Separation and Interpretation

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Should the establishment clause be interpreted in terms of "separation between church and state"? If not, how should the establishment clause be interpreted?

In 1802, in a letter to the Danbury Baptist Association, Thomas Jefferson wrote that the First Amendment had the effect of "building a wall of separation between Church & State." As it happens, in 1789, when Congress drafted the First Amendment, Jefferson was enjoying Paris. Nonetheless, his words about separation are often taken to be an authoritative interpretation of the First Amendment’s establishment clause. Indeed, in 1947, in Everson v. Board of Education, the Supreme Court quoted Jefferson’s pronouncement to justify its conclusion that the First Amendment guarantees a separation of church and state. Not only the justices but also vast numbers of other Americans have come to understand their religious freedom in terms of Jefferson’s phrase. As a result, Jefferson’s words often seem more familiar than the words of the First Amendment itself.

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2 330 U.S. 1, 13 (1947).

3 Edwin S. Gaustad writes that "[t]his powerful metaphor, once employed, became even more familiar to the American public than did the constitutional language itself." Edwin S. Gaustad, Religion, in THOMAS JEFFERSON: A REFERENCE BIOGRAPHY 277, 282 (Merrill D. Peterson ed., 1986), quoted in Dreisbach, supra note 1, at 456. Similarly, "[t]he phrase, coined by Thomas Jefferson as an interpretative metaphor for the Establishment Clause of the First Amendment, undoubtedly is more familiar to the general public than the Amendment’s actual language." Barbara A. Perry, Justice Hugo Black and the Wall of Separation Between Church and State, 31 J. of Church & St. 55 (1989), quoted in Dreisbach, supra note 1, at 456. Daniel Dreisbach writes:
During the past two decades, however, there have been doubts about separation. Jefferson's phrase retains all of the attractions of a bold, almost metaphysical metaphor. Yet its constitutional authority and its worldly consequences increasingly have been called into question. Many scholars and judges have come to view separation as a metaphor that obscures more than it illuminates. Accordingly, the U.S. Supreme Court has backed away from the idea of separation. Already in 1994, Ira C. Lupu pointed out that "separationism is on the wane," and by now, in 2002, this seems especially clear.\footnote{Ira C. Lupu, The Lingering Death of Separationism, 62 GEO. WASH. L. REV. 230, 256, 267 (1994).}

Occasionally a metaphor is thought to encapsulate so thoroughly an idea or concept that it passes into the vocabulary as the standard expression of that idea. Such is the case with the graphic phrase "wall of separation between Church and State," which in the twentieth century has profoundly influenced discourse and policy on church-state relations. Jefferson's "wall" is accepted by many Americans as a pithy description of the constitutionally prescribed church-state arrangement. More important, the federal judiciary has found the metaphor irresistible, elevating it to authoritative gloss on the First Amendment religion provisions.

\textit{Id.} Among others quoted by Dreisbach is R. Freeman Butts, who writes about Jefferson's words concerning separation:

[They] are not simply a metaphor of one private citizen's language; they reflect accurately the intent of those most responsible for the First Amendment; and they came to reflect the majority will of the American people. The words "separation of church and state" are an accurate and convenient shorthand meaning of the First Amendment itself; they represent a well-defined historical principle from the pen of one who in many official statements and actions helped to frame the authentic American tradition of political and religious liberty.

\textit{Id.} (quoting R. FREENOM BUTTS, THE AMERICAN TRADITION IN RELIGION AND EDUCATION 93 (1950)). Indeed:

The metaphor of the "wall of separation" between church and state has become an enduring element of First Amendment analysis. Resurrected from Jefferson by the Supreme Court in 1878, since 1947 the vision of the wall seems to have molded almost all attempts to analyze the First Amendment's control over the Government's relationship to religion. Indeed, Court opinions, and scholarly analyses of those opinions, have relied on it so much that the "wall of separation" has become more than a mere symbol or a basis for analysis; it is a rule of law.

Yet separation remains a potent ideal. Although most of the justices of the Supreme Court have abandoned an open reliance upon “separation of church and state,” they have not expressly rejected their earlier cases that espouse separation, and some of the justices still employ Jefferson’s phrase or at least tests derived from it.\(^5\) Outside the Court, moreover, many Americans continue to think of their religious liberty as a separation of church and state. Many such Americans—whether in Congress or on school boards—wield much power over the practical religious liberty of their fellow citizens. As a result, “separation of church and state” still casts a shadow over the First Amendment. Two hundred years after Jefferson wrote his letter to the Danbury Baptist association, separation remains a pressing issue.

At stake, first, is the character of religious freedom in the United States. In particular, will lingering separationist notions continue to affect the interpretation of the First Amendment?\(^6\) Notwithstanding the claims made on behalf of separation, there is reason to fear that it is not the religious freedom guaranteed by the First Amendment. Indeed, it will be seen that the interpretation of the First Amendment in terms of “separation of church and state” has tangibly diminished this amendment’s religious liberty and that this interpretation became popular as a result of prejudice. Accordingly, it is argued in Part I that separation should be viewed with skepticism.

At issue is also a second, more general, methodological problem concerning the role of prejudice in interpretation. When interpreting the Constitution, Americans often end up applying their own phrases, which they derive, directly or indirectly, from the words of the Constitution. This in itself hardly seems unusual, and the risks of this approach—particularly when it is pursued by enlightened, open-minded judges—may seem manageable. Nonetheless, the jurisprudence based on separation suggests a need for caution. In Part I, it will be seen that “separation of church and state” has not been as secular, dispassionate, or unprejudiced as many Americans suppose. Insufficiently self-conscious of what they were doing, some of the most progressive and liberal justices in the nation’s history adopted the phrase “separation of church and state” without pausing

\(^5\) See infra text at notes 40-41.

\(^6\) For the lingering quality of separation’s demise, see Lupu, supra note 4, at 256, 267.
to contemplate the prejudiced and discriminatory character of the phrase. In fact, the phrase became popular in constitutional analysis through deeply felt animosities; it lends itself to discrimination; and it thereby continues to give effect to prejudice even when innocently or at least naively used by unprejudiced judges. Thus separation illustrates a larger problem of interpretation: the direct importation of discriminatory and prejudiced phrases into constitutional law.

With this problem in mind, Part II suggests that, even if only for heuristic purposes, judges and other Americans should experimentally consider the application of the Constitution’s words before applying other words of their own selection. By first applying the words of the establishment clause, for example, judges could learn what this clause can accomplish and what it cannot, and they thereby could observe the different effect of the phrase about separation. Such an approach would not by itself prevent prejudice or discrimination. Yet it would at least create an opportunity for judges to become more self-conscious about the words they apply that are not in the Constitution. In this way, it could help them to avoid introducing phrases into constitutional law that perpetuate the effects of prejudice. This methodological conclusion about interpretation does not resolve in detail how the establishment clause should be interpreted. It does, however, suggest how judges could reduce the danger that they themselves will become responsible for adopting prejudiced phrases into constitutional law—a danger illustrated here by the phrase “separation of church and state.”

I. SEPARATION

Although for many Americans, the words “separation of church and state” have acquired greater prominence than those of the establishment clause, there are reasons to doubt whether the establishment clause of the First Amendment should be interpreted in terms of “separation of church and state.”

According to popular myth, separation is an authoritative understanding of the establishment clause and, indeed, the epitome of religious freedom—a neutral, secular principle that prevents the evils of religious prejudice. Yet notwithstanding the attractive sound of the words “separation of church and state,” these words may, in fact, threaten the First Amendment’s religious liberty. It will be seen (A) that they have no particular authority in the Constitution and (B)
that they set up a dangerously impracticable standard. Indeed it will become evident \((C)\) that the words penalize religion and discriminate against religious groups in ways that the words of the establishment clause do not and \((D)\) that this discriminatory approach became popular in constitutional law as a result of prejudice and even overtly religious animosities. Taken together, these considerations suggest that the First Amendment should not be interpreted in terms of "separation of church and state."

\section{Authority in the Constitution}

Constitutional authority is a complicated matter. The very foundations of this authority are sometimes disputed, and therefore it may seem difficult to reach any strong conclusion about the authority of the phrase "separation of church and state." Nonetheless, there are substantial reasons to believe that this phrase has no special authority in the Constitution.

\textit{Non-Historical Authority}. There are conceptions of authority based on the Constitution that do not rely on history, but they provide little, if any, legitimacy to separation. To start with, "separation of church and state" lacks the authority of a phrase within the Constitution itself. Although the text of the Constitution need not be the only basis for constitutional law, the Constitution’s terms have long seemed to have a constitutional authority superior to that of other phrases. As Kent Greenawalt observes, the words of a constitution are "an authoritative formulation."\textsuperscript{7} Accordingly, it seems relevant that the words "separation of church and state" are not employed by the Constitution. Many Americans apparently assume that the First Amendment actually uses the words "separation of church and state." The phrase, however, does not enjoy this high level of constitutional authority.

Nor does "separation of church and state" have authority as a phrase or principle derived from the establishment clause. "Separation of church and state" is only one of numerous possible interpretations of the establishment clause, and some of these can more easily be derived from the original. For example, one could easily derive the phrases "no discrimination in favor of religion" or "no support on the basis of religion." Although not as pleasing to

\textsuperscript{7} \textit{KENT GREENAWALT, LAW AND OBJECTIVITY} 65-66 (1992).
the ear as "separation of church and state," these phrases seem to follow more clearly from the words of the establishment clause. Similarly, one could derive the principle of equality or that of no government benefits for religion. Each of these principles seems more directly derivable from the establishment clause than the principle of separation between church and state.

This lack of authority becomes most evident in the contrast between the metaphor of "separation" and that of "establishment." Whereas an establishment seems to imply one object elevating or raising up another, separation seems to suggest keeping two objects apart. Accordingly, the establishment clause implies a different structure of analysis than the phrase about separation: The Constitution's clause limits government in its acts establishing religion; in contrast, the alternative phrase limits both church and state by requiring that they be kept separate.

Apparently, therefore, "separation of church and state" does not have any special authority in the Constitution under conventional non-historical modes of interpretation. Whether considered as a phrase, principle, or metaphor drawn from the establishment clause, it has less non-historical authority in the Constitution than other phrases. Hence, the importance of history.

**Historical Authority.** Perhaps because the advocates of separation recognize that "separation of church and state" does not (in the absence of history) have any clear authority in the establishment clause, they often emphasize the historical foundations of separation. For example, they argue that already in 1791 separation was the meaning, principle, implication, goal, or purpose of the establishment clause. Indeed, few constitutional doctrines are more frequently defended on the basis of their eighteenth-century authority than the separation of church and state.

Strikingly, however, it is difficult to think of an allegedly eighteenth-century constitutional doctrine that has as little eighteenth-century foundation. The standard claim on behalf of separation is that it was the religious liberty demanded by eighteenth-century religious dissenters and then adopted in the First Amendment. Certainly, were separation the principle of religious liberty adopted in the First Amendment, one would expect to find that it had been much discussed by the dissenters. Few advocates of religious liberty have been as voluble and importunate as the
dissenters who clamored against state establishments in late eighteenth-century America. Therefore, if separation were the concept of religious liberty that the framers of the First Amendment took for granted or otherwise employed, one would expect to find that it had been repeatedly demanded by dissenters in the numerous petitions, pamphlets, newspaper articles, sermons, and even poems in which these advocates of religious liberty sought a freedom from state establishments. Yet it is astonishingly difficult to find late eighteenth-century American demands for "separation of church and state" or for any clear equivalent.

