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Separation Rhetoric and Its Relevance. Book Review Of: Separation of Church and State. by Philip Hamburger

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SEPARATION RHETORIC AND ITS RELEVANCE

SEPARATION OF CHURCH AND STATE. By Philip Hamburger.[1] Harvard University Press. 2002. Pp. 514. $49.95.

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A degree of conventional constitutional interpretation is backward-looking, sometimes even nostalgic. Adjudication demands innovation, of course. But fidelity to a reconstructed past is an embedded interpretive value, which means that conclusions about the complexion of our national heritage can have consequences for federal constitutional law. An apparent case in point is establishment clause precedent and the rhetoric of church-state "separation"—a slogan that Philip Hamburger seeks to vitiate in his latest work, *Separation of Church and State.*

This book alone places Professor Hamburger among the most serious and industrious of the "separation" critics. By canvassing an impressive amount of primary source material, emphasizing public discourse, and exploring religious, political, and social movements, Hamburger helps to explain what various Americans thought about religion-government relations over approximately two centuries. His ultimate conclusions about "separation" are stark, yet also undergirded by something better than the wishful thinking of a beholden advocate. The book has and will receive attention from scholars and judges.[3]

Separation's analysis of rhetoric, religion, and intolerance is worth remembering for many reasons, but objections to its use in

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3. Though perhaps not always for the author's intended purposes. *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2504-05, 2507 (2002) (Breyer, J., dissenting) (citing both Hamburger and the separation metaphor favorably in arguing for doctrine that minimizes religious strife); see Marci A. Hamilton, *"Separation": From Epithet to Constitutional Norm*, 88 Va. L. Rev. 1433 (2002) (book review).

establishment clause adjudication are probably insurmountable. The book's treatment of the founding era leaves open significant issues germane to an originalist understanding, and the post-First Amendment material is harrowing but mostly irrelevant to present-day litigation. These observations are not necessarily criticisms of what Hamburger has accomplished; perhaps he did not intend to advocate any particular position on modern constitutional law. But of course authorial intent need not equate with a text's received meaning at any subsequent reading. And, whatever the author's view, *Separation*'s sources and conclusions may pertain to contemporary constitutional disputes. This review considers the book for that connection.

I. CONTEXT FOR AND THEMES IN *SEPARATION*

Church-state "separation" has been promoted by a variety of Americans for a variety of purposes, as Hamburger documents. Every constitutional lawyer is aware of Thomas Jefferson's use of the metaphor: in 1802, President Jefferson drafted a letter responding to the laments of a Connecticut Baptists association, in which he characterized the establishment clause as "building a wall of separation between Church & State." (p. 161) This word-image was vivid and potent, and Jefferson was neither the first[4] nor the last to use it. Tocqueville attributed the concept to Catholic interviewees in 1831-32.[5] Three decades later, P.T. Barnum derided religious superstition while endorsing church-state separation.[6] In 1875, President Grant picked up the line in opposing government funding for parochial schools.[7] Many years

4. Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* 5-6 (U. of Chicago Press, 1965) (distinguishing Roger Williams) sense of the image from Jefferson's); John Locke, *A Letter Concerning Toleration* (1685), in 6 *The Works of John Locke* 21 (T. Davison, 1801) (advocating limits on ecclesiastical power in civil affairs, particularly over liberty and property "upon the account of" religious differences, using separationist terms: "the church itself is a thing absolutely separate and distinct from the commonwealth. The boundaries on both sides are fixed and immoveable."); see also Thomas Paine, *Age of Reason* (1794), in *Thomas Paine: Collected Writings* 667 (Library Classics, 1995) (referring to "[t]he adulterous connection of church and state" that trenched upon open discussion of religious matters).

5. 1 Alexis de Tocqueville, *Democracy in America* 308 (Vintage Books, 1990) (1835) ("[T]hey differed upon matters of detail alone, and that they all attributed the peaceful dominion of religion in their country mainly to the separation of church and state. I do not hesitate to affirm that during my stay in America I did not meet a single individual, of the clergy or the laity, who was not of the same opinion on this point.").

6. P.T. Barnum, *The Humbugs of the World, Account of Humbugs, Delusions, Impositions, Quackeries, Deceits, and Deceivers Generally, in All Ages* 415 (Carelton, 1866).

7. Anson P. Stokes and Leo Pfeffer, *Church and State in the United States* 433 (Greenwood Press, 1964) ("Leave the matter of religion to the family, altar, the church, and the private school supported entirely by private contributions. Keep the church and

later, Democratic presidential candidates Al Smith and Jack Kennedy each professed their devotion to an "absolute" separation of church and state.[8] And in 1878 and again in 1947, the United States Supreme Court quoted Jefferson's letter and elevated what may have been a popular slogan into an apparently justiciable concept.[9]

Importation of a separationist mind-set into federal constitutional law nevertheless was, and is, deeply troubling to many. A chief concern has been that a separation principle produces too many restraints on government action that redounds to the benefit of religion, to a point where it indicates or dictates a secular society hostile to religious liberty. Largely for that reason, *Everson* rivals *Marbury* among the opinions most vilified by those who support the result reached.

Hamburger adds other objections. He concludes that "the constitutional authority for separation is without historical foundation."[10] (p. 481) It may not be entirely clear what brand of church-state "separation" is being eliminated here, but the author does deny that it was a popular slogan or principle before the First Amendment was ratified. The project is much more ambitious than contributing to an understanding of the founding generation, however. *Separation* also attempts to track American use of the metaphor during the fourteen decades between Jefferson's letter and the decision in *Everson*. And it turns out that many lesser-known proponents of church-state separation are now far less reputable than even P.T. Barnum. So Hamburger's work not only cabins the historical roots of separation rhetoric, it also taints them. His research places Jefferson's views at the margins and associates subsequent adherents with bigotry, usually of an anti-Catholic stripe;[11] with "theological liberals, especially anti-Christian 'secularists'"; and with a particular vision of religion that emphasizes the individual over hierarchy and institutions. (pp. 10-11, 14-16) For Hamburger, then, church-state separation might be a useful concept in some respects, but

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state forever separate."). It is not clear whether Grant was one of Barnum's "sucker[s]."

8. Al Smith, Letter, *Atlantic Monthly* 728 (May, 1927); *Transcript of Kennedy Talk to Ministers and Questions and Answers*, N.Y. Times 22 (Sept. 13, 1960).

9. *Everson v. Board of Educ. of Ewing Township*, 330 U.S. 1, 16 (1947) (citing *Reynolds v. United States*, 98 (8 Otto) 145, 164 (1878)).

10. Accord *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting); see also *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 856 (1995) (Thomas, J., concurring).

11. Cf. *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality opinion of Thomas, J.) (condemning tests for prohibited government aid that turn on whether a school is "pervasively sectarian": "This doctrine, born of bigotry, should be buried now.").

