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THAT SERPENTINE WALL OF SEPARATION

*John Witte, Jr.**

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. \$42.

SEPARATION OF CHURCH AND STATE. By *Philip Hamburger*. Cambridge and London: Harvard University Press. 2002. Pp. xiii, 514. \$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 *McCullum v. Board of Education*, the Supreme Court’s first religion in public schools case.¹ “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.”² 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 in the effort. He continued to regard the separation of church and state as essential to the protection of

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1. *McCullum v. Bd. of Educ.*, 333 U.S. 203, 237 (1948) (Jackson, J., concurring).

2. *Id.*

3. *Id.* at 238; see also DREISBACH, p. 109.

4. DREISBACH, pp. 100-04 (summarizing cases); HAMBURGER, pp. 463-78. The most recent Supreme Court cases where the separationist principle dominated the Court’s reasoning were *Texas Monthly Inc. v. Bullock*, 489 U.S. 1 (1989); *Aguilar v. Felton*, 473 U.S. 402 (1985); and *Larkin v. Grendel’s Den Inc.*, 459 U.S. 116 (1982).

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 off site.¹¹ 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."¹²

For all his growing misgivings about separationism, however, even this bold dissenter on the Court,¹³ well trained in legal history,¹⁴ never

5. See, e.g., *United States v. Ballard*, 322 U.S. 78, 92-95 (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, 176-78 (1944) (Jackson, J., dissenting from decision to uphold child-labor laws against distribution of religious literature by a minor); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 642 (1943) (Jackson, J., writing for the majority, exempting Jehovah's Witnesses from compulsory flag salute).

6. See 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* 29, 36-43 (1969) (summarizing cases).

7. See, e.g., *Kunz v. New York*, 340 U.S. 290, 295-314 (1951) (Jackson, J., dissenting from holding that a city may not deny a license to a Baptist preacher in a public park); *Terminiello v. Chicago*, 337 U.S. 1, 13-37 (1949) (Jackson, J., dissenting from holding that free speech protects anti-Semitic hate speech that causes riot); *Saia v. New York*, 334 U.S. 558, 566-72 (1948) (Jackson, J., dissenting from holding that banning religious broadcasts without a license violates free speech); *Murdock v. Pennsylvania*, 319 U.S. 105, 117-34 (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 also JACKSON, *supra* note 6, at 65-83 (examining role of Supreme Court in state and local disputes).

9. *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952).

10. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 126-32 (1952) (Jackson, J., dissenting).

11. *Zorach*, 343 U.S. at 323-25 (Jackson, J., dissenting).

12. *Id.* at 325.

13. 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 concur-

once questioned the historical foundation or constitutional imperative of strict separationism. In *Everson v. Board of Education*,¹⁵ the Supreme Court for the first time applied the First Amendment disestablishment guarantee to the states. Justice Black, Jackson's nemesis,¹⁶ 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 impregnable."¹⁷ Though Jackson dissented from the *Everson* holding, he accepted the Court's account of the history and meaning of the First Amendment.¹⁸ Jackson was concerned about the rhetorical "undertones" of "advocating complete and uncompromising separation of Church from state."¹⁹ 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.²⁰

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 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.²¹ "Metaphors in law are to be narrowly watched," Benjamin Cardozo had warned in 1926, "for starting as devices to liberate thought, they end often by enslaving it."²² So it has been with the metaphor of a wall of separation.²³ What started as one of several useful principles of

rences. *Id.* at 504 n.95; *Bibliography: The Judicial Opinions of Justice Robert H. Jackson in the Supreme Court of the United States October 6, 1941 — October 9, 1954*, 8 STAN. L. REV. 60, 60-71 (1955).

14. See ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941) (giving a detailed history of constitutional law).

15. 330 U.S. 1 (1947).

16. Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203.

17. *Everson*, 330 U.S. at 18.

18. *Id.* at 28.

19. *Id.* at 19.

20. JACKSON, *supra* note 14, at 315 (discussing Jefferson).

21. *Genesis* 3:1-7.

22. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926).

23. See DREISBACH, pp. 107-28, and HAMBURGER, pp. 487-90, on the virtues and vices of the wall metaphor.

religious liberty eventually became a mechanical test²⁴ that courts applied bluntly, even slavishly, in a whole series of cases. What started as one of many images²⁵ 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,²⁶ and overruled some of its harshest applications in earlier cases,²⁷ the wall-of-separation metaphor has lived on in popular imagination as the salutary source and summary of American religious liberty (Hamburger, pp. 1-8; Dreisbach, pp. 1-8, 107-28). Even popular imagination might change, if the findings of Professors Dreisbach and Hamburger are taken seriously.²⁸

II. ENTER HAMBURGER AND DREISBACH

Between the two of them, Daniel Dreisbach²⁹ and Philip Hamburger³⁰ 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 “deuteronomos”) 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 (Hamburger, pp. 111-492). While Hamburger inevitably covers some of the same ground broken earlier by Anson Stokes,³¹

24. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (requiring that government policies challenged under the establishment clause must 1) have a secular purpose; 2) have a primary effect that neither advances or inhibits religion; and 3) not foster an excessive entanglement between church and state).

25. For other images that were current, including “barriers,” “fences,” and “lines” of separation, see DREISBACH, pp. 83-89.

