prayers that take place at the Western (Wailing) Wall.

The New Testament commanded believers to "render to Caesar the things that are Caesar's and to God the things that are God's,"[50] and reminded them that "two swords" were enough to govern the world.[51] Christians were warned that they should "not conform to the world"[52] but remain "separate" from the world and its temptations,[53] maintaining themselves in purity and piety. Echoing the Hebrew Bible, St. Paul spoke of a "wall of separation" (*paries maceriae*) between Christians and non-Christians interposed by the Law.[54] Interspersed among these various political dualisms,

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[45] Hamburger, supra note __, at 21, 29, 41, 44, 48; Dreisbach, supra note __, at 230 n.4.
[46] Exodus 34:11-16; Leviticus 20:24-5; 2 Sam. 22:26-7; 1 Kings 8:53; Ezra 6:21; 10:1; Nehemiah 9:1-15, 10:28-31, 13:1-3; 1 Esdras 7-9.
[47] Leviticus 21:1-22:16; Numbers 8:14, 16:9; Deuteronomy 10:8, 32:8, 1 Chronicles 23:13; Ezekial 40-42.
[48] Jeremiah 1:18, 15:20.
[49] 1 Kings 3:1; Jeremiah 1:18-19, 15:19-21; Nehemiah 3:1-32, 4:15-20, 12:27-43; Ezekial 42.
[50] Matthew 22:21; Mark 12:17; Luke 20:25.
[51] Luke 22:38.
[52] Romans 12:2.
[53] 2 Corinthians 6:14-18.
[54] Ephesians 2:14. See historical interpretation of this text in Markus Barth, The Anchor Bible: Ephesians 263-65, 283-87 (1974).

the Bible included many other dualisms -- between spirit and flesh, soul and body, faith and works, heaven and hell, grace and nature, the kingdom of God and the kingdom of Satan, and much more.[55]

B. Early Catholic Models

1. Two Communities. These various biblical dualisms were repeated in some of the early church constitutions. Among the earliest was the Didaché (ca. 120 c.e.), which opened with a call for believers to separate from the world around them: "There are two Ways, one of Life and one of Death; but there is a great separation between the two Ways."[56] The Way of Life follows the commandments of law and love. The Way of Death succumbs to sins and temptations. The two ways must remain utterly separate, and those who stray from the Way of Life must be cast out. The Epistle of Barnabas provided similarly: "There are two ways of teaching and of authority, one of light and one of darkness. And there is a great difference between the two ways. For over one are set light-bearing angels of God, but over the other angels of Satan. And the one is Lord from eternity to eternity, but the other is prince of the present time of darkness."[57]

These dualistic adages and images recurred in scores of later apostolic and patristic writings of the second through fifth centuries.[58] They became the basis for one persistent model of separationism in the Christian West -- the separation of the pure Christian life and community governed by religious authorities from the sinful and sometimes hostile world governed by political authorities. This apostolic ideal of separationism found its strongest and most enduring institutional form in monasticism, which produced a vast archipelago of communities of spiritual brothers and sisters, each walled off from the world around

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[55] Oliver O'Donovan, The Desire of the Nations: Rediscovering the Roots of Political Theology 82ff., 193ff. (1996).

[56] Reprinted in Philip Schaff, The Teaching of the Twelve Apostles 162-3 (1889)(my translation). Several comparable formulae from the apostolic sources are quoted in id., at 163 n.1. See comparable language in Deuteronomy 30:15; Jeremiah 21:8; Matthew 7:13-14; 2 Peter 2:2.

[57] Reprinted in Schaff, supra note __, at 227, 228.

[58] Id., 18ff.; Adolf von Harnack, The Constitution & Law of the Church in the First Two Centuries (trans. F.L. Pogson, ed. H.D.A. Major 1910); Lester L. Field, Liberty, Dominion, and the Two Swords: On the Origins of Western Political Theology (180-398) (1998); Gerard E. Caspary, Politics and Exegesis: Origen and the Two Swords (1979).

them.[59] But separationism in this sense remained a recurrent spiritual ideal in Christian theology and homiletics -- a perennial call to Christians to keep the Way of Life in the community of Christ separate from the Way of Death and in the company of the Devil.

2. Two Cities. By the fifth century, Western Christianity had distilled these early biblical teachings into other models of separationism. The most famous was the image of two cities within one world, developed by St. Augustine, Bishop of Hippo. In his *City of God* (c. 413-427),[60] Augustine contrasted the city of God with the city of man. The city of God consisted of all those who were predestined to salvation, bound by the love of God, and devoted to a life of Christian piety, morality, and worship led by the Christian clergy. The city of man consisted of all the things of this sinful world, and the political and social institutions that God had created to maintain a modicum of order and peace.[61] Augustine sometimes depicted this dualism as two walled cities separated from each other[62] -- particularly when he was describing the sequestered life and discipline of monasticism, or the earlier plight of the Christian churches under Roman persecution.[63] But Augustine's more dominant teaching was that dual citizenship would be the norm until these two cities were fully and finally separated at the Last Judgment of God.[64] For Augustine, it was ultimately impossible to achieve complete separation of the city of God and the city of man in this world. A Christian

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[59] Gerd Tellenbach, Church, State, and Christian Society 25-29 (trans. R.F. Bennett 1959). See sources and discussion in C.H. Lawrence, Medieval Monasticism: Forms of Religious Life in Western Europe in the Middle Ages (3d ed. 2001); David Knowles, Christian Monasticism (1969); Marily Dunn, The Emergence of Monasticism: From the Desert Fathers to the Early Middle Ages (2000).

[60] St. Augustine, City of God (G.G. Walsh et al. trans.; Vernon J. Bourke ed., 1958), bk. 4.1-4; bk. 19.15-22; bk. 20.1-2, 30; bk. 21 [hereafter "City of God"].

[61] Id., at bk. 21.

[62] Id., at bk. 19.19-22. See also The Political Writings of St. Augustine 241-75, 305-17 (Henry Paolucci ed., 1962) (letters arguing that the authority of church and state are separate but subject to the same power of God who enjoins Christian morality on both).

[63] See examples in Eugene TeSelle, Living in Two Cities: Augustinian Projections in Political Thought (1998); Jean Bethke Elshtain, Augustine and the Limits of Politics (1995); J. van Oort, Jerusalem and Babylon: A Study into Augustine's City of God and the Sources of his Doctrine of the Two Cities (1990).

[64] City of God, supra note __, at bk. 20.

remained bound by the sinful habits of the world, even if he aspired to greater purity of the Gospel. A Christian remained subject to the authority of both cities, even if she aspired to be a citizen of the city of God alone.

3. Two Powers. It was crucial, however, that the spiritual and temporal powers that prevailed in these two cities remain separate. Even though Christianity became the one established religion of the Roman Empire, patronized and protected by the Roman state authorities, Augustine and other Church Fathers insisted that state power remain separate from church power. All magistrates, even the Roman emperors, were not ordained clergy but laity. They had no power to administer the sacraments or to mete out religious discipline. They were bound by the teachings of the Bible, the decrees of the ecumenical councils, and the traditions of their predecessors. They also had to accept the church's instruction, judgment, and spiritual discipline. Pope Gelasius put the matter famously in 494 in a letter rebuking Emperor Anastasius:

There are, indeed, most august Emperor, two powers by which the world is chiefly ruled: the sacred authority of the Popes and the royal power. Of these the priestly power is the more important, because it has to render account for kings of men themselves at [the Last Judgment]. For you know, our clement son, that although you have the chief place in dignity over the human race, yet you must submit yourself faithfully to those who have charge of Divine things, and look to them for the means of your salvation.[65]

This “two powers” passage became a *locus classicus* for many later theories of a basic separation between pope and emperor, clergy and laity, *regnum* and *sacerdotium*.[66]

4. Two Swords. In the course of the Papal Revolution[67] of the eleventh to thirteenth centuries, this model of two separate powers within the extended Christian empire was transformed into a model of two swords ruling a unified

[65] Quoted in Church and State Through the Centuries: A Collection of Historic Documents with Commentaries 10-11 (Sidney Z. Ehler and John B. Morrall, trans. and ed. 1954) [hereafter “Church and State”].
[66] See, e.g., Karl F. Morrison, The Two Kingdoms: Ecclesiology in Carolingian Political Thought (1964); Ernst Kantorowicz, The King’s Two Bodies: A Study in Medieval Political Theology (1957).
[67] The term was coined by Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition (1983).

