Book Review: Gimme That Ol' Time Separation: A Review Essay

Francis J. Beckwith

GIMME THAT OL' TIME SEPARATION: A REVIEW ESSAY

Philip Hamburger, *Separation of Church and State*

*Francis J. Beckwith**

The United States Constitution addresses religion in only two places. First, Article VI states that "no religious Test shall ever be required as a Qualification to any Office or public Trust"[1] Second, the First Amendment contains a sequence of words that many Americans can recite by memory: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[2] The phrase "separation of church and state" has often been employed as a shorthand way to describe the legal principles that many believe are the basis for the Establishment and Free Exercise Clauses. However, the language is notoriously vague, for it gives us no direction as to the precise meaning of "free exercise," "establishment," or even "religion."[3]

It is clear, though, from the text that the First Amendment was intended solely to limit the law-making power of *Congress* and not any other branch of the state or federal governments. But since the early twentieth century, the Supreme Court, in a piecemeal fashion, began applying the First Amendment to *all* governments in the United States.[4] For example, in 1947, in

* Associate Professor of Church-State Studies, and Associate Director of the J. M. Dawson Institute of Church-State Studies, Baylor University. Ph.D. (philosophy), M.A. (philosophy), Fordham University; M.J.S. (Master of Juridical Studies), Washington University School of Law, St. Louis.

1 U.S. CONST. art.VI cl. 3.

2 U.S. CONST. amend. I.

3 *Id*.

4 The Court first incorporated the Freedom of Speech and Press Clauses, eventually incorporating the entire First Amendment. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (stating that freedom of speech and press "are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States"); Near v. Minnesota, 283 U.S. 697, 707 (1931) ("It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by

Everson v. Board of Education, the Supreme Court applied the Establishment Clause to a non-federal government.[5] The Court's justification was a theory of constitutional interpretation known as the incorporation doctrine.[6] The Fourteenth Amendment states that no citizen may be deprived of "life, liberty, or property, without due process of law."[7] Thus, according to the Supreme Court and many constitutional scholars, many of the guarantees found in the Bill of Rights, including the religion clauses found in the First Amendment, apply to the States *in addition to* the federal government.[8] Whether such a move is justified is outside the scope of this review. Regardless, Americans have grown so accustomed to thinking of their Federal Constitutional rights as restraints on all governments – federal, state, and local – that even a logically sound argument against incorporation is not likely to get very far.[9]

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state action."); De Jonge v. Oregon, 299 U.S. 353, 364 (1937) ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (agreeing 9-0 that the Establishment Clause applies to the States through the Fourteenth Amendment).

5 330 U.S. at 15-18.

6 *Id*. at 8. For an explanation of the incorporation doctrine, see *Gideon v. Wainwright*, 372 U.S. 335, 341-42 (1963):

> [T]his Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States. Explictly recognized to be of this "fundamental nature" and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, religion, assembly, association, and petition for redress of grievances.

Id. at 341 (emphasis added).

7 U.S. Const. amend. XIV, § 1.

8 There are disagreements among jurists as to what aspects or provisions of the Bill of Rights should be incorporated through the Fourteenth Amendment. *See* Doug Linder, *The Incorporation Debate*, *at* http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/incorp.htm (last visited May 1, 2005).

9 *See, e.g.*, Elk Grove v. Newdow, 124 S.Ct. 2301, 2328 (Thomas, J., concurring). Justice Thomas writes:

> Because I agree with THE CHIEF JUSTICE that respondent Newdow has standing, I would take this opportunity to begin the process of rethinking the Establishment Clause. I would acknowledge that the Establishment Clause is a federalism provision, which, for this reason, resists incorporation. Moreover, as I will explain, the Pledge policy is not implicated by any sensible incorporation of the Establishment Clause, which would probably cover little more than the Free Exercise Clause.

Id. at 2328 (Thomas, J., concurring).

According to Justice Thomas, the Establishment Clause was intended to be a limit on federal power by forbidding the federal government to establish a national church while permitting each state to establish a state church if it desired. *Id*. at 2330. Thus, because it was not intended to protect any individual liberty relative to the federal government, it cannot be incorporated through the "liberty" referred to in the Fourteenth Amendment. *Id*. at 2331. One could add to Justice Thomas' analysis that, given the

The notion of "separation of church and state" is a largely unquestioned dogma in American political and legal discourse even though the phrase does not appear in the text of the Constitution. A plain reading of the religion clauses is just as consistent with some forms of moderate separationism as it is with strong separationism.[10] In his masterful work entitled *Separation of Church and State*, Philip Hamburger demonstrates that separationism has achieved its status in American politics and jurisprudence largely as a result of an ignoble pedigree, which harnessed an ambiguously understood slogan – separation of church and state – to advance a particular view of religion, state, and liberty, which its proponents consider to be the "American Way."[11]

I. STORY OF A SLOGAN

Hamburger, who is the John P. Wilson Professor of Law at the University of Chicago, divides his book into four sections: Late Eighteenth-Century Religious Liberty; Early Nineteenth-Century Republicanism; Mid-Nineteenth-Century Americanism; and Late Nineteenth and Twentieth-Century Constitutional Law. Hamburger tells the story of a slogan, which was famously employed by Thomas Jefferson in his Letter to the Danbury Baptists:

> 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

Establishment Clause's original purpose, an incorporation of the Clause through the Fourteenth Amendment would technically entail that the state, like the federal government, may not establish a religion. A local government, however, *would* be able to establish a religion, just as the states were able to do prior to incorporation.

10 Although it is difficult to precisely define the difference between moderate separationism and strong separationism, it seems to me that the following is a fair distinction. First, both affirm that the government should maximize religious liberty consistent with the public good and prohibit both ecclesiastical control of government powers and government control of ecclesiastical powers. Second, moderate separationism does not attempt to marginalize religion in public life, and, for example, would support public funding programs for similarly-situated religious and secular entities. On the other hand, strong separationism forbids any direct aid to religion, even when similarly situated secular entities are given aid. In addition, strong separationists seem willing to marginalize the political proposals of religious citizens if those proposals are religiously motivated, though similarly-situated non-religious citizens offering proposals based on secular grounds are unlikely to suffer the same fate. *See* Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations,* 33 LOY. U. CHI. L.J. 121, 122 n.5 (2001); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997); Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 285 (1999).