"separation ought not be assumed to have any special legitimacy as an early American and thus constitutional idea. On the contrary, precisely because of its history—both its lack of constitutional authority and its development in response to prejudice—the idea of separation should, at best, be viewed with suspicion."[12] (p. 483)

To evaluate such claims about the historical or constitutional authority for "the idea of separation," we need to consider the ways in which the author chose to examine the phrase in question. Many methods were available, and there is certainly no one "correct" way to study the history of an idea. But just as surely, some approaches are more relevant to modern constitutional law than others. *Separation* does not directly defend its relevance to today's lawsuits, which might not be the author's concern. By isolating the book's method of study, however, we can make our own judgments.

It seems that Hamburger's methods and sources contribute to at least three perspectives on "separation of church and state": (1) *As rhetoric or slogan.* Hamburger's analysis is plainly, even primarily, about the history of separation rhetoric, its popularity, and the motives of its sloganeers. From this vantage, "separation" is easy to see but probably least significant to constitutional law. (2) *As concept or general principle.* Also explored is the general idea and rationale expressed by church-state "separation." This conceptual angle is related but not identical to the study of rhetoric and slogan—insofar as it is possible to distinguish ideas and principles from their authors and adherents. General principles are perhaps more difficult to pin down than are sloganeers, and general principles sometimes seem too abstract to resolve concrete constitutional problems. But their use in adjudication is apparent even if their clarity is not: to elaborate constitutional text, courts often employ principles; and these principles are commonly informed by historical sources close to the time at which the text was adopted, by experience since then, or by both. *Separation* therefore bears on this sort of decision-making. (3) *As program, rule, or agenda.* Finally, segments of the book suggest more specific ramifications for a separation principle or concept. Granted, Hamburger does not issue a discrete and programmatic definition of "separation,"[13] which

12. See also Philip Hamburger, *Separation and Interpretation*, 18 J.L. & Pol. 7, 37 (2002) (calling for rejectionof thephrase).

13. Hamburger indicates that separation means some distinction between church and state; often means elimination of laws supporting, instituting, "or otherwise establishing" religion; and perhaps "point[s] to . . . a distance, segregation, or absence of

might be a function of his focus on rhetoric and concepts, or simply vagueness on the part of those who employed the phrase. Still, the book provides some information on the agenda of those who by 1791 opposed existing state relationships with religion, and those who thereafter touted "separation" as a matter of effective rhetoric or guiding principle.

II. REVIEW AND SUPPLEMENTAL THOUGHTS, IN TWO CHRONOLOGICAL STAGES

The analysis below proceeds in two stages: up until the generation that ratified the First Amendment (which obviously can inform originalist evaluations of that text), and then after (which is not so plainly within the boundaries of conventional interpretive sources). A concluding section adds some broader comments on the relevance of Hamburger's account to today's constitutional law.

A. THE SETTING FOR THE ESTABLISHMENT CLAUSE

Separation's first principal question is "whether separation was the religious liberty protected by the First Amendment," (p. 9) and the book begins by exploring the rhetorical (dis)use of the phrase prior to ratification of the federal Bill of Rights. Here Hamburger consults the written records of Christian "religious dissenters"[14] and their opponents, primarily in America and England. These sources provide fascinating examples of rhetoric dating to the sixteenth century, and Hamburger does the curious a favor by providing extensive quotations from surviving tracts.

On this matter, *Separation*'s essential finding is that pre-Amendment religious dissenters rarely called for a "separation of church and state" much less a "separation of religion and government." Instead, "separation" was a goal that dissenters were occasionally and unfairly accused of seeking. For example, at the end of the sixteenth century Richard Hooker alleged that English dissenters had implied the untenable principle "that the *Church* and the *Commonwealth* are two both distinct and separate societies . . . and the walles of separation between these two

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lishing" religion; and perhaps "point[s] to . . . a distance, segregation, or absence of contact between church and state. Rather than simply forbid civil laws respecting an establishment of religion [however defined], it has more ambitiously tended to prohibit contact between religious and civil institutions." (pp. 2-3)

14. This class is not formally defined. Hamburger does indicate that he is referring to members of religious sects who opposed "state establishments," (p. 19) but that term is not specified by an easy-to-locate set of attributes, either.

must for ever be upheld." (p. 36) On this side of the Atlantic, evangelical dissenters were sometimes indicted for proposing a separation of all religion and government. This attack was probably quite effective, assuming the audience believed that the charge was accurate and that social order and civil government depended on religion and a resulting morality. (p. 66) Secular reason and government power might still skirt chaos absent the fear of God, (p. 70) and so perhaps government had to be better able to encourage religious exercise than the dissenters' views might permit (p. 71 n.7).

This is not to say that church-state *integration* was a popular concept. Assorted dissenters in Europe and America attacked the "union" of church and state as an adulterous corruption of the former. (p. 55) Similarly, Hamburger contends that pro-establishment ministers resented the accusation that church and state had been "united" or "blended," defending the status quo as an acceptable alliance or affiliation between distinct institutions. (pp. 65, 72-73) Defenders of official churches like Hooker could accept distinctions between church and commonwealth, between ecclesiastical and secular affairs, while at the same time disparaging complete severance of the faithful from the citizenry. (p. 37) Indeed, these general principles are not far removed from how *Separation* describes the position of establishment assailants. Dissenters themselves saw critical connections among vibrant religious practice, widespread morality, and a functioning state; and Hamburger emphasizes that they avoided rhetoric disparaging civil-religious connections or supporting church-state separation. (pp. 73-75, 78) Of course these dissenters opposed "establishments" by definition, and some were concerned about clerical involvement in politics. (p. 83) Still, they did not reject a moral or religious foundation for law. (pp. 76-78) They may have "avoided convoluted distinctions about the permissible degree or type of connection between religion and government," but they "had every reason to seek religious liberty and no reason to demand the disconnection of religion and government." (p. 78)

In important respects, then, Hamburger attributes to both establishment ministers and religious dissenters similar conceptions of church-state and religion-government relations. True, certain strains of Christian thought during the sixteenth through eighteenth centuries indicate yearnings for detachment from the wilderness of an impure world and government, or even from other religious creeds (pp. 21-32, 38-52); and there were a few

more secular, fringe critics of the clergy and institutional religion (pp. 53, 59-62). Yet Hamburger cannot find strong evidence that dissenters (or much of anyone) advocated segregation of religion and government or repudiated a relationship of mutual support. (p. 23) Rather, dissenting Protestants "left open the possibility of other, nonestablishment connections." (p. 28)

At this juncture, attention to programmatics might be required if we want to convert these rhetorical and conceptual findings into constitutional lessons.[15] If, as matters of general principle, dissenters supported "distinctions" and opposed "union" or "establishment" yet refrained from demanding "separation" and could accept "nonestablishment connections," precisely what *was* their practical, affirmative vision for government-religion relations? Did they have one? *Separation*'s discussion leaves doubts. Even on the implausible assumption that America's religious dissenters spoke with one voice, serious uncertainty about the operational meaning of their anti-establishment arguments would persist if they "avoided convoluted distinctions about the permissible degree or type of connection between religion and government." (p. 78) Those distinctions constitute the constitutional issues that have taunted the courts for decades.

