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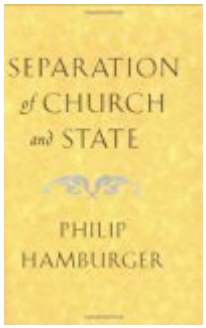

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Was the Constitution Rewritten by Anti-Catholics? A New Approach to the Church-State Controversy

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In this study, Philip Hamburger, professor of law at the University of Chicago, seeks to present the history of an idea, separation of church and state, over time. He begins with a cursory examination of the drafting of the United States Constitution, and finds that there is support for neither of the assertions that the founding document separated church and state nor that its drafters intended such a separation. He contends instead that the Constitution addressed a different concern, religious liberty, and argues that the idea of separation of church and state arose only in the mid-nineteenth century, in the context of intense anti-Catholicism, as a means of both protecting Protestant freedoms and acculturating recent Catholic immigrants.

With this book, Hamburger joins a passionate debate about the meaning of religious freedom currently being waged in academic, political, and legal communities. Since the 1960s, members of the "religious right" have argued that federal law's proscriptions of governmental support of religion were intended as nothing more than a prohibition of state preference for one Christian denomination over another. From their perspective, America always was and should be a "Christian nation." Although Hamburger does not endorse this position, his book, in removing "separation of church and state" from the Constitution, provides support for the position of the religious right. This is probably an unintended consequence of his work. More likely, Hamburger hopes to resolve the academic and legal argument over the scope of federal constitutional law in this area by knocking one position–that favoring a strict separation–right out of the box. He fails to do so.

Even in the brief distillation of Hamburger's work presented above, several problems should be readily apparent. First, Hamburger limits his constitutional argument to the First Amendment. Although that amendment contains no language separating church and state, it may logically be argued that separation of church and state derives naturally from the protection of religious freedom or is necessary to secure the right listed in the First Amendment. This reading is consistent with expressions of the Founders, especially James Madison, to which Hamburger gives confusing coverage. More critical is Hamburger's failure to address more direct language in the founding document. The Federal Convention adopted the language of the prohibition on religious tests in Article VI with almost no dissent. Yet, the controversy, primarily fomented by established clergymen during the ratification controversy of 1787-1788, when the drafters' intents and their philosophical reasons for the position were clarified, led the drafters at the First Congress to craft the First Amendment, which accepted religion as a private concern, appropriately separate from public governance.

Nobody has ever claimed that the Constitution is or

should be a complete document. Enforcement of the Constitution depends upon reasonable and logical interpretation. Take, for instance, the protection of privacy rights articulated by Justice William O. Douglas in his opinion for the Court in *Griswold v. Connecticut*.[1] Nowhere are such rights explicitly listed in the Constitution, but, as Justice Douglas noted, just what is protected by the protection of religious freedom if the police are free to stand outside churches on Sunday mornings checking off names of attendees? Hamburger seems unwilling to accept this significant judicial role in defining constitutional freedoms. He castigates late-nineteenth-century and twentieth-century judges for reading pervasive cultural values and beliefs into the nation's primary laws, noting with disdain (p. 446) that "[e]ven state courts were not immune to the culture of Americanism." In adopting this perspective, he seems to resent the significant role that cultural values play in judicial interpretation of the law. Moreover, by looking only to the First Amendment and later decisions regarding it, he misses the vital role played by the Contract Clause and the No Religious Tests Clause in the separation of church and state in the Early Republic.

Many specialists in legal history and the history of ideas have documented how the efforts of Jeffersonian liberals transformed American culture from a Christian communitarian society valuing social conformity into a rabidly individualistic society in which capitalistic free enterprise provided the ethics and values of social intercourse.[2] Hamburger misses the significance of this cultural transformation and its relationship to the process of disestablishment. The privatization of the churches and their removal from quasi-governmental functional responsibilities is part of this larger cultural transformation, which occurred before Andrew Jackson's presidency (1829-1837). Constitutional law played a vital role in this transformation. However, the most important constitutional provision for this purpose was not the First Amendment, but rather the Contract Clause (Art. I, sec. 10). State and federal judges restricted the scope of government action in respect of private contracts, including corporate charters. Increasingly after 1790, churches assumed the corporate form to protect their assets and their abilities to proselytize. In doing so, they implicitly assumed a "private" status distinct from public institutions, even in states which still supported religion.