11 *See generally* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (Paperback ed. 2004).

> "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of *separation between Church & State*.[12]

Because Jefferson is one of America's Founding Fathers, this letter, which Jefferson wrote while President, has the status of a sacred text in separationist circles. In fact, among some Christian church-state separationists, Jefferson's Letter to the Danbury Baptists carries with it an authority not unlike Paul's Letter to the Galatians. And yet, Jefferson's letter is, after all, a type of communication that presidents produce at least several times a day to a wide range of constituencies. Given that, it seems somewhat dubious to base constitutional doctrine on what amounts to nothing more than a note to political allies seeking the president's support for their religious liberty. This note was not part of an executive order, proposed legislation, or even a directive offered by the president to the attorney general as a suggested way to interpret the Establishment Clause. It is not clear, therefore, why one should take Jefferson's letter to the Baptists as any more normative for constitutional interpretation as, for example, Ronald Reagan's published book defending the pro-life position on abortion.[13] After all, Reagan, as California's governor, signed into law one of the first statutes that significantly liberalized access to abortion.[14] Thus, because the California law pre-dated *Roe v. Wade*[15] by six years, Governor Reagan was, in reality, one of legalized abortion's "founding fathers," and thus perhaps possessed a special insight into the issue's jurisprudence.

Hamburger points out that Jefferson's letter embodied a particular understanding of the relationship between church and state that was not shared by the Danbury Baptists.[16] Rather, the

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12 Thomas Jefferson, *Jefferson's Letter to the Danbury Baptists* (Jan. 1, 1802), 57 THE LIBRARY OF CONGRESS INFORMATION BULLETIN 6 (June 1998), *available at* http://www.loc.gov/loc/lcib/9806/danpre.html (last visited May 1, 2005).

13 RONALD W. REAGAN, ABORTION AND THE CONSCIENCE OF THE NATION (1984).

14 *See* Carole Joffe, *30 Years After Roe v. Wade: Lessons about Abortion from the San Francisco Nine*, *at* http://www.prochoiceforum.org.uk/ocrabortlaw6.asp (Jan. 2003). She writes:

> The case [of the San Francisco Nine] reverberated in California and across the nation. In California, it gave new momentum to a bill, previously introduced in the legislature, that reformers had designed to broaden the grounds on which abortion would be legally permitted in the state. In 1967 this law passed, and a reluctant Governor Ronald Reagan signed the California Therapeutic Abortion Act.

Id.

15 410 U.S. 113 (1973).

16 According to Hamburger, "Jefferson's letter was not entirely a declaration of liberty. Separation was an idea first introduced into American politics by Jefferson's allies, the Republicans, who used it to elicit popular distaste against Federalist clergymen in their exercise of their religious freedom." HAMBURGER, *supra* note 11, at 109-10. For

Danbury Baptists were known as dissenters – those who opposed religious establishment but did *not* oppose the influence of religion on government.[17] In fact, because it was assumed that the moral ecology of a society could not be maintained without the influence of religion, dissenters had to constantly deal with the false charge that they were really separationists wanting to remove any vestiges of religion from the public square. As Hamburger points out, that was why the "Baptists who sought the support of the president were . . . silent about his letter . . . ."[18] Jefferson's letter, in fact, would have been counterproductive in quelling the fears of those who equated anti-establishment with separationism.[19] According to Hamburger, "Baptists merely sought disestablishment and did not challenge the widespread assumption that republican government depended upon the people's morals and thus upon religion."[20]

The Danbury Baptists, like most Americans at the time, maintained that the church and state were two separate spheres. However, they believed that the church, like other non-government institutions, played a vital role in civilizing the nation's citizens. In addition, they noted that the church instilled in citizens the notion that their rights were not derived from the fiat of governments, but were stamped on them by their Creator. The Baptists believed that the role of government was to protect the people's God-given rights, whereas the role of religion was to shape the moral understanding of the nation's people in order that they might be upstanding citizens.[21]

According to this view, the United States of America is a constitutional republic whose institutions presuppose and entail certain beliefs about the order and nature of things. These beliefs are nonnegotiable and necessary to maintain the continuity and purpose of the nation, including the rights of its people and the powers of its governments (both state and federal). The philosophical infrastructure of the American Republic consists of a cluster of ideals, beliefs, practices, and

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the Federalist clergy had "inveighed against Jefferson, often from their pulpits, excoriating his infidelity and deism." *Id.* at 111. Although "[t]he religious dissenters, including the Baptists, sympathized with the Republicans and distrusted the Federalists, particularly the Federalist clergy. Yet, when invited by Jefferson to join the Republican demand for separation, the Baptists quietly declined." *Id.* at 110.

17 HAMBURGER, *supra* note 11, at 163-80.

18 *Id.* at 165.

19 Hamburger notes that: "[I]t may be useful to begin by considering [the Baptists'] awkward situation. . . . [E]stablishment ministers had long accused dissenters of advocating separation, whether of church from state or religion from government." *Id.*

20 *Id*.

21 *See generally* HAMBURGER, *supra* note 11.

institutions that are best sustained by a people who see this cluster as grounded in certain unchanging moral truths that are religious in nature.