To be sure, eighteenth-century Americans often alluded to particular types of differences and disconnections between church and state, and in retrospect these allusions are sometimes imagined to have been references to a separation. For example, throughout the period, Americans of all sorts—including both dissenters and establishment clergy—distinguished between church and state as different institutions with different goals and powers. They did not, however, thereby suggest that these institutions should be separated in the sense of being kept apart or segregated. (Indeed, many Americans assumed that the distinction between church and state implied the necessity of an alliance between these institutions.) Moreover, religious dissenters and their allies often condemned a "union of church and state," but in rejecting this extreme, they did not embrace the other. Instead, they took care to reject the "adulterous" or "illicit connection" formed by an establishment of religion. In this way, dissenters almost always avoided any suggestion that they wanted a more general separation of church and state.8

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8 The author has located only one instance in which American dissenters prior to the adoption of the Bill of Rights unequivocally demanded a general disconnection of church and state. In a 1783 memorial to the Virginia legislature, some dissenters dropped the typical qualification—that they were objecting to the "adulterous" or "illicit" connection—and they thereby seem to have demanded an unqualified, general disconnection of church and state. Yet they promptly abandoned this position in 1784, apparently recognizing that it was not what they really wanted. See PHILIP HAMBERGER, SEPARATION OF CHURCH AND STATE 58-59 n.68 (2002). Whether the position taken in their 1783 memorial was knowing or merely inadvertent, it was most unusual, even for these dissenters who in 1783 briefly endorsed it. Of course, among the multitudinous late eighteenth-century American petitions, pamphlets, newspaper essays, and poems demanding religious liberty—some of which must have escaped the notice of the author—there probably were some other unqualified demands for a disconnection or separation of church and state. Yet such demands clearly were most unusual and were not among the dissenters' prominent and popular demands for religious liberty.

Another early American demand for a type of separation has recently been found by the author in a Philadelphia magazine essay of 1792. Although published a year after the
Thus, it should be no surprise that the debates on the adoption of the First Amendment reveal no requests for a "separation of church and state." The phrase simply was not used in these debates, and the idea was not advocated. Although this is not the place to recite the full history of the First Amendment's religion clauses, one basic ratification of the U.S. Bill of Rights, and although a demand for separation of religion and government rather than church and state, it suggests how ideas of separation were beginning to enter public debate in the 1790s. The essay began by reciting three justifications "for the disqualification of the clergy"—the third being that "when they enjoy particular emoluments or exemptions under the law, it is but right and just that these should be balanced by particular legal disqualifications and disadvantages; otherwise this class of citizens would not be on a level with the rest." On the Exclusion of Ministers of Religion from Civil Offices, THE UNIVERSAL ASYLUM AND COLUMBIAN MAGAZINE, Aug. 1792, at 75, 75. In response, the essay argued:

When it is considered that religion is not an object of political regulation, and that the rights of conscience are, from their nature, as well as by most of the declarations of rights, excepted out of the jurisdiction of the civil magistrate, too much care cannot be taken to keep government and religion separate and distinct. And it seems not to have been duly considered, by the constitutions which impose these civil disqualifications, and which probably did not mean to violate their principle of religious liberty, that they paved the way therefor as much by beginning with the disqualifications, as if they had begun, on the other side, with particular favours and exemptions. For there is the same interference of the civil power on account of religion, in the one case as in the other; and on whichever side the government interferes, its interference on the other side follows of course. Justice pleads for it. Privileges authorize disabilities, and disabilities lead to privileges; till at length the ministers of religion are established into a political order in the state; the magistrate is clothed with complete jurisdiction over it; and religion is turned into a mere engine of civil government. Let the ministers of religion then be considered by civil society merely as members of civil society. Let them claim no privileges not common to all other citizens; and let other citizens impose no burden whatever not common to themselves. This is the only just and safe way in which this question can be decided.

Id. at 76. In enunciating the principle that "too much care cannot be taken to keep government and religion separate and distinct," this essay appears to have suggested that these things, far from being merely distinct, were to be kept apart. This was quite different from the typical anti-establishment position of dissenters, and therefore it should be no surprise that this separationist viewpoint was adopted in an argument against the exclusion of clergymen from civil office rather than in the campaign against the surviving state establishments.

Incidentally, the position taken by the 1792 essay against both exemptions and exclusions is remarkably similar to that of John Leland. John Leland, The Virginia Chronicle (1790), reprinted in THE WRITINGS OF THE LATE ELDER JOHN LELAND 122 (L.F. Green ed., 1845); John Leland, The Rights of Conscience Inalienable, and, Therefore, Religious Opinions Not Cognizable by Law; or, the High-Flying Churchman, Stripped of His Legal Robe, Appears a Yahoo (1791), reprinted in THE WRITINGS OF THE LATE ELDER JOHN LELAND 188 (L.F. Green ed., 1845). Perhaps the author of the Columbian Magazine had read Leland. Of course, so severe an argument could have little appeal to most dissenting clergymen, who valued their exemptions and had no desire to see influential establishment ministers in state legislatures.
observation is inescapable: In light of the failure of dissenters to seek a separation of church and state and the failure of the framers to mention separation, the historical claims that the amendment adopted this principle are, at best, improbable.

In fact, American dissenters made demands for a religious liberty very different from separation. Although the evangelical dissenters who dominated the campaign against state establishments relied upon numerous arguments and principles, they tended to make demands for two types of constitutional protection. First, they sought equal rights, without respect to religious differences. Second, and much more broadly, some of them insisted that the laws should take no cognizance of religion.9

It was in the context of these anti-establishment demands that Congress adopted the words of the First Amendment. In particular, the establishment clause of the amendment was an ameliorated version of the second kind of demand. Whereas the first type, which merely required equality among religions, did not accomplish enough, the second, which precluded all laws concerning religion, came to seem too severe. It would have made the First Amendment an obstacle to laws that protected religious liberty or that otherwise concerned religion without establishing it. Accordingly (as will be explained in more detail below in Part II), Congress adopted words that prohibited laws respecting an establishment of religion—thus permitting other laws concerning religion.10 This was a far cry from separation of church and state.

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10 See infra text accompanying notes 78-85; see also HAMBURGER, supra note 8, at ch. 4. Incidentally, contrary to the assumptions of many lawyers, judges, and historians who discuss eighteenth-century ideas or principles of religious liberty, it should not be taken for granted that there is an exact or uncomplicated correlation between such eighteenth-century ideas and eighteenth-century constitutional provisions protecting religious liberty. The religious dissenters who demanded constitutional protections drew upon numerous ideas—whether religious or secular, legal or philosophical—to conceptualize religious liberty and to explain why and how it needed constitutional protection. Yet they typically expected their constitutional provisions rather than their vague principles to protect their religious liberty. Indeed, evangelical dissenters focused their efforts for constitutional protections on two basic types of demands that could be adjusted in their details to different theological perspectives but that still consisted of two basic models of analysis. See id. at ch. 4; see also infra text at note 89. The concentration of these dissenters on obtaining constitutional protections—protections that fell largely within two basic categories—allowed them to find much unity in their cause even when some of their underlying assumptions diverged.
An Explanation of the Absence of Historical Authority. It is no coincidence that eighteenth-century American religious dissenters demanded a religious liberty very different from separation of church and state, for they did not want separation. This lack of interest in separation may come as a surprise, but it is important to recall, because it explains the conclusion that separation is without historical authority. Incidentally, it also provides an initial hint about separation’s moral illegitimacy.

Many American dissenters would have been familiar with the phrase “separation between church and state,” but they knew it as an establishment accusation rather than an anti-establishment demand. It was a phrase that establishment ministers had long used to mischaracterize the claims of religious dissenters. In particular, during an era in which morals were widely understood to depend upon religion, the suggestion that dissenters sought to separate church from state (or religion from government) implied that dissenters hoped to separate government from the foundations of morality. As it happens, dissenters did not demand a separation of church and state. Yet establishment ministers found it advantageous to hint that dissenters sought this precisely because it made the dissenters’ demands for religious liberty seem disreputable.

Already in the late sixteenth century, Richard Hooker attributed separation to dissenters. In his voluminous Of the Laws of Ecclesiastical Polity, this learned Anglican apologist had suggested that the arguments of English dissenters against the government-appointed Anglican prelacy did not make sense, “unless they against us should hold that the Church and the Commonwealth are two both distinct and separate societies, of which two the one comprehendeth always persons not belonging to the other.” In Hooker’s view, dissenters seemed to be arguing from the position that there were walls of separation between church and commonwealth and that “the walles of separation between these two must for ever be upheld.” Although, as Hooker practically admitted, dissenters had not actually demanded “walles of separation” between church and

12 Id. at 320.
commonwealth, he surely was pleased to believe that dissenters built their arguments on this foundation, for he could easily demolish it.\textsuperscript{13}

Yet almost no dissenters—whether in sixteenth-century England or eighteenth-century America—took such a position. On the contrary, like establishment ministers, they tended to assume that some connections between church and state were unavoidable and even valuable. They typically opposed any civil establishment of religion, and they therefore rejected some of the institutional connections between church and state, but they had no desire to prevent all connections. In particular, they tended to share with establishment ministers a hope for a civil society in which religious societies were supportive of civil law and in which civil law protected the rights of religious societies. For example, most dissenters assumed that they assisted government by encouraging morality, by praying for government, and by upholding the sanctity of oaths. By the same token, they needed government to provide legal protection for their church property, to give legal effect to the marriages conducted by their clergy, and to protect the freedom of their preachers in expounding faith and morality to the people, including with respect to politics. Indeed, dissenters expected government to protect the religion of the people in more substantial ways, such as by passing laws prohibiting Sunday labor or even requiring observance of the Sabbath.\textsuperscript{14} American dissenters therefore had every reason to share with establishment ministers the sense that a separation of church and state was disreputable. Accordingly, it should come as no surprise that the dissenters did not demand “separation of church and state” and that this phrase does not appear in the Constitution.

\textbf{B. Impracticable}

Another problem with separation is the impracticability of separating church and state. Mere inconvenience is not ordinarily understood to be a legitimate reason for failing to enforce a constitutional right. Yet a more substantial impracticability is a reason for caution in giving a right constitutional status.

\textsuperscript{13} \textit{Id.} at 320-21.

\textsuperscript{14} For the distinction between Sabbath laws and Sunday laws, and the response to these among dissenters, especially Baptists, see HAMBERGER, \textit{supra} note 8, at 178 n.60; WILIAM G. MCLoughlin, \textit{2 New England Dissent, 1630-1883: The Baptists and the Separation of Church and State} 758 (1971).
The value of confining the Constitution to practicable limitations on government—limitations that are feasible—was cogently stated by James Madison. In 1787, when contemplating the adoption of a federal bill of rights, Madison feared that an overly rigorous enumeration of rights would necessarily require the government on occasion to violate these rights and thus would gradually inure Americans to breaches of their Constitution. With this in mind, Madison wrote to Jefferson: “I am inclined to think that absolute restrictions in cases that are doubtful, or where emergencies may overrule them, ought to be avoided. The restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public; and after repeated violations in extraordinary cases, they will lose even their ordinary efficacy.”

Today, the same reasoning calls for caution about “separation of church and state.” In particular, if this phrase (in contrast to the establishment clause) tends to require what is physically or morally impossible, then it may undermine confidence in the Constitution’s limitations on government—whether with respect to religious liberty or other matters.

Degrees of Impracticability. Of course, any right can be understood so broadly or perversely as to seem dangerously impracticable. For example, any clause in the U.S. Bill of Rights could be interpreted to refer to an impracticable degree of freedom. Accordingly, it may seem doubtful that the “separation of church and state” is worse. Yet this phrase (if it means more than a mere distinction between church and state) seems to require some absence of contact between church and state.

Rather than simply limit government in its establishment of religion, the phrase unspecifically but generally forbids relationships between church and state. Whereas most clauses in the Bill of Rights preserve liberty by limiting government’s power over various rights, the phrase “separation of church and state” generally prohibits church-state relationships. The phrase thus lends itself to a prohibition on contact between institutions that inescapably must

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15 Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 THE PAPERS OF JAMES MADISON 295, 299 (Robert Rutland et al. eds., 1977). More generally, in drafting the Bill of Rights, Madison was careful to avoid the adoption of expansive rights that would alter the existing character of the federal government or threaten its “energy.” See Paul Finkelman, James Madison & the Bill of Rights: A Reluctant Paternity, 1990 SUP. CT. REV. 301.
have contact with each other—whether through the government's protection of churches and church property or through the churches' participation in moral and political movements.

For example, in broadly condemning contact between church and state, separation implies constraints not only on government but also even on churches, and it thereby lends itself to limitations on groups that have long been among the most irrepressible participants in American politics. This constraint on non-governmental groups is most clearly evident in the criticisms of churches for violating separation through their lobbying and other political expression. It also can be discerned in the Supreme Court's Lemon test—a separationist standard that condemns the intrusion of religious purposes into legislation and that leaves open the possibility that the salient lobbying of churches for a bill on religious grounds might give it a dominantly religious purpose.\(^{16}\) Thus, separation directly limits non-governmental groups and their contact with government in ways quite unlike anything else ordinarily attributed to the Bill of Rights. Through its implications for the basic freedom of non-governmental groups and their members, separation is much more broadly impracticable than the various rights that more clearly limit only government.