Christendom.[68] In the name of “freedom of the church” (*libertas ecclesiae*), Pope Gregory VII (1073-1085) and his successors threw off their political patrons and protectors, and eventually established the Catholic Church itself as the superior legal and political authority of Western Christendom. The church now claimed more than a spiritual and sacramental power over its own affairs. It claimed a vast new jurisdiction, an authority to make and enforce laws for all of Christendom.

The pope and the clergy claimed exclusive personal jurisdiction over clerics, pilgrims, students, heretics, Jews, and Muslims. They claimed subject matter jurisdiction over doctrine, liturgy, patronage, education, charity, inheritance, marriage, oaths, oral promises, and moral crimes. And they claimed concurrent jurisdiction with state authorities over secular subjects that required the Church’s special forms of Christian equity.[69] A vast torrent of new church laws, called canon laws, issued by popes, bishops, and church councils came to govern Western Christendom. A vast network of church courts, headquartered in the papal court, enforced these laws throughout the West.[70] In the period from ca. 1150-1350, the Roman Catholic Church ironically became “the first modern state” in the West.[71] The Church’s canon law became the first modern international law.

This late medieval system of church government and law was grounded in part in the two-swords theory. This theory taught that the pope is the vicar of Christ, in whom Christ has vested his whole authority.[72] This authority was symbolized in the “two swords” discussed in the Bible (Luke 22:38), a spiritual sword and a temporal sword. Christ had metaphorically handed these two swords to the highest being in the human world -- the pope, the vicar of Christ. The pope and lower clergy wielded the spiritual sword, in part by establishing canon law rules for the governance of all

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[68] For the transmutation of the two powers image to two swords, see Brian Tierney, The Crisis of Church and State 1050-1300 53ff. (1964).
[69] See Berman, supra note __, at 85-119, 165-00; Udo Wolter, "Amt und Officium in mittelalterlichen Quellen von 13. bis 15. Jahrhunderts," 105 Zeitschrift der Savigny-Stiftung (Kan. Ab.) 246 (1988).
[70] Berman, supra note __, at 199-254; R.H. Helmholz, The Spirit of the Classical Canon Law (1996).
[71] The phrase is from F.W. Maitland, quoted and elaborated in Berman, supra note __, at 113-15.
[72] Brian Tierney, The Origins of Papal Infallibility, 1150-1350 39-45, 82-121 (1972).

Christendom. The clergy, however, were too holy to wield the temporal sword. They thus delegated this temporal sword to those authorities below the spiritual realm -- emperors, kings, dukes, and their civil retinues, who held their swords "of" and "for" the church. These civil magistrates were to promulgate and enforce civil laws in a manner consistent with canon law. Under this two-swords theory, civil law was by its nature inferior to canon law. Civil jurisdiction was subordinate to ecclesiastical jurisdiction. The state answered to the church.[73] Pope Boniface VIII put this two-swords theory famously and forcefully in 1302:

We are taught by the words of Gospel that in this Church and in its power there are two swords, a spiritual, to wit, and a temporal…. [B]oth are in the power of the Church, namely the spiritual and [temporal] swords; the one, indeed, to be wielded for the Church, the other by the Church; the former by the priest, the latter by the hand of kings and knights, but at the will and sufferance of the priest. For it is necessary that one sword shall be under another and that the temporal authority should be subjected to the spiritual.... If, therefore, the earthly power err, it shall be judged by the spiritual power; if the lesser spiritual power err, it shall be judged by the higher, competent spiritual power; but if the supreme spiritual power [i.e., the pope] should err, it could be judged solely by God, not by man.[74]

Two communities, two cities, two powers, two swords: These were four common models of separationism that obtained in the Western Catholic tradition in the first 1500 years. Each model emphasized different biblical texts. Each started with a different theory of the church. But each was designed ultimately to separate the church from the state. On one extreme, the apostolic model of two communities was a separationism of survival -- a means to protect the church from a hostile state and pagan world. On the other extreme, the late medieval model of two swords was a separation of preemption -- a means to protect the

[73] On various medieval formulations, see Otto von Gierke, Political Theories of the Middle Age 7-21 (F.W. Maitland, trans. 1958); 2 Ewart Lewis, Medieval Political Ideas 506-38 (1954). For patristic antecedents, Caspary, supra note __; Field, supra note __.
[74] Quoted in Church and State, supra note __, at 89-92. For other such later medieval formulations, see Tierney, supra note __, at 180ff.

church in its superior legal rule within a unified world of Christendom.

C. Early Protestant Models

The sixteenth-century Protestant Reformation began as a call for freedom from the late medieval “two swords” regime -- freedom of the church from the tyranny of the pope, freedom of the individual conscience from canon laws and clerical controls, freedom of state officials from church power and privilege. "Freedom of the Christian" was the rallying cry of the early Reformation.[75] Catalyzed by Martin Luther’s posting of the Ninety-Five Theses in 1517 and his burning of the canon law books in 1520, early Protestants denounced church laws and authorities in violent and vitriolic terms, and urged radical reforms of church and state on the strength of the Bible.[76]

After a generation of experimentation, however, the four branches of the Protestant Reformation returned to the same four models of separation that the earlier Catholic tradition had forged -- two communities, two cities, two powers, two swords -- now with new accents and applications.

1. Two Communities. The Anabaptist tradition -- Amish, Hutterites, Mennonites, Swiss Brethren, German Brethren, and others -- returned to a variation of the apostolic model of two communities. Most Anabaptist communities separated themselves into small, self-sufficient, intensely democratic communities, cordoned off from the world by what they called a “wall of separation.”[77] These separated communities governed themselves by biblical principles of

[75] Martin Luther, Freedom of a Christian (1520), reprinted in 31 Luther’s Works 327-77 (J. Pelikan ed. 1955-68).

[76] See sources and discussion in John Witte, Jr., Law and Protestantism: The Legal Teachings of the Lutheran Reformation 33-64 (2002).

[77] The phrase is from Menno Simons, quoted by Dreisbach, supra note __, at 73. See comparable sentiments in The Complete Writings of Menno Simons, c. 1496-1561 29, 117-20, 158-159, 190-206 (L. Verduin trans., J.C. Wenger ed., 1984). See also the call for “separation” in the Schleitheim Confession (1527), art. 4, in Howard J. Loewen, One Lord, One Church, One Hope, and One God: Mennonite Confessions of Faith in North America 79-84 (1985). For the Biblical roots of this Anabaptist separationism, see Biblical Concordance of the Swiss Brethren, 1540 56-60 (C.A. Synder, ed., G. Fast and G.A. Peters trans. 2001)(a frequently reprinted volume listing all the biblical passages on separation that were to be the subject of Anabaptist sermons, devotions, and catechesis).

discipleship, simplicity, charity, and non-resistance. They set their own internal standards of worship, liturgy, diet, discipline, dress, and education. They handled their own internal affairs of property, contracts, commerce, marriage, and inheritance, without appeal to the state or to secular law.[78]

The state, most Anabaptists believed, was part of the fallen world, and was to be avoided so far as possible. Though once the perfect creation of God, the world was now a sinful regime "beyond the perfection of Christ"[79] and beyond the daily concern of the Christian believer. God had allowed the world to survive by appointing magistrates who used the coercion of the sword to maintain a modicum of order and peace. Christians should thus obey the state, so far as Scripture enjoined, such as in paying their taxes or registering their properties. But Christians were to avoid active participation in and interaction with the state and the world. Most early modern Anabaptists were pacifists, preferring derision, exile, or martyrdom to active participation in war. Most Anabaptists also refused to swear oaths, or to participate in political elections, civil litigation, or civic feasts and functions.[80]

This early Anabaptist separationism was echoed in the seventeenth century by Rhode Island founder Roger Williams, who called for a "hedge" or "wall of separation between the garden of the Church and the wilderness of the world."[81] It was elaborated by American Baptist and other Evangelical groups born of the Great Awakening (c. 1720-1780). These latter American groups were principally concerned to protect their churches from state interference. They strove for freedom from state control of their assembly and worship, state regulations of their property and polity, state incorporation of their society and clergy, state interference in their discipline and government, state collection of religious tithes and taxes. Some American Baptist groups went further to argue against tax exemptions, civil immunities, and property donations as well. Religious bodies that received state benefits, they

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[78] See illustrative texts in Anabaptism in Outline 101-14, 211-32 (Walter Klaasen ed. 1981).
[79] The language is from the Schleichtheim Confession (1527), supra note __, at art. 6.
[80] See samples in Anabaptism in Outline, supra note __, at 244-63.
[81] Letter to John Cotton (1643), in 1 The Complete Writings of Roger Williams 392 (1963).

feared, would become too beholden to the state and too dependent on its patronage for survival.[82]

2. Two Kingdoms. The Lutheran tradition returned to a variation on Augustine's two cities theory. The fullest formulation came in Martin Luther's complex two-kingdoms theory, which provided what Luther called a "paper wall" between the spiritual and temporal estates.[83] God has ordained two kingdoms or realms in which humanity is destined to live, Luther argued, the earthly kingdom and the heavenly kingdom. The earthly kingdom is the realm of creation, of natural and civic life, where a person operates primarily by reason and law. The heavenly kingdom is the realm of redemption, of spiritual and eternal life, where a person operates primarily by faith and love. These two kingdoms embrace parallel forms of righteousness and justice, government and order, truth and knowledge. They interact and depend upon each other in a variety of ways. But these two kingdoms ultimately remain distinct. The earthly kingdom is distorted by sin, and governed by the Law. The heavenly kingdom is renewed by grace and guided by the Gospel. A Christian is a citizen of both kingdoms at once and invariably comes under the distinctive government of each. As a heavenly citizen, the Christian remains free in his or her conscience, called to live fully by the light of the Word of God. But as an earthly citizen, the Christian is bound by law, and called to obey the natural orders and offices of household, state, and church that God has ordained and maintained for the governance of this earthly kingdom.