Although the New Testament speaks very little about government and the Christian's responsibility as a citizen, there is one particular passage that may illuminate this Early American understanding. Jesus, in a familiar scene, is confronted by the Pharisees with an apparent dilemma:

> "Tell us, then, what is your opinion: Is it lawful to pay the census tax to Caesar or not?" Knowing their malice, Jesus said, "Why are you testing me, you hypocrites? Show me the coin that pays the census tax." Then they handed him the Roman coin. He said to them, "Whose image is this and whose inscription?" They replied, "Caesar's." At that he said to them, "Then repay to Caesar what belongs to Caesar and to God what belongs to God." When they heard this they were amazed, and leaving him they went away. [22]

Generally, "[t]he dominant understanding of this passage is that Jesus was instructing His audience that the church and government have jurisdiction over different spheres of authority."[23] As I have previously expressed:

> I believe this understanding is largely correct; however, those who present it often miss the subtle and political implications of what Jesus said. He asked whose image was on the coin. The answer was, of course, Caesar's. There is, however, an unsaid question that begs to be answered: What or who has the image of God on it? If the coin under the authority of Caesar because it bore his image, then we are under the authority of God because we bear His image. Good governments, nevertheless, ought to be concerned with the well-being of their citizens, and these citizens correctly believe that their well-being is best sustained by a just government. It follows that both government and church, though having separate jurisdictions, share a common obligation to advance the well-being of those who bear God's image. [24]

Given this understanding, the Danbury Baptists were troubled that their state, Connecticut, levied a tax to support the state's established religion: Congregationalism. Although Connecticut did allow Baptists and other citizens to request that the state redirect their tax money to their own churches, the process required that "they first. . .obtain, fill out, and properly

22 *Matthew* 22:11-13 (New American Bible).

23 Francis J. Beckwith, *Wise as Serpents: Christians, Politics & Strategic Voting*, 27 CHRISTIAN RESEARCH JOURNAL 3, 52-53 (2004) *at* http://homepage.mac.com/francis.beckwith/WiseAsSerpents.html (original manuscript on file with author) [hereinafter Beckwith, *Wise as Serpents*].

24 *Id.* (citation omitted).

file an exemption certificate."[25] And because "Baptists were a harassed minority, some communities made it difficult for them to receive these exemptions,"[26] which is why they shared their complaint with President Jefferson. However, like many Americans at the time, the Danbury Baptists did not see their resistance to religious establishment as inconsistent with a government that accommodates, and even encourages, its people to embrace an account of rights and human institutions in which religion, and its moral instruction, is essential.[27]

II. ANTI-CATHOLIC PREJUDICE AND THE TRIUMPH OF SEPARATIONISM

In the nineteenth century, separationism surged to prominence, largely as a Protestant reaction against the influx of immigrants from predominantly Roman Catholic countries. Some of these immigrant groups, including Irish and Italians, had set up their own private religious schools. However, many non-Catholic Americans believed that Catholic schools indoctrinated students with superstitions that were inconsistent with the principles of American democracy.[28] Therefore, in order to make sure that such schools would not receive government funding of any sort, federal and state legislation was proposed that forbade the use of public resources for religious, e.g.

25 Derek H. Davis, *Thomas Jefferson and the "Wall Of Separation" Metaphor,* 45 J. CHURCH & STATE 5, 10 (2003).

26 *Id.*

27 Of course, establishment supporters saw anti-establishment dissenters as no different than separationists. *See* HAMBURGER, *supra* note 11, at 65-78.

28 Take, for example, these comments by Joseph Martin Dawson:

> The Catholics, who [in 1948] are claiming a near majority over all Protestants in the United States, would abolish our public school system which is our greatest single factor in national unity and would substitute their old-world, medieval parochial schools with their alien culture. Or else they make it plain that they wish to install facilities for teaching their religion in the public schools.
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> . . . .
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> Perhaps the burning issue has arisen soon enough to enable the friends of the native American culture to arrest the progress of the long-range plan of those who would supplant it. There can be no doubt about the Catholic plan. Having lost enormous prestige in Europe, the Church now looks to the United States as a suitable stage for the recovery of its lost influence. Here it would seek new ground, consolidate and expand, as compensation for its weakened position in bankrupt Europe, with the hope of transforming this continent, a Protestant country, into a Catholic citadel from which to exert a more powerful rule. If this seems exaggerated and fanciful, the reader has only to open his eyes to what the Catholics are doing to achieve this end.

JOSEPH MARTIN DAWSON, SEPARATE CHURCH AND STATE NOW 98-100 (1948). Special thanks to the Rev. Dawson's granddaughter, Alice Baird, for bringing this book to my attention in her personal correspondence with me. (Personal correspondence on file with author).

Catholic, purposes. The most ambitious attempt to put this sentiment into law was the so-called "Blaine Amendment,"[29] which was named after the Congressman who proposed it.[30] Although it never became part of the Constitution, some individual states passed Blaine-type statutes or constitutional amendments that still remain on the books.[31]

Hamburger astutely points out that by arguing there was a need for these amendments, supporters of the Blaine Amendment and its progeny implicitly conceded that the First Amendment's Establishment Clause, by itself, does not prohibit the use of public resources for religious purposes.[32] Of course, this would mean that separationist jurisprudence relying on a Blaine-type understanding of church and state is likely an improper reading of the First Amendment. This does not mean, of course, that some modest form of separationism, such as the traditional anti-establishment position of the Danbury Baptists, is not correct (as I believe is, in fact, the case). Rather, it means that a doctrine borne of anti-Catholic animus and a desire to declare an American Protestant hegemony as the *established understanding of public faith* is hardly the "neutral" and "separationist" creed its proponents have led us to believe.

Ironically, as Hamburger points out, the underlying principles of separationism were adopted in the twentieth century by secularists, who were hostile to *all* religion in public life.[33] They used these principles to eliminate some of the most cherished practices of many (though not all) nineteenth century Anti-Catholic Protestant Separationists, including prayer[34] and Bible-reading in public schools.[35] These separationist principles were eventually applied by jurists and scholars to laws reflecting

29 The proposed amendment text reads:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

4 CONG. REC. 205 (1875).

30 James G. Blaine was a Republican Congressman from Maine. Biographical Directory of the United States Congress, 1774-Present, *at* http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000519 (last visited May 1, 2005).

31 For example, the Constitution of Texas states: "No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes." TEX. CONST. art. 1, § 7.

32 HAMBURGER, *supra* note 11, at 296-312.

33 *Id*. at 478.

34 *See* Engel v. Vitale, 370 U. S. 421 (1962); Wallace v. Jaffree, 472 U. S. 38 (1985).