The potentially severe impracticality of "separation of church and state" is revealed by the experience of Americans with this phrase. The unworkable character of its requirements became evident already at the start of the nineteenth century, when Americans first made popular political demands for separation. Beginning in these years, separation seemed to require that clergymen not preach on politics—as if preachers could be expected to give up their freedom of speech and as if the moral implications of religion could be confined to the next world and such few matters in this one as are beyond controversy. In the mid-nineteenth century, separation seemed to require that states deny Catholics the right to incorporate their churches in a manner compatible with their centralized conceptions of church government. In this way, separation prevented Catholics from holding their church property in a form in which it could be fully protected by law. As was widely understood

\(^{16}\) For example, the first Lemon test could have called into question the constitutionality of civil rights statutes if they had been understood to have arisen from religious opposition to racial inequality. See Lemon v. Kurtzman, 403 U.S. 602 (1971).
and desired, the separation that prevented Catholics from incorporating their churches would effectively deprive them of their own church government and discipline, thus threatening their ability to preserve their religion.\textsuperscript{17}

More recently, the justices of the Supreme Court have acknowledged the unusually impracticable character of separation. In 1952, in \textit{Zorach v. Clauson}, Justice William O. Douglas wrote that “[t]here cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated” but added that the amendment “does not say that in every and all respects there shall be a separation of Church and State,” for otherwise “[c]hurches could not be required to pay even property taxes” and “[m]unicipalities would not be permitted to render police or fire protection to religious groups.”\textsuperscript{18} Similarly, in 1971 in \textit{Lemon v. Kurtzman}, Justice Warren Burger emphasized that “[s]ome relationship between government and religious organizations is inevitable.”\textsuperscript{19} Thus, “separation between church and state” does not prohibit all “contacts,” as evident from “[f]ire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws.”\textsuperscript{20} Indeed, in 1984 in \textit{Lynch v. Donnelly}, Burger acknowledged: “No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government.”\textsuperscript{21} Thus, even while adopting the phrase “separation of church and state,” the justices have repeatedly and quite candidly felt obliged to interpret it narrowly and even to reach conclusions in defiance of its apparent meaning so as to avoid the risk that it might become impracticable.

\textit{The Dangers of Impracticability.} The dangers of separation’s impracticability extend beyond what Madison anticipated. Unlike the impracticability discussed by Madison, which concerned rights

\textsuperscript{17} Philip Hamburger, \textit{Illiberal Liberalism: Liberal Theology, Anti-Catholicism, & Church Property}, 12 J. L. & CONTEMP. ISSUES 693 (2002).
\textsuperscript{18} 343 U.S. 306, 312 (1952).
\textsuperscript{19} 403 U.S. at 614.
\textsuperscript{20} \textit{id.}
that might seem too constraining in a national emergency, the impracticability of separation is continual and pervasive.

The phrase "separation of church and state" lends itself to a most improbable set of expectations even in ordinary, everyday situations. In particular, as already noted, it lends itself not merely to a distinction between church and state, nor merely to an absence of a government establishment of religion (neither of which would be controversial), but to an undefined degree of segregation between church and state. It therefore seems to conflict with even non-establishment contacts between religion and government—contacts that necessarily occur all the time. For example, separation often seems to be at odds with the otherwise not unconstitutional rights of churches and their clergy to speak, publish, and petition on political matters; of political candidates to invoke religion; and of churches and religious organizations to qualify for government benefits distributed on purely secular grounds. Of course, the Supreme Court has not adopted all of the implications of "separation of church and state"—indeed, it could not plausibly do so—but this sensible restraint of the Court only draws further attention to the persistent contrast between the phrase and the reality. In contrast to what the phrase seems to require, churches almost unavoidably continue to lobby and speak on politics, candidates inescapably proclaim about religion, and churches cannot help but receive at least some secularly defined benefits from government. As a result, many Americans have quite reasonably come to believe that a central principle of the Bill of Rights—separation of church and state—is repeatedly violated every day by numerous Americans and that these violations are wantonly ignored by the Supreme Court. This inevitable impracticability of separation habituates Americans—in a continuous, unbroken manner—to the sort of disregard for the Constitution that Madison had feared even if it occurred only on rare occasions.22

22 Incidentally, like the "separation of church and state" from which it was derived, the Lemon test is impracticable. Consider, for example, the second part of the Lemon test—that the "principal or primary effect [of a statute] must be one that neither advances or inhibits religion." Lemon, 403 U.S. at 602. Many essential laws (for example, statutes protecting church property or creating religious exemptions) have as their most salient effect to facilitate the practice of religion. In this way, the second part of the Lemon test (or any similar "substantive neutrality" test) is almost as impracticable as the "separation of church and state" from which it was derived.
Unfortunately, the impractical character of separation has yet other consequences that more directly threaten freedom. In particular, the impracticability of separation has a corrosive effect on a host of unavoidable connections between government and religion. By establishing a standard that prohibits unspecified contacts between church and state, separation calls into question the legitimacy of myriad connections between church and state that do not amount to an establishment and that are an ordinary and inevitable part of American life. Although the Supreme Court has backed away from "separation of church and state," it has not openly abandoned the phrase, and some justices persist in using it. Therefore, Jefferson's words have continued to enjoy a legitimacy buttressed by the Court's earlier decisions, and on this foundation, they still have a destructive effect outside the Court—for example, in the administrative and legislative acts of the federal and state governments. More prominently, on the basis of separation, legislatures have felt constitutionally obliged to deny funding to private schools and other organizations with religious affiliations. Most significant culturally are the efforts on behalf of separation by numerous organizations, which complain, for example, that politicians violate separation by appealing to a power higher than government and that churches violate separation by engaging in politics, lobbying, or petitioning government. In all of these ways, the constitutional and never entirely repressible activities of churches and the individuals who belong to them are recharacterized as threats to separation and the Constitution.

Thus, through its broad and unspecific prohibition on contact between two institutions that inescapably must interact with each other, the phrase "separation of church and state" lends itself to corrosive implications. On account of its impracticability, the phrase

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\[23\] For example, in the various manuals that instruct principals and teachers in public schools on how to avoid violating the First Amendment. For attempts to address such problems through federal administrative actions, see Marci Hamilton, *Religion and the Law in the Clinton Era: An Anti-Madisonian Legacy*, 63 LAW & CONTEMP. PROBS. 359, 387 (2000); Ira C. Lupu, *Reading Between the Religion Clauses*, 63 LAW & CONTEMP. PROBS. 439, 447 (2000). For suggestions that some of the most egregious interference with religious liberty has occurred in public schools, see Eric W. Treene, *Religion, the Public Square, and the Presidency*, 24 HARV. J.L. & PUB. POL'Y 573, 581 (2001) (and the cases cited therein, particularly C.H. v. Oliva, 990 F. Supp. 541 (D.N.J. 1997), aff'd in part by an equally divided en banc court, vacated in part, 226 F.3d 198 (3d Cir. 2000), cert. denied sub nom and *Hood v. Medford Twp. Bd. of Educ.*, 533 U.S. 915 (2001) (case in which a grade school that invited children to read stories of their choice prevented one such child from reading his, because it was based on the Bible)).
stands as a continual challenge to the legitimacy of otherwise constitutional and often unavoidable conduct.

Of course, the worst consequences of separation have been experienced more as threats than as legally enforced realities. For example, in spite of separation’s implication that churches should stay out of politics, churches have continued to bring their faith to bear on public matters. Nonetheless, separation’s implication against political involvement—while not adopted by the Supreme Court—has been the source of much anxiety and trouble for religious Americans. Worried about violating separation’s apparent constitutional prohibition on political expression and influence, adherents of some religious groups have censored themselves in a manner suggestive of the chilling effect of other overly broad prohibitions on speech. Yet the self-restraint typically is inadequate, and, unable to avoid all political speech, members of religious groups often have had to face withering criticism simply for exercising their constitutional rights of expression. Thus, even when neither judges nor legislatures adhere to separation, the impracticable breadth of this principle has had serious consequences—both for the religious liberty of Americans and for their confidence in the Constitution.24

C. Discrimination

Some caution is advisable before reaching any conclusion about the discriminatory character of a doctrine adopted by the U.S.

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24 The impracticable character of separation as a legal standard may have something to do with its historical association with religious aspirations and demands for purity. Although many concepts in constitutional law have religious origins, this is ostentatiously true of the phrase "separation of church and state." As should be apparent from the very words, "separation of church and state," it is an ideal expressly based on religious assumptions. Some early Christians had conceived of the church as the bride of Christ, and with this vision of the church, many Christians eventually rejected what they considered an adulterous union between church and state. The principle of separation echoed these sexual metaphors of religious purity by its contrast to a union of church and state—as occasionally made clear, for example, by locutions that emphasized that church and state should be "divorced." More directly, separation developed from the image of a wall of separation, which was borrowed from Christian conceptions of the church walled off from the corruptions of the world.

Although these various Christian origins were soon largely ignored, many of the Americans who organized on behalf of separation demanded it on religious grounds. Separation tended to become the ideal of Protestants and others who found in it an attractive expression of their distrust of ecclesiastical authority—a distrust that often was of a distinctly Protestant or broader, theologically liberal character. Even more strikingly, some advocates of separation adopted it as a religious belief and even as a part of their creeds. Although Baptists did this most prominently, so did many nativists, Masons, and even atheists. Nonetheless, the separation of church and state is often said, without irony, to be a secular legal standard.
Supreme Court. With respect to separation, however, such a conclusion seems inescapable. In particular, the phrase "separation of church and state" seems to discriminate against churches—that is, against religious groups and other distinct religions.

Even without an examination of the history, it is possible to discern in the words "separation of church and state" substantial reason to worry that this phrase lends itself to discriminatory penalties on religion and especially some types of religion. This may seem odd to Americans who identify their religious freedom with separation, and certainly their separationist ideals are not obviously unreasonable in light of the long history of interpreting the First Amendment in terms of "separation." Nonetheless, the potential for discrimination and penalty is evident from the very words "separation of church and state."

In a sense, the First Amendment's establishment clause itself discriminates against religion. While the free exercise clause gives special protection to religion, the establishment clause simultaneously forbids laws respecting an establishment of religion and thereby precludes some government support for religion. It therefore is a sort of discrimination and penalty. Yet the phrase "separation of church and state" introduces much more direct penalties and discrimination.

Unlike the establishment clause, the phrase about separation places burdens directly on religion. The First Amendment forbids Congress from making certain laws—such as those respecting the establishment of religion or prohibiting the free exercise of religion. In contrast, as already noted, the phrase about separation focuses on church and state, thus shifting the constraints of the First Amendment directly onto religion as well as government. To be sure, the Supreme Court has never gone so far, but popular conceptions of separation constrain churches in their freedom of speech and press and in their right to petition and persuade government.

Moreover, the phrase "separation of church and state" discriminates among different types of religion. In particular, with the word "church," it tends to distinguish religious groups from religious individuals and tends to distinguish distinct religions from

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25 Chip Lupu observes that "[t]he separationist premise of thoroughly privatized religion is symbolically threatened even if sectarian forces merely occupy public space . . . ." Lupu, supra note 4, at 249.
an individual religiosity. In the last half of the twentieth century, separation has often seemed to extend to a separation of all religion from government. Yet even when conceived of in this very expansive manner, separation has typically been understood as a separation of distinct religions from government, thus permitting political leaders and schools to indulge in a diffuse individual spirituality, as long as they avoid any distinct type of religion. Separation thus effectively privileges individuals and individual religiosity by discriminating with different degrees of intensity against a continuum of religious groups (ranging from such religions as are merely distinct to such institutional churches as emphasize conformity to their creeds and hierarchies).²⁶

This discrimination can be illustrated by the debates concerning the distribution of government funds. No one worries about government distribution of social security, welfare, or other government support to religious individuals. No one challenges this support even if it goes to individuals who are wholly engrossed by their religious identity and who use the money for exclusively religious purposes, such as to proselytize or to purchase votive candles. Yet government distribution of money to groups on the basis of purely secular qualifications often seems to violate the separation of church and state if religious groups are not excluded. This government distribution seems to violate the separation of church and state even if (as in a voucher system) individuals can select which groups receive their share of the funds. One reason for suspicion about this sort of government program is the possibility that the religious groups that receive funds (for example, religious schools) will use the money to proselytize or otherwise support religious activities. The phrase “separation of church and state,” however, is not understood to preclude the receipt of aid by religious individuals, even though individuals can use the government money in the same way. Apparently, separation of church and state has different effects upon groups and individuals.²⁷ As a commentator

²⁶ Professors Lupu and Tuttle observe that "the continued vitality of Separationism is more pronounced in cases involving religious institutions than religiously motivated individuals." Ira C. Lupu & Robert Tuttle, The Distinctive Place of Religious Entities in Our Constitutional Order, 47 VILL. L. REV. 37, 81 (2002).