Constructively, Hamburger puts forward a counter-principle promoted by dissenters: some form of "religious liberty" different from "separation." (p. 89) But both terms need additional content before they become mutually exclusive; and a disjunction is perhaps more difficult because, as Hamburger observes, official punishment for religious difference was largely abandoned in America by the late 1700s. (pp. 89-90) Dissenters were likely most concerned with government benefits, privileges, and protections.

Assuming it is desirable to assemble a more specific program of state-level legal reform that religious dissenters did or

15. Some might search *only* for general principle here, but I am not convinced that this can yield much guidance for constitutional law. In any event, identifying specific historical controversies is plainly one way to inform principle. See Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 Val. U. L. Rev. 37, 49-50 (1991) ("*Noncoercive*"). More programmatic inquiries, like the state of state establishments or alternative legal regimes proposed by dissenters, are hardly incontestable; but that might be cause for downgrading the role of both in constitutional adjudication. Cf. Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm. & Mary L. Rev. 839, 842 (1986) ("History ordinarily should not be expected, however, to provide specific answers to the specific problems that bedevil the Court.").

would endorse, what sources are available? Identifying a negative agenda is probably easiest. The specifics of state laws directed at religion, and their actual operation, help define what religious dissenters opposed—although not necessarily why or exactly what was objectionable. *Separation* does not dwell on the details of the challenged "establishments," however, which were not all of a piece.[16] Hamburger does helpfully single out as dissenter priorities their opposition to taxes for ministers' salaries, and to exclusive rights to conduct legal marriages in a preferred class of clergy. (p. 90) Even if *Separation* had departed from its primary themes to give more details, though, additional information would be needed to determine what if any alternative program could have existed. Eliminating "establishment" is not a precise conclusion, even if we had a working definition of it. For example, two different ways to eliminate a system of government-sponsored benefits for only favored religious sects are (1) abolition of the benefits, or (2) extension to those excluded.

Separation suggests some other building blocks for a dissenter program of religion-government relations; but the contours are somewhat fuzzy. For instance, Hamburger helps specify dissenter demands for state constitutional amendments regarding "religious liberty" by categorizing them under two sub-principles: equal rights—"a freedom from laws that discriminated on the basis of religious differences"; and no legislation cognizant of religion—"a request that law take no notice of religion," which was "an approach that denied civil government any jurisdiction over religion." (pp. 94, 100) How these ideas differed from possible versions of "separation" is not clear, nor is there much certainty about how these counter-principles play out in live controversies. One extension is the thought that few religious dissenters disavowed all government-derived benefits: many supported government recognition for their marriage rituals and protection of religious property; some others endorsed legislative exemptions from secular demands for minorities like Quakers. (pp. 90, 93, 101, 107) In addition, some founding era state constitutions prohibited compelled worship and payments for the support of clergy or churches.[17] Hamburger calls them

16. For additional specifics and perspectives, see, for example, Gerard V. Bradley, *Church-State Relationships in America* ch. 2 (Greenwood Press, 1987), Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* chs. 5-7 (Oxford, 1986), and Anson P. Stokes, 1 *Church and State in the United States* ch. 5 (Harper, 1950).

17. These clauses came in several forms. E.g., N.J. Const. art. XVIII (1776), reprinted in Francis N. Thorpe, ed., 5 *The Federal and State Constitutions: Colonial Char-*

departures from the "standard pattern of antiestablishment demands" and parallel to free-exercise based rights against compulsion. (p. 94 n.10) On the other hand, we cannot ignore their apparent tension with, for example, sect-neutral but tax-financed or government-prompted religious worship.[18]

To confidently conclude that the founders rejected separation as a proper principle or resulting program, one must confront another concrete issue: the state practice of excluding clergy from holding certain offices in government—certainly a conceivable plank in a separation platform. (pp. 184-85) Hamburger does so. He reports that he found no sound evidence that, during the founding era, such exclusions were justified with reference to separation of church and state or of religion and government. (p. 79) To the contrary, he points out that Massachusetts and South Carolina, which officially supported preferred religions, also maintained such exclusions; that dissenters usually ignored the question; and that the exclusions were supported by

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ters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 2597 (Government Printing Office, 1909); Pa. Const. art. IX, § 3 (1790) ("[N]o man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience . . . ."), reprinted in Thorpe, 5 *Federal and State Constitutions* at 3100; cf. Ga. Const. art. IV, § 5 (1789) ("All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession *but their own.*") (emphasis added), reprinted in Thorpe, 2 *Federal and State Constitutions* at 789; Vt. Declaration of Rights art. III (1787) ("[N]o man ought, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his *conscience* . . . *Nevertheless*, every sect or denomination of Christians ought to observe the Sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.") (emphasis added), reprinted in Thorpe, 6 *Federal and State Constitutions* at 3752. These provisions and others can be browsed at *1st Amendment Online*, <*http://1stam.umn.edu*>.

18. See also Laycock, *Noncoercive* at 47 (cited in note 15) (arguing that, in Virginia and Maryland, "[s]tate assistance to churches was rejected as an establishment, even with the right to designate the recipient of the tax, . . . and in Maryland, to escape the tax altogether by declaring nonbelief"). Hamburger makes the intriguing suggestion that New York and South Carolina "prohibited an establishment *by*" adding sect-neutral free exercise clauses. (p. 99 & n.20) (emphasis added) South Carolina does appear to have eliminated its declaration that Protestantism was the state's "established" religion at the same time that it adopted a broader free exercise guarantee. See S.C. Const. art. XXXVIII (1778), reprinted in Thorpe, 6 *Federal and State Constitutions* at 3255-57 (cited in note 17); S.C. Const. art. VIII (1790), reprinted in Thorpe, 6 *Federal and State Constitutions* at 3264 (cited in note 17); Stokes, 1 *Church and State in the United States* at 434 (cited in note 16). New York's situation is less amenable to the description, however. See Stokes, 1 *Church and State in the United States* at 405-06 (cited in note 17). That state's federal constitutional ratifying convention also indicated independent meaning for free exercise and *anti*establishment clauses: the convention declared *both* principles when they ratified the Federal Constitution. (p. 99 n.21); Edward Dumbauld, *The Bill of Rights and What It Means Today* 189 (U. of Oklahoma Press, 1957).