35 *See* Sch. Dist. of Abington Township v. Schempp, 374 U. S. 203 (1963).

traditional moral understandings on abortion[36] and homosexuality,[37] as well as to the idea that just government and constitutional jurisprudence both presuppose that we can know and apply unchanging moral truths.[38]

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36 Justice John Paul Stevens, for example, offers the following analysis of a Missouri statute that placed restrictions on abortion and included a preamble that asserted that human life begins at conception:

> Indeed, I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution. This conclusion does not, and could not, rest on the fact that the statement happens to coincide with the tenets of certain religions . . . or on the fact that the legislators who voted to enact it may have been motivated by religious considerations. . . .Rather, it rests on the fact that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths, serves no identifiable secular purpose. That fact alone compels a conclusion that the statute violates the Establishment Clause.
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> As a secular matter, there is an obvious difference between the state interest in protecting the freshly fertilized egg and the state interest in protecting a 9-month-gestated, fully sentient fetus on the eve of birth. There can be no interest in protecting the newly fertilized egg from physical pain or mental anguish, because the capacity for such suffering does not yet exist; respecting a developed fetus, however, that interest is valid.

Webster v. Reproductive Health Services, 492 U.S. 490, 566-67, 569 (1989) (Stevens, J., concurring in part and dissenting in part) (citations and footnotes omitted). Justice Stevens' judgment that there is no prima facie wrong in killing a pre-sentient human being because she is not yet sentient is curious. What Justice Stevens should have done is provide an argument as to why full sentience is the property a human being must possess in order for the law to be justified in recognizing it as a being worthy of legal protection. Stipulation just doesn't cut it.

37 *E.g.*, in his dissenting opinion in *Bowers v. Hardwick*, Justice Stevens writes:

> Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.

478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (citations and footnote omitted).

In *Lawrence v. Texas*, the Court embraced Justice Stevens' reasoning in a holding that overturned *Bowers* and concluded that homosexual sodomy is a protected liberty under the Fourteenth Amendment: "Justice STEVENS' analysis, in our view, should have been controlling in *Bowers* and should control here." 539 U.S. 558, 578 (2003).

38 For example, separationist law professor Steven G. Gey writes:

> The establishment clause should be viewed as a reflection of the secular, relativist political values of the Enlightenment, which are incompatible with the fundamental nature of religious faith. As an embodiment of these Enlightenment values, the establishment clause requires that the political influence of religion be substantially diminished. . . . Religious belief and practice should be protected under the first amendment, but only to the same extent and for the same reason that all other forms of expression and conscience are protected – because the first amendment prohibits government from enacting into law any religious, political, or aesthetic orthodoxy.

As America moved into the twentieth century, separationism was increasingly perceived as *the* American understanding of the Establishment Clause. Among its most vocal and public advocates were Baptists, Freemasons, the Ku Klux Klan, Nativists, and Secularists. One of the most ardent separationists of the twentieth century, Supreme Court Justice Hugo Black, was a Baptist and Freemason and, up until about ten years prior to his 1937 nomination to the Court, a member of the Ku Klux Klan. Although, as Hamburger points out, Black, "[i]n later years, would discount his association with the Invisible Empire of the Ku Klux Klan" as an innocent membership in a fraternal

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> [R]eligious principles are not based on logic or reason, and, therefore, may not be proved or disproved.
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> Whereas religion asserts that its principles are immutable and absolutely authoritative, democratic theory asserts just the opposite. The sine qua non of any democratic state is that everything political is open to question; not only specific policies and programs, but the very structure of the state itself must always be subject to challenge. Democracies are by nature inhospitable to political or intellectual stasis or certainty. Religion is fundamentally incompatible with this intellectual cornerstone of the modern democratic state. The irreconcilable distinction between democracy and religion is that, although there can be no sacrosanct principles or unquestioned truths in a democracy, no religion can exist without sacrosanct principles and unquestioned truths.

Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 79, 167, 174 (Fall 1990).

Aside from raising the awkward question of whether the claim that "no religion can exist without sacrosanct principles and unquestioned truths" is an unquestioned truth about which Professor Gey is certain, one may consult the following responses to the sort of "reasoning" he is offering his readers. *See generally* Mark Fisher, *The Sacred and the Secular: An Examination of the "Wall of Separation" and Its Impact on the Religious World View*, 54 U. PITT. L. REV. 325 (Fall 1992); HADLEY ARKES, FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE (1986); HADLEY ARKES, NATURAL RIGHTS AND THE RIGHT TO CHOOSE (2002); FRANCIS J. BECKWITH & GREGORY P. KOUKL, RELATIVISM: FEET FIRMLY PLANTED IN MID-AIR (1998); C. S. LEWIS, MERE CHRISTIANITY (1952); Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality,* 106 YALE L.J. 2475, 2486-95 (1997); and Ronald Dworkin, *Darwin's New Bulldog,* 111 HARV. L. REV. 1718 (1998).

Because Gey does not interact with any of the relevant literature on religious belief, morality, and rationality, it is difficult to know how he would reply to the sophisticated and/or compelling arguments offered by members of the growing intellectual movement of theistic philosophers in North America and Britain. Among the works that include these arguments are numerous books that were published before 1990 (the year Gey's article appeared in print). They include the following: RICHARD SWINBURNE, THE EXISTENCE OF GOD (1979); RICHARD SWINBURNE, FAITH AND REASON (1981); FAITH & RATIONALITY: REASON & BELIEF IN GOD (Alvin Plantinga & Nicholas Wolterstorff eds., 1983); WILLIAM LANE CRAIG, THE *KALAM* COSMOLOGICAL ARGUMENT (1979); ALVIN PLANTINGA, GOD AND OTHER MINDS: A STUDY OF THE RATIONAL JUSTIFICATION OF BELIEF IN GOD (1967); J. P. MORELAND, SCALING THE SECULAR CITY (1987); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980); JOHN FINNIS, FUNDAMENTALS OF ETHICS (1983); MORTIMER ADLER, TEN PHILOSOPHICAL MISTAKES (1985); MORTIMER ADLER, HOW TO THINK ABOUT GOD: A GUIDE FOR THE 20TH CENTURY PAGAN (1980).