In Luther's view, the church was not a political or legal authority. The church has no sword, no jurisdiction, no daily responsibility for law. The church and its leadership was to separate itself from legal affairs, and attend to the principal callings of preaching the word, administering the sacraments, catechizing the young, and helping the needy. Legal authority lay with the state. The local magistrate was God's vice-regent called to elaborate natural law and to reflect divine justice in his

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[82] See sources in William G. McLoughlin, New England Dissent, 1630-1833 (2 vols. 1971); William G. McLoughlin, Soul Liberty: The Baptists' Struggle in New England ,1630-1833 (1991); Isaac Backus on Church, State, and Calvinism: Pamphlets 1754-1789 (William G. McLoughlin, ed. 1968).

[83] Detailed sources for this subsection are in Witte, supra note __, at 87-117.

local domain. The local magistrate was also the "father of the community" (*Landesvater*). Like a loving father, he was to keep the peace and to protect his subjects in their persons, properties, and reputations. He was to deter his subjects from abusing themselves through drunkenness, sumptuousness, gambling, prostitution, and other vices. He was to nurture his subjects through the community chest, the public almshouse, the state-run hospice. He was to educate them through the public school, the public library, the public lectern. He was to see to their spiritual needs by supporting the ministry of the local church, and encouraging attendance and participation through civil laws of religious worship and tithing.[84]

3. Two Powers. The Calvinist Reformation returned to a variation on the two-powers model, in which both church and state exercised separate but coordinate powers within a unitary local Christian commonwealth.[85] Calvinists insisted on the basic separation of the offices and operations of church and state. Adverting frequently to St. Paul's image of a "wall of separation," John Calvin insisted that the "political kingdom" and "spiritual kingdom" must always be "considered separately." For there is "a great difference between the ecclesiastical and civil power," and it would be "unwise to mingle these two which have a completely different nature."[86] But Calvin and his followers insisted that the church play a role in governing the local Christian commonwealth. In Calvin's Geneva, this role fell largely to the consistory, an elected body of civil and religious officials, with original jurisdiction over cases of marriage and family, charity and social welfare, worship and public morality. Among most later Calvinists -- French Huguenots, Dutch Pietists, Scottish Presbyterians, German Reformed, and English Puritans -- the Genevan-style consistory was transformed into the body of pastors, elders, deacons, and teachers that governed each local church congregation without state interference, and

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[84] See sources and discussion in Witte, supra note __, at 108-15, 129-40, 147-64.

[85] Detailed sources for this subsection are in John Witte, Jr., Moderate Religious Liberty in the Theology of John Calvin, 31 Calvin Theological Journal 359, 392ff. (1996).

[86] See, e.g., John Calvin, *Institutes of the Christian Religion* (F.L. Battles trans.; John T. McNeill, ed. 1559), bk. 3., chap. 19.15; bk. 4., chap. 11.3; bk. 4, chap. 20.1–2. See also 39 *Ioannis Calvini Opera Quae Supersunt Omnia* 352 (G. Baum, et al., eds. 1863); 48 id., at 277.

cooperated with state officials in defining and enforcing public morals.[87]

These early Calvinist views on separationism came to prominent expression in the New England colonies and states.[88] New England Calvinists -- variously called Puritans, Pilgrims, Congregationalists, Independents, Brownists, and Separatists -- conceived of the church and the state as two separate covenantal associations, two seats of Godly authority in the community, each with a distinct polity and calling. The church was to be governed by pastoral, pedagogical, and diaconal authorities who were called to preach the word, administer the sacraments, teach the young, and care for the poor and the needy. The state was to be governed by executive, legislative, and judicial authorities who were called to enforce law, punish crime, cultivate virtue, and protect peace and order.

Church and state officials were to remain separate. Church officials were prohibited from holding political office, serving on juries, interfering in governmental affairs, endorsing political candidates, or censuring the official conduct of a statesman. Political officials, in turn, were prohibited from holding ministerial office, interfering in internal ecclesiastical government, performing sacerdotal functions of clergy, or censuring the official conduct of a cleric. But church and state officials could and should make common cause in serving the common good of the community as a whole -- cooperating in the maintenance of public religion, morality, education, charity, and other good works.

4. Two Swords. The Anglican tradition returned to a variation on the two-swords theory, but now with the English Crown, not the pope, holding the superior sword within the unitary Christian commonwealth of England. In a series of Acts passed in the 1530s, King Henry VIII severed all legal and political ties between the Church in England

[87] See representative articles in John Calvin's Thought on Economic and Social Issues and the Relation of Church and State (Richard C. Gamble, ed. 1992) and the classic study of Josef Bohatec, Calvins Lehre von Staat und Kirche mit besonderer Berücksichtigung des Organismusgedankens (1961).

[88] Emil Oberholzer, Delinquent Saints: Disciplinary Actions in the Early Congregational Churches in Massachusetts (1956): David A. Weir, Church Covenants and Covenanting in Seventeenth-Century New England (2003). See key documents in Williston Walker, The Creeds and Platforms of Congregationalism (1991).

and the pope.[89] The Supremacy Act (1534) declared the English monarch to be "the only Supreme Head" of the Church and Commonwealth of England, with final spiritual and temporal authority.[90] The Tudor monarchs and Parliaments thus established a uniform doctrine, liturgy, and canon by issuing the Book of Common Prayer, Thirty-Nine Articles, and Authorized (King James) Version of the Bible. They also assumed final legal responsibility for poor relief, marriage, education, and other activities, delegating some of this responsibility back to the church courts. Clergy were appointed, supervised, and removed by the Crown and its delegates. Communicant status in the Church of England was rendered a condition for citizenship status in the Commonwealth of England. Contraventions of royal religious policy were punishable both as heresy and as treason. A whole battery of apologists rose to the defense of this alliance of church, commonwealth, and crown, notably Thomas Cranmer, Richard Hooker, and Robert Filmer.

Richard Hooker's lengthy apologia for the Anglican establishment was particularly significant, for he offered a sustained rebuke to English separationists. In the later sixteenth and seventeenth centuries, various non-Anglican Protestant groups in England -- Puritans, Brownists, Congregationalists, Baptists, Quakers, and other self-styled "Separatists"[91] -- had called the English church and state to a greater separation from each other and from the Church of Rome. They also had called their own faithful to a greater separation from the Church and Commonwealth of England. Richard Hooker had no patience with any of this. In his massive *Laws of Ecclesiastical Polity* (1593-1600),

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[89] See sources in Carl F. Stephenson, and Frederick G. Marcham, Sources of English Constitutional History 304-12 (1937).

[90] Reprinted in ibid., 311, with discussion in Josef LeCler, Toleration and the Reformation, 329-79 (1960).

[91] On various English and New England "separatists" see Champlin Burrage, The Early English Dissenters in the Light of Recent Research (1550-1641) (2 vols. 1912); James R. Coggins, John Smyth's Congregation: English Separatism, Mennonite Influence, and the Elect Nation 29-68, 128-32 (1991); B.R. White, The English Separatist Tradition: From the Marian Martyrs to the Pilgrims Fathers (1971); Timothy George, John Robinson and the English Separatist Tradition (1982); C.C. Goen, Revivalism and Separatism in New England, 1740-1800 (1962); Norman A. Baxter, History of the Freewill Baptists: A Study in New England Separatism (1957); Edward H. Bloomfield, The Opposition to the English Separatists, 1570-1625 (1981); Stephen Brachlow, The Communion of Saints: Radical Puritan and Separatist Ecclesiology (1988); Verne D. Morey, The Brownist Churches: A Study in English Separatism, 1553-1630 (Ph.D. Diss. Harvard, 1954).