²⁷ The discrimination against religious groups is also evident in other ways. Consider, for example, the different responses to legislators who vote on religious grounds. Legislators who avowedly vote according to their conscience can expect to escape some of the condemnations
observed already 150 years ago, "it is indeed difficult to conceive of a separation between Church and State in the individual."\(^{28}\)

The discrimination may make sense as a matter of legislative policy if one feels little concern about a generalized spirituality but fears religions and their organizations. For example, one might fear that religious groups, their creeds, and their hierarchical structures of authority pose a threat to free, democratic government. One might also fear that they encourage conformity and thus stifle independent thinking and the mental freedom necessary for uncompromised individual belief. More generally, the discrimination may also make sense if one fears religious challenges to modernity, especially to modern beliefs in the progressive character of truth—challenges that might be expected to come from traditional, organized religious groups. The discrimination particularly makes sense if one distrusts Catholicism, which has long been the model from which Europeans and Americans have generalized their fears of religious groups, their conceptions of individualism and intellectual freedom, and their aspirations for progress and modernity.

Yet these fears of distinct and especially organized religions provide a poor foundation for constitutional discrimination. Religions are usually distinguished by at least their religious tenets, and as Jefferson himself wrote—in 1779 rather than 1802—"our civil rights have no depend[e]nce on our religious opinions, any more than our opinions in physics or geometry."\(^{29}\) He explained that there "is time enough for the rightful purposes of civil government for its

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\(^{28}\) Freedom of Opinion, 18 AM. REV. 551, 554 (1849). The theologically liberal fears underlying the distinction between individuals and churches may also be evident in the different treatment of ecclesiastical and individualistic claims of constitutional exemption from general laws. In Reynolds v. U.S.—a federal prosecution for polygamy—the Supreme Court denied the First Amendment argument of the defendant that he had acted in obedience to the Mormon Church, 98 U.S. 145, 164 (1878). In contrast, during the last half of the twentieth century, at the height of its separationism, the Court acceded to claims of individual conscientious objection—typically made by members of Protestant sects. See Sherbert v. Verner, 374 U.S. 98 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

officers to interfere when principles break out into overt acts against peace and good order.  

Not only in the past, but also today, there is all too great a danger that fears of Catholicism or, more generally, of distinct religions may derive from inherited and even theological hostility rather than merely secular analysis. For example, the fear that churches and above all the Catholic Church endanger civil government and individual freedom has been at the heart of modern, individualistic, liberal theology. It has also been at the core of radical, anti-Christian rationalism. Both perspectives increasingly dominated American attitudes about religion in the late nineteenth century and especially the twentieth, whether among Christians, Jews, or the unreligious. Even if only contemporary America is examined, fears of church authority and corresponding desires for separation of church and state seem to flourish amid religious and anti-religious suspicions. Whether the First Amendment should be interpreted in terms of a phrase that has tended to appeal to such intra- or anti-religious animosities is doubtful.

Equally sobering, separation's discrimination against religious groups often amounts to discrimination against religion in general and thus functions as a penalty on religion. At the very least, religion is penalized by the interpretation of "separation of church and state" to mean a separation between government and religion. More significantly, however, separation's discrimination against religious groups more broadly penalizes religion. Organization in such a group probably is essential for the long-term survival of any religion, for its successful propagation, and for its influence in society. Certainly, religion as it has existed thus far in America is difficult to imagine without religious groups. Accordingly, separation's requirement of discrimination against churches often amounts to a penalty on religion. Undoubtedly, to the extent that the

30 Id. at 546; see also An Act for Establishing Religious Freedom (1786), reprinted in 12 HENING'S VIRGINIA STATUTES AT LARGE 84 (1823). Similarly, the Pennsylvania Constitution had stated: "Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen on account of his religious sentiments or peculiar mode of religious worship." PA. CONST. of 1776, Declaration of Rights, art II. Incidentally, the phrase "civil rights" could have a narrower meaning than was probably intended in the Pennsylvania Constitution or by Jefferson. HAMBURGER, supra note 8, at 98; Hamburger, supra note 9, at 384-85. In particular, following Blackstone and others, many Americans assumed that civil rights were merely such natural liberty as was preserved under the laws of civil government. 1 WILLIAM BLACKSTONE, COMMENTARIES *123-29.
establishment clause itself bars legislation in support of religion, it places disadvantages on religion. Yet the phrase "separation of church and state" goes much further, for it condemns connections between government and churches and thus deprives religious organizations of ordinary relations to government that do not constitute an establishment. In such ways, separation discriminates against religious groups and even penalizes religion.

D. The History of Prejudice

The history of separation suggests that its discriminatory character was not merely coincidental. Unlike the First Amendment's establishment clause, the phrase "separation of church and state" became popular as part of American constitutional law largely through the effect of fear and animosity of a sort that can justly be considered prejudiced. Particularly after so much time has elapsed, a discussion of the possibility of prejudice cannot be avoided.

Although often praised as the desire of eighteenth-century minorities, separation has, in fact, a later and very different genealogy. Separation entered American constitutional law through the importunate demands of nineteenth- and twentieth-century majorities, who embraced separation in response to their anxieties about ecclesiastical authority, especially that which they associated with the Catholic Church. These conclusions about the century and a half leading up to the adoption of separation by the Supreme Court in 1947 are very much in accord with the scholarship of Thomas Berg, John C. Jeffries, Jr., and James E. Ryan, who focus on the subsequent evolution of separation and of the related animosity against sectarian institutions.31 In conjunction with their work on the

31 Thomas C. Berg, Anti-Catholicism and Modern Church-State Relations, 33 LOY. U. CHI. L. J. 121 (2001); John C. Jeffries, Jr. & James E. Ryan, A Political History of the Establishment Clause, 100 MICH. L. REV. 279 (2001). See also Lupu, supra note 4. Writing about the constitutional doctrine on sectarianism—a doctrine closely related to the principle of separation—Jeffries and Ryan observe: "The constitutional disfavor of 'pervasively sectarian' institutions is indeed a doctrine born, if not of bigotry, at least of a highly partisan understanding of laws 'respecting an establishment of religion.'" Id. at 280.

Douglas Laycock discusses the prejudice evident in the movement against funding for sectarian institutions, but he tries to distance separation from such prejudice. He observes that "the nineteenth century movement against support for sectarian schools was based in part on premises that were utterly inconsistent with the First Amendment" and that "some Justices [in the 1950s] were influenced by residual anti-Catholicism." Douglas Laycock, The Underlying Unity of Separation and Neutrality, 46 EMORY L. J. 43, 50, 58 (1997). Yet Laycock avoids reaching such a conclusion about separation and the opinion establishing it in Everson v. Board of
post-1947 period, the prior development of separation—particularly, the history of how separation came to be adopted as a constitutional right—leaves little room to escape the conclusion that prejudice played an essential role.

Of course, just because separation was used by prejudiced groups in the past does not mean that its current supporters—or even all of its past advocates—have been prejudiced. Separation came to be adopted as a constitutional right in response to prejudiced fears of church and particularly Catholic authority, but there have long been thoroughly unpredisced Americans who have desired separation because they have been educated to assume that it is an American tradition and a constitutional guarantee. Especially today, more than a half-century after the Supreme Court declared separation to be a constitutional right, there is every reason to assume that advocates of separation are relying upon what they have been told about the idea, and consequently it would be a mistake to leap to the conclusion that they are prejudiced on account of their support for it.

Nonetheless, the earlier history of separation is revealing and should not be minimized. Some advocates of separation may attempt to discount the bigotry or downplay the importance of the more prejudiced supporters of separation in establishing this idea in American constitutional law. Yet while the good faith of the current advocates of separation should not be questioned, the obvious prejudice of many of their predecessors begs attention. Accordingly, this prejudice should be recognized and examined for what it reveals about separation.

This use of the history of prejudice in matters of religion is analogous to the use of such history in matters of race. For example, the phrase “separate but equal” rolls easily off the tongue and in 1896 seemed innocuous to most of the Supreme Court. Its history, however, is suggestive—not least the history of the prejudice that

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*Education.* He distinguishes between the crude nativist anti-Catholicism of the 1920s and the “intellectual anti-Catholicism” of the post-War years, and although he acknowledges that the post-War justices had lived their formative years in the earlier period, he suggests that intellectuals would not “publicly associate themselves” with the crude sort of anti-Catholicism. He even argues that the post-War type of “anti-Catholic attitudes plainly did not control the result in *Ehron*, but they influenced the dissent and they may have influenced the majority’s no-aid rhetoric.” *Id* at 58. On such assumptions, he defends a limited separation, which he describes as compatible with “neutrality.” In fact, however, “separation of church and state” became popular as a constitutional ideal as a result of anti-ecclesiastical and especially anti-Catholic fears and animosities that often were of a decidedly theological character. *See generally,* HAMBERGER, *supra* note 8, at ch. 8-14.
prevailed at the time of its adoption.\textsuperscript{32} Similarly, “separation of church and state” is a pleasingly round phrase that seems innocuous to many Americans. Yet its history should prompt caution. The history shows that the adoption of separation as a constitutional standard was the product of deep-seated prejudice. Although separation is today typically supported by persons without animus toward Catholic or other ecclesiastical authority, the separation of church and state still imposes elements of an historical discrimination that became popular and a part of American constitutional law through prejudiced fears.\textsuperscript{33}

The phrase “separation between church and state” first entered popular American political debates during the aftermath of the election of 1800. Although the phrase is ordinarily attributed to Jefferson, he was following a path laid out by his fellow Republicans. Federalist clergymen had preached that Jefferson was an infidel and therefore unworthy to be President, and Republican propagandists responded by arguing that clergymen should keep religion and politics—and even church and state—separate. In effect, these Republicans used a version of the idea of separation to condemn Federalist ministers for speaking about politics. Shortly after the election, in 1802, Jefferson echoed this electioneering rhetoric when he responded to a letter from the Danbury Baptist Association: “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.”\textsuperscript{34} Although today venerated as a statement of religious liberty, Jefferson’s letter was also a highly political condemnation of the New England clergy for exercising their First Amendment rights. The implications of the phrase “separation of church and state” were not lost on Jefferson’s contemporaries, and the words did not become popular outside of some Republican and, later, Jacksonian political circles.

\textsuperscript{32} Charles Lofgren, \textit{The Plessy Case} (1987); Brown \textit{v.} Bd. of Educ., 347 U.S. 483 (1954). Obviously, this is not to say that religious prejudice is fully analogous to racial prejudice.

\textsuperscript{33} Berg, \textit{supra} note 31; Jeffries & Ryan, \textit{supra} note 31.

In the 1840s, however, anti-Catholic Americans elevated separation to an American ideal, and they thereby began a century-long process by which popular prejudice would lead to the adoption of separation as a constitutional right. In particular, many Protestant Americans who were proud of being native-born citizens formed "nativist" organizations and political parties that campaigned against Catholic immigration and Catholic influence in American politics. Nativists and other anti-Catholic Protestants objected to a wide range of connections between the state and the Church. For example, they condemned Catholic preaching on politics, coordinated Catholic voting, the appointment of Catholic teachers and officeholders, and the use of public funds for Catholic schools (even if distributed to schools in general on the basis of entirely secular qualifications). Although these condemned practices did not amount to an establishment of religion as traditionally understood, they seemed to violate the separation of church and state, which the nativists elevated as a republican and "American" constitutional ideal in opposition to the hierarchical and foreign ideals of the Catholic Church. Indeed, separation seemed the primary defense available to the United States in the coming conflict that many Protestants anticipated between Americanism and Catholicism.