26. *Zelman v. Simmons-Harris*, 536 U.S. 639 (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 Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990); *Bowen v. Kendrick*, 487 U.S. 589 (1988); cases cited *infra* note 27.

27. *Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (overruling *Wolman v. Walter*, 433 U.S. 229 (1977), and *Meeck v. Pittenger*, 421 U.S. 349 (1975)); *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985)).

28. 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. 805 (1999).

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30. John P. Wilson Professor of Law, University of Chicago.

31. ANSON P. STOKES, *CHURCH AND STATE IN THE UNITED STATES* (1950).

Leo Pfeffer,³² Leonard Levy,³³ and others,³⁴ 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, the National Liberal League, the Ku Klux Klan, and sundry other groups (Hamburger, 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 — "Late Eighteenth-Century Religious Liberty," "Early Nineteenth-Century Republicanism," "Mid-Nineteenth-Century Americanism," and "Late Nineteenth- and Early Twentieth-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 ample reservations about parts of Professor Hamburger's analysis,³⁵ 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 interpret 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.³⁶ For Dreisbach, this is precisely the sort of evidence that is needed to understand what Thomas

32. LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* (rev. ed. 1967).

33. LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (2d ed. 1994).

34. 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).

35. See *infra* notes 93-95, 117-118, 121-129 and accompanying text.

36. James H. Hutson, "A Wall of Separation": *FBI Helps Restore Jefferson's Obliterated Draft*, 57 *LIBR. CONG. BULL.* 136-39, 163 (1998). The original Jefferson letter is reprinted in DREISBACH, pp. 144-46. 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* (James H. Huston ed., 2000) (based on papers of a June 18-19, 1998 conference at the Library of Congress); *Forum*, 56 *WM. & MARY Q.* 775 (1999).

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 (Dreisbach, pp. 71-82), and forward to selected nineteenth- and twentieth-century interpretations, including those of the United States Supreme Court (Dreisbach, pp. 95-128).

This book is vintage Dreisbach.³⁷ A neatly trimmed and tightly written text of 128 pages is built on a scholarly foundation of even greater thickness: eighty-nine pages of dense notes, twenty-four pages of bibliography, and nine appendices with critical editions of Jefferson’s letters to and about the Danbury Baptists as well as other key documents on religious liberty that Jefferson wrote as Virginia’s Governor and as America’s President and aged savant. Any-one studying Jefferson’s views of separation would be wise to use Dreisbach’s primary texts and to ponder his 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 (Dreisbach, 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,³⁸ 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 anticlericalism, 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.³⁹ 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 important, Jefferson’s 1802 letter simply repeated what the founders commonly understood the First Amendment to be: It was a declaration that the federal government (“Congress”) had no jurisdic-

37. It is much in the style of *RELIGION AND POLITICS IN THE EARLY REPUBLIC: JASPER ADAMS AND THE CHURCH-STATE DEBATE* (Daniel L. Dreisbach ed., 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*, pp. 250-51.

38. Dreisbach gave Hamburger’s book a handsome jacket endorsement and cited him several times throughout. *DREISBACH*, pp. 7, 29, 52, 200, 203, 225. Hamburger sent Dreisbach his draft manuscript, *DREISBACH*, p. 272, and discussed his views generously. See *HAMBURGER*, pp. 1-2, 4, 55, 159, 164, 259.

39. See *infra* notes 117-118 and accompanying text.

tion over questions of religion and religious liberty; these were left to the states to resolve in accordance with their own state constitutions.⁴⁰

Second, Hamburger argues that, in the course of the nineteenth century, strict separation of church and state became an American ideal. It was the product of a growing alliance 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.⁴¹ By contrast, Dreisbach sees little evidence of any sustained strict separation of church and state in nineteenth-century law.⁴² 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 separate but functionally cooperated in a variety of ways, particularly at the local level.⁴³

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.⁴⁴ 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.⁴⁵

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 authors differ markedly in interpretation or where my own interpretation of the sources differs from one or both of theirs.

40. See *infra* note 116 and accompanying text.

41. See *infra* notes 105-106 and accompanying text.

42. See *infra* notes 149-152 and accompanying text.

43. See *infra* notes 139-147 and accompanying text.

44. See *infra* note 155 and accompanying text.

45. See *infra* notes 105-106, 155 and accompanying text.

III. GENESIS: THE ROOTS OF AMERICAN SEPARATIONISM

A. *Biblical Roots*

Though it makes only modest appearance in these two volumes, (Hamburger, pp. 22, 29, 41, 44, 48; Dreisbach, p. 230 n.4), 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 them⁴⁶ 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 people⁴⁹ — 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 “be not conformed to this 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, 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

46. 1 *Esdras* 7-9; *Exodus* 34:11-16; *Ezra* 6:21, 10:1; 1 *Kings* 8:53; *Leviticus* 20:24-5; *Nehemiah* 9:1-15, 10:28-31, 13:1-3; 2 *Samuel* 22:26-7.

47. 1 *Chronicles* 23:13; *Deuteronomy* 10:8, 32:8; *Ezekial* 40-42; *Leviticus* 21:1-22:16; *Numbers* 8:14, 16:9.

48. *Jeremiah* 1:18, 15:20.

49. *Ezekial* 42:1; *Jeremiah* 1:18-19, 15:19-21; 1 *Kings* 3:1; *Nehemiah* 3:1-32, 4:15-20, 12:27-43.