a variety of ideas about the proper role of clergy and civil magistrates, perhaps even anti-Catholic bias. (pp. 79-83, 87) Yet the exclusions probably deserve greater weight than *Separation* gives, inasmuch as the book's mission is to study something other than rhetoric.[19] Regardless of the arguments audibly voiced in their favor, these bars were common at the time the First Amendment was drafted and ratified. Indeed, Hamburger asserts that ministerial exclusions "were often paired with exemptions from civil obligations, such as the obligation to pay taxes or serve in the military," (p. 84) which are likewise potential components of a separation program. Regardless, the critics failed to eliminate ministerial exclusions, whatever force the separation accusation had, however attractive was Noah Webster's message that "[r]eligion and policy ought ever to go hand in hand," (p. 88) whatever the tensions with then-prevailing notions of free exercise, and however irrelevant this history is to contemporary constitutional law.[20]

Having emphasized state-level dissent, *Separation* briefly recounts the drafting history of the First Amendment to the Federal Constitution. Hamburger begins with the plausible point that religious dissenters would have been skeptical of any provision that might prohibit legislatures from protecting the free exercise of religion. (pp. 106-07) We should be careful, therefore, not to over-read demands that government not take "cognizance" of religion.[21] (p. 102) In any event, Hamburger contends, an unqualified no-cognizance standard was not what Madison proposed in his first draft of amendments to the Federal Constitution on June 8, 1789,[22] nor what Congress referred and the

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19. This broader mission seems apparent. For example, Hamburger looks beyond slogans in *confining* the meaning of attacks on the status quo. Locke once described the church as "a thing absolutely separate and distinct from the commonwealth," which Hamburger characterizes as "merely an expression of his pervasive and hardly original argument about the difference between religious and civil jurisdiction." (p. 54) In 1767, Britain's James Burgh asked future generations to "[b]uild an impenetrable wall of *separation* between things *sacred* and *civil*," which Hamburger asserts "came close" to a wall of separation between church and state. (p. 57) Paine likewise "came close" in *Age of Reason*, (p. 60) which Hamburger asserts "did not necessarily refer to all types of church-state connections" in its condemnation of "adulterous connection" (p. 62).

20. See *McDaniel v. Paty*, 435 U.S. 618 (1978).

21. This was a principle that Madison used in drafting the famous *Memorial and Remonstrance Against Religious Assessments* in Virginia. *Everson v. Board of Educ. of Ewing Township*, 330 U.S. 1, 64 (1947) (appendix) ("We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.").

22. See 1 *Journal of the House of Representatives of the United States at the First Session of the First Congress* at 46 (Gales & Seaton, 1826) (June 8, 1789); Bernard Schwartz, *The Great Rights of Mankind: A History of the American Bill of Rights* 202

state legislatures ratified. (p. 105) Indeed the House of Representatives ultimately rejected a version of the religion clauses that would have stated, "Congress shall make no laws touching religion or [infringing?] the rights of conscience."[23] Hamburger concludes that "Madison reconciled himself to language less sweeping than that he had used in 1785 [in Virginia], and Congress adopted a moderated version of the no-cognizance standard, which did not forbid all legislation respecting religion." (p. 107)

The drafting history of the religion clauses may be a sidelight for *Separation*, and this essay is not the place for a comprehensive rendition of that process. But the topic is sufficiently important to warrant some additions to the record. While the text ratified by the states "said nothing about separation," (id.) neither did it use the words "religious liberty," "coercion," "neutrality," "sect preferences," "accommodation," or a variety of other phrasings that might or might not have provided additional guidance for constitutional interpretation. In fact, it appears that no state constitution of that era nor any amendment recommended by a state ratifying convention employed the precise terminology ultimately ratified as our First Amendment.[24] Moreover, Congress dispensed with *several* drafts regarding religion before the members reached agreement. In addition to rejecting Madison's first draft and one referring to laws "touching" religion, Congress also set aside an establishment clause that would have confirmed that it lacked authority to make law es-

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(Madison House, 1977).

23. According to the collection cited by Hamburger on this point—Helen E. Veit, et al., eds., *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* (Johns Hopkins U. Press, 1991)—one of three sources for this proposal includes the word "infringing." Id. at 150, 153, 158 (quoting The Daily Advertiser, The Gazette of the United States, and The Congressional Register); see also 1 *Annals of Congress* 759 (Gales & Seaton, 1834) (Aug. 15, 1789). According to another of those sources, Representative Sam Livermore, who proposed this language, apparently did not intend a substantive change from the text that it replaced ("no religion shall be established by law, nor shall the equal rights of conscience be infringed"). Veit, *Creating the Bill of Rights* at 150-51. In any case, the language referred to the Senate was: "Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of Conscience be infringed." Schwartz, *The Great Rights of Mankind* at 240 (cited in note 22).

24. Cf., e.g., N.J. Const. art. XIX (1776) ("That there shall be no establishment of any one religious sect in this Province, *in preference to another* . . . .") (emphasis added), reprinted in Thorpe, 5 *Federal and State Constitutions* at 2597 (cited in note 17); Dumbauld, *The Bill of Rights* at 189 (cited in note 18) (reprinting New York's declarations and recommended amendments of July 26, 1788: the delegates "Do declare and make known . . . . that no Religious Sect or Society ought to be favoured or established by Law *in preference of others*") (emphasis added).

tablishing "one religious sect or society in preference to others,"[25] as well as the Senate's final draft: "Congress shall make no law establishing articles of faith, or a mode of worship."[26] Whether the congressional drafters rejected such alternative language because they wanted a meaning broader, or otherwise different, or because of stylistic or other reasons—or whether any other relevant cohort of Americans understood the text in the same way—is subject to fair and perhaps irreconcilable differences of opinion. But there is a sound argument that the drafting history and meaning of the federal establishment clause were unique.[27]

There is also substantial reason to believe that the federal clause was *uniquely restrictive*. The institution of a new central government raised acute concerns about the scope of its authority, and the constitutional amendments pressed by Madison and others during the very first Congress were a response to them.[28] So why would founding era criticism of *state*-level relationships between government and religion round out concerns about such *national* government relationships?[29] Even some opponents of "separation" might agree that the importance of decentralized power at that time supports at least one distinct limitation that had no state-side analogue: preventing the national legislature from *dis*establishing locally and officially preferred faiths—in that sense, "mak[ing]" a "law *respecting* an establishment of religion."[30] Hamburger mentions and disagrees with the opinion of some that the clause should be interpreted to restrict *only* the

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25. 1 *Journal of the First Session of the Senate of the United States of America* 70 (Gales & Seaton, 1820) (Sept. 3, 1789). It is well known that Madison tried but failed to include additional express limitations on state government power, including protection for "the equal rights of conscience." Schwartz, *The Great Rights of Mankind* at 177, 202-03 (cited in note 22). The House agreed to language similar to Madison's, but the Senate balked. Id. at 240, 242-44; 1 *Journal of the Senate* 72 (Sept. 7, 1789) (rejecting House article 14).