Of course, in far greater numbers than Catholics, Protestants also introduced religion into politics and government. Protestants preached on politics, voted on religious grounds, and demanded that public school funds be used in support of their own religion. Unlike Catholics, who were a minority, Protestants were numerous enough to expect almost exclusive control over politics and education. In fact, Protestants exercised a profound dominance over public educational institutions. For example, in the late 1830s, almost all teachers receiving public support in the state of New York were Protestant ministers.35

Yet when nativists and other Protestants insisted upon separation of church and state, they had no sense of any inconsistency, for they were demanding separation of church from state rather than a

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35 When Tocqueville wrote that the clergy "filled no public appointments" in America, his American editor, the New York politician John C. Spencer, noted after the word "appointments": "Unless this term be applied to the functions which many of them fill in the schools. Almost all education is intrusted to the clergy." ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 309 (Francis Bowen & Phillips Bradley eds., Alfred A. Knopf 1945) (1838).
separation of religion or of Christianity. Catholicism was a church, and its beliefs seemed to be imposed on individuals by a deceptive and imperious hierarchy. In contrast, Christianity—especially Protestant Christianity—was understood to be a religion freely chosen by individuals, as evident from their diverse denominations. Accordingly, for many Protestants well into the twentieth century, there seemed a necessity of separating church and state, but there seemed no need to separate Christianity or religion in general from the state. When this was misunderstood, Protestants made their perspective abundantly clear, as when c.1912 over 100 pastors in Washington D.C. declared that “[w]e mean the separation of Church and State: not the separation of Christianity and the State”—a resolution that was “endorsed by the whole body with applause.”

In addition to popularizing “separation of church and state,” nativists cultivated the ugly tactic of wrapping discriminatory ideals in the American flag. Insisting that their point of view was the only “American” perspective, they condemned their opponents—whether Protestants or, most notably, Catholics—as un-American. In particular, they put much pressure on their fellow Americans to acknowledge that separation of church and state was the nation’s religious liberty. As a result, even those who opposed nativist intolerance often felt obliged to acknowledge that separation was the American religious freedom—a concession necessary lest these defenders of tolerance be themselves condemned as un-American. Thus, nativists created an oppressive culture of Americanism, in which they demanded a heightened sense of identity with their vision of American ideals, including separation of church and state. It was what Alexis de Tocqueville called the “tyranny of the majority”—although perhaps more accurately a tyranny of those who exercised the power of the majority by claiming to speak on behalf of “true Americans” and their “American” ideals.

Separation appealed not only to nativists and others with nativist sympathies but also, more generally, to all who adopted a theologically liberal posture in opposition to the Catholic Church. In attacking Catholicism, many nativists drew upon theologically liberal ideals concerning the intellectual independence of individuals and the threat posed to such independence by ecclesiastical authority. Against this tyrannical church authority,
which seemed to make Catholic voters and elected officials mere tools of the Church and thus a threat to republican government, nativists and increasingly others demanded a separation of church and state. Although Protestants were much divided over theological liberalism, they could find considerable unity in adopting a theologically liberal stance against Catholicism, and from this perspective many welcomed and adopted nativist demands for a separation of church and state.

The Protestants who were themselves theologically liberal tended to share with nativists an especially heightened sense of the dangers posed by churches to individual mental independence. Yet theological liberals took this perspective further than most nativists and other Protestants in fearing not only the Catholic Church but also orthodox Protestant denominations. On this basis, the liberals eventually developed a much broader and more secular understanding of separation.

Prominent among the theological liberals who adopted the goal of separation were those who became anti-Christian secularists. These anti-Christian secularists included both theists and atheists (not to mention assorted Spiritualists and other heterodox thinkers), and they called themselves “Liberals” to emphasize that they acted on liberal theological ideals—albeit they applied such ideas more expansively than the Protestant “liberals” who remained within Christianity. Forming themselves into the National Liberal League, the Liberals devoted themselves to a separation of church and state that was systematically secular and anti-ecclesiastical rather than merely anti-Catholic. They aimed in particular to rid American government—both state and federal—of all traces of Christianity. Although their bitter anti-Christian sentiments and their defense of persons prosecuted under the Comstock Laws deprived them of any chance of political success, their vision of a thoroughly secular anti-ecclesiastical separation of church and state formed the basis of subsequent more or less secular demands for separation. In particular, later atheist organizations adopted this heritage and carried it forward into the twentieth century. Gradually, some small but vocal religious minorities—such as Jews and Seventh Day Adventists—and even substantial groups of Protestants and political liberals adopted versions of the secular understanding of separation.

By the first half of the twentieth century, a broad array of Protestants and non-Protestants assumed separation was their
"American" religious liberty. Many were anti-Catholic. Others were more broadly suspicious of all organized Christianity—although even these generally anti-Christian Americans usually felt a special horror of Catholicism. The advocates of separation included Protestants, Jews, and atheists. They included both nativists and many who despised nativism. They included all sorts of theological and political liberals. What united them was a shared fear of Catholicism and, more generally, a theologically liberal distrust of ecclesiastical authority.\footnote{For a more general discussion of the potential partiality of liberal ideals, see Larry Alexander, Liberalism, Religion, and the Unity of Epistemology, 30 San Diego L. Rev. 765 (1993); William P. Marshall, Truth and the Religion Clauses, 43 DePaul L. Rev. 243, 265-66 (1994); Nomi M. Stolzenberg, He Drew a Circle That Shut Me Out: Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 Harv. L. Rev. 582 (1993).} In this way, growing numbers of Americans from diverse backgrounds and perspectives elevated separation to an American constitutional liberty that they understood to protect Americans from ecclesiastical intolerance and tyranny, especially that of the Catholic Church. The very diversity of the Americans who supported this principle seemed to confirm that it was a shared American ideal, and regardless of their different politics and different conceptions of separation, the divergent advocates of this ideal tended to elevate it as a progressive American constitutional liberty, which protected Americans from the tyranny of the Church, and which it was un-American to oppose. Such expectations about separation reached through much of American society and all the way up to the Supreme Court. Amid this culture of Americanism and separation, the Supreme Court in 1947 held that the First Amendment's establishment clause guarantees the separation of church and state.\footnote{See Everson v. Bd. of Educ., 330 U.S. 1 (1947).} Remarkably, nativism not only did much to popularize separation but also laid the cultural foundation for widespread acceptance of the method by which separation and other freedoms associated with the U.S. Bill of Rights came to be applied to the states. In particular, the nativist concept of Americanism and American liberties (including separation of church and state) paved the way for the Supreme Court's "incorporation" of the Bill of Rights. In asserting their understandings of their "American" freedoms, nativists persuaded themselves and soon also numerous others, including liberals, to view constitutional rights as attributes adhering to individual Americans rather than as limitations on any particular
government, whether state or federal. Nativists demanded what they considered American liberties, and in response, Catholics, liberals, and others each insisted that their own perspective was the real Americanism. Thus, those who asserted their freedom in Americanist terms were diverse and espoused different conceptions of American ideals, but they shared an allegedly “American” vision of freedom. From this perspective, they tended to depict the rights enumerated in American bills of rights—particularly in the U.S. Bill of Rights—as fundamental American liberties, and they thereby blurred the distinction between the rights held against the states and those held against the federal government. The justices could not help but be familiar with these popular conceptions of “American” freedoms. Drawing upon these notions of “American” liberty (together with some other, more universalistic conceptions of liberty), many Americans, including the justices, assumed that their freedoms—particularly those catalogued in the U.S. Bill of Rights—transcended the distinction between federal and state governments.

Accordingly, it did not seem very surprising or of much concern to the states when, in the 1920s and 1930s, the justices of the Supreme Court began to hold that the Fourteenth Amendment protected the fundamental freedoms of the Bill of Rights. The Court held that the Fourteenth Amendment prevented states from depriving individuals of these fundamental liberties without providing due process of law. The ideals associated with the Bill of Rights had long been praised as “American” liberties, and therefore the justices’ analysis applying the most popular of such ideals to the states did not seem particularly novel or threatening. Much vaunted as an “American” principle, separation seemed one of the fundamental liberties listed in the Bill of Rights, and as such it was eventually applied to the states by the Supreme Court in 1947.39

39 Numerous scholars have suggested that the Fourteenth Amendment applied the Bill of Rights to the states already in the late nineteenth century. Yet leaving aside the general question as to whether or not the Fourteenth Amendment in 1868 applied substantive rights in the U.S. Bill of Rights to the states, it seems that throughout the 1870s Americans who wrote on religious liberty took for granted that a further amendment would be necessary if the First Amendment were to be applied to the states. This expectation, moreover, seems to have been held prior to the Slaughter House Cases, 83 U.S. 36 (1879). For example in 1870, Elisha P. Hurlbut—a former New York judge—proposed an amendment to the U.S. Constitution that would have extended the First Amendment to the states and would have given Congress power to ban the Catholic hierarchy. Hurlbut explained: “The proposed amendment prohibits a state from establishing any religion, or preventing its free exercise. The writer has assumed, that there is nothing in the Constitution as it stands, which prevents a state from doing either.” E.P.
For several decades after 1947, the Supreme Court interpreted the First Amendment in terms of "separation of church and state." The Court soon acknowledged the unrealistic character of the metaphor but nonetheless applied it. By 1971, in *Lemon v. Kurtzman*, the justices adopted a series of more specific tests that they derived from separation of church and state. As already noted, however, in the

HURLBUT, A SECULAR VIEW OF RELIGION IN THE STATE AND THE BIBLE IN THE PUBLIC SCHOOLS 14 (1870). He understood that judges could strain to reach another conclusion, but he doubted the propriety of such an approach:

There are... clauses in the Constitution of the United States which might be tortured into a construction prohibiting of state establishment of religion, by a court which should lean against it; or might be held, as I think more properly, by an impartial legal tribunal, not applicable to the case: such as the clauses which provide the privileges and immunities of the citizens of the several states shall be equal, and that the United States shall guaranty to every state, a republican form of government.

*Id.* at 14. Apparently, Hurlbut did not consider any provisions of the recently adopted Fourteenth Amendment to be among the possible vehicles for an interpretation prohibiting state establishments. In any case, he rejected "tortured" interpretations, believing that: "It is better that a Constitution should speak plainly than hint its meaning." *Id.* On such grounds, he began his pamphlet by stating his assumption "that there is nothing in the Constitution as it stands, which forbids a state from establishing a religion." *Id.* at 5. Incidentally, the amendment published by Hurlbut, which had been drafted by a friend, altered the First Amendment as follows:

Neither congress nor any state shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances. But congress may enact such laws as it shall deem necessary to control or prevent the establishment or continuance of any foreign hierarchical power in this country, founded on principles or dogmas antagonistic to republican institutions.

*Id.* at 5. See generally, Hamburger, *supra* note 9, at 437-58.

Professors Akhil Amar and Kurt Lash have argued that if the Fourteenth Amendment applied the Bill of Rights to the states, it also thereby may have expanded and thus "reconstructed" such rights, not least First Amendment rights, thus creating a constitutional right of religious exemption against the states, even if this right had not existed against the federal government. AKHIL REED AMAR, THE BILL OF RIGHTS CREATION AND RECONSTRUCTION 256-57 (1998); Kurt T. Lash, The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment, 88 NW. U. L. REV. 1106 (1994); Kurt T. Lash, The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle, 27 ARIZ. ST. L. J. 1085 (1995). Compare with HAMBURGER, *supra* note 8, at 436 n.112.