50. *Mark* 12:17; *Matthew* 22:21; *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).

55. OLIVER O'DONOVAN, *THE DESIRE OF THE NATIONS: REDISCOVERING THE ROOTS OF POLITICAL THEOLOGY* 82-119, 193-211 (1996).

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* (ca. 100-120 c.e.) 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 — both in the East and in the West.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 them.⁵⁹ But separationism in this sense also 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 in the company of the Devil.

56. Reprinted in PHILIP SCHAFF, *THE TEACHING OF THE TWELVE APOSTLES* 162-63 (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; and 2 *Peter* 2:2.

57. Reprinted in SCHAFF, *supra* note 56, at 227-28.

58. *Id.* at 18; GERARD E. CASPARY, *POLITICS AND EXEGESIS: ORIGEN AND THE TWO SWORDS* (1979); LESTER L. FIELD, JR., *LIBERTY, DOMINION, AND THE TWO SWORDS: ON THE ORIGINS OF WESTERN POLITICAL THEOLOGY* 180-398 (1998); ADOLF HARNACK, *THE CONSTITUTION AND LAW OF THE CHURCH IN THE FIRST TWO CENTURIES* (F.L. Pogson trans., H.D.A. Major ed., 1910).

59. GERD TELLENBACH, *CHURCH, STATE AND CHRISTIAN SOCIETY* 25-29 (R.F. Bennett trans., 1959). See sources and discussion in MARILYN DUNN, *THE EMERGENCE OF MONASTICISM: FROM THE DESERT FATHERS TO THE EARLY MIDDLE AGES* (2000); DAVID KNOWLES, *CHRISTIAN MONASTICISM* (1969); and C.H. LAWRENCE, *MEDIAEVAL MONASTICISM: FORMS OF RELIGIOUS LIFE IN WESTERN EUROPE IN THE MIDDLE AGES* (3d ed. 2001).

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 other⁶² — 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 in both cities 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 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 in function. 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 adminis-

60. ST. AUGUSTINE, CITY OF GOD 84-89, 460-73, 483-506 (Gerald G. Walsh et al. trans., Vernon J. Bourke ed., 1958) [hereinafter CITY OF GOD].

61. *Id.* at 494-506.

62. *Id.* at 466-72; 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 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); and EUGENE TESELLE, LIVING IN TWO CITIES: AUGUSTINIAN TRAJECTORIES IN POLITICAL THOUGHT (1998).

64. CITY OF GOD, *supra* note 60, at 481-93.

ter 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 this world is chiefly ruled: the sacred authority of the Popes and the royal power. Of these the priestly power is much more important, because it has to render account for the kings of men themselves at [the Last Judgment]. For you know, our very 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 Revolution⁶⁷ 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 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 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, a spiritual office within the Christian empire. It claimed a vast new jurisdiction, a political 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

65. Quoted in CHURCH AND STATE THROUGH THE CENTURIES: A COLLECTION OF HISTORIC DOCUMENTS WITH COMMENTARIES 10-11 (Sidney Z. Ehler & John B. Morrall trans. & eds., 1954) [hereinafter CHURCH AND STATE].

66. See, e.g., ERNST H. KANTOROWICZ, THE KING'S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY (1957); KARL FREDERICK MORRISON, THE TWO KINGDOMS: ECCLESIOLOGY IN CAROLINGIAN POLITICAL THOUGHT (1964).

67. The term was made popular by HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983).

68. For the transmutation of the two-powers image to two swords, see BRIAN TIERNEY, THE CRISIS OF CHURCH AND STATE 1050-1300, at 53 (1964).

authorities over secular subjects that required the Church's special forms of Christian equity.⁶⁹ A vast body of new church law, called canon law, 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 system of 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 Christendom. The clergy, however, generally delegated the temporal sword to those authorities below the spiritual realm — emperors, kings, dukes, and their civil retainers, 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 preempted by 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 the 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 should be under another and that the temporal authority

69. See BERMAN, *supra* note 67, at 85-119, 165-200; Udo Wolter, *Amt und Officium in mittelalterlichen Quellen vom 13. bis 15. Jahrhundert*, 105 ZEITSCHRIFT DER SAVIGNY-STIFTUNG (KAN. AB.) 246 (1988).

70. BERMAN, *supra* note 67, at 199-254; R.H. HELMHOLZ, *THE SPIRIT OF CLASSICAL CANON LAW* (1996).

71. The phrase is from F.W. Maitland, quoted and elaborated in BERMAN, *supra* note 67, at 113-15.

72. BRIAN TIERNEY, *THE ORIGINS OF PAPAL INFALLIBILITY, 1150-1350*, at 39-45, 82-121 (1972).

73. On various medieval formulations, see OTTO GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* 7-21 (Frederic William Maitland trans., 1958); 2 EWART LEWIS, *MEDIEVAL POLITICAL IDEAS* 506-38 (1954). For patristic antecedents, see CASPARY, *supra* note 58, and FIELD, *supra* note 58.

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] err, it could be judged solely by God, not by man.⁷⁴

Two communities, two cities, two powers, two swords: These were four 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 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 law and clerical control, 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 variations of the same four models of separationism that the earlier Catholic tradition had forged — two communities, two cities, two powers, two swords — adding 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 communi-

74. Quoted in *CHURCH AND STATE*, *supra* note 65, at 91-92. For other such later medieval formulations, see *TIERNEY*, *supra* note 68, at 180.