26. Schwartz, *The Great Rights of Mankind* at 242 (cited in note 22); 1 *Journal of the Senate* 77 (Sept. 9, 1789) (cited in note 25).

27. For additional detail on establishment clause drafting history, see, for example, Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875 (1986).

28. See, e.g., 1 *Journal of the Senate* 73 (Sept. 8, 1789) (cited in note 25) (preamble to the congressional resolution referring amendments to the state legislatures).

29. For one rather severe version of this line of argument, see Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* 89, 121-22 (U. of North Carolina Press, 1986). See also Daniel L. Dreisbach and John D. Whaley, *What the Wall Separates: A Debate on Thomas Jefferson's "Wall of Separation" Metaphor*, 16 Const. Comm. 627, 649-54 (1999) (collecting sources).

30. U.S. Const., Amend. I (emphasis added); see Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 Notre Dame L. Rev. 311, 321 (1986).

federal government's ability to interfere with state establishments, (p. 106 n.40) but he does not address the possibility that the clause must be interpreted differently from analogous state constitutional provisions or the agenda of dissenters from state regimes.

Separation's attention to religious dissenters and their state-level battles in pre-Amendment America is one legitimate method for beginning to reconstruct constitutionally relevant history. Yet a complete investigation into the original meaning or intent of the establishment clause should answer more questions—whether dissenter positions are fairly ascertainable, differed from any useful definition of separation principles or programs, and are an appropriate proxy for establishment clause meaning.

B. THE POST-TEXT RISE OF SEPARATION RHETORIC

Doubts about whether *Separation* is apposite to modern constitutional law escalate when one turns to its review of post-ratification separation rhetoric. The story is enticing, illuminating, and depressing. But it raises disturbing possibilities if employed as a backlight to contemporary constitutional adjudication.

According to Hamburger, separation slogans were first popularly used by Jefferson's political supporters during the 1800 presidential campaign. Far from any high-minded principle, these phrases were rhetorical tools for attracting anti-establishment voters while simultaneously chastening pro-Federalist clergy for their intervention into a partisan political campaign. (p. 111) Certain religious leaders had vocally and vigorously opposed Jefferson's election, assaulting him as a non-Christian infidel who might undermine religion and morality in America. (pp. 112-14) As one reverend reasoned, because the Federal Constitution did not foreclose the election of "a manifest enemy to the religion of Christ, in a Christian nation," voting was the only way to close the door. (p. 116) Perhaps struggling to defend Jefferson's prior writings indicating an individual's right to declare the nonexistence of God and that the Bible was an inappropriate teaching tool for the schools (pp. 116, 119), his supporters sometimes shot back in blunderbuss fashion. Aside from denials, some publicly demanded disconnection of religion and politics—something that Republicans did not necessarily practice themselves (pp. 140-43)—and suggested that

their opponents supported an actual union of church and state (p. 120).

Apparently, "the Republican demand for a separation of religion and government . . . resonated among the people," and pro-Federalist ministers discontinued such sermons sometime after the election. (p. 129) Not long after, Jefferson used separation to explicate the First Amendment, which Hamburger associates with the then-President's now-developed fear of clerical tyranny over the individual mind and the clergy's unhealthy propagation of entrenched custom. (pp. 147-49) *Separation* does not quite explain how separation rhetoric could be perceived by Republicans as appropriate and effective in 1800 and yet still have been a poignant accusation a decade earlier. But the book does note an interesting intersection of politics, religion, and rhetoric.

If campaign strategy helped vault separation into popular discourse, Hamburger's explanation for its subsequent staying power is more disturbing. No doubt some were honestly concerned that traditional religious hierarchies and mores were inhibiting human progress through reason, science, and the secular arts. (pp. 132-36) But Hamburger views this justification for "separation" as a minority position that cannot adequately explain its rise. Too many Americans accepted interconnections of religion, morality, and government. (p. 189) Instead, *Separation* posits the confluence of three trends: not just (1) skepticism of organized or hierarchical religion, but also (2) the growing force of anti-Catholic nativists, and (3) a generalized movement toward specialization, division of labor, and segregation of American life, which tended to isolate the influence of religion within a private sphere. (pp. 14-16, 252, 265) Although the relative importance of each factor is difficult to judge, Hamburger maintains that "the separation of church and state became popular mostly as an anti-Catholic and more broadly antiecclesiastical conception of religious liberty." (p. 252)

The 1830s through the 1850s are pivotal decades for *Separation*. They are portrayed as the time at which church-state "separation" became an acceptable and even popular goal. Because fears about the influence of clergy or organized religion were pronounced with regard to Catholics—who some believed acted on remote control from Rome (pp. 203-05, 234-35, 237 n.110)—Protestant clergy had an opportunity to redirect individualism-based complaints to the Catholic Church. (p. 201) Some Protestants perceived (or at least portrayed) Catholicism as an institu-

tion that inherently burdened freedom of thought, freedom of conscience, and individualism in preference to hierarchy, top-down dictates, and tradition-bound superstition.[31] (pp. 204-05) In this way, Catholicism might conflict with an evolution of Protestantism to emphasize personal faith, (pp. 203-04) as well as the felt preconditions for America's democracy. Regardless, Hamburger's conclusions permit us to characterize 1800s separationism as a theologically rooted concept—in fact, partly founded on sect-based bigotry.

One mid-century example of separation's apparent public acceptance occurred during an otherwise well-known 1840 debate over school funding. In New York City, government funding was forbidden to all sectarian schools, yet the schools receiving the money were hardly secular: they required readings from the King James version of the Bible and some of their textbooks were unfriendly to Catholicism.[32] (pp. 219-20, 223 n.83) Although the Public School Society ultimately offered to delete certain anti-Catholic textbook passages, (p. 223) that body and its allies also opposed funding for Catholic schools on the general principles of church-state separation and voluntary support for religion (p. 222). Hamburger helps explain this apparent contradiction by pointing to a Protestant conception of Catholicism as an institutional and hierarchical church, while Protestantism operated through individuals. A Protestant audience might well conclude that calls for separation of "church" and state referred only to the *Catholic* Church. This context and other "code words" (p. 222) indicate that an important part of the New York opposition to private school funding was opposition to Catholicism.