Hooker recognized a "natural separation" between the Church and the Commonwealth of England. But he insisted these two bodies had to be "under one Chief Governor."[92] For Hooker, those Separatists who sought to erect "a wall of separation" between church and commonwealth would destroy English unity and deprive its church of the natural and necessary patronage and protection of the Crown. It was a short step from this argument to the bitter campaigns of persecution in the early seventeenth century that drove many thousands of separatists from England to Holland and then to North America.

D. Significance of This Earlier History

Professors Dreisbach and Hamburger pick up the story from here, each pausing to inspect the views of Richard Hooker and Roger Williams[93] before plunging into more familiar texts by James Burgh, Thomas Paine, Isaac Backus, James Madison, George Washington, Thomas Jefferson and many others. Dreisbach recognizes full well "that the 'wall of separation' has a long history in Western theological and political discourse" before the eighteenth century (pp. 82, 104), topics on which he has written astutely before.[94] In this book, Dreisbach focuses deliberately on American examples.

Hamburger, however, argues that "in the centuries before 1800 the idea of the separation of church and state appealed to only a tiny fraction of Europeans and Americans" (pp. 21, 63). The occasional references to separation that do exist before Jefferson's 1802 letter to the Danbury Baptists, he argues, were "incomplete," "partial," "undeveloped," "nascent manifestations" (pp. 5-6, 23-5, 29, 57, 79). They either had "nothing to do" with separation of church and state (pp. 79-88), or were at best "sort of," "close to," or "almost espoused" formulations (p. 55, 58) that "found little support" (pp. 56, 59, 60).

In fact, there was a great deal of support for separation of church and state in earlier American and

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[92] Richard Hooker, Of the Laws of Ecclesiastical Polity bk. VIII.1.2,7 (A.S. McGrade ed. 1989). See Dreisbach, supra note __, at 73-6; Hamburger, supra note __, at 32-8.

[93] Dreisbach, supra note __,at 73-79; Hamburger, supra note _, at 32-45, 50-53.

[94] See comments in Dreisbach, supra note __, at 72-3, and sources in id., at 250-51.

European traditions, little of which makes its way into Professor Hamburger's volume. As the foregoing thumbnail sketch illustrates, Catholics and Protestants alike had robust, diverse, and evolving theories of separation of church and state, many grounded in the Bible and classical texts. The archives hold a massive farrago of unexplored sermons and commentaries on the many biblical passages that call for (walls of) separation between the faithful and fallen, the religious and the political, the priests and the people, the church and the state. The archives also hold a whole arsenal of legal and political provisions that churchmen and statesmen forged over the centuries to delimit their respective offices and powers and to determine their mutual responsibilities and rights.

Much of this rich history is lost in Hamburger's early chapters that repeatedly juxtapose the views of "religious establishments" and "religious dissenters." Religious establishmentarians, in his view, were by definition not separationist. Religious dissenters were not separationist either, he argues, but were "falsely accused" of being so by the religious establishment (pp. 65-80).

The binocular of establishment v. dissenter, however, does not bring the many varieties of separationism into proper focus. Religious establishmentarians and religious dissenters alike taught different forms of separationism, and these often clashed. Thus, for example, in seventeenth-century England, Calvinists who sought a different separation of church and state than prevailed in the Anglican establishment were called dissenters. In seventeenth century New England, however, Calvinists were the religious establishment and the Anglicans in their midst were the dissenters. Yet the seventeenth-century Calvinist doctrines of separation of church and state were virtually identical on both sides of the Atlantic.[95] Similarly, eighteenth-century Presbyterians in Scotland were part of the religious establishment, but when they moved to America, they were usually treated as religious dissenters, even in Puritan New England. And while Professor Hamburger lumps these Presbyterians in with other American dissenters (pp. 92-4, 102-4), American Presbyterians not only divided bitterly on issues of

[95] See, e.g., Edmund S. Morgan, Puritan Political Ideas (1954); John Witte, Jr., How to Govern a City on a Hill: Early Puritan Contributions to American Constitutionalism, 39 Emory L.J. 41 (1990).

separationism,[96] but their views differed markedly from those taught by other so-called "religious dissenters" in America -- Baptists, Quakers, Methodists, Lutherans, Moravians, Mennonites, Reformed, and others.[97]

Professor Hamburger too readily equates the separation of church and state with the disestablishment of religion in judging the pre-nineteenth century material.[98] He thus too easily dismisses the varieties of separation that were taught by religious establishmentarians -- even when they expressly called for (a wall of) separation between church and state. And he too easily passes over many sermons and theological writings of "religious dissenters" that were not directed to advocating the disestablishment of religion -- even though they, too, sometimes sounded in separationist terms.

Moreover, after learning that the pre-nineteenth century references to separationism that Hamburger does discuss were all only "partial," "incomplete," "nascent," "close to," but "not quite" separationist, a reader could rightly expect a very clear and detailed definition of separation of church and state against which these writings are being measured. But no such definition appears. Professor Hamburger properly warns the reader in his Introduction (pp. 8-14) that eighteenth-century definitions of separationism should not be equated with the twentieth century separationism of the Supreme Court. I agree completely. But what then is the eighteenth-century definition of separation of church and state against which earlier theories are being judged? The book does not say.

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[96] See, e.g., the debates over reformulation of the provisions on church and state in the Westminster Confession (1647) in 1 Creeds of Christendom With a History and Critical Notes 807-8 (Philip Schaff ed., 3d. enlarged ed. 1881) [hereafter "Creeds"]; 2 id., at 653-54; Williston, supra note __, at 388-97.

[97] See detailed religious demography in Edwin S. Gaustad and Philip L. Barlow, The New Historical Atlas of Religion in the United States (2001).

[98] See, e.g., Hamburger, supra note __, at 23, 36-38, 53-4, 58, 79-83 (arguing repeatedly that certain texts were not really separationist because their authors still countenanced an established religion). This stands in contrast to a central method and thesis of the rest of his volume: "Underlying the story recorded here is the distinction between the separation of church and state and the constitutional freedom from a religious establishment. For many Americans, the differences between these ideals has become difficult to discern [see examples ibid., at 6-9]. The difference, however, was of profound importance to earlier Americans." Ibid., at 479-80.

IV. Exodus: The Routes of American Separationism

A. Five Varieties of Separationism

None of this is to say that eighteenth- and nineteenth-century Americans simply repeated earlier European formulations of separation of church and state. To the contrary, as both Professors Hamburger and Dreisbach make abundantly clear, American writers adopted and adapted the principle of separation of church and state to express a variety of new (or newly prominent) ideals. At least five understandings of separationism became commonplace in the opening decades of the American republic.

First, separationism aimed to protect the church from the state. This had long been a dominant motif in European Catholic and Protestant writings. The concern was to protect church affairs from state intrusion, the clergy from the magistracy, ecclesiastical rules and rites from political coercion and control. This accent continued and grew in American discussions of separationism. George Washington, for example, wrote in 1789 of the need "to establish effectual barriers against the horrors of spiritual tyranny and every species of religious persecution" so that there was no threat "to the religious rights of any ecclesiastical Society."[99] This ideal of separationism was captured in state and federal constitutional guarantees of freedom of association and free exercise rights of religious groups.[100]

Second, separationism served to protect the liberty of conscience of the religious believer from the intrusions of both church and state. This had been an early and enduring aspiration of some Anabaptist and Quaker separationist writers in Europe.[101] It became a commonplace in eighteenth- and nineteenth-century America. "Every man has

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[99] Quoted and discussed in Dreisbach, supra note __, at 84-5.

[100] See samples in John Witte, Jr. Religion and the American Constitutional Experiment: Essential Rights and Liberties 42-44, 88-91, 246-49 (2000).