75. MARTIN LUTHER, *FREEDOM OF A CHRISTIAN* (1520), *reprinted in* 31 *LUTHER’S WORKS* 327-77 (W. A. Lambert trans., J. Pelikan ed., 1968).

76. See sources and discussion in JOHN WITTE, JR., *LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION* 33-64 (2002) [hereinafter *WITTE, LAW AND PROTESTANTISM*].

ties 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 discipleship, simplicity, charity, and nonresistance. 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 regula-

77. The phrase is from Menno Simons, quoted by DREISBACH, p. 73. See comparable sentiments in *THE COMPLETE WRITINGS OF MENNO SIMONS*, c. 1496-1561, at 29, 117-20, 158-59, 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, at 56-60 (Gilbert Fast & Galen A. Peters trans., C. Arnold Synder ed., 2001) (a frequently reprinted volume listing all the biblical passages on separation that were to be the subject of Anabaptist sermons, devotions, and catechesis).

78. See illustrative texts in *ANABAPTISM IN OUTLINE* 101-14, 211-32 (Walter Klaasen ed., 1981).

79. This language is from the Schleitheim Confession (1527), art. 6, *supra* note 77, at 80-81.

80. See samples in *ANABAPTISM IN OUTLINE*, *supra* note 78, at 244-63.

81. Letter from Roger Williams to John Cotton (1643), in 1 *THE COMPLETE WRITINGS OF ROGER WILLIAMS* 392 (1963).

tions of their property and polity, state incorporation of their society and clergy, state interference in their discipline and government, and 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 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 visible 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 were 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. While the church should cooperate in implementing laws, and

82. See sources in WILLIAM G. MCLOUGHLIN, *NEW ENGLAND DISSENT, 1630-1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE* (1971); WILLIAM G. MCLOUGHLIN, *SOUL LIBERTY: THE BAPTISTS' STRUGGLE IN NEW ENGLAND, 1630-1833* (1991); and ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM: PAMPHLETS, 1754-1789 (William G. McLoughlin ed., 1968).

83. Detailed sources for this subsection are in WITTE, *LAW AND PROTESTANTISM*, *supra* note 76, at 87-117.

its clergy and professors were to preach against injustice, formal 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 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, and the state-run hospice. He was to educate them through the public school, the public library, and 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 "examined separately." For there is "a great difference . . . between 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 cooperated with state officials in defining and enforcing public morals.⁸⁷

84. See sources and discussion in *id.* 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 J. 359, 392 (1996).

86. See, e.g., JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 847, 1215, 1486 (F.L. Battles trans., John T. McNeill ed., 1960) (1559); see also 39 IOANNIS CALVINI, OPERA QUAE SUPERSUNT OMNIA 352 (G. Baum et al. eds., 1863); 48 CALVINI, *supra*, at 277.

87. See representative articles in CALVIN'S THOUGHT ON ECONOMIC AND SOCIAL ISSUES AND THE RELATIONSHIP OF CHURCH AND STATE (Richard C. Gamble ed., 1992)

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 — generally 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 and the pope.⁸⁹ The Supremacy Act of 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 English monarchs and Parliaments thus established a uniform doctrine, liturgy, and canon by issuing the Book of Common Prayer, the Thirty-Nine

and the classic study of JOSEF BOHATEC, *CALVINS LEHRE VON STAAT UND KIRCHE MIT BESONDERER BERÜCKSICHTIGUNG DES ORGANISMUSGEDANKENS* (1968).

88. EMIL OBERHOLZER, JR., *DELINQUENT SAINTS: DISCIPLINARY ACTIONS IN THE EARLY CONGREGATIONAL CHURCHES IN MASSACHUSETTS* (1956); DAVID A. WEIR, *COVENANT AND COVENANTING IN SEVENTEENTH-CENTURY NEW ENGLAND* (forthcoming 2004). See key documents in WILLISTON WALKER, *THE CREEDS AND PLATFORMS OF CONGREGATIONALISM* (1991).

89. See sources in *SOURCES OF ENGLISH CONSTITUTIONAL HISTORY* 304-12 (Carl F. Stephenson & Frederick G. Marcham eds. & trans., 1937).

90. *Reprinted in id.* at 311. For further discussion of The Supremacy Act of 1534, see 2 JOSEF LECLER, *TOLERATION AND THE REFORMATION* 329-79 (1960).

Articles, and the 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 Convocation, the church courts, or parish clergy. 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 separatists. 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), Hooker recognized a "natural separation" between the Church and the Commonwealth of England. But he insisted that these two bodies had to be "under one chief Governor."⁹² For Hooker, 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 to North America.