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31. That Catholicism was also the religion of many new immigrants did not augur well for tolerance, either. (p. 202) Certain Catholic leaders fed such fears, however, by advocating world conversion, overt intolerance for other faiths, and organized political participation as bloc voters. (pp. 209-10, 227) Hamburger notes that Pope Gregory XVI deepened the political vulnerabilities in the United States when, in 1832, he not only denounced separation of church and state and lauded their union, but also challenged modern liberty of conscience, opinion, and the press. (pp. 230-32 & n.96); see also John C. Jeffries, Jr. and James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 302-03 (2001); Marc D. Stern, *School Vouchers—The Church-State Debate that Really Isn't*, 31 Conn. L. Rev. 977, 987 (1999) ("[T]wentieth century Americans make the mistake of measuring the import of that anti-Catholic response against the post-Vatican II Catholic Church . . . .").

32. See also *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2503 (2002) (Breyer, J., dissenting) ("When it decided these 20th century Establishment Clause cases, the Court did not deny that an earlier American society might have found a less clear-cut church/state separation compatible with social tranquility.").

The parallel ascendance of nativist politics and separation rhetoric is confirmed in the later half of the nineteenth century. In the 1870s and 1880s, as Hamburger describes it, "anti-Christian" secularists sought relatively broad federal constitutional amendments separating government from religious organizations or creeds. (pp. 287-90, 294-97, 314) These secular liberals were essentially equal-opportunity skeptics who feared the influence of religion writ large.[33] But their agenda was overrun. An intersecting movement for "separation" was sect-discriminatory in motive and strategy, drawing support from those who drew lines between "real" Americans and the Catholic Church. Accordingly, another amendment was offered by Republican presidential aspirant James G. Blaine in the wake of President Grant's call. (pp. 297-98, 322-25) Rather than addressing all aspects of government-religion relations, it targeted state funding for parochial schools. That focus could join the interests of secular liberals and anti-Catholic nativists. (pp. 324-25) While both efforts to amend the Federal Constitution failed, the Protestant-Republican-anti-Catholic movement, which also traveled under the banner of separation, was the more popular. (p. 321) The secularist effort ultimately imploded, (pp. 330-31) yet Blaine-like amendments were adopted in a majority of the states by 1890[34] and the Republican, Democratic, and Prohibition Parties expressed support for church-state separation. (pp. 324, 326 & n.102)

Blaine's proposal has always been a facially inconvenient fact for those who want to remain faithful to original meaning while still enforcing First Amendment limits against state action through the Fourteenth—especially if the establishment clause is to be read broadly enough to inhibit government financing of parochial schools. Why was more constitutional text offered if the old document already accomplished the goal? It turns out, though, that the issue is not very straightforward, and *Separation* indirectly helps to confirm that. Like the drafting history of the First Amendment, this subject is partly outside the scope of Hamburger's analysis. Nevertheless, his coverage of nineteenth century constitutional movements generates thoughts about Article V failures.

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33. Their specific agenda included eliminating religious tax exemptions and other government benefits, prohibiting clerical involvement in political questions, and repealing religiously motivated Sunday laws. (pp. 304-05, 308-09)

34. Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J.L. Hist. 38, 43 (1992).

First of all, one may simply conclude that the best answer to the same debatable constitutional question can be different in a different era, after historical sources and received wisdom are "examined in the crucible of litigation."[35] Putting that option aside, it is also possible for failed amendment proponents to see a need for new text that isn't there, or to seek additions out of uncertainty and caution (at least if there is no ex ante rule that estops subsequent litigation after an Article V defeat).[36] Many constitutional clauses, including some in the Fourteenth and First Amendments, do not evince specificity as their highest value; and there is no instruction manual for interpreting the Constitution. Furthermore, unless we concede judicial infallibility on constitutional questions, then Article V can be used to seek correction of court error—for example, an erroneously narrow reading of the Fourteenth Amendment.[37] Just because the corrective was unsuccessful, which might be for any number of reasons, does not mean that the judiciary was right all along or that it has no business self-correcting thereafter. Furthermore, as *Separation*'s emphasis on extra-judicial social movements helps to suggest, there are other reasons to promote a constitutional amendment than changing a constitution. Stirring up controversy and animus is a perfectly understandable goal for any good nativist, and a constitutional campaign can be a good vehicle for doing so.

Consider as well that Blaine's proposal as amended and passed in the House was not the same text that was narrowly defeated in the Senate. The successful House version restated the religion clauses of the First Amendment, prefaced by "No State shall make any law," and then added a relatively specific prohibition regarding religious sects and state support for public schools.[38] The failed Senate version included several additional

35. *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985).

36. Hamburger argues that, in fact, these amendment proponents believed that the same result could not be achieved through litigation and legitimate interpretation, (pp. 435-38) but *Separation* itself notes that some who advocated a robust separation pointed to constitutional norms, or maintained that their amendment proposals converted justified inferences into explicit constitutional declarations (pp. 223, 236, 240 n.114, 246-47, 275 n.11, 301-02 & n.36).

37. Cf. *Alden v. Maine*, 527 U.S. 706, 721-27 (1999) (spinning yarns about the Eleventh Amendment). Hamburger asserts that there is no evidence that post-Fourteenth Amendment proposals like Blaine's were drafted in response to the *Slaughter-House Cases*, 83 U.S. 36 (1872), but Green, while noting some contrary statements, advises us to consider that Congress' attention was on "the School Question" rather than the proper interpretation of the Fourteenth Amendment. Green, 36 Am. J.L. Hist. at 68-69 (cited in note 34).

38. Blaine's version read: "[N]o money raised by taxation in any State for the sup-

restraints, and also a caveat. In part it stated, "And no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit .... This article shall not be construed to prohibit the reading of the Bible in any school or institution."[39] That caveat closely aligns the proposal with the nativist-Protestant-Republican agenda that Hamburger elucidates. On the other hand, such particularities underscore the peculiar character of the proposal under consideration and the range of reasons any one member of Congress might have opposed it. Finally, Blaine's and the Liberals' proposals were not the only notable amendment movements that fell short during this period. The National Reform Association, as Hamburger notes, pushed for an amendment to the preamble which would have declared America's Christianity.[40] (pp. 291-93, 326 n.101) Insofar as any

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port of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations." Stokes and Pfeffer, *Church and State in the United States* at 434 (cited in note 7) (quoting 44th Cong., 1st Sess., 4 Cong. Rec. 205 (1875)). The House Judiciary Committee added language which, unlike the Fourteenth Amendment, left Congress without explicit authority to enforce the proposal: "This article shall not vest, enlarge, or diminish legislative power in the Congress." Green, 36 Am. J.L. Hist. at 58 (cited in note 34) (quoting 44th Cong., 1st Sess., 4 Cong. Rec. 5189 (1876)).

39. The full text read:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. No public property and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to or made or used for the support of any school, educational or other institution under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught. And no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or denomination, or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights of property already vested.