40 According to *Lemon*, "First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances or inhibits religion, *Id. of Educ. v. Allen*, 392 U.S. 286 (1968); finally the statute must not foster an 'excessive government entanglement with the religion.' *Walz.* *Lemon*, 403 U.S. at 612-13. That *Lemon* derived these criteria from separation is clear enough from *Lemon*'s citations. In *Allen*, the Court wrote that
1980s and 1990s the justices gradually backed away from separation’s implications. Although the Court did not expressly repudiate its earlier endorsement of separation, it gradually retreated from this ideal, leaving their Americans in considerable confusion as to what the establishment clause requires.41

The history not only explains how the phrase "separation of church and state" became part of American constitutional law but also intimates much about the moral character of separation and the tests derived from it. At the very least, the history suggests it is no coincidence that separation transformed the First Amendment into an instrument of discrimination among religions and even against religion. Of course, this is not to say that persons who today use the phrase "separation of church and state" are prejudiced. Surely, in most instances, they are not. Yet the history confirms observations about the discriminatory character of the phrase and suggests that the phrase perpetuates the effects of prejudice.

Thus, the phrase "separation of church and state" and criteria derived from it should be viewed with suspicion. Separation lacks constitutional authority. It is unusually impracticable, and it thereby threatens religious liberty and undermines the confidence of Americans in the Constitution. Most strikingly, it penalizes religion and discriminates among different types of religion—indeed, it does so in a manner that became popular and became a part of constitutional law on the basis of religious prejudice. After two centuries, it now is time for an express rejection of this non-constitutional phrase that has distorted and diminished the Constitution’s religious liberty.

II. INTERPRETATION

If the establishment clause does not guarantee separation, how should this clause be interpreted? Ideally, one could formulate a detailed substantive answer to this question. In an essay on

41 Lupu, supra note 4, at 256, 267.
separation of church and state, however, it seems more pressing to address a preliminary methodological problem. In particular, it seems necessary to identify an approach to interpretation that would minimize the likelihood of introducing yet another discriminatory phrase—especially one likely to perpetuate in constitutional law the effect of prejudice. With the goal of avoiding even an innocent adoption of such a phrase, Part II takes an interpretative path that leads toward the words of the establishment clause.

It cannot be overemphasized that this is only a first step in avoiding prejudiced interpretations of the Constitution. The approach proposed here in Part II could reduce the direct importation into constitutional law of phrases that give effect to prejudice. Further measures against this danger, however, and against others (such as discriminatory understandings of the Constitution’s phrases) are also desirable. Accordingly, the proposal here is only an initial precaution, albeit an essential one.

A. The Risk of Prejudice

The interpretative problem most saliently illustrated by the history of separation is the risk of prejudice and discrimination in applying words other than those in the Constitution. The First Amendment was drafted and adopted at a time when loose coalitions of evangelical minorities were seeking their religious liberty, and the religion clauses of the First Amendment built carefully on their demands. In contrast, as has been seen, the phrase typically used to interpret the First Amendment was popularized by nativists and was adopted by a powerful religious majority united in its theologically liberal fears of ecclesiastical authority, particularly its fears of America’s minority Catholic Church. In the context of these fears, the apparently liberal and enlightened attitudes that prevailed among the justices were no protection against the judicial adoption of a prejudiced phrase.

Both among the crudest of nativists and among more elevated, ecumenically-minded Americans, separation consistently seemed the goal of those who were progressive and liberal rather than an instrument of prejudice and discrimination. In 1907, Tom Watson’s antagonism to the Catholic Church and his support for separation made him “a profound exponent of progressive thought” among
"liberty loving people." Similarly, in 1930, the Imperial Wizard of the Ku Klux Klan, Hiram W. Evans, demanded separation as one of the "Liberal principles" in his campaign for a "Liberal awakening," which he hoped would be supported by "Liberal-minded Americans" in opposition to Catholicism. These nativists were not alone, for theological and political liberals also supported separation. One such was the Unitarian Paul Blanshard, whose *American Freedom and Catholic Power* (1948) became one of the most popular anti-Catholic tracts of the post-War period. Another was the Baptist pastor Joseph M. Dawson—an anti-Klan, liberal Southern Baptist, who founded Protestants and Other Americans United for the Separation of Church and State. Late in life, when told that the members of this group had been accused of being "bigots," he protested that, in fact, "it was composed of the most liberal minds in America." This belief in their own liberality was evident among a wide variety of Protestant, Jewish, and non-religious advocates of separation. Confident that they rather than Catholics were progressive, liberal, and tolerant, these Americans, including much of the Supreme Court, became habituated to a discriminatory standard and eventually adopted it with little sense of its invidious character.

Apparently, a populace or judiciary accustomed to prevailing cultural perspectives will not always recognize the contemporary prejudices transmitted and carried into action through the words with which they interpret the Constitution. Indeed, precisely because words of their own choosing are apt to seem (at least to them) neutral, tolerant, progressive, and liberal, the Americans who

42 Letter from A.H. Livingston to Thomas E. Watson (Apr. 29, 1907), in Thomas E. Watson's Jeffersonian Magazine 911 (Thomas E. Watson ed., 1907). Like so many nativists, Livingston complained about "the influence of the Priesthood over the minds of men." *Id.* Although he acknowledged that the Church "in this country is not so intolerant, because it cannot be under our system of government; but would be, and I sometimes fear, hopes to be, as blindly intolerant, haughty and tyrannical as . . . in the countries it has ruled." *Id.* Similarly he believed it "has held back the world's progress and civilization" and that its "chief object and purpose is . . . to hold the masses in ignorance and superstition; because when reason and enlightenment hold sway its power diminishes." *Id.* For Watson's views, see Thomas E. Watson, *The Struggle of Church and State in France*, 1 Watson's Jeffersonian Magazine 171 (1907).


44 Oral Memoirs of Joseph Martin Dawson 198 (Baylor Univ. Program for Oral History, Texas Collection 1972). Revealingly, when talking about separation, Dawson explained: "Secular' in its primary meaning is 'not under church control.'" *Id.* at 210, 213. For his views on the Catholic Church, see Joseph Martin Dawson, *Separate Church and State Now* app. A (1948) (documenting Catholic opinion in a manner indebted to nativist literature).
interpret the Constitution in terms of their own phrases are all the less likely to perceive the possibility that these expressions may lend themselves to discrimination. Accordingly, it should not be assumed that even a modern, enlightened populace or judiciary will understand the prejudice and potential for oppression in their apparently non-discriminatory words.

The danger of prejudice seems particularly high when Americans not only interpret the Constitution in terms of words not in the document but also end up applying these extra-Constitutional words. Clearly, there is a risk of prejudice even when judges use such words merely to understand and then apply those in the Constitution. Yet there is a much greater risk of prejudice when judges end up applying, not the Constitution’s words, but their own. These other words that are, in effect, applied instead of the Constitution’s are typically derived (directly or indirectly) from the Constitution’s clauses and therefore often seem legitimate. These additional words, however, although assumed to be elaborations of the Constitution’s words, not only lack the constitutional authority of the latter but also are likely (as illustrated by “separation of church and state”) to give particularly free rein to prevailing cultural assumptions. Although the Constitution’s words can be reconceived or redefined in the direction of current prejudices, and although non-Constitutional words are used for such purposes, the non-Constitutional words that are applied as elaborations of the Constitution’s are much more likely to open up opportunities for prevailing prejudices.\(^45\)

This risk is particularly worrisome because currently existing prejudices have an unusually small chance of popular or judicial correction. The Constitution’s words themselves reify and carry forward some eighteenth-century prejudices—both expressly and through lacunae—but as several amendments to the Constitution and numerous cases reveal, the most invidious of these eighteenth-century prejudices are capable of redress when they come in conflict

\(^{45}\) Of course, the non-Constitutional words themselves do not ordinarily cause prejudice or even prejudiced applications of the Constitution, but, when adopted through prejudice, they are at least the means of transmitting prejudice and of carrying it into action. Even long after the prejudice itself has dissipated, the words, after having been popularized or adopted through prejudice, can continue to have constitutional significance. Once elevated to the status of constitutional law, such words distract Americans from unprejudiced constitutional criteria, they perpetuate discrimination, and they thereby preserve the effects of the prejudice. Indeed, after such words are severed from the prejudice essential to their adoption, they can look all the more non-discriminatory.
with more modern assumptions of the American people or at least the judges. Currently dominant prejudices, however, are unlikely to be much constrained if judges apply words of their own choosing rather than those of the Constitution. Of course, neither the Constitution’s words nor those of the judges are likely to pose much of an obstacle to the prejudices typical of both the present and the eighteenth century. Yet this is no reason to abandon such means as are available in the words of the Constitution to limit the prejudices that have become prevalent in the centuries since the adoption of the Constitution.

Judges have special reason to be cautious in applying words not in the Constitution, lest they become responsible for constitutionalizing words that are instruments of prejudice. As Robert Cover observes, the existence of prejudiced clauses in the Constitution should lead judges to worry about their enforcement of these provisions. Arguably, when judges themselves introduce prejudiced phrases into constitutional law, they have all the more reason for concern. Accordingly, judges who apply words not in the Constitution assume an unusually high risk of not only following but also creating a constitutional avenue for prejudice.

To minimize this risk, judges and other Americans need to become more self-conscious about the words they select, and for this purpose an experimental application of the Constitution’s words is proposed here. Through a tentative application of such words, judges and other Americans could gain a clearer sense of what is accomplished by their application of other words, and they thus could become more attentive to the risk of prejudice inherent in their own vocabulary. Even if only for a baseline from which to measure other words, judges should explore the possibility of

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46 ROBERT M. COVER, JUSTICE ACCUSED 228 (1975).
47 Perhaps even more dangerously, the application of words not in the Constitution deprives Americans of the advantages of a shared constitutional vocabulary enumerated in the Bill of Rights. When writing to Thomas Jefferson, James Madison observed that in a popular government, the utility of a bill of rights was unclear but that a bill of rights probably would still be valuable in the United States, primarily because “[t]he political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion.” Letter from James Madison to Thomas Jefferson, supra note 15, at 298-99. This capacity of the Constitution to moderate impulses of interest and passion is threatened by the application of popular phrases such as “separation of church and state” or judicial phrases such as those of the Lemon test. This, however, is a broader and much more complex problem than can be examined in this essay.
applying the words of the Constitution—not least, those of the establishment clause.

B. The Experiment

The experiment proposed here is to apply the words of the Constitution. There would remain considerable freedom to contract or expand the meaning of the Constitution's words, but only as a preliminary step to applying them. Although obviously not a complete account of constitutional interpretation, this application of the Constitution's words would be an informative way with which to preface any attempt at constitutional interpretation—even if it ended up applying other words.

It cannot be overemphasized that in requiring the application of the Constitution's words, this experiment does not do away with other words or phrases. On the contrary, it merely suggests that these additional words be introduced earlier in the reasoning process. A standard approach to constitutional interpretation starts with the Constitution's words. It then contracts or expands their meaning by narrowing or generalizing to other words. Finally, it applies these other words—typically, generalizations—to the facts of a case. What is proposed here is not necessarily to do away with the contractions or expansions of meaning, but rather to use them to understand the words of the Constitution, and then to conclude by applying these words. Thus, although it is often assumed that one must "start with the Constitution," it is here proposed that one should also end with it.

On account of the opportunity in the middle of the process to expand or narrow the meaning of the words in the Constitution, this approach is not literal or historical. No position is taken here as to whether the words should be understood narrowly or generally, in light of principles or rules, or on the basis of history, moral theory, political philosophy, or any other foundation. Accordingly, there is nothing of literalism in this approach. Nor is it based on historical intent, for it does not resolve whether late eighteenth-century understandings of the words are to be adopted or merely used as a starting point.

In effect, the experiment adopts a very limited type of textualism. Unlike some textual approaches, it insists on the application of the text itself and does not permit the application of more general or detailed phrases derived from the text. At the same time, however,
this experiment is quite lax in that it does not preclude or dictate any particular meaning—whether plain, original, modern, or otherwise. Indeed, because it is only an experiment undertaken for informational purposes, it does not even purport to be binding or to preclude the subsequent application of entirely different words or such further layers of analysis as judges may choose for themselves. While engaged in this experiment, however, judges would apply the words of the Constitution and thus would work within the Constitution's semantic and syntactic framework.

Although this approach is too minimal to be the author's (or probably anyone else's) preferred or complete mode of interpretation, it seems useful here for heuristic purposes. As already seen, the experience of Americans with "separation of church and state" suggests the risk of applying non-constitutional words in place of those in the Constitution. To explore a means of reducing this risk, Part II of this essay applies the Constitution's words. From this baseline, it should be possible to observe what is changed by the application of other words (such as "separation of church and state"), and it thereby should be possible to become more self-conscious about the risk of these other words.