organization, "Black's account of his participat[ion] in the Klan was, at best, understated."[39] Hamburger presents a detailed history of Black's Klan affiliation which leaves no doubt that Black was much more than a nominal Klansman who wore his sheets only on holidays and for weddings.[40] According to Hamburger, "[i]n September 1923, Black joined the powerful Richard E. Lee Klan No. 1 and promptly became Kladd of his Klavern [which meant that he was] the officer who initiated new members by administering the oath about 'white supremacy' and 'separation of church and state.'"[41] Apparently, to quote the comedian Dennis Miller, Black was "burning the cross at both ends!"[42]

According to Hamburger, by the time the U. S. Supreme Court applied the Establishment Clause to the states in *Everson*, the separationist understanding was so widely accepted throughout the country that the Court could make it a fixed point in constitutional law without the need for any Blaine-type amendment.[43] And the Court did so in *Everson*, whose majority opinion was penned by Justice Black.[44] The case concerned the question of whether the Township of Ewing, New Jersey's payment to parents for the busing of their children to Catholic parochial schools, violated the Establishment Clause. Black concluded that it did not because (1) the payment was not given directly to a religious organization; (2) the payment was available to children in all schools, including non-religious private schools; and (3) it was much like other public services, such as the police and fire department.[45] Although many of Black's separationist allies on and off the Court – four of his brethren dissented [46] – did not like the fact that the Township of Ewing won the lawsuit, they would in coming years, upon reflection, realize that Black had delicately and cleverly placed into the arsenal of constitutional law adjudication, for the first time, the principles of separationism. Black wrote:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a

39 HAMBURGER, *supra* note 11, at 423-24.

40 *Id.* at 422-34.

41 *Id.* at 426.

42 Joe Kovacs, "Dennis Miller jabs Democrat all-stars," WorldNetDaily, *at* http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=34524 (last visited May 1, 2005) (talking about Senator Robert Byrd (D-WV), another former member of the Ku Klux Klan).

43 HAMBURGER, *supra* note 11, at 455.

44 330 U.S. at 3-18.

45 *Id.* at 6, 17-18.

46 *Id.* at 18-63. Justices Jackson, Rutledge, Frankfurter, and Burton dissented from Justice Black's majority opinion.

> 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 to 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 from 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."[47]

Hamburger writes that Black "understood what he was doing. Only ten years before, when Black was appointed to the Court, Catholics vociferously condemned him for his Klan membership."[48] Thus, the facts and circumstances of *Everson* afforded Black "an opportunity to make separation the unanimous standard of the Court while reaching a judgment that would undercut Catholic criticism."[49] A fellow Baptist and separationist ally of Black's, the Reverend Joseph Martin Dawson, the namesake of the institute in which I hold my academic appointment, began to understand this as well. In commenting on the *Everson* case in his autobiography, he wrote, "We had lost a battle, but won the war!"[50]

Despite this victory, and a few subsequent ones for the separationists,[51] the Supreme Court has not fully absorbed the

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47 *Id.* at 15-16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1879)).

48 HAMBURGER, *supra* note 11, at 461-62.

49 *Id.* at 462.

50 *Id.* at 462. *See also* JOSEPH MARTIN DAWSON, A THOUSAND MONTHS TO REMEMBER: AN AUTOBIOGRAPHY 194 (1964) (citing the same sentence). It should be noted that the Rev. Dawson never shared Justice Black's affection for the Klan. In fact, Dawson was a courageous opponent of racial prejudice. He writes in graphic detail:

> The First Baptist Church upheld a free pulpit. I denounced the Ku Klux Klan in face of nearly all in the church being members of the Klan. I was most severe when the Klan's mob lynched a Negro. My resolutions adopted by the Waco Pastor's Association are still being quoted around the country. These resolutions had been written just after I had seen the mob drag the terror-stricken Negro youth to the city hall square, seen the crazed mobsters toss him into the flames, in horror beheld them heap the faggots about his tortured body, gasped as they seized his torso, tied a rope around it to be hitched to the horn of a saddle for a so-called man to race with it hurtling on the ground to a creek bed in the country.

DAWSON, *supra* note 28, at 165. *See also*, James M. Dunn, *The Ethical Thought of Joseph Martin Dawson* 151-186 (1966) (unpublished Th.D. dissertation, Southwestern Baptist Theological Seminary) (on file with the Baylor University Church-State Research Center).

51 *See*, *e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985) (holding that New York City's use of federal funds to help underprivileged children, who attended parochial schools and were in need of remedial reading and math, violated the Establishment Clause because of excessive entanglement. The program involved the use of public school teachers,

premises of its jurisprudence. In fact, the contemporary Court seems to be moving in a direction more accommodating of religion, especially in the areas of religious speech and public funding of schools when the funds are directed to the schools by private choice or when there is no evidence that the funds are being used for indoctrination.[52] There are exceptions, however, in free exercise cases involving states with Blaine-type laws.[53]

III. TAKING HAMBURGER SERIOUSLY

By making a convincing case that there are good historical

although no religious symbols in the classrooms or religious indoctrination in the students' lessons were allowed), *overruled by* Agostini v. Felton, 521 U.S. 203, 236 (1997). *See also* Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) (issued the same day as *Aguilar* and involved similar issues that led the Court to strike down two school district programs on Establishment Clause grounds based on excessive entanglement), *overruled in part by Agostini*, 521 U.S. at 236 (overruling the aspect of *Ball* pertaining to the "Shared Time" program).

52 *See* Widmer v. Vincent, 454 U.S. 263 (1981) (finding that a religious student group's free speech and association rights were violated when it was prohibited by a state university from meeting on campus); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (ruling that it does not violate the Establishment Clause for a public school district to permit a church to show, after school hours and on school property, a religiously-oriented film on family life); Zobrest v. Catalina, 509 U.S. 1 (1993) (ruling that a school district may not refuse to supply a sign-language interpreter to a student at a religious high school when such government benefits are neutrally dispensed to students without regard to the public-nonpublic or sectarian-nonsectarian nature of the school); Capitol Square Review Bd. v. Pinette, 515 U.S. 753 (1995) (finding that it was content-based discrimination for the government to prohibit a controversial organization from sponsoring a religious display in a public park); Rosenberger v. Rector, 515 U.S 819 (1995) (ruling that it was a denial of college students' free speech rights, as well as a risk of nurturing hostility toward religion, to prohibit the students from using student-funds for a religiously-oriented publication); Mitchell v. Helms, 530 U.S. 793 (2000) (finding that direct funding to private schools, including religious schools, does not violate the Establishment Clause, since the distribution is evenhanded and the use of the money to indoctrinate students in religious schools cannot reasonably be attributed to government); *Mitchell*, 530 U.S. at 837-40, 867 (O'Connor, J., concurring) (finding that direct funding to private schools including religious schools does not violate the Establishment Clause, since the distribution is evenhanded *and* there is no evidence that funds given to religious schools were used to indoctrinate students).