Stokes and Pfeffer, *Church and State in the United States* at 434 (cited in note 7) (quoting 44th Cong., 1st Sess., 4 Cong. Rec. 5453, 5595 (1876)); see also Green, 36 Am. J.L. Hist. at 61 (cited in note 34) ("Apparently, members of the [Senate Judiciary Committee] were impressed with the [caveat] because it allowed the Senators to have it both ways ...."); Stokes, 2 *Church and State in the United States* at 723-28 (cited in note 16).

40. See also Isaac Kramnick and R. Laurence Moore, *The Godless Constitution: The Case Against Religious Correctness* 148-49 (Norton, 1996) (contending that the Federal Constitution's secular character is partly confirmed by the failure of such amendment efforts); Stokes, 2 *Church and State in the United States* at 260 (cited in note 16); 3 id., at 587-88 (noting an unsuccessful 1888 proposal that would have mandated free public schools with education "in virtue, morality, and the principles of the Christian religion").

rejected amendment may be used to construe constitutional text left intact, there are several rational inferences that might be drawn here.

The final chapters of *Separation* are the grimmest. They cover the closing years of the 1800s through *Everson*, and they link an emboldened and bigoted nativism with a popular penchant for separation slogans. (pp. 342, 352-54, 359, 366-68, 391) Hamburger notes some doubts among religionists regarding the possible negative effect of a separation principle on morality and social accountability, (p. 389) and that different proponents had different understandings about just what separation meant; but he finds substantial support for separation as a constitutional norm in the era leading up to *Everson*. By the early twentieth century a bevy of groups and writers saw separation as "an 'American' constitutional right," (p. 391) part of a set of individually oriented and nationwide liberties that could not be limited to any one level of government (pp. 434-35, 448-49). The Court, therefore, applied the clauses of the First Amendment to the states within the "cultural circumstances created by nativism." (p. 448)

However, Hamburger argues, a significant component of that popular support can be traced to movements with which few present-day Americans would proudly associate: "the modern myth of separation omits any discussion of nativist sentiment in America and, above all, omits any mention of the Ku Klux Klan. Yet nativists . . . continued to distinguish themselves as the leading proponents of this ideal." (p. 399) In one version of the Klan oath, new members dedicated themselves not only to free public schools and free speech, but also to white supremacy and separation of church and state. (p. 409) They may have endorsed Bible readings in public schools as well, (p. 410 n.46) but they certainly opposed any influence of the Catholic Church on American life. The Klan is all the more important to Hamburger's connection of separation and bigotry, because the author of *Everson*, Justice Hugo Black, was affiliated with the organization during his rise to political prominence in Alabama.[41] (p. 423) "A Baptist, Black opposed the consumption of alcohol and harbored deep suspicions of Catholicism." (Id.) Black apparently delivered the oath

41. Two excuses for Black's membership are political expedience and local-juror persuasion, neither of which demonstrate the sort of personal risk-taking that helps define modern heroes. Nor do they differentiate Justice Black from many who have both made serious mistakes and serious contributions to legal progress.

about white supremacy and separation to entering Klansmen. (p. 426)

Which brings us to *Separation*'s punch line. Hamburger recounts *Everson* as a case instigated by anti-Catholic nativists, (pp. 455-57) authored by an ex-Klansman, and best understood as a Pyrrhic victory for Catholics and others opposing separation and seeking government benefits (pp. 461-63).[42] Having weathered criticism for his Klan membership at the outset of his judicial career, the case can be viewed as a double-sided opportunity for Justice Black, part legal and part public relations: "Black expected that his disarming conclusion would lead Catholics to think that they had succeeded in staving off the practical consequences of separation. The justice, however, knew better . . . ." (p. 462) All nine members of the Court concurred in a separation principle, and its potential bite was indicated a year later in *McCollum*.[43] Justice Black again wrote for the majority, which persisted in employing a church-state separation principle—although this time in a way that rolled back access to public school students for a variety of religious instructors, not just Catholics. The *McCollum* litigation thus ended with the first successful establishment clause objection in Supreme Court history, but the Court had gone "far beyond the Protestant version of separation of church and state" to "a relatively secular version." (pp. 476-77)

By the middle of the twentieth century, then, Americans saw separation "as their historic religious liberty, as a fundamental American freedom, and even as a constitutional right protected by the First Amendment." (p. 479)

III. *SEPARATION* AND ITS RELEVANCE

Despite the critique and supplemental analysis provided above, *Separation*'s primary themes are essentially intact. Sepa-

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42. Hamburger also calls Justice Frankfurter "[a] secularized Jew" with "a distinct distaste for Catholicism." (p. 474) Although he rejects the notion of a "Masonic conspiracy to adopt the idea of separation," Hamburger does estimate the number of Mason Justices at no fewer than seven. (p. 451 & n.146) Nonetheless, it is impossible to identify the Supreme Court of this era with an exclusively nativist program, see *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); id. at 643-44 (Black, J., concurring) (relying primarily on a religious-freedom rationale); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923), and Hamburger makes no such claim.

43. *Illinois ex rel. McCollum v. Board of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 209-12 (1948) (invalidating a public school program that set aside time during the school day for students to attend religious instruction delivered by private parties on school grounds, with parental consent).

ration rhetoric was apparently not at its peak in 1791, and some disreputable characters invoked the slogan thereafter. In certain respects, a principle of church-state separation might also be undermined by Hamburger's research, assuming it is sensible to inquire whether that concept comports with founding era understandings and subsequent tradition. The precise content of any separation principle, however, is open to serious debate both in its historical and contemporary forms. Neither *Separation* the book nor "separation" the concept can provide terribly precise guidance about whether any one rule or agenda is implied or appropriate.

Where, then, should this lead constitutional law? Perhaps nowhere at all, or perhaps to a point already reached by the judiciary. For the Supreme Court at least, the metaphor of "separation" has recently but certainly declined in prevalence. It seems to have been a decade since even a concurring opinion invoked the separation slogan in a positive light,[44] and longer since a majority signed on.[45] That rhetoric is essentially left to dissents.[46]

Moreover, separation has not been an obviously outcome-determinative principle in litigation, regardless of what *Everson* might have intimated. Absent separation rhetoric, the Court still enforces government limits with reference to the establishment clause.[47] Even *Lemon v. Kurtzman*,[48] which may be viewed as

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44. *Lee v. Weisman*, 505 U.S. 577, 599-601 & n.1 (1992) (Blackmun, J., concurring). Justice Blackmun's concurrence was joined by Justices Stevens and O'Connor, but the latter has not shown interest in promoting the phrase since, and she authored an opinion that reworked *Lemon*'s entanglement prong. *Agostini v. Felton*, 521 U.S. 203, 233 (1997) ("Interaction between church and state is inevitable . . . .").