Thus, a judge seeking to understand his application of words not in the Constitution would have every reason to experiment with an application of the Constitution's words. Afterward, he could actually apply the non-constitutional words of his own choice—whether "separation of church and state," the related Lemon test, or any other establishment clause factors and principles he finds appealing. Precisely because what is proposed here is merely an experiment, it would not stand in the way of any words a judge chooses to apply. It would, however, require the judge to pay greater attention to the difference between his words and those in the Constitution.

A Traditional Approach. Obviously, this experiment—at least its application of the Constitution's words—is thoroughly traditional. To be sure, it differs from much textualism in its focus on the application of the Constitution's words. And it thereby differs more substantially from much nontexualism. Nonetheless, it is at least an element of what many interpreters have long assumed they are doing.

48 See Lemon, 403 U.S. at 614.
In *McCulloch v. Maryland*, Justice Marshall wrote: "we must never forget that it is a constitution we are expounding."49 Although he thereby aimed to reach an appropriate understanding of the Constitution's words "necessary and proper," he took for granted that it was the task of the Court to expound the Constitution's words so that they could be applied. Thus, in *McCulloch*, he held that the federal statute incorporating the Second Bank of the United States was "necessary and proper."

Numerous scholars also tend to understand themselves as applying the Constitution's words. In fact, what is treated here as a mere experiment is more directly advocated by others, including both textualists and non-textualists.50 Of particular importance, some scholars have expressly focused on the application of the words of the Constitution. Frederick Schauer writes about how judges engage in "a law-applying and law-interpreting act" and notes that "precedents can be discarded if necessary in a way that textual language cannot."51 Similarly, Kent Greenawalt draws a distinction between written rules (evident in statutes and constitutions), which have a fixed formulation, and common law rules, which do not. On this foundation, he argues that "[a] judicial formulation of a relatively precise standard governing freedom of speech under the First Amendment has itself no more of a canonical status than a judicial formulation of a common law rule." Accordingly, "[t]he language of a statute or constitution is the language to which a court must refer; that language represents an authoritative formulation."52 This essay adopts such a perspective in order to work from the words of the Constitution. The only difference is that this essay emphasizes that a court should not merely "refer" to the words but also apply them. As Gary Lawson argues, "interpreting the Constitution and applying the Constitution are two different enterprises," and

50 Most clearly this is true of textualists, but an attention to the Constitution's words has become widely popular even among scholars who do not consider themselves textualists. Randy Barnett calls this "a shift . . . to textualism." Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOYOLA L. REV. 611, 617 (1999).
51 Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 426 (1985). Schauer, however, assumes that "the language in the document can be viewed as theory authorizing" and thus goes beyond the more limited approach adopted experimentally here. See id. at 437.
52 GREENAWALT, supra note 7, at 65-66.
although interpretation must precede "adjudication," the latter ultimately requires an "application" of the Constitution.\textsuperscript{53}

In this spirit, the words of the Constitution will be applied here, even if only experimentally. Other words will be imported for purposes of interpreting the Constitution's words—for purposes of figuring out their meaning. Once, however, the meaning of the Constitution's words are ascertained by whatever approach a judge may choose, this experiment proposes the application of these words—an application that, even if not binding, should be informative.\textsuperscript{54}

\textit{Freedom & Constraint.} Incidentally, one characteristic of this experiment is that it takes a middle ground between freedom and constraint. Accordingly, the approach examined here is unlikely to satisfy either those who expect the Constitution to empower judges or those who expect it to constrain them. Yet it at least provides a central measuring point from which interpreters can then depart in either direction.

On the one hand, this approach does not dictate any particular type of interpretation and therefore leaves judges relatively free. Some judges are content to look for what they call "plain meaning." Many judges doubt that anything is very plain and at least begin with an historical understanding of the Constitution. Many turn to various moral, political, and other theories. Nothing proposed here prevents any such modes of interpretation. Nor does it give legitimacy to any of them. Instead, the application of the Constitution's words merely provides a framework in which such types of interpretation are possible as long as they do not establish words that are applied in place of the Constitution's. This leaves considerable freedom.

On the other hand, the approach proposed here is more confining than approaches that allow judges to apply words not in the Constitution. As Frederick Schauer points out, interpreters are limited by words—what he calls "language":


\textsuperscript{54} For an illustration of this sort of experimental application of the establishment clause—albeit with only very brief analysis—see David A. Strauss, \textit{Freedom of Speech and the Common Law Constitution}, in \textit{ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA} 33, 39 (Lee C. Bollinger & Geoffrey R. Stone, eds. 2002).
In some cases exigent factors may outweigh the pull of language. But language still pulls, and thus channels thinking, thereby providing the dispositive factor in all but that minority of cases in which the exigent factors are present. . . . Once we look at easy as well as hard cases . . . antilingualistic results occupy but a miniscule fraction of the instances in which the language is applied. By recognizing that following language is a law-applying and law-interpreting act, we can sensibly reject the claim that law is not importantly a function of the power of language.\textsuperscript{55}

If language "pulls," it matters which words are applied. In particular, if judges can free themselves from the Constitution's words, they will be confined by linguistic conventions only in applying such words as they choose. In contrast, by requiring judges to apply the words of the Constitution, the approach suggested here requires judges to work within linguistic conventions in applying a predetermined set of words—those of the Constitution itself.

The most obviously relevant linguistic conventions are those of the bench, the bar, and the public. Flexible as these conventions may be, judges typically must work within them in order to persuade their brethren, their fellow lawyers, the wider populace, and, not least, themselves. Moreover, even when developing their own, new usages, judges have reason to try to explain these as extensions of existing conventions and to try to explain their conclusions with at least some coherence and consistency. Although judges often achieve coherence and consistency by stating the law in a very elaborate way—each of their generalizations being qualified with detailed exceptions—such complexity eventually becomes itself an obstacle to

\textsuperscript{55} Schauer, supra note 51, at 425-26 (footnote omitted). He also writes: "If we consider the text to be informative about boundaries, or limits, rather than about centers, or cores, then the text appears far less irrelevant than is commonly assumed." \textit{id.} at 431. On the assumption that "an expression is more formal the less variance there is, under changes in context, in its meaning," Henry Smith observes that "formality is a matter of degree," and that "the all-or-nothing approach to the determinacy of legal and other language only serves to obscure the degree of reliance on context." Henry E. Smith, The Language of Property: Form, Context, and Audience 75 (2001) (unpublished manuscript on file with author).
persuasiveness, especially in an egalitarian society. In these circumstances, in which linguistic conventions and the desire to persuade limit the judges in their use of words, the judges who apply only the Constitution’s words are more confined than those who feel free to substitute other words.

Consider, for example, the word “Congress” in the First Amendment. In theory, any meaning could be attributed to it, and therefore a judge could understand “Congress” to mean church or religion. In practice, however, it is improbable that a judge would do so. To be persuasive, the judge would have to reconcile his meaning with widely held meanings to which judges, lawyers, and the public have greater attachments, and the mental maneuvers required to achieve coherence and consistency would be too elliptical to convince many Americans. The judge’s difficulties would be particularly great because his meaning would threaten the existing meanings of both “Congress” and “church” and thereby also the deeply embedded legal and theological distinctions between them. On account of such limitations on the use of words, this experiment in applying the words of the Constitution leaves judges with a freedom that, although considerable, is not unlimited.

C. The Establishment Clause

The remaining task is to begin this experiment in constitutional interpretation by considering the application of the First Amendment’s establishment clause. Few parts of the Constitution have been lauded as repeatedly and emphatically as the First Amendment, and therefore after the failed effort to rely upon the phrase “separation of church and state,” it would be worthwhile to know whether one could revert to the words of the establishment clause. In particular, it would be valuable to learn what these words can accomplish, and what they cannot. Although many readers may not wish to confine their interpretation of the Constitution to the application of its words, they may at least be willing to apply these words so as to understand what is achieved by other words—in this case, to understand how the phrase “separation of church and state”

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56 Alexis de Tocqueville, 2 Democracy in America 13 (Francis Bowen & Phillips Bradley eds., 1945) (1838). Incidentally, this is one reason why “slippery slopes” are not illusory.

57 For the not entirely indeterminate character of words within the context of “social practice,” see Greenawalt, supra note 7, at 72-73.
has altered American religious freedom. By this means, they would at least have a chance to observe the prejudicial effects of the phrase.

Incidentally, because this attempt to apply the establishment clause does not assume any particular approach to figuring out the meaning of the clause’s words, much is left to be resolved by the reader’s choices in interpreting these words prior to their application. To see how one such interpretation could be developed, and more broadly for purposes of explanation and comparison, the history of the establishment clause will occasionally be examined. Yet it should be kept in mind that the history is not treated here as a necessary source of authority. Indeed, a wide array of approaches to ascertaining the meaning of the words will be mentioned. In the end, the choice among these belongs to the reader.

“Congress”. The First Amendment begins: “Congress shall make no law respecting an establishment of religion.” In this manner, the amendment places its prohibitions on “Congress.”

A contrast with separation is revealing. Whereas the phrase “separation of church and state” places equal emphasis on church and state, the Constitution’s establishment clause does not. Instead, this clause limits only government (a conclusion that will be confirmed and refined when the words “law” and “establishment” are considered). Indeed, the establishment clause does not even limit government as a whole. With considerable specificity, it mentions one branch of the federal government.

The history of the First Amendment suggests that this reference to Congress was not accidental, and therefore a brief historical diversion will be pursued here—if only to show that the word “Congress” was once taken seriously. In 1789, in the House of Representatives, when Madison proposed what became the Bill of Rights, he urged that it should limit not only the United States but also the states—at least as to some essential rights. For example, on the subject of religion, he proposed for the United States that “[t]he civil rights of none shall be abridged on account of religious belief or

58 The words applied here can be divided into a generic first half (“Congress shall make no law”), which prefaces each of the rights in the First Amendment, and a more specific second half (“respecting an establishment of religion”), which refers to the particular right under consideration. The latter is considered in its entirety, but the former is further divided for the sake of clarity in presentation.

worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed." As for the states, he more modestly suggested that "[n]o state shall violate the equal rights of conscience."60

Eventually, the House adopted a draft that similarly placed numerous limitations on the federal government and a few on the states. With respect to the federal government, the House passed more than a half dozen provisions, one of which specified "Congress":

Congress shall make no law establishing religion, or prohibiting the free exercise thereof; or to infringe the rights of conscience.61

In a single later section, moreover, the House limited the states:

No State shall infringe the equal rights of conscience, nor the freedom of speech, or of the press, nor of the right of trial by jury in criminal cases.62

The Senate, however, dropped this provision concerning the states. Moreover, it bundled various rights—those of speech, press, and assembly and petitioning—into the "Congress shall make no law" provision. This proposal (with adjustments proposed by the House in a joint conference committee) eventually became the First Amendment. The amendment may initially have mentioned Congress in order to clarify that its original clauses (which focused on religion) did not apply to the states. Yet, as noted, other clauses

60 Madison Resolution (June 8, 1789), reprinted in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 12-13, (Helen E. Veit, et al. eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS]. Madison drafted a provision on religious liberty against the states that was quite modest compared with his clauses against the federal government, and he obviously thereby hoped to reassure the representatives of the Northern states that had establishments. Of course, he simultaneously probably hoped that his apparently modest restriction on the states would prove a Trojan horse. Certainly, it was viewed as such. See Marc M. Arkin, Regionalism and the Religion Clauses: The Contribution of Fisher Ames, 47 BUFFALO L. REV. 763, 787-89 (1999). For Madison's expansive use of a modest constitutional clause in Virginia, see Hamburger, supra note 9 at 347-48, 351-52.

61 H. Comm. Rep. (July 28, 1789), in CREATING THE BILL OF RIGHTS, supra note 60, at 30 n.9. This wording derived from a motion by Fisher Ames, which is discussed in the context of New England politics by Marc Arkin, supra note 60.

were soon added to it. Moreover, it was but one of the amendments that protected rights against only the federal government, and the other amendments did not mention Congress. Accordingly, it is unlikely that the First Amendment as adopted specified Congress merely to clarify that the amendment did not apply to the states.