53 *See, e.g.,* Locke v. Davey, 540 U.S. 712, 715 (2004) (refusing to overturn Washington's Blaine-type amendment on free exercise grounds) In pertinent part, Washington's Blaine-type amendment reads: "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." *Id.* at 719 n.2 (quoting WASH. CONST., art I, § 11). The case concerned Joshua Davey, a theology student who qualified for a state scholarship, but was denied it on the grounds that Washington law forbade any funding for theological education, even though similarly situated students majoring in philosophy, history, or chemistry could make use of the same financial help. *Id.* at 717, 721. The Court held that states have much leeway in the area of funding, and that Washington could have a Blaine-type law without violating Mr. Davey's free exercise rights. *Id.* at 721. However, the flip-side of this "leeway" is that if Washington had funded Davey's theology education it would not have violated the Establishment Clause. *Id.* at 719. So, contrary to conventional wisdom and the beliefs of some separationist groups, *Locke* was not a victory for separationism. *See also* Witters v. Comm'n for the Blind, 771 P. 2d 1119 (Wash. 1989).

and textual reasons not to equate separationism with anti-establishment, Hamburger has provided a conceptual scheme by which courts may affirm the constitutionality of laws that are tied to religious understandings, but, nevertheless, do not constitute state establishments of religion. In other words, a government within the United States may pass laws providing public approval and sustenance to moral understandings that are consistent with, congenial to, or have their grounding in certain religious traditions, and which, simultaneously, are thought to advance the public good *without* offending the First Amendment religion clauses. Although not in line with the agenda of many contemporary separationists, such an approach would have been well-received by their anti-establishment predecessors, such as the Danbury Baptists, who believed in the importance of religion and morality in the preservation of a Constitutional Republic.[54]

For example, consider the debate over abortion. Contemporary separationists generally support abortion rights on anti-establishment and/or free exercise grounds.[55] They argue that the pro-life position on abortion, that the fetus is a full-fledged member of the human community and is entitled to

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54 As Daniel Dreisbach writes:

> Although no friend of religious establishments, many evangelical dissenters resisted efforts to inhibit religion's ability to influence public life and culture, to deprive religious leaders of the civil liberty to participate in politics armed with political opinions informed by religious values, and to restrain the freedom of churches to define and advance their own mission and ministries, whether spiritual, social, or civic.

DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 52 (2002). Concerning the era in which President Jefferson penned his letter to the Danbury Baptists, Hamburger writes:

> In all probability, therefore, only a handful of Baptists, if any, and no Baptist organizations made separation their demand. Instead, Baptists focused on other, more traditional, claims of religious liberty.
>
> What Baptists sought not only differed from separation of church and state but also conflicted with it. Tactically, dissenters could not afford to demand separation, for a potent argument against them had been that they denied the connection between religion and government – a serious charge in a society in which religion was widely understood to be the necessary foundation of morality and government.

HAMBURGER, *supra* note 11, at 177-78.

55 *See, e.g.*, PETER S. WENZ, ABORTION RIGHTS AS RELIGIOUS FREEDOM (1992); Paul D. Simmons, *Religious Liberty and Abortion Policy:* Casey *as "Catch-22"*, 42 J. CHURCH & STATE 69 (2000) [hereinafter Simmons, *Religious Liberty and Abortion Policy*]; Paul D. Simmons, *Religious Liberty and the Abortion Debate*, 32 J. CHURCH & STATE 567 (1990); Stuart Rosenbaum, *Abortion, the Constitution, and Metaphysics*, 43 J. CHURCH & STATE 707 (2001); Judith Jarvis Thomson, *Abortion*, 20 BOSTON REV. 11 (Summer 1995). *But cf.* Francis J. Beckwith, *Law, Religion and the Metaphysics of Abortion: A Reply to Simmons*, 43 J. CHURCH & STATE 19 (2001); Francis J. Beckwith, *When You Come to a Fork in the Road, Take It?: Abortion, Personhood, and the Jurisprudence of Neutrality*, 45 J. CHURCH & STATE 485 (2003). Francis J. Beckwith, *Thomson's "Equal Reasonableness" Argument For Abortion Rights: A Critique*, 49 AM. J. JURIS. 118 (2004).

constitutional protection from the moment of conception, depends on "[a]bstract metaphysical speculation."[56] Therefore, any law prohibiting abortion on pro-life grounds would either constitute the establishment of religion, and/or violate the Free Exercise Clause by impeding the right of a woman who *wants* to obtain an abortion because, under her religious convictions, a fetus is not entitled to any legal rights.

Of course, it is no coincidence that opponents of abortion are generally more religious than those who support abortion-choice.[57] Opponents of abortion usually accept a view of the nature of the unborn that is consistent with their religion's philosophical anthropology.[58] However, those who offer this point of view in the public square do not merely stipulate the veracity of their position, as one would expect from people whose purpose is simply to propound dogmas condemning the "infidels."[59] Rather, they offer arguments consisting of reasoning that is remarkably public.[60] These arguments are not extracted

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56 Simmons, *Religious Liberty and Abortion Policy*, *supra* note 55, at 75. Simmons writes:

> The fact that many people believe strongly that a zygote is a person is by now well established. The First Amendment allows people to believe as they will as a matter of conscience or religious belief. That is a matter *of* freedom of religion. But as a definition of personhood for constitutional protections in a pluralistic society, the zygote-as-person rationale is untenable in the extreme.
>
> . . . Abstract metaphysical speculation has its rightful place in theology; but it must finally be rejected as inappropriate to the logic necessary for democratic rule.