91. On various English and New England "separatists" see NORMAN ALLEN 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 1570-1625* (1988); CHAMPLIN BURRAGE, *THE EARLY ENGLISH DISSENTERS IN THE LIGHT OF RECENT RESEARCH (1550-1641)* (1912); JAMES ROBERT COGGINS, *JOHN SMYTH'S CONGREGATION: ENGLISH SEPARATISM, MENNONITE INFLUENCE, AND THE ELECT NATION 29-68, 128-32* (1991); TIMOTHY GEORGE, *JOHN ROBINSON AND THE ENGLISH SEPARATIST TRADITION* (1982); C.C. GOEN, *REVIVALISM AND SEPARATISM IN NEW ENGLAND, 1740-1800* (1962); B.R. WHITE, *THE ENGLISH SEPARATIST TRADITION: FROM THE MARIAN MARTYRS TO THE PILGRIM FATHERS* (1971); and Verne Dale Morey, *The Brownist Churches: A Study in English Separatism, 1553-1630* (1954) (unpublished Ph.D. dissertation, Harvard University) (on file with author).

92. RICHARD HOOKER, *OF THE LAWS OF ECCLESIASTICAL POLITY* 129-38 (Arthur Stephen McGrade ed., 1989); see DREISBACH, pp. 73-76; HAMBURGER, pp. 32-38.

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 (Dreisbach, pp. 73-79; Hamburger, pp. 32-45, 50-53) 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’ metaphor has a long history in Western theological and political discourse” before the eighteenth century (Dreisbach, p. 104), topics on which he has written astutely before.⁹³ In this book, Dreisbach focuses deliberately on American examples.

Hamburger, however, argues that “in the centuries prior to 1800 the idea of the separation of church and state appealed to only a tiny fraction of Europeans and Americans” (Hamburger, p. 21). The occasional references to separation that do exist before Jefferson’s 1802 Letter to the Danbury Baptists, he argues, were at best only “nascent manifestations” of the ideal of separation of church and state (Hamburger, p. 29). “Earlier Christians . . . adopted many different conceptions of the relationship between church and state, but they did not ordinarily, if ever, propose a separation, let alone a wall of separation, between these two institutions” (Hamburger, p. 29). Seventeenth- and early eighteenth-century writers in America, England, and France generally said “little if anything about” separation (Hamburger, p. 78), and none “even came close to” advocating separation of church and state (Hamburger, p. 79). Even the more radical writers of the day, from John Locke and Roger Williams to Marquis de Condorcet and Thomas Paine, had formulations of separations that were “very limited” in scope (Hamburger, pp. 53, 60, 89), and at best “sort of,” “not quite,” “close to,” “almost espoused” formulations of a separation of church and state (Hamburger, pp. 53, 57, 60, 65, 79, 89). And even these prototypical views “made little impression” (Hamburger, p. 60) and “found little support” (Hamburger, p. 53).

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

93. See comments in DREISBACH, pp. 72-73, and sources in DREISBACH, pp. 250-51.

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 (Hamburger, pp. 65-80).

The binocular of establishment versus 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.⁹⁴ 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 (Hamburger, pp. 92-94, 102-04), American Presbyterians not only divided bitterly on issues of separationism,⁹⁵ 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.⁹⁶

Professor Hamburger too readily equates the separation of church and state with the disestablishment of religion in judging the pre-nineteenth-century material.⁹⁷ He thus too easily dismisses the

94. See, e.g., EDMUND S. MORGAN, *PURITAN POLITICAL IDEAS: 1558-1794* (1965); John Witte, Jr., *How to Govern a City on a Hill: The Early Puritan Contributions to American Constitutionalism*, 39 EMORY L.J. 41 (1990).

95. For an example, see the debates over reformulation of the provisions on church and state in the Westminster Confession (1647), in 1 PHILLIP SCHAFF, *CREEDS OF CHRISTENDOM WITH A HISTORY AND CRITICAL NOTES 807-08* (4th ed. 1877) [hereinafter *CREEDS*]; 3 SCHAFF, *supra*, at 653-54; WALKER, *supra* note 88, at 388-97.

96. See detailed religious demography in EDWIN SCOTT GAUSTAD & PHILIP L. BARLOW, *NEW HISTORICAL ATLAS OF RELIGION IN AMERICA* (2001).

97. See, e.g., HAMBURGER, pp. 23, 36-38, 53-54, 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 in HAMBURGER, pp. 6-9. "The difference, however, was of profound importance to earlier Americans." HAMBURGER, pp. 479-80.

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 (Hamburger, 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.

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 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, and 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.”⁹⁸ This ideal of separationism was captured in

98. Quoted and discussed in DREISBACH, pp. 84-85.

state and federal constitutional guarantees of freedom of association and free exercise rights of religious groups.⁹⁹

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.¹⁰⁰ It became commonplace in eighteenth- and nineteenth-century America. "Every Man has an equal Right to follow the Dictates of his own Conscience in the Affairs of Religion . . . and to follow his Judgment wherever it leads him," one pamphleteer wrote. This is "an equal Right with any Rulers be they Civil or Ecclesiastical."¹⁰¹ This goal of separationism was captured in the numerous state constitutional guarantees of liberty of conscience.¹⁰²

Third, separationism served to protect the state from the church. This was a more novel sentiment in early America, but it was pressed with increasing 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."¹⁰³ "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."¹⁰⁴ This goal of separationism was particularly pronounced in state constitutional and statutory prohibitions on clerical participation in political office.¹⁰⁵

Fourth, separationism served to protect individual state governments from interference by the federal government in governing their local religious affairs. As Professor Dreisbach argues, this "jurisdictional view" of separationism was part and product of the American founders' experiment in federalism (Dreisbach, pp. 55-70). The found-

99. For examples, see JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 42-44, 88-91, 246-49 (2000) [hereinafter WITTE, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT].