Just as serious a problem is Hamburger's misunderstanding of the history of disestablishment–the process of separating church and state in the Early Republic. Establishment laws were found in eleven of the thirteen colonies before the Revolution and in a majority of the states when the Constitution was framed in 1787. Churches functioned as semi-public institutions to instill morality and moral values into the public, to care for people's souls, to educate the young, and to tend the poor and the sick. Creatures of colonial and later state law, the established churches were not directly affected by the federal Constitution, though the document did give expression to ideas and values that ultimately would prove irreconcilable with established religion. Disestablishment occurred during a period spanning more than five decades (1776-1833) and on a state-by-state basis. Disestablishment embroiled the citizenry in an emotionally intense and intellectually exciting debate over the new society's values and institutions as it redefined churches as private corporations. In these state disestablishment struggles, Hamburger could find many references to the separation of church and state and the necessity of making that separation. In the process, he would have learned from that evidence that "separation" as much as "religious freedom" was a vital concern early in the nation's history.

Hamburger not only ignores all the disestablishment battles waged in the various states, he also overlooks the debate over cultural values that those battles addressed. When examining the Early Republic, rather, he focuses on the Constitution itself and on the role of dissenters (Protestant Christians belonging to non-established churches) in securing protection for religious liberty. By focusing on dissenters, he writes the more radical non-sectarian liberals out of his history. They also certainly sought separation of church and state by the late 1700s, and many worked successfully in their own states to achieve that goal. The noted historian Sidney E. Mead argued convincingly, as long ago as 1963, that the protection of religious liberty could not have come about by the efforts of either the dissenters or the liberal humanists alone; rather, a tentative alliance between them was needed to achieve the first step of disestablishment–the Constitution's protection of religious freedom.[3] Hamburger correctly asserts that all the dissenters wanted was the freedom to practice their religion without state preference for any denomination. They never sought to divorce Christian beliefs, values, and ethics from the public institutions of the new society. But, as Mead recognized, the dissenters' actions constitute only part of the story; by premising his understanding of the Constitution (and of its framers' intent) entirely on the dissenters' attitudes and goals, Hamburger misses important historical evidence that might have compelled

him to reconsider or recast his thesis.

Hamburger's primary thesis–that during the latter half of the nineteenth century anti-Catholicism spawned a reconceptualization of the meaning of religious freedom into a doctrine of separation of church and state–depends on his establishing his premise, that the Early Republic never envisioned a separation of church and state. Unfortunately for the success of Hamburger's interpretative enterprise, the fatal flaws afflicting the premise render unconvincing the proof he asserts in support of his thesis. To be sure, he does provide a good sense of the historical context for the idea of religious liberty. Even so, his use of theological and political scholarship from the fifteenth through seventeenth centuries (during which era religious liberty was understood within a framing context of religious establishment) cannot stand in for the ideas and motivations of historical actors of the late eighteenth century. For this most relevant period, as noted, Hamburger relies only on the words of a few dissenters; though he mentions Thomas Paine and Thomas Jefferson, he marginalizes them as minor players in the drafting of the Constitution. That specific point may be true, but their ideas were hardly insignificant or unrepresentative, as further research into pamphlets, newspapers, and letters of the period would show. Furthermore, James Madison, Jefferson's partner-in-arms in Virginia's protection of religious freedom, made his position on separation known in his "Memorial and Remonstrance Against Religious Assessments" (1785).

Various state ratification debates, which raised the need for a bill of rights, referenced Jefferson by name and drew upon more radical and libertarian ideas than Hamburger acknowledges or wishes to address. Hamburger asserts further that an ideological debate between humanistic liberals and dissenters erupted only in the mid-1800s, and he subordinates the religious debates of the 1790s and early 1800s to the broader political contests pitting Federalists against Republicans. In so doing, he seems unaware that Timothy Dwight, president of Yale and a leading defender of establishment, perceived his enemies to be not the dissenting clergy who supported Jeffersonian candidates, but those secular humanists whom he castigated as liberals, Deists, agnostics, nothingarians, and infidels.[4]

Hamburger repeatedly asserts that the early Republic's laws recognizing religious freedom only limit government, not the churches (pp. 94, 107). He concludes from this claim that the people of the Early Republic never intended to separate church and state nor to remove religion from the governing of the Republic. This bold assertion ignores the most plausible explanation: that private corporate churches were not subject to legal restraint, as were governmental institutions. Hamburger misses a crucial point: that during the Early Republic, Americans transformed their churches into private corporations. In fact, in this connection, at times Hamburger fails to recognize the significance of his own text. On page 182, he writes that James Madison sought to limit all "corporations," ecclesiastical or otherwise, from accumulating property in perpetuity. He correctly notes that this aim is more a matter of property law than a reflection of Madison's distrust of churches holding property. But he then misses the more important fact: that Madison perceived churches not as semi-public institutions necessary for instilling virtue (as they were understood throughout the colonial era) but as private corporations pursuing their own agendas distinct from, perhaps even antithetical to, public governance. By ignoring this crucial point, Hamburger also misses how and why this transformation occurred. Further, he fails to see how, as private corporations, churches had to be excluded from government and removed from their colonial roles in providing education, poor relief, and community record-keeping.