Id.

57 There are, of course, exceptions. For example, Doris Gordon (Founder, Libertarians for Life) and Nat Hentoff (writer, THE VILLAGE VOICE) are pro-life atheists. As far as I know, it is Doris Gordon who coined the term "abortion-choice," which I use in this essay and elsewhere. See Doris Gordon, *How I Became Pro-Life: Remarks on Abortion, Parental Obligation, and the Draft*, 19 INT'L J. SOC.& SOC. POL'Y 14 (1999).

58 *See, e.g.*, PATRICK LEE, ABORTION AND UNBORN HUMAN LIFE (1996); J. P. MORELAND & SCOTT B. RAE, BODY & SOUL: HUMAN NATURE & THE CRISIS IN ETHICS (2000); Francis J. Beckwith, *The Explanatory Power of the Substance View of Persons*, 10.1 CHRISTIAN BIOETHICS 33 (2004).

59 This is the stereotype advanced by Simmons when he writes that the pro-life view of the unborn's intrinsic value is *merely* a claim of "Catholic dogma" and/or "special knowledge" that is neither "subject to critical analysis" nor rooted in "reason." Simmons, *Religious Liberty and Abortion Policy*, *supra* note 55, at 71-5.

60 Sophisticated pro-life advocates typically argue from the nature of the unborn in order to establish its standing as a rights-bearer who ought to be protected by our laws. This type of argument is meant to rebut the typical abortion-choice argument that equates a human being's intrinsic value with whether it has the present ability to exercise or exhibit certain functions, e.g., consciousness, self-awareness, ability to communicate, or having a self-concept. *See, e.g.*, DAVID BOONIN, A DEFENSE OF ABORTION (2002); Dean Stretton, *The Fallacy of Essential Moral Personhood*, *at* http://www.pcug.org.au/~dean/fe mp.html (last visited May 1, 2003) [hereinafter Stretton, *Fallacy*]; MICHAEL TOOLEY, ABORTION AND INFANTICIDE (1983). In a nutshell, pro-lifers respond to this sort of argument by arguing that there is a deep connection between our human nature and the rights that spring from it, which a just government is obligated recognize. The unborn – from zygote to blastocyst to embryo to fetus – is the same being, the same substance, that

uncritically from a religious text or from the pronouncements of a religious authority. On the contrary, they are fully accessible to a wide range of people, even those who dispute their veracity and/or the conclusion for which they are conscripted.

It is not surprising, therefore, that supporters of abortion-choice rebut the pro-life case by offering their own philosophical anthropology. That is, they present arguments to show that the unborn, though a human being, does not possess the requisite characteristics that would require the government to protect it as a subject of rights.[61]

Both the pro-life proponent and the abortion-choice advocate offer contrary accounts of the same being – the unborn. The former offers a view of the human person that is at home in a religious worldview, though it is certainly not unreasonable to accept the pro-life position while rejecting the religious tradition from which it sprang.[62] On the other hand, the abortion-choice advocate offers an explanation of the human person that denies the soundness of the pro-life position. The abortion-choice position is widely held by citizens who are secular in their worldview and harbor an antipathy to the influence of traditional religion on public life.[63]

develops into an adult. The actualization of a human being's potential, e.g. her "human" appearance and the exercise of her rational and moral powers as an adult (which abortion-choice advocates argue determine the unborn's intrinsic value), is merely the public presentation of functions latent in every human substance from the moment it is brought into being. A human may lose and regain those functions throughout her life, but the substance remains the same being. Moreover, if one's value is conditioned on certain accidental properties then the human equality presupposed by our legal institutions and our form of government – the philosophical foundation of our constitutional regime – is a fiction. In that case, there is no principled basis for rejecting the notion that human rights ought to be distributed to individuals on the basis of native intellectual abilities or other value-giving properties, such as rationality or self-awareness. One can only reject this notion by affirming that human beings are intrinsically valuable because they possess a particular *nature* from the moment they come into existence. That is to say, what a human being *is,* and not what she *does*, makes her a subject of rights.

61 *See* BOONIN, *supra* note 60; Stretton, *Fallacy, supra* note 60; TOOLEY, *supra* note 60.

62 *See supra* note 57, 60.

63 For example, the number of organizations and individuals that own websites that advance a secular worldview while supporting church-state separation and the abortion-choice position are nearly limitless. *See, e.g.,* Internet Infidels Discussion Forum, *at* http://www.iidb.org/vbb/archive/index.php/t-79887 (last visited Mar. 1, 2005) ("Delaware Valley Chapter of Americans United for Separation of Church and State President Janice Rael has details on carpools and buses to the March for Women's Lives from everywhere."); Debra Arias, *A Close Encounter With the Religious Right*, Separation of Church and State Home Page, *at* http://candst.tripod.com/tnppage/debbie.htm (last visited Mar. 1, 2005) ("I did what I could to support pro-choice . . . because this was the only area of my life that I felt the radical right threatened. I was wrong."); *AU Joins 'March for Women's Lives' - Sunday, April 25* , The Wall of Separation: Official Weblog of Au.org, *at* http://blog.au.org/2004/04/march_for_women.html (Apr. 20, 2004) ("We encourage all AU activists to join us in marching behind our church-state separation banner. AU Executive Director Barry Lynn will be one of the featured speakers at the rally."); *The Affirmations*

Thus, both the pro-lifer and the abortion-choice advocate present divergent answers to the same question: Who and what are we? Yet, according to the separationist, only the pro-lifer is forbidden from shaping public policy because her point of view is "[a]bstract metaphysical speculation [that] has its rightful place in theology; but it must finally be rejected as inappropriate to the logic necessary for democratic rule."[64] But the abortion-choice advocate attempts to justify his position by offering what is essentially a different metaphysical account, e.g. one that picks out certain presently exercisable abilities or functions that a being must have in order to be afforded the protections of our laws. There seems to be no good reason, except a type of crass philosophical apartheid, which would justify the latter account having a rightful place in politics and law, while its pro-life alternative is relegated to "its rightful place in theology."[65]