100. 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 & W. Cole Durham, Jr. eds., 1996).

101. ELISHA WILLIAMS, THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS 7-8 (1744).

102. See samples in WITTE, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT, *supra* note 99, at 39-42, 88-89, 246-49.

103. Quoted and discussed in HAMBURGER, p. 122 (internal quotation marks and citation omitted).

104. *Id.* (internal quotation marks and citation omitted).

105. See HAMBURGER, pp. 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).

ers 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” (Dreisbach, p. 62). 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 principle of free exercise and free association. The individual state’s jurisdiction was protected by the constitutional principle of federalism. On this jurisdictional reading of separationism, state governments 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. In the nineteenth century, this view of separationism spurred the call to separate religion and politics altogether. This was the most novel, and the most controversial, form of separationist logic to emerge in early 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 (Hamburger, pp. 111-43). The fighting continued in the successive state (and sometimes federal) battles over freemasonry, Sunday laws, slavery and abolition, marriage and divorce reforms, religious education, enforcement of Christian morals, and more (Hamburger, pp. 178-79, 244-45, 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 United States Constitution, either with overtly pro-Christian or covertly antireligious sentiments (Hamburger, 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.¹⁰⁶ The First Amendment provides: “Congress shall make

106. See DREISBACH, pp. 55-76; HAMBURGER, pp. 9-13, 89-107; see also Daniel L. Dreisbach, *A Lively and Fair Experiment: Religion and the American Constitutional Tradition*, 49 EMORY L.J. 223 (2000) (reviewing WITTE, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT, *supra* note 99); Philip A. Hamburger, *A Constitutional*

no law respecting an establishment of religion, or prohibiting the free exercise thereof."¹⁰⁷ 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 (Dreisbach, 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, [it] sought to preserve the power of government to legislate on religion in other ways." (Hamburger, 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.¹⁰⁸ 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.¹⁰⁹

Right of Religious Exemption: An Historical Perspective, 60 GEO. WASH. L. REV. 915 (1992); Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295.

107. U.S. CONST. amend. I.

108. WITTE, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT, *supra* note 99, at 37-86.

109. See also *id.* at 91-96 (arguing similarly that while the term "separation of church and state" does not appear in the texts of 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, pp. 90-107.

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?¹¹⁰

The Danbury Letter must be understood in political context, and both authors take pains to provide the same.¹¹¹ Less than two years before, Jefferson had barely survived a brutal Presidential campaign against incumbent John Adams. Leaders of Adams's 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 as 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.¹¹²

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's counsel on how better to secure religious liberty in the state. Jefferson saw this letter as a welcome occasion to sow “useful truths and principles” among friends and foes alike about his views of religious liberty (Dreisbach, p. 43). 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

110. For Supreme Court cases that cite the letter, see DREISBACH, pp. 97-106, and HAMBURGER, pp. 6-7, 454-78.

111. See DREISBACH, pp. 25-54; HAMBURGER, pp. 111-55.

112. EDWIN S. GAUSTAD, *SWORN ON THE ALTAR OF GOD: A RELIGIOUS BIOGRAPHY OF THOMAS JEFFERSON* 93 (1996) (internal quotation marks omitted).

prayers, even though he had done so as Governor of Virginia.¹¹³ The first draft of the letter sought to accomplish both goals. His Attorney General, Levi Lincoln, advised Jefferson to drop the discussion of Thanksgiving proclamations, for fear of offending Republican friends and Federalist foes alike.¹¹⁴ Jefferson obliged him, and issued the final letter on January 1, 1802. After its opening salutation the full letter reads:

Believing with you that religion is a matter which lies solely between Man & 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 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 tender you for yourselves & your religious association, assurances of my high respect & esteem.¹¹⁵

Professor Dreisbach reads this letter as a part and product of Jefferson's jurisdictional separationism. Jefferson 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 powers 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.¹¹⁶

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

113. DREISBACH, pp. 43-44. Governor Jefferson's 1779 Thanksgiving proclamation is in DREISBACH, pp. 137-39.

114. Levi's letter is quoted in DREISBACH, pp. 44-45. The changes that Jefferson made are tabulated in DREISBACH, pp. 48-49.

115. DREISBACH, p. 148. This edition corrects the punctuation of the common edition in 8 THE WRITINGS OF THOMAS JEFFERSON 113-14 (H. Washington ed., 1853-54), and properly uses the original word "legitimate" rather than "legislative."

116. DREISBACH, p. 152 (internal quotation marks omitted).

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 (Dreisbach, p. 53).

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 explicitly 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. . . . [T]he "wall of separation" metaphor reconceptualized the First Amendment in terms of *separation* between church and (federal) state. (Dreisbach, pp. 53-54)

The final letter said nothing directly about the free exercise or nonestablishment of religion. But Jefferson's view of the nonestablishment prohibition on religious establishments by 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 (Dreisbach, p. 54).

Professor Hamburger reads Jefferson's letter as evidence 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 "tyranny over the mind of man," dulling them into "steady habits," stable institutions, and routine rituals that impeded experimentation and novelty, the lifeblood of liberty and progress (Hamburger, pp. 148-49).