[101] See, e.g., William Penn, The Great Case of Liberty of Conscience (1670), reprinted in The Political Writings of William Penn 79-119, esp. 101, 112 (Andrew R. Murphy ed., 2002). See other examples in Brian Tierney, Religious Rights: A Historical Perspective, in Religious Liberty in Western Thought 29, 50-55 (Noel B. Reynolds and W. Cole Durham, Jr. eds. 1996).

an equal right to follow the dictates of his own conscience in the affairs of religion ... and to follow his own judgment wherever it leads him," one pamphleteer wrote. This is "an equal right with any rulers be they civil or ecclesiastical."[102] This goal of separationism was captured in the numerous state constitutional guarantees of liberty of conscience.[103]

Third, separationism served to protect the state from the church. This was a more novel sentiment in early America, but it was pressed with increasingly alacrity at the turn of the nineteenth century. Tunis Wortman, for example, wrote: "Religion and government are equally necessary, but their interests should be kept separate and distinct."[104] "Upon no plan, no system can they become united, without endangering the purity and usefulness of both -- the church will corrupt the state, and the state pollute the church."[105] This goal of separationism was particularly pronounced in state constitutional and statutory prohibitions on clerical participation in political office.[106]

Fourth, separationism served to protect individual state governments from interference by the federal government in governing their local religious affairs. As Professor Dreisbach astutely argues, this "jurisdictional view" of separationism was part and product of the American founders' experiment in federalism (pp. 55-70). The founders regarded religion as a "subject reserved to the jurisdictions of the individual, religious societies, and state governments; the federal government was denied all authority in matters pertaining to religion" (p. 56). The individual's jurisdiction over religion was protected by the constitutional principle of liberty of conscience. The church's jurisdiction was protected by the constitutional principles of free exercise and free association. The individual state's jurisdiction was protected by the constitutional principles of federalism. On this jurisdictional reading of separationism, state governments

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[102] Elisha Williams, The Essential Rights and Liberties of Protestants 7-8 (1744).
[103] See samples in Witte, supra note __, at 39-42, 88-89, 246-49.
[104] Quoted and discussed in Hamburger, supra note __, at 118-36.
[105] Ibid.
[106] See Hamburger, supra note __, at 79-88; Daniel L. Dreisbach, The Constitution's Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban, 38 J. Church & St. 261 (1996).

were free to patronize, protect, and participate in religious affairs, so long as they did not trespass the religious freedom of religious bodies or individuals. But the federal government was entirely foreclosed from the same.

Fifth, separationism served to protect society from unwelcome participation in and support for religion. In the eighteenth-century, this view of separationism drove the many campaigns against mandatory payments of tithes, required participation in swearing oaths, or forced attendance at religious services.[107] In the nineteenth century, this view of separationism drove the growing campaigns to separate religion and politics altogether. This was the most novel, and the most controversial, form of separationist logic to emerge in American history.

Hamburger documents the nineteenth-century unfolding of this fifth form of strict separationist logic and rhetoric in stunning detail. Attempts to implement this separationism at law caused endless rounds of bitter fighting throughout the nineteenth century. The fighting began with the infamous battles between Federalists and Republicans over the election of Thomas Jefferson (pp. 111-43). The fighting continued in the successive state (and sometimes federal) battles over dueling, freemasonry, lotteries, drunkenness, Sunday laws, slavery and abolition, marriage and divorce reforms, women suffrage, religious education, blasphemy prosecutions, enforcement of Christian morals, and more (pp. 244-47, 262-67, 305-08, 355-57, 391-99, 414-17, 445-46). And the fighting broke out yet again in the great, but ultimately futile, battles to amend the U.S. Constitution, either with overtly pro-Christian or covertly anti-religious sentiments (pp. 287-334).

B. First Amendment Separationism?

It is an interesting, but largely passing, question for both these authors which of these views of separationism, if any, informed the First Amendment religion clauses. That subject has been argued at inordinate length by others, and the authors accordingly state their views briefly.[108] The First Amendment provides:

[107] Hamburger, supra note __, at 11-12.
[108] Id., at 9-13, 89-107; Philip A. Hamburger, “Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Both authors agree that this language has nothing to do with the fifth form of strict separation of religion and politics. Dreisbach argues that the First Amendment was the crowning piece of the fourth type of "jurisdictional" separationism. It was a guarantee that the federal government ("Congress") could make no law respecting religion, for such matters were left to the states, who were unaffected by the First Amendment (pp. 1-4, 58-70). Hamburger argues that the First Amendment does not deal with separationism at all. For him, the First Amendment was a demand for "a religious liberty that limited civil government, especially civil legislation, rather than for a religious liberty conceived as a separation of church and state. Moreover, in attempting to prohibit the civil legislation that would establish religion, they sought to preserve the power of government to legislate on religion in other ways" (p. 107).

The cryptic record of the debates over the First Amendment religion clauses can support both these readings -- and many others. My own reading is that the disestablishment and free exercise clauses provided interlocking guarantees that at least touched on the first four types of separationism, but not on the fifth. In my view, the free exercise clause was intended to outlaw Congressional proscriptions of religion -- actions that unduly burdened the conscience, restricted religious exercise, discriminated against religion, or invaded the autonomy of churches and other religious bodies. The disestablishment clause was intended to outlaw Congressional prescriptions of religion -- actions that coerced the conscience, mandated forms of religious exercise, discriminated in favor of religion, or improperly allied the state with churches or other religious bodies.[109] While the term "separation of church and state" makes no appearance in the First Amendment text, the principle of separationism does, and in various forms.[110]

Rights, 1992 Supreme Court Review 347; Philip A. Hamburger, A Constitutional Rights of Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915 (1992). See Dreisbach, supra note __, at 55-76; Daniel L. Dreisbach, A Lively and Fair Experiment: Religion and the American Constitutional Tradition, 49 Emory L. J. 223 (2000).

[109] Witte, supra note __, at 37-86.

[110] See also id., at 91-96 (arguing similarly that while the term "separation of church and state" does not appear in the texts of

C. Thomas Jefferson's Separationism

The more interesting question for both these authors is what views of separationism were espoused by Thomas Jefferson. More particularly, what views did Thomas Jefferson espouse in his famous 1802 Letter to the Danbury Baptist Association, which the Supreme Court has repeatedly used as the authoritative gloss on the First Amendment text?[111]

The Danbury Letter must be underscored in political context, and both authors take great pains to provide the same.[112] Less than two years before, Jefferson had barely survived a brutal Presidential campaign against incumbent John Adams. Leaders of Adams' Federalist party charged that Jefferson was an immoral, deist, Jacobin infidel, bent on severing government from its necessary religious roots and essential clerical alliances. Particularly vehement in this attack were the New England clergy who presided over the established Congregationalist churches. Leaders of Jefferson's Republican party countered that Jefferson was a Christian, albeit of an unusual sort, who saw separation of church and state essential to the protection of religious liberty. Some went further and urged officious establishment churchmen either to give up their political platforms or to give up their political perquisites. Clergy should not claim exemptions from government burdens yet claim special entitlements to preach about politics. The political and theological stakes in this political battle were very high. Jefferson, already no warm friend of clergy, came away with a bitter hatred for the established clergy of New England -- those "barbarians" and "bigots in religion and government," as he complained privately.[113]

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nineteenth-century state constitutions, the principle of separation of church and state does). Interestingly, while Hamburger eschews such analysis regarding the First Amendment, he interprets several nineteenth-century federal and state provisions as separationist in spirit, even if not in letter. See, e.g., Hamburger, supra note __, at __.

[111] For Supreme Court cases that cite the letter, see Dreisbach, supra note __, at 95-106; Hamburger, supra note __, at 6-7, 454-78.

[112] See Dreisbach, supra note __, at 25-54; Hamburger, supra note __, at 111-55.

[113] Quoted by Edwin S. Gaustad, Sworn on the Altar of God: A Religious Biography of Thomas Jefferson 93 (1996).