The interpretation of anti-establishment as the equivalent of a total separation of religion from our political and legal institutions has resulted in this unjustified public marginalization of citizens who have a religious understanding of certain political and moral issues. As Hamburger and others point out, traditional dissenters such as the Danbury Baptists, did not understand anti-establishment in this way, and neither should we.[66] The courts should not be in the business of siding with a militant secularism that seeks to have its metaphysics and morals firmly embedded in our laws while suggesting that the metaphysics and morals of its religious opponents, regardless of the quality of the arguments offered, should not even be considered by the citizenry simply because they flow from a religious worldview. If liberal democracy means anything, it should at least mean that all citizens – regardless of the religious or non-religious source of their policy proposals – should be allowed to offer their best arguments without first being required by the courts or mischievous secularists to undergo a metaphysical litmus test.[67]

of Humanism: A Statement of Principles, Council for Secular Humanism, *at* http://www.secularhumanism.org/intro/affirmations.html (last visited Mar. 1, 2005) ("Mature adults should be allowed to fulfill their aspirations, to express their sexual preferences, to exercise reproductive freedom . . . .").

64 Simmons, *Religious Liberty and Abortion Policy*, *supra* note 55, at 75.

65 *Id.*

66 *See* HAMBURGER, *supra* note 11, at 163-80.

67 For an extended defense of a similar point of view, see Nicholas Wolterstorff's contribution to ROBERT AUDI & NICHOLAS WOLTERSTORFF, RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE (1997).

IV. CONCLUSION

Hamburger's book is an important work of compelling scholarship, and its content is much richer than I can possibly begin to convey in this brief review essay. Although it is difficult to predict the Court's future trajectory in religion-clause jurisprudence, there is little doubt that Hamburger's book and its conclusions, will, and ought to, play a major part in directing that trajectory. In his conclusion, Hamburger writes that "Americans . . . gradually forgot the character of their older, antiestablishment religious liberty and eventually came to understand their religious freedom as a separation of church and state."[68] Thus, despite this view's widespread acceptance, it lacks constitutional authority. For this reason and because of its roots in prejudice, "the idea of separation should, at best, be viewed with suspicion."[69]

Separation of Church and State has, of course, ruffled some feathers, as do all great books that seek to critically assess beliefs that once seemed like permanent fixtures of the canon of conventional wisdom.[70] Although it is a hard pill for some to

68 HAMBURGER, *supra* note 11, at 492.

69 *Id.* at 483.

70 *See, e.g.*, J. Brent Walker, *Hamburger wrong about founders' early Baptists' view of separation*, Baptist Joint Committee on Public Affairs, *at* http://www.bjcpa.org/Pages/Views/2002/08.07reflections.html (Aug. 7, 2002) [hereinafter Walker, *Hamburger Wrong*]. Walker concludes his review by charging Hamburger with historical revisionism. *Id.* Yet, in his attempt to rebut Hamburger's claim that church-state separation harms religious liberty, Walker offers an argument that is terribly misleading:

> Moreover, the separation of church and state serves both religion clauses in the First Amendment. It operates not only to insist upon non-establishment, but also to ensure the free exercise of religion. In fact, the Supreme Court's first use of the words "separation of church and state" came in a free exercise case in 1879.

Id. But what Walker does not tell his readers is that the 1879 case to which he refers, *Reynolds v. United States*, involved a federal statute that prohibited Mormon polygamy and that the Court ruled in favor of the government and *rejected* the Mormon Free *Exercise* claim. 98 U.S. 145, 166-8. The Mormons were free to *believe* in polygamy, but they could not exercise it (which, I suspect, is the point of the practice). The *Reynolds* Court writes:

> In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not

swallow, especially those who have linked the veracity of their theological tradition to separationism,[71] integrity demands that those individuals begin to rethink and re-adjust their understanding of First Amendment jurisprudence to fit the facts. Perhaps it is time to take the advice of Jefferson's predecessor, John Adams: "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence[.]"[72]

> interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

Id. at 166.

The *Reynolds* opinion, which Walker cites as supporting his position, does not seem to square well with his embracing of the peculiar Baptist doctrine of "soul freedom." Walker, *Hamburger Wrong*, *supra.* Elsewhere on the same website where Walker's article appears, Walter B. Shurden hashes out a meaning of "soul freedom" that would seem to *require* that the Court permit polygamy between three or more consenting "souls." Walter B. Shurden, *How We Got That Way Baptists on Religious Liberty and the Separation of Church and State*, Baptist Joint Committee on Public Affairs, *at* http://www.bjcpa.org/Pages/ Resources/Pubs/shurden.html (last visited Mar. 1, 2005).

71 For example, the Baptist scholar James Dunn writes:

> I contend that there is a Baptist identity. There are Baptist spots on our herd and you can tell them from the others. . . So, without those spots you may be a wonderful person, maybe a devout and dedicated Christian, far closer to the Jesus model than I may ever be, but frankly, my dear, you are not a Baptist. I personally and passionately believe that Baptist Christians are an identifiable breed. One of our marks is separation of church and state. There is no doubt that there is an unbroken chain in our "baptist bonafides" from soul freedom to religious liberty to the separation of church and state, all part of the package.
>
> Thank God Texas Baptists are not among those so-called, semi, pseudo anti-Baptists who have turned away from our blood-bought heritage.

James Dunn, *Religious Liberty as a Baptist Distinctive*, 7 JOURNAL OF CHRISTIAN ETHICS (Apr. 2001), *at* http://www.christianethicstoday.com/Issue/033/Religious%20Liberty%20as%20a%20Bapti st%20Distinctive%20By%20James%20Dunn_033_3_.htm. Although Dunn's account of Baptist doctrine may sound like the description of an essential belief or something that one would find in a creed, elsewhere Dunn denies that Baptists embrace creeds. Ken Woodward quotes Dunn as saying: "The only Baptist creedis 'Ain't nobody but Jesus goin' to tell me what to believe.'" Ken Woodward, *Sex, Sin, and Salvation,* NEWSWEEK, Nov. 2, 1998, at 37.

72 John Adams, 3 LEGAL PAPERS OF JOHN ADAMS 98, 269 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).