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 by churches to devote their time and energy to this specialty. As Jefferson put it:

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 or conduct of those administering it, it is a breach of contract, depriving their audience of the kind of service for which they are salaried.¹¹⁷

117. Letter from Thomas Jefferson to P.H. Wendover (March 13, 1815), *quoted and discussed in* HAMBURGER, pp. 152-55.

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 decades later by French philosopher Auguste Comte that sought to differentiate all of human knowledge into a series of separate disciplines and specialties.¹¹⁸

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 (Hamburger, 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 novel and provocative. Despite their differences, they both show how multiple views of separation of church and state can be plausibly read in this famous text. I read another view of separationism in the text, 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.¹¹⁹ 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 & 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. . . .*" Then after reciting his memorable "thus building a wall of separation between Church & State," he says that "this expression of the supreme will of the nation [was] *in behalf of the rights of*

118. See THE POSITIVE PHILOSOPHY OF AUGUSTE COMTE (Harriet Martineau ed., 1853).

119. 12 THE STATUTES AT LARGE . . . OF VIRGINIA 84-86. The 1779 Draft Bill is included in DREISBACH, pp. 133-35.

conscience,” and designed “to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.”¹²⁰

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.”¹²¹

D. *Separationism and Anti-Catholicism*

The bitter political struggles of 1800 were only 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 immigrants, 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 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. Around 1790, American Protestants and Catholics had 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

120. Quoted in DREISBACH, p. 148 (emphasis added).

121. *See id.*

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 (Hamburger, pp. 191-251, 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 (Hamburger, 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 (Hamburger, pp. 219-29, 322, 340-41, 412-18). All this is a salutary corrective to more pro-Protestant traditional accounts.¹²²

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 (Hamburger, pp. 219-46). These caveats deserve 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.¹²³ 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 of freedom almost always marching in opposite directions. In America I found them intimately

122. Including my own unduly pro-Protestant reading. See criticisms in Richard W. Garnett, *Francis Bacon Takes on the Ghouls: The "First Principles" of Religious Freedom*, 3 GREEN BAG (2d ser.) 447, 453-54 (2000).

123. See *supra* notes 56-66 and accompanying text.

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 the 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 their country was the complete 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.¹²⁴

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.¹²⁵ For the pope it was an “absurd and erroneous proposition which claims that liberty of conscience must be maintained for everyone.”¹²⁶ 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.”¹²⁷ 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.’”¹²⁸ 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.”¹²⁹ 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.”¹³⁰

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

124. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 295 (George Lawrence trans., J.P. Mayer ed., 1969) (paragraph breaks removed).

125. See HAMBURGER, pp. 229-34 (discussing some of this papal document and Protestant reactions thereto).

126. *Mirari vos* (On Liberalism and Religious Indifferentism) (1832) [hereinafter *Mirari vos*], available at <http://www.petersnet.net/browse/3881.htm>, ¶ 14 (last visited Sept. 15, 2003).

127. *Id.* ¶¶ 15-16.

128. *Id.* ¶ 19. “Belial” means the “spirit of evil personified” or “fallen angel.” OXFORD ENGLISH DICTIONARY “Belial” (1971).

129. *Mirari vos*, *supra* note 126, ¶ 20.

130. *Id.* ¶ 23.

18. Protestantism is nothing more than another form of the same true Christian religion, in which it is possible to be equally pleasing to God as 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.¹³¹

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 power in both spiritual and temporal affairs, unhindered by the state.¹³² Six years later, the church declared the pope's teachings to be infallible and condemned Protestants as "heretics" who dared subordinate the "divine magisterium of the Church" to the "judgment of each individual."¹³³

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 powers¹³⁴ specters of the two-swords theory by which the papacy had claimed supreme rule in a unified Christendom.¹³⁵ This simply could not be for Protestants. Conveniently armed with new editions of the writings of Martin Luther,¹³⁶ John Calvin,¹³⁷ and others,¹³⁸ American Protestants repeated much of the vitriolic anti-Catholic and anticlerical rhetoric that had clattered so

131. The Papal Syllabus of Errors (1864), in 2 CREEDS, *supra* note 95, at 213, 217-19, 227.

132. *Id.* at 218-33, ¶¶ 20, 24-35, 41-44, 53-54, 75-80.

133. The Dogmatic Decrees of the Vatican Council Concerning the Catholic Faith and the Church of Christ (1870), *reprinted in* 2 CREEDS, *supra* note 95, at 234, 236.

134. *Id.* at 221, ¶ 34.

135. *See supra* notes 67-74.

136. *See* ERIC W. GRITSCH, A HISTORY OF LUTHERANISM 179-216 (2002); ERIC W. GRITSCH & ROBERT W. JENSON, LUTHERANISM: THE THEOLOGICAL MOVEMENT AND ITS CONFESSIONAL WRITINGS (1976).

137. *See* WULFERT DE GREEF, THE WRITINGS OF JOHN CALVIN (Lyle D. Bierma trans., Baker Book House Co. 1993) (1989).

138. *See* JOHN ADAMS, A DISSERTATION ON THE CANON AND FEUDAL LAW (1774), *reprinted in* 3 THE WORKS OF JOHN ADAMS 447 (Charles F. Adams ed., 1851) (denouncing Catholic canon law and papal authority for its intrusions on liberty).