One year into his Presidency, Thomas Jefferson received a congratulatory letter from a small company of Baptists in Danbury, Connecticut. Chafing under the restrictions and taxes imposed by the Congregationalist establishment of Connecticut, this obscure company of Baptists also requested Jefferson for counsel on how better to secure religious liberty in the state. Jefferson saw in this letter a welcome occasion to sow "useful truths and principles" among friends and foes alike about his views of religious liberty.[114] He aimed in particular, as he put it, to condemn "the alliance of church and state, under the authority of the Constitution" and to explain why he as President did not offer Thanksgiving Day proclamations and prayers, even though he had done so as Governor of Virginia.[115] The first draft of the letter sought to accomplish both goals. His Attorney-General, Levi Lincoln, advised Jefferson to drop the discussion of Thanksgiving proclamation, for fear of offending Republican friend and Federalist foe alike.[116] Jefferson obliged him, and issued the final letter on January 1, 1802. After its opening salutation the full letter reads thus:

Believing with you that religion is a matter which lies solely between Man and his God, that he owes account to none other for his faith or his worship, that the [legitimate] powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that the act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State. [A]dhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

I reciprocate your kind prayers for the protection & blessing of the common father and creator of man, and

[114] Dreisbach, supra note __, at 43.
[115] Id., at 43-44; Governor Jefferson's proclamation is in id., at 137-39.
[116] Levi's letter is quoted in id., at 44-45. The changes that Jefferson made are tabulated in id., at 48-9.

tender you for yourselves and your religious association, assurances of my high respect & esteem.[117]

Professor Dreisbach reads this letter as a part and product of Jefferson's jurisdictional separationism. Jefferson had said many times that no branch of the federal government, including the executive branch, had jurisdiction over religion. Religion was entirely a state and local matter. As he put it famously in his Second Inaugural: "In matters of religion, I have considered that its free exercise is placed by the constitution independent of the general [federal] government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it; but have left them, as the constitution found them, under the direction and discipline of State or Church authorities."[118] *Governor* Jefferson's ample earlier religious activities thus provided little guidance or precedent for what he could do as President. As President he had to be more circumspect in matters religious. In his return letter, therefore, President Jefferson did not counsel the Danbury Baptists on how to undo the Connecticut establishments, nor did he condemn the establishment clergy themselves. Jefferson's was a more subtle and suitable presidential approach of "sowing useful truths and principles" about the meaning of religious liberty in the young nation.

After a meticulous sifting of the various drafts of the Danbury Letter, Dreisbach concludes: "A universal principle of church-state separation applicable at all levels of civil government -- local, state, and federal -- was *not* among the seeds deliberately sown. Jefferson deliberately stated that his project was to address church-state relations 'under the authority of the Constitution', and he clearly recognized that the First Amendment, with its metaphoric barrier, was applicable to the federal government only.... The 'wall of separation' metaphor reconceptualized the First Amendment in terms of *separation* between church and (federal) state."[119] The final letter said nothing directly about the free exercise or nonestablishment of religion clauses. But Jefferson's view

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[117] Reprinted in ibid., at 148. This edition corrects the punctuation of the common edition in 8 The Writings of Thomas Jefferson 113-14 (H. Washington ed. 1853-4), and properly uses the original word "legitimate" rather than "legislative."

[118] Quoted in Dreisbach, supra note __, at 152.

[119] Id., at 53-54.

of the nonestablishment prohibition on the federal government "was much more expansive than virtually all previous interpretations," for he had intended to go so far as to outlaw presidential Thanksgiving Day proclamations.[120]

Professor Hamburger reads Jefferson's letter as part and product of Jefferson's abiding anticlericalism, his desire to separate clergy, and indeed religion altogether from the state and the political process. Jefferson hated the clergy, Hamburger argues, and the bitter 1800 campaign only deepened his resolve to separate them from matters political. Owing to their religious privileges, the clergy were both politically and psychologically powerful. They held "a mental tyranny over the mind of men," dulling them into "steady habits," "stable institutions" and routine rituals that impeded progress, experimentation, and novelty, the lifeblood of liberty (pp. 148-9).

It would be better for the clergy to stick to their specialty of soulcraft rather than interfere in the specialty of statecraft. Religion is merely "a separate department of knowledge," Jefferson wrote, alongside other specialized disciplines like physics, biology, law, politics, and medicine. Preachers are the specialists in religion, and are hired to devote their time and energy to this specialty. "Whenever, therefore, preachers, instead of a lesson in religion, put them off with a discourse on the Copernican system, on chemical affinities, on the construction of government, or the characters of those administering it, it is a breach of contract, depriving their audience of the kind of service for which they were salaried."[121]

This is a marvelous insight into one aspect of Jefferson's theory of religious liberty. It goes beyond the typical argument that Jefferson's theory of society sought to privatize religion, leaving the public square open to the discourse of reason. What Hamburger shows is that Jefferson's theory of knowledge also sought to compartmentalize religion, leaving the department of politics and law free from clerical influence or interference. This is not only an intriguing new epistemology of separation. It is also an anticipation of the positivist philosophy of knowledge made famous two

[120] Id., at 54.
[121] Letter to P.H. Wendover (March 13, 1815), quoted and discussed in Hamburger, supra note __, at 152-54.

decades later by French philosopher Auguste Comte that sought to differentiate all of human knowledge into a series of separate disciplines and specialties.[122]

While Hamburger's account of Jefferson's anticlericalism is compelling, I find less compelling his argument that this was the import of Jefferson's 1802 Danbury Letter. First, this religious specialization thesis is the subject of an unsent letter of 1815, prepared more than a decade after the Danbury Letter. Second, there is not a word of anticlericalism in the Danbury Letter. Hamburger says that Jefferson's phrase "with sovereign reverence" was intended irony aimed to tweak the New England establishment clergy (p. 147). But why should it be ironic or strategic? Jefferson did revere the divine, albeit unconventionally. Moreover, in the letter's concluding paragraph, which Hamburger does not quote, Jefferson did show "sovereign reverence" and invoked God's name in reciprocating the Danbury Baptists' prayers.

Both these readings of Jefferson's Letter to the Danbury Baptists are very novel and very provocative. Despite their differences, they both show how multiple views of separation of church and state can be plausibly read in this famous text. Another view of separationism can be read in the text as well, namely, Jefferson's explicit concern to separate church and state for the protection of individual conscience. Liberty of conscience had long been one of Jefferson's central preoccupations. He had stated his view with particular flourish in his 1786 Act for the Establishment of Religious Freedom.[123] This preoccupation with liberty of conscience continues in his 1802 Letter, as much of the long first sentence makes clear: "... religion is a matter which lies solely between a man and his God, that he owes account to none other for his faith or his worship, that the [legitimate] powers of government reach actions only, and not opinions...." Then after reciting his memorable "… thus building a wall of separation between church and State," he says that "this expression of the supreme will of the nation [was] in behalf of the rights of conscience," and designed "to

[122] See Harriet Martineau, The Positive Philosophy of Auguste Comte (1853).
[123] 12 The Statutes of Large ... of Virginia 84-86. The 1779 Draft Bill is in Dreisbach, supra note __, at 133-35.

restore to man all his natural rights, convinced he has no natural right in opposition to his social duties."[124]

Separationism thus assured individuals of their natural, inalienable right of conscience, which could be exercised freely and fully to the point of breaching the peace or shirking social duties. Jefferson is not talking here of separating politics and religion altogether, nor is he eschewing federal religious activity altogether. Indeed, in the last paragraph of his letter, President Jefferson performed an avowedly religious act of offering prayers on behalf of his Baptist correspondents: "I reciprocate your kind prayers for the protection and blessing of the common Father and Creator of man."[125]

D. Separationism and Anti-Catholicism

The bitter political struggles of 1800 were but the opening shots in a century-long American battle over the meaning and means of separating church and state. It was a battle fought in Congress and in the courts, in states and on the frontier, in churches and in the schools, in clubs and at the ballot box. It was largely a war of words, occasionally a war of arms. The battles included many familiar foes -- Republicans and Federalists, the north and the south, native Americans and new emigrants, the cities and the countryside. It also included a host of newly established political groups: the American Protestant Association, the Know-Nothing Party, the Ku Klux Klan, the American Protective Association, the National Liberal League, the American Secular Union, the National Reform Association, the Masonic League, and many more. All these antagonists make appearances on Hamburger's wide stage, tell their separationist stories in long quoted pamphlets, briefs, and speeches, before yielding the stage to others. This is an extraordinary drama that Hamburger tells with great flourish and power.

I would like to focus on just one running episode in this great battle, the repeated clashes between Protestants and Catholics over separationism. The long and sad story of the anti-Catholicism of American Protestants is well known. In ca. 1790, American Protestants and Catholics had

[124] Quoted in Dreisbach, supra note __, at 144-45.
[125] See supra note __.

seemed ready to put their bitter and bloody battles behind them. But with the swelling tide of Catholic émigrés into America after the 1820s -- all demanding work, building schools, establishing charities, converting souls, and gaining influence -- native-born Protestants and patriots began to protest. Catholic bashing became a favorite sport of preachers and pamphleteers. Then rioting and church-burnings broke out in the 1830s and 1840s, followed by even more vicious verbal pillorying and repressive actions against Catholics that continued well into the twentieth century. This sad and ugly story is well known, and Hamburger recounts it faithfully (esp. pp. 191-252, 272-302).

What Hamburger makes clear is that the principle of separation of church and state became one of the strong new weapons in the anti-Catholic arsenal. Foreign Catholics were for the union of church and state, the propagandists claimed. American Protestants were for the separation of church and state. To be a Catholic was to oppose separationism and American-style liberties. To be a Protestant was to defend separationism and American-style liberties. To bash a Catholic was thus not a manifestation of religious bigotry, but a demonstration of American patriotism. Protestants and patriots began to run closely together, often tripping over each other to defend separationism and to decry and deny Catholics for their failure to do so (esp. pp. 201-240).