Hamburger's proof of his major thesis concerning anti-Catholicism is no more convincing than that offered in support of his premise. His "anti-Catholicism" argument appears in chapter 8, with proof limited to lengthy references to New York and a more general discussion of New England. To be sure, as Hamburger shows, the historical evidence of the latter half of the nineteenth century abounds with disparaging comments aimed at Catholics, but these alone do not persuade the reader that anti-Catholicism *forced* a reconsideration of the meaning of religious freedom. Hamburger further asserts that anti-Catholicism was so strong that it united not only Protestants of different denominations, but also racist nativists and polarized extremists, such as the Ku Klux Klan and liberal atheists. In this, Hamburger may be attempting an argument paralleling one made by Edmund S. Morgan to explain a different time and place: that antebellum white southerners defined "blackness" in such a way as to unite all non-black people, despite their great differences in wealth, attitudes, and beliefs, into a white citizenry that supported slavery.[5] And yet Morgan mounted massive proof of his historical actors' thoughts, motivations, and concerns to support his conclusion–all of which are lacking in Hamburger's study.

Hamburger asserts further that, by the 1930s, the public's new perception of religious liberty as including

the separation of church and state forced itself upon a Supreme Court that acceded to the pervasive "culture of Americanism." He concludes that, in its expansive reading of the Fourteenth Amendment to prevent states from legislating in matters of religion, the Court "drew upon a context that had little connection to the Fourteenth Amendment, that was as much cultural as it was legal, and that concerned religion more than race" (p. 439). The Court's adoption of bifurcated review was probably more a matter of political and social expediency than one of well-reasoned analysis of the Constitution. Yet Hamburger's summary of the Justices' thought processes renders them mere puppets of public opinion. This view of the Justices pales by comparison with that offered in G. Edward White's *The Constitution and the New Deal*, which provides a thorough and enlightening discussion of this important and controversial period of American legal and constitutional history.[6] Once again, Hamburger's assertion that the federal courts imposed a doctrine of separation of church and state on the states in the twentieth century misses the important state-by-state process of religious disestablishment that occurred from 1776 to 1833.

Despite this book's flaws, it contains some good history. Hamburger skillfully develops the ideological debates of the late nineteenth century, which sparked conflicting proposals to amend the Constitution to clarify what constitutes religious freedom. He also offers some valuable insights, as when he notes that Thomas Jefferson had a tendency "to give words and phrases new contexts in which they acquired fresh, often polemical significance" (p. 147). He should be applauded for trying to make sense of a difficult historical problem made even more troublesome by its relevance to, and its entanglement with, current political debates.

In addition, he deserves credit for aggressively using broad descriptive terms, sometimes risking the sacrifice of historical accuracy in the details to try to further his readers' understanding of his broad arguments. To be sure, such terms as "liberals," "secularists," "Protestants," "Christians," and "nativists" describe people with widely divergent and sometimes overlapping values and beliefs. Yet Hamburger uses these terms to define attitudes of people whom he juxtaposes in opposition to one another. Ultimately, his terms do help to define groups of actors in a complex historical debate over ideas. An author should be granted leeway in trying to describe groups of historical actors who may have shared certain ideological proclivities, but were nonetheless culturally and politically diverse.

Even so, these good qualities are not enough to overcome the essential weaknesses of Hamburger's book. Its thesis fails to illuminate his subject despite nearly five hundred pages of explanatory, densely documented text. Its only value is to be found in the historical record and anecdotes it provides rather than its attempt to reconfigure a complex historical issue.

Notes

[1]. *Griswold v. Connecticut*, 379 U.S. 926 (1964).

[2]. *See, e.g.*, Joyce Appleby, *Capitalism and a New Social Order* (New York: New York University Press, 1984); Michael Grossberg, *Governing the Hearth* (Chapel Hill: University of North Carolina Press, 1985); and Gordon S. Wood, *The Radicalism of the American Revolution* (New York: Alfred A. Knopf, 1992).

[3]. Sidney E. Mead, *The Lively Experiment* (New York: Harper & Row, 1963), *passim.*

[4]. On this point, *see* Colin Wells, *The Devil and Doctor Dwight: Satire and Theology in the Early American Republic* (Chapel Hill: University of North Carolina Press, 2002).

[5]. Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York: W. W. Norton, 1975). A similar approach for a later period may be found in C. Vann Woodward, *The Strange Career of Jim Crow*, anniversary edition (New York: Oxford University Press, 2002).

[6]. G. Edward White, *The Constitution and the New Deal* (Cambridge, Mass.: Harvard University Press, 2000).

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