45. See *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987) (an exemption for religious organizations in Title VII did not "impermissibly entangle[] church and state; the statute effectuates a more complete separation of the two"); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982) ("Some limited and incidental entanglement between church and state authority is inevitable in a complex modern society, but the concept of a 'wall' of separation is a useful signpost.") (citations omitted); cf. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("The concept of a 'wall' of separation is a useful figure of speech . . . . But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists . . . ."); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 696-98 (1994) (plurality opinion of Souter, J.) (discussing impermissible fusion of governmental and religious functions, but not invoking the separation metaphor and invalidating a "separate" school district).

46. E.g., *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2485 (2002) (Stevens, J., dissenting); *Mitchell v. Helms*, 530 U.S. 793, 873 (2000) (Souter, J., dissenting).

47. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Grumet*, 512 U.S. at 709-10; *Lee*, 505 U.S. at 599. Granted, when judged by its agenda and judgments, the sympathies of the current Court usually rest more with the government and the religious faithful. See *Zelman*, 122 S. Ct. at 2473; *Good News Club v. Milford Centr. Sch.*, 533 U.S. 98,

the epitome of separationism, survives the late demise of the separation slogan.[49] And *Everson* itself is the best evidence that the converse is also true: the Court can say it stands ready to ensure church-state "separation" and nevertheless permit government action that benefits religious institutions or individuals. Consider as well *McDaniel v. Paty*,[50] in which the Court invalidated a state's exclusion of clergy from the role of constitutional convention delegate. Despite a related historical lineage dating to the founding, a rather literal relationship with a separation program, and an apparently positive reference to separation in the decision,[51] time and modern constitutional law had passed these exclusions by, and the Court acted accordingly. Separation rhetoric and principle guaranteed neither the implementation of every conceivable component of a program for church-state disconnection, nor the insulation of public policy from religious influence and experience.[52]

Judicial tendencies aside, there are several defensible grounds for rejecting a constitutional principle of separation. Perhaps "separation of church and state" is so imprecise that it cannot be useful in deciding real controversies.[53] Or, the term might now be misleading considering the results in recent cases. Or, perhaps there is a competing, superseding, or otherwise superior principle with which to begin establishment clause analysis. None of these grounds, however, depend upon which groups or individuals bandied the phrase in the past nor whether they harbored illicit motives.

To be sure, revulsion is an understandable consequence of learning that one's principle looks a lot like the rhetoric of hateful bigots. And the connection, even if logically strained, can be cause for caution. If nothing else, there is the risk that an otherwise helpful term will be mistaken for code and a spiteful

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102 (2001); *Mitchell*, 530 U.S. at 801 (plurality opinion of Thomas, J.); *Agostini*, 521 U.S. at 208-09; *Capitol Sq. Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (plurality opinion of Scalia, J.); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845-46 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 3 (1993); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394-95 (1993).

48. 403 U.S. 602, 612-14 (1971).

49. See *Doe*, 530 U.S. at 314.

50. 435 U.S. 618 (1978).

51. See id. at 622 (plurality opinion of Burger, C.J.) (asserting that "[t]he purpose of the several States in providing for disqualification was primarily to assure the success of a new political experiment, the separation of church and state").

52. See also *Zorach v. Clauson*, 343 U.S. 306, 312 (1952).

53. The Court has intermittently sent that message for decades. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 672-73 (1984); *Illinois ex rel. McCollum v. Board of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 212-13 (1948) (opinion of Frankfurter, J.).

agenda. But there is a cost to reticence, too. Removing words and their images from our constitutional vocabulary can hinder communication, understanding, and problem solving. Attempts to partner separation and hate, moreover, will be beside the point for anyone willing and able to evaluate ideas and their ramifications without binding them down to the agenda of those who have mouthed the words in the past. Finally, consider the alternative: disavowing terminology or even ideas, no matter how useful, if invoked by otherwise repugnant movements or groups. It is worth remembering that new Klan members pledged themselves to freedom of speech and press as well as church-state separation and white supremacy. (p. 409) And of course there is no guarantee that religious exercise in the public sphere would remain untouched by analogous taint. After all, politicians like George Wallace fought to keep God's Word, but only one color of His children, in Alabama's finest public schools.[54]

Any effort to preserve the viability of a separation principle rests on an important assumption, however: that a program of religion- or church-state "separation" can be constructed free from prohibited anti-religious or anti-Catholic features, while still so related to common use of the term that the label is useful. In other words, it must be *logically, conceptually* possible to purify the separation principle, to separate separation from hostility. That potential should exist, so long as its meaning does not solely depend on the term's heritage, but also on the content we choose to attribute to separation and unacceptable hostility. Thus "separation of church and state" (or even separation of religion and government) at least means that the two cannot be utterly *integrated*, which is a conclusion that is not in serious dispute in this country. On the other hand and doctrinally, separation has never meant that religious practice and belief are incompatible with American democracy, entailing a faith-expelling final solution.[55] And surely a separation principle can be fashioned to mean *more* than the absence of union, *less* than expulsion, and *not* sheer hostility to religious belief and practice.

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54. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38 (1985); Philip B. Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . . ,"* in Philip B. Kurland, ed., *Church and State: The Supreme Court and the First Amendment* 3 (U. of Chicago Press, 1975) (quoting one United States Representative reacting to *Engel v. Vitale*: "They put the Negroes in to the schools and now they have driven God out of them.").

55. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) ("Some relationship between government and religious organizations is inevitable."); *Zorach*, 343 U.S. at 312.

It could mean both a prohibition against tax dollars flowing directly from government treasuries into the accounts of religious institutions, yet insulation of those same organizations from some "neutral" or "generally applicable" secular rules that unduly inhibit their ability to operate as their faith dictates.[56] The first consequence of this version of the separation principle tends to disadvantage religious organizations relative to others, at least in the short run; yet the second consequence has the opposite effect. Whatever its faults, in no sense is this version uniformly hostile to the interests of religious organizations.

The judiciary may well be free to adopt this or other forms of "separation," or to select components of an otherwise unacceptable program of church-state separation—and regardless of how dirty, low-down, and double-dealing were prior proponents of similar rhetoric. None of this is to say that historical examples cannot assist our judgment in these matters, of course. But *Separation*'s history need not confine our freedom to decide which constitutional principles to promote and which consequences those principles should have.

56. In an exceptionally useful article, Hamburger examines and rejects the evidence for a founding era general right to religious exemptions from civil laws. Philip Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992). In addition, *Reynolds v. United States*, 98 U.S. (8 Otto) 145 (1878), which was apparently the first Supreme Court opinion to quote Jefferson's use of the metaphor, id. at 164, did so in *denying* rather than supporting a faith-based exemption from an anti-polygamy law. But neither history nor precedent prevents us from at least conceptualizing an alternative principle in tension with either or both.