Hamburger properly indicts scores of Protestant leaders and followers for their participation or complicity in the violence and political scheming against Catholics on the pretext or platform of separation of church and state. He properly points to the battles over school and school funding as the arena where the fighting was fiercest (pp. 219-29, 321-22, 340-41, 412-18). All this is a salutary corrective to more pro-Protestant traditional accounts.

But it is important that the corrected story not now be read as a simple dialectic of Protestant separationist hawks versus Catholic unionist doves. And it is important to be clear that the Protestant-Catholic battle over the doctrine of separation of church and state had two sides, with Catholics giving as well as taking, winning as well as losing. Professor Hamburger takes pains to show that not all Protestants and Catholics participated in these rivalries, and that not all these rivalries turned on

separation of church and state (pp. 219-46). These caveats deserve a bit more amplification.

First, many American Catholic clergy were themselves separationists, building their views in part on the ancient patristic models of two communities, two cities, and two powers.[126] Moreover, a good number of American Catholic clergy saw separation of church and state as an essential principle of religious liberty and embraced the doctrine without evident cavil or concern. Alexis de Tocqueville, for one, noted this in his *Democracy in America* (1835):

In France, I had seen the spirits of religion and freedom almost always marching in opposite directions. In America, I found them intimately linked together in joint reign over the same land. My longing to understand the reason for this phenomenon increased daily. To find this out, I questioned the faithful of all communions; I particularly sought the society of clergymen, who are depositaries of the various creeds and have a personal interest in their survival. As a practicing Catholic I was particularly close to the Catholic priests, with some of whom I soon established a certain intimacy. I expressed my astonishment and revealed my doubts to each of them; I found that they all agreed with each other except about details; all thought that the main reason for the quiet sway of religion over the country was the compete separation of church and state. I have no hesitation in stating that throughout my stay in America I met nobody, lay or cleric, who did not agree about that.[127]

Second, many Protestant anti-Catholic writings started not so much as attacks upon American Catholics as counterattacks to several blistering papal condemnations of Protestantism, democracy, religious liberty, and separation of church and state. In *Mirari vos* (1832), for example, Pope Gregory XVI condemned in no uncertain terms all churches that deviated from the Church of Rome, and all states that granted liberty of conscience, free exercise, and free speech to their citizens.[128] For the pope it was an “absurd and erroneous proposition which claims that

[126] See supra notes __ and accompanying text.
[127] Alexis de Tocqueville, Democracy in America 295 (J.P. Mayer ed., G. Lawrence trans. 1969)(paragraph breaks removed).
[128] See Hamburger, supra note __, 229-234 (discussing some of this papal document and Protestant reactions thereto) .

liberty of conscience must be maintained for everyone."[129] The pope "denounced freedom to publish any writings whatever and disseminate them to the people.... The Church has always taken action to destroy the plague of bad books."[130] He declared anathema against the "detestable insolence and probity" of Luther and other Protestant "sons of Belial," those "sores and disgraces of the human race" who "joyfully deem themselves 'free of all'."[131] Even worse, the Pope averred, "were the plans of those who desire vehemently to separate the Church from the state, and to break the mutual concord between temporal authority and the priesthood."[132] The reality, the Pope insisted, was that state officials "received their authority not only for the government of the world but especially for the defense of the Church."[133]

In the blistering *Syllabus of Errors* (1864), the papacy condemned as cardinal errors the propositions that:

18. Protestantism is nothing more than another form of the same true Christian religion, in which it is equal pleasing to be than in the Catholic Church.
19. The Church is not a true, and perfect, and entirely free society, nor does she enjoy peculiar and perpetual rights conferred upon her by her Divine Founder, but it appertains to the civil power to define what are the rights and limits with which the Church may exercise authority....
24. The church has not the power of availing herself of force, or any direct or indirect temporal power....
55. The Church ought to be separate from the State, and the state from the Church.[134]

In place of these cardinal errors, the papacy declared that the Catholic Church was the only true church, which must, as in medieval centuries past, enjoy unlimited power in both spiritual and temporal affairs, unchecked by the state.[135] Six years later, the church declared the pope's teachings to be infallible, and condemned Protestants as

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[129] Mirari Vos (On Liberalism and Religious Indifferentism), in www.petersnet.net/browse/3881.htm, para. 14.
[130] Id., paras. 15-16.
[131] Id., para. 19. "Belial" means the "spirit of evil personified" or "fallen angel." Oxford English Dictionary s.v. "belial" (1971).
[132] Mirari vos, supra note __, at para. 20.
[133] Id. para. 23.
[134] The Papal Syllabus of Errors (1864), in 2 Creeds, supra note __, at 213, 217-19, 227.
[135] 2 id. at 218-33 (paras. 20, 24-35, 41-44, 53-54, 75-80).

"heretics" who dared subordinate the "divine magisterium of the Church" to the "judgment of each individual."[136]

It is perhaps no surprise that American Protestants repaid such alarming comments in kind -- and then with interest. The pope, as Americans heard him, had condemned the very existence of Protestantism, and the very fundamentals of American democracy and liberty -- effectively calling the swelling population of American Catholics to arms. Many Protestants saw in the papacy's favorable references to its past medieval powers[137] specters of the two-swords theory by which the papacy had claimed supreme rule in a unified Christendom.[138] This simply could not be for Protestants. Conveniently armed with new editions of the writings of Martin Luther,[139] John Calvin,[140] and others,[141] American Protestants repeated much of the vitriolic anti-Catholic and anti-clerical rhetoric that had clattered so loudly throughout the sixteenth century. At least initially, the loud commendation of America's separation of church and state and loud condemnation of the Catholic union of church and state was more a rhetorical quid pro quo to the papacy than a political low blow to American Catholics. Inevitably, there was plenty of political imitation and plenty of cheap shots taken at the American Catholic clergy, particularly those who echoed the papacy. And inevitably, this rhetoric brought anti-Catholicism and pro-separationism into close association -- particularly when it was taken up by secular political groups, few of whom spoke for most mainstream Protestants.

Third, when local anti-Catholic measures did pass, as they too often did, both the U.S. Supreme Court and Congress did sometimes provide Catholics with some relief. Thus in *Cummings v. Missouri* (1866), the Court held that a

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[136] The Dogmatic Decrees of the Vatican Council Concerning the Catholic Faith and the Church of Christ (1870),reprinted in 2 Creeds, supra note __, at 234, 236.
[137] Id., at 221 (para. 34).
[138] See supra notes _-_.
[139] See Eric W. Gritsch, A History of Lutheranism 179-216 (2002); Eric W. Gritsch and Robert Jenson, Lutheranism: The Theological Movement and its Confessional Writings (1976).
[140] See W. de Greef, The Writings of John Calvin (trans. L.D. Bierma 1993).
[141] See esp. John Adams, A Dissertation on the Canon and Feudal Law (1774), reprinted in 3 The Works of John Adams 451 (J.F. Adams ed. 1850)(denouncing Catholic canon law and papal authority for its intrusions on liberty).

state may not deprive a Catholic priest of the right to preach for failure to take a mandatory oath disavowing his support for the confederate states.[142] In *Watson v. Jones* (1871) and *Bouldin v. Alexander* (1872), the Court required civil courts to defer to the judgment of the highest religious authorities in resolving intrachurch disputes, explicitly extending that principle to Catholics.[143] In *Church of the Holy Trinity v. United States* (1892), the Court refused to uphold a new federal law forbidding contracts with foreign clergy, a vital issue for Catholic clergy.[144] In *Bradfield v. Roberts* (1899), the Court upheld, against establishment clause challenge, a federal grant to build a Catholic hospital in the District of Columbia.[145] In *Quick Bear v. Leupp* (1908), the Court upheld the federal distribution of funds to Catholic schools that offered education to Native Americans.[146] In *Order of Benedict v. Steinhauser* (1914), the Court upheld a monastery's communal ownership of property against claims by relatives of a deceased monk.[147] In *Pierce v. Society of Sisters* (1925), the Court invalidated a state law making public school attendance mandatory, thereby protecting the rights of Catholic parents and schools to educate children in a religious school environment.[148] A good number of these Supreme Court holdings were, in part, expressions of the principle of separation of church and state. And there were more such Catholic victories in state courts, in cases that also sometimes sounded in separationist terms.[149]