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 United States Supreme Court and Congress sometimes provided Catholics with relief. Thus in *Cummings v. Missouri* (1866), the Court held that a 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.¹³⁹ 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 intra-church disputes, explicitly extending that principle to Catholics.¹⁴⁰ 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.¹⁴¹ 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.¹⁴² In *Quick Bear v. Leupp* (1908), the Court upheld the federal distribution of funds to Catholic schools that offered education to Native Americans.¹⁴³ In *Order of St. Benedict v. Steinhäuser* (1914), the Court upheld a monastery's communal ownership of property against claims by relatives of a deceased monk.¹⁴⁴ 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.¹⁴⁵ 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.¹⁴⁶

139. 71 U.S. (4 Wall.) 277 (1866).

140. 82 U.S. (15 Wall.) 131 (1872); 80 U.S. (13 Wall.) 679 (1871).

141. 143 U.S. 457 (1892).

142. 175 U.S. 291 (1899).

143. 210 U.S. 50 (1908).

144. 234 U.S. 640 (1914).

145. 268 U.S. 510 (1925); see also HAMBURGER, pp. 417-19, 453.

146. CARL ZOLLMAN, AMERICAN CHURCH LAW (1933).

Fourth, it is going too far, in my view, to allege that later Protestants rewrote history to claim they had invented separationism earlier and had inscribed it onto American constitutional law (Hamburger, pp. 201-19, 246-51, 342-59). This charge presupposes that Protestants did not teach separation of church and state before the mid-nineteenth century. But they did.¹⁴⁷ This charge presupposes that earlier American constitutional laws did not prescribe separationism. But they did.¹⁴⁸ 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.¹⁴⁹

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 other 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 1892,¹⁵⁰ testify to this reality, which Professor Dreisbach has detailed in several writings beyond the volume under review.¹⁵¹ This was no paradigm or paradise of American religious liberty. But it

147. See *supra* notes 75-92 and accompanying text.

148. See *supra* notes 98-109 and accompanying text.

149. See ABRAHAM KUYPER, LECTURES ON CALVINISM (1931) (lectures delivered at Princeton University, 1898) ; ABRAHAM KUYPER, VARIA AMERICANA (1899); PHILIP SCHAFF, CHURCH AND STATE IN THE UNITED STATES (1888); TOCQUEVILLE, *supra* note 124; ACTON IN AMERICA: THE AMERICAN JOURNAL OF SIR JOHN ACTON 1853 (S.W. Jackman ed., 1979). For other such foreign impressions see sources in HENRY T. TUCKERMAN, AMERICA AND HER COMMENTATORS (1864); AMERICA THROUGH BRITISH EYES (Allan Nevins ed., 1948); and AMERIKA IN EUROPESE OGEN (K. van Berkel ed., 1990).

150. Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892).

151. 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 (1996). See also the recent MARK A. NOLL, AMERICA'S GOD: FROM JONATHAN EDWARDS TO ABRAHAM LINCOLN (2002) and the massive literature distilled therein.

does attest to the legal presence of the first four kinds of separation of church and state, but not the fifth form of strict separationism.¹⁵²

V. DEUTERONOMY: WHAT 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.¹⁵³ 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, and *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."¹⁵⁴

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 (Hamburger, 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 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.¹⁵⁵

152. See *supra* notes 98-105 and accompanying text.

153. 330 U.S. 1 (1947).

154. *Everson*, 330 U.S. at 15-16.

155. DREISBACH, pp. 97-116; Daniel L. Dreisbach, *Everson and the Command of History: The Supreme Court, Lessons of History, and the Church-State Debate in America*, in

Much of the rest of the American separationist story has risen to hornbook familiarity,¹⁵⁶ and both authors eschew detailed analysis of it. It is now well known that, from 1947-1989, the Supreme Court applied its newly minted separationist logic primarily to issues of education. In nearly forty cases, the Court largely removed religion from the public school and largely removed religious schools from state patronage.¹⁵⁷ 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.¹⁵⁸ This constitutional reification of separationist 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 nonendorsement most prominently.¹⁵⁹ 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 described.

In my view, separation of church and state must remain a vital principle of American religious liberty — despite its serpentine history and despite the antireligious 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 antireligious 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.

Separation of church and state serves religious liberty best when it is used prudentially not categorically. James Madison, a firm proponent of separationism in later life, warned in 1833 that “it may not be easy, in every possible case, to trace the line of separation between the

EVERSON REVISITED: RELIGION, EDUCATION, AND LAW AT THE CROSSROADS 23 (Jo Renée Formicola & Hubert Morken eds., 1997).

156. See a good summary in THOMAS C. BERG, RELIGION AND THE STATE IN A NUTSHELL (1998).

157. See MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION (2002); ROBERT T. MILLER & RONALD B. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT (5th ed. 1996).

158. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

159. See WITTE, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT, *supra* note 99, at 154-63; cases cited *supra* notes 26-27.

rights of Religion & the Civil authority, with such distinctness, as to avoid collisions & doubts on *unessential* points.”¹⁶⁰ 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.”¹⁶¹ 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 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 nonreligious 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.¹⁶² 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.

160. Letter from James Madison to Reverend Jasper Adams, *reprinted in* DREISBACH, pp. 83 (emphasis added).

161. DREISBACH, *supra* note 37, at 117, 120.

162. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).