Fourth, it is going too far, in my view, to allege that Protestants invented the doctrine of church and state to wage their battles with Catholics or that they rewrote history to claim they had invented separationism earlier and had inscribed it onto American constitutional law (pp. 201-219, 246-51, 342-59). This is a rather remarkable charge of conspiracy and fraud that will take more than a few selected anecdotes to prove. This charge presupposes that Protestants did not teach separation of church and state before the mid-nineteenth century. But they did.[150] This charge presupposes that earlier American

[142] 71 U.S. (4 Wall.) 277 (1866).
[143] 80 U.S. (13 Wall.) 679 (1871) and 82 U.S. (15 Wall.) 131 (1872).
[144] 143 U.S. 457 (1892).
[145] 175 U.S. 291 (1899).
[146] 210 U.S. 50 (1908).
[147] 234 U.S. 640 (1914).
[148] 268 U.S. 510 (1925). Hamburger, supra note __, at pp. 419, 453.
[149] Carl Zollman, American Church Law (1902; repr. ed. 1933).
[150] See supra note __ and accompanying text.

constitutional laws did not prescribe separationism. But they did.[151] And this charge presupposes that those who wrote about the history of Protestant separationism were both falsifying the record and fortifying their anti-Catholicism. Not only would this be a big surprise to many Protestant historians who wrote on the history of church-state relations. But it also does not explain why a host of nineteenth-century European writers, both Catholic and Protestant -- Alexis de Tocqueville, Lord Acton, Philip Schaff, Abraham Kuyper, and many others -- with no anti-Catholic ax to grind and no fraudulent historiography to press would write so favorably about the long history of Protestant separationism.[152]

Finally, all these great campaigns for a strict separation of church and state, whether or not anti-Catholic in motivation, made rather few legal changes in nineteenth century America. The dominant reality was that liberty of conscience was guaranteed against church and state. Churches and states retained separate offices and operations yet cooperated and supported each in countless ways. The federal government remained largely removed from religious affairs, leaving states and local governments to govern questions of religion and religious liberty. "A mass of organic utterances," as the Supreme Court put in 1892,[153] testify to this reality, which Professor Dreisbach has detailed in several writings beyond the volume under review.[154] This was no paradigm or paradise of American religious liberty. But it does attest to the legal presence of the first four kinds of separation of church

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[151] See supra note __ and accompanying text.

[152] See Tocqueville, supra note __; Acton in America: The American Journal of Sir John Acton (S.W. Jackman ed., 1979); Abraham Kuyper, Lectures on Calvinism (1898; 1931); Abraham Kuyper, Varia Americana (1899); Philip Schaff, Separation of Church and State in America (1888). For other such foreign impressions see sources in Henry T. Tuckerman, America and Her Commentators (18640: Allan Nevins, America Through British Eyes (1948); Amerika in Europese Ogen (K. van Berkel ed., 1990).

[153] Holy Trinity, 143 U.S. at 471.

[154] See, e.g., Daniel L. Dreisbach, In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution, 48 Baylor L. Rev. 927-1000 (1996). See also very recently Mark A. Noll, America's God: From Jonathan Edwards to Abraham Lincoln (2002) and the massive literature distilled therein.

and state, but not the fifth form of strict separationism.[155]

V. Deuteronomy: A Legal Place for Separationism Today?

All this changed dramatically with *Everson v. Board of Education* (1947), where Justice Black made strict separationism a mandate of the First Amendment establishment clause. As Justice Black put it for the *Everson* majority:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, or vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."[156]

Readers of Hamburger's volume will recognize that not a single statement in Justice Black's lengthy recitation was new. Groups like the National Liberal League and the Ku Klux Klan (of which Justice Black had been a member), had pressed for all these separationist precepts, and indeed many more, for decades (pp. 399-454). What was new was the elevation of these separationist precepts from a popular demand to a constitutional command that was binding on both federal and state governments. Readers of Dreisbach's volume will recognize that this latter move in the name of separation of church and state was in defiance of another species of separation, the separation of federal

[155] See supra notes __, and __, and accompanying text.
[156] 330 U.S. 1, 15-16 (1947).

and state governance of religion and religious liberty. While there may have been good reasons for the Court to apply the First Amendment to the states, this move defied a basic structural separation of jurisdictions that the founders, for good or ill, thought essential to the protection of American religious liberty.[157]

Much of the rest of the American separationist story has risen to hornbook familiarity,[158] and both authors eschew detailed analysis of it. It is now well known that, from 1947-1989, the Supreme Court applied its newly minted Jeffersonian logic primarily to issues of education. In nearly 40 cases, the Court largely removed religion from the public school, and largely removed religious schools from public aid.[159] In *Lemon v. Kurtzman* (1971), the Court demanded that all laws must (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) foster no excessive entanglement between church and state.[160] This constitutional reification of Jeffersonian logic rendered the First Amendment establishment clause a formidable weapon for lower courts to outlaw many remaining forms and forums of church-state cooperation.

It is also well known that the Supreme Court of late has abandoned much of this strict separationism in favor of other principles of religious liberty -- neutrality, accommodationism, noncoercion, equal treatment, and nonendorsment most prominently.[161] Many of these new establishment clause principles have been more deferential to state laws on religion and thus at least tacitly more sympathetic to the jurisdictional separationism that Professor Dreisbach has so well described.

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[157] Dreisbach, supra note _, at 97-116 and Daniel L. Dreisbach, *Everson* and the Command of History: The Supreme Court, Lessons of History, and Church-State Debate in America __ (Jo R. Formicola and Hubert Morken, eds. 1997).

[158] See a good summary in Thomas C. Berg, Religion and the State in a Nutshell (1998).

[159] See collection in Robert T. Miller and Ronald B. Flowers, Toward Benevolent Neutrality: Church, State, and the Supreme Court (5th ed. 1996) and Michael W. McConnell, et al., Religion and the Constitution (2002).

[160] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[161] See summaries in Witte, supra note __, at 154-63 and the cases listed above in nn. __.

In my view, separation of church and state must remain a vital principle of American religious liberty -- despite its serpentine history and despite the anti-religious words, deeds, and associations that it has sometimes inspired. Separationism needs to be retained, particularly for its ancient insight of protecting religious bodies from the state and for its more recent insight of protecting religious believers from violations by government or religious bodies. Separationism, however, also needs to be contained, and not used as an anti-religious weapon in the culture wars of the public square, public school, or public court. Separation of church and state must be viewed as a shield not a sword in the great struggle to achieve religious liberty for all.

In my view, separation of church and state serves religious liberty best when it is used prudentially not categorically. James Madison, a firm proponent of separationism, warned already in 1833 that "it may not be easy, in every possible case, to trace the line of separation between the rights of Religion and the Civil authority, with such distinctness, as to avoid collisions & doubts on *unessential* points."[162] This caveat has become even more salient today. For better or worse, the modern American welfare state, and now the modern American security state, reaches very deeply into virtually all aspects of modern life through its vast network of education, charity, welfare, child care, health care, construction, zoning, workplace, taxation, immigration, security, and sundry other regulations. Madison's preferred solution was "an entire abstinence of the Government from interference [with religion] in any way whatever, beyond the necessity of preserving public order, & protecting each sect against trespasses on its legal rights by others."[163] This traditional understanding of a minimal state role in the life of society in general, and of religious bodies in particular -- however alluring it may be in libertarian theory -- is no longer realistic in practice.

It is thus even more imperative today than in Madison's day that the principle of separation of church and state not be pressed to reach, what Madison called, the "unessentials." It is one thing to outlaw daily Christian

[162] Letter to Rev. Adams, reprinted in Dreisbach, supra note __, at 117, 120 (emphasis added).
[163] Ibid.

prayers and broadcasted Bible readings from the public school, quite another thing to ban moments of silence and private displays of the Decalogue in the same schools. It is one thing to bar direct tax support for religious education, quite another thing to bar tax deductions for parents who wish to educate their children in the faith. It is one thing to prevent government officials from delegating their core police powers to religious bodies, quite another thing to prevent them from facilitating the charitable services of voluntary religious and non-religious associations alike. It is one thing to outlaw governmental prescriptions of prayers, ceremonies, and symbols in public forums, quite another thing to outlaw governmental accommodations of private prayers, ceremonies, and symbols in public forums. To press separationist logic too deeply into the "unessentials" not only "trivializes" religion in public and private life, as Stephen Carter has argued.[164] It also trivializes the Constitution, converting it from a coda of cardinal principles of national law into a codex of petty precepts of local life.

[164] Stephen L. Carter, The Culture of Disbelief: How American Law and Politics Trivializes Religious Devotion (1993).