The First Amendment in its final form limited Congress for the additional, more specific reason that the rights it protected were understood to involve a freedom from Congressional legislation. Akhil Amar points out that the 1789 bill proposing the Bill of Rights listed the amendments in a sequence corresponding to the provisions in the Constitution that they were thought to modify. Preceding what became the First Amendment were two amendments that failed to be ratified—the first modifying the number of representatives established in Article I, section 2, and the second adding to the provisions on Congressional salaries in Article I, section 6. Then, the current First Amendment qualified the enumeration of Congressional power in Article I, section 8; and the current Second through Eighth Amendments added to the enumeration of rights in Article I, section 9.63

In accord with this sequence of relationships to provisions in the Constitution, the amendments limited the federal government with different words. The initial unratified amendment on the numbers of representatives, like its corresponding section in the Constitution, was structural and therefore did not specify either “law” or “Congress.” Instead, it simply declared that “there shall be one Representative for every thirty thousand, until . . . .” The next unratified amendment related back to a section stipulating that compensation was “to be ascertained by law,” and therefore this amendment similarly began: “No law varying the compensation . . . shall take effect, until . . . .” Next, as Amar observes, the First Amendment corresponded to the Constitution’s section enumerating Congressional power—a section that began “Congress shall have power . . .” and that ended with the necessary and proper clause: “To make all laws . . . .” The First Amendment was a limitation on this Congressional power of legislation and therefore stated “Congress shall make no law . . . .”64 In contrast, Amendments Two through Eight added to the rights enumerated in a portion of

63 AMAR, supra note 39, at 36-37.
64 Id. at 39.
the Constitution that limited not only Congress but also the other branches of government.\textsuperscript{65} Accordingly, the Second through Eighth Amendments did not place their limitations merely on Congress or its laws (other than in one clause of the Sixth Amendment).

The particular rights protected in the various amendments confirm the distinction between the rights in the First Amendment and those in subsequent amendments. Almost all of the rights enumerated in Amendments Two through Eight were at least as closely associated with executive and judicial violations as with legislative infringements, and therefore these amendments did not state the branch of government against which they were held. Indeed, they were written mostly in the passive voice. In contrast, the rights grouped together in the First Amendment had all been understood as rights held against statutory constraints. To be sure, this was not the only possible understanding of these rights, but it was a prominent understanding of them. For example, the right of the people to assemble and to petition for redress of grievances was chiefly associated with petitioning the king in Parliament and had been notably constrained by statute in the seventeenth century.\textsuperscript{66} Moreover, the freedom of speech and press had been most notoriously censored by the English government under Parliament’s licensing legislation, and this sort of legislated censorship seemed the primary threat to the freedom of the press.\textsuperscript{67} Finally, as will be seen

\textsuperscript{65} See Strauss, supra note 54, at 39.

\textsuperscript{66} An Act against Tumults and Disorders, Upon Pretence of Preparing or Presenting Public Petitions, or other Addresses to His Majesty or the Parliament, 13 Car. 2, st. 1, c. 5 (1661) (Eng.); WILLIAM BLACKSTONE, 1 COMMENTARIES *188-99 (1765). In addition, at the very beginning of the seventeenth century, the judges had relied upon common law to give an opinion against the collection of multitudes of signatures on petitions, but this seems to have made less of an impression upon Americans. For the opinion, see Moore’s Reps. 756; 72 Eng. Rep. 885; Croke Jac. 37; 79 Eng. Rep. 30. The Crown revived the memory of this opinion in 1679 during the Exclusion Crisis, but the Crown also relied upon the statute of 1662. See THE JUDGES OPINIONS CONCERNING PETITIONS TO THE KING IN PUBLICCK MATTERS [broadside] (1679). Later, in 1774, the threat of prosecutions under the statute was very much on the minds of the colonists, who protested “that they have a right peaceably to assemble, consider of their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.” See Declaration and Resolves (Oct. 14, 1774), in JOURNAL OF THE PROCEEDINGS OF THE CONGRESS, HELD AT PHILADELPHIA, SEPTEMBER 5, 1774 62 (1774).

\textsuperscript{67} Such legislation began with the licensing order of 1642. 5 H.L. JOUR. 37 (May 2, 1642). The final version of such legislation was that of the Licensing Act of 1662. Licensing Act of 1662, 13 & 14 Car. 2, c.33 (Eng.). See also LEONARD W. LEVY, THE EMERGENCE OF A FREE PRESS 99-100 (1985); Philip Hamburger, The Development of the Law of Sedition Libel and the Control of the Press, 37 STAN. L. REV. 661, 679-91 (1985).
below, the free exercise of religion and especially the freedom from a religious establishment was often understood to be a freedom from legislation. Thus, in placing its limitations on Congress, the First Amendment drew upon strands of contemporary thought that treated the rights protected in the amendment as freedoms from legislative interference. Of course, this history need not be considered legally authoritative, but it does suggest that the word “Congress” was not a verbal accident and that it once was taken seriously.

For purposes of the establishment clause, the word “Congress” has substantial implications. If the word “Congress” does not refer to the other branches of government or even the individual houses of Congress, then these other components of the federal government are not directly limited by the establishment clause. On such assumptions, most eighteenth-century Americans saw no conflict between the First Amendment and the President’s proclamation of Thanksgiving days or the appointment of chaplains by the House, the Senate, or the military.

Of course, one could contract or expand the meaning of the word “Congress.” Perhaps, it means not only Congress, but also the House, the Senate, and any member of these institutions. Perhaps, it also means the executive and judiciary branches. Perhaps, it simply means any part of the federal government or, indeed, any other government within the United States. Any of these positions is possible. Yet the conventional meaning of “Congress”—not least in Article I of the Constitution—may make it difficult to impose these other meanings on the word.68

Among the meanings that seem particularly improbable are those that would have the effect of applying the First Amendment directly to limit churches or religious individuals. Some Americans complain of a violation of the separation between church and state when churches and clergymen participate in politics, even if only by petitioning, publishing, and speaking. Yet the First Amendment limits only “Congress,” and it is not clear how many judges or other

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68 Of course, none of this excludes the possibility that the First Amendment was applied to the states by a later amendment, such as the Fourteenth, which would lead to the curious question of how the word “Congress” should be understood for such purposes. In fact, the most prominent version of the Supreme Court’s “incorporation” doctrine avoids this sort of interpretative issue by applying freedoms mentioned in the First Amendment to the states rather than incorporating, let alone applying the First Amendment itself.
Americans could be persuaded to apply this word to churches or their ministers. Thus, unless other words (such as "separation of church and state") are applied in place of the Constitution's words, the establishment clause cannot easily be applied directly to limit the conduct of religious organizations and individuals.

If Americans had confined themselves to applying the First Amendment to Congress (or even to the things that with a stretch could plausibly be called "Congress"), Americans might have avoided much of the discrimination introduced under the rubric "separation of church and state." Although some such discrimination has been popular rather than judicial, even this popular discrimination was not insignificant, as evident in the nineteenth- and early twentieth-century attempts to prevent Catholics from voting and to exclude them from positions in public schools and government. Such discrimination has also been evident in twentieth and twenty-first century attempts to discourage religious organizations from lobbying or otherwise expressing their views to government. The application of the Constitution's words is no guarantee against prejudice or oppression. Yet the application of such words probably would have discouraged the most blatant, wholesale attempts to extend the First Amendment's limitations from Congress to churches.

"shall make no law". The First Amendment requires that Congress "shall make no law" respecting an establishment of religion. The amendment thereby prohibits the making of some laws. Once again, the contrast with separation is suggestive. The phrase "separation of church and state" delegitimizes connections between the government and religious groups. Rather than prohibiting some laws, it more generally inhibits connections, and thus, instead of simply restraining government (let alone merely Congress), it also directly constrains churches. Accordingly, it seems significant that (unlike the phrase about separation) the First Amendment's establishment clause limits only government, particularly its laws.

As already hinted, the amendment's emphasis on laws made by Congress drew upon an intellectual tradition in which religious liberty was understood in terms of legislation. For both theological and practical reasons, many religious dissenters defined religious liberty, especially their anti-establishment religious liberty, as a
freedom from certain types of legislation. Not surprisingly, this conception of an establishment became evident in the proposals for a federal bill of rights. For example, the Anti-Federalist minority in the Maryland Ratification Convention proposed as an amendment to the Constitution "[t]hat there be no national religion established by law," and the New Hampshire ratification convention proposed that "Congress shall make no Laws touching Religion." Of course, the meaning of "law" in the First Amendment can be contracted or expanded. It can be expanded, for example, to include administrative acts taken under the authority of Congressional acts. The word "law" can even be understood to mean any policy pursued under color of Congressional law—or even any official act by an official. All of this is possible. Nonetheless, because the First Amendment refers to law made by "Congress," considerable effort may be required to expand the meaning of the word "law" in the amendment beyond Congressional statutes.

The focus on "law," like that on "Congress," has some explanatory power. At the very least, it helps to explain why the First Amendment was not typically understood in the eighteenth century to affect non-legislative acts—whether of the judiciary, the houses of Congress (in appointing chaplains), or the executive (in appointing military chaplains or in proclaiming fast and thanksgiving days). Other such issues today include the judiciary's construction of religious motifs and quotations in the architecture of courtrooms, the executive's placement of holiday decorations on public property, and executive (in contrast to statutory) use of the phrase "In God We Trust."

To explain the legitimacy of various non-legislative government acts, judges and commentators have employed various techniques. Some judges describe such acts as traditional practices that create

69 This tradition among the dissenters can be illustrated by a 1785 petition to the General Assembly of Virginia in which the state's Presbyterians argued that "it would be an unwarrantable stretch of prerogative in the legislature to make laws concerning it [i.e., religion], except for protection." Memorial of the Presbyterians of Virginia to the General Assembly (Aug. 13, 1785), in AMERICAN STATE PAPERS BEARING ON SUNDAY LEGISLATION 114 (William Addison Blakely ed., 1911).


71 This expansion of the meaning may be unnecessary if such regulations or other acts are understood to specify implied requirements of the statute or are understood to be authoritative implications of it. But see infra note 77.
exceptions to constitutional principles. More typically, judges draw
detailed distinctions among non-legislative acts to determine which
are religious and which are not. For example, they attempt to resolve
whether a Christmas tree is religious or cultural and in what context
Bible reading is religious or literary. In contrast, the words of the
Constitution could be understood generally to permit these non-
legislative acts of government and thus may avoid such distinctions.72

Obviously, there are risks to an approach that leaves so much to
the prudence of government officers, particularly in the executive
branch.73 Imagine if the President were to order Americans in the
military either to worship or not to worship in accord with a
particular religion. Improbable as this may seem, it is not entirely
fanciful. During the 1991 war with Iraq, the U.S. military ordered
various restrictions on the conduct of Christian and Jewish worship
by American troops in Saudi Arabia.74 Was this a prudent concession
to Saudi sensibilities? Or was it a blatant constraint on the religion of
Americans? Perhaps both. The larger question is particularly
complicated because the conduct of the executive branch in foreign
affairs may require self-restraint not only by the President but also by
all who serve under him and may require support for particular
religious organizations or governments with established religions,
whether Catholic, Anglican, Jewish, or Muslim. Fortunately, for
purposes of this essay's experiment, the constitutional question is
merely whether the President's order was a law made by Congress
respecting an establishment of religion or infringing the free
exercise of thereof, and this depends on the meaning of the words
"Congress shall make no law."

More broadly, the words "Congress shall make no law" frames First
Amendment questions in an unusual all-or-nothing manner. For
example, the First Amendment does not forbid the application of a
law that prohibits the free exercise of religion. Instead, it requires
that Congress shall make no such law. Some judges and scholars
argue that the First Amendment's free exercise clause can exempt an
individual from an otherwise constitutional statute to which he or she

72 Incidentally, in the nineteenth century, states tended to rely upon the distinction
between legislative and non-legislative acts, most notably in their support of education.

73 For a brief discussion of this problem in the field of speech, see Strauss, supra note 54, at
38.

74 Kenneth Las, Religious Liberty in the Military: The First Amendment under "Friendly Fire," 9
has conscientious objections.\textsuperscript{75} In other words, they assume that the First Amendment can invalidate a particular application of a law without invalidating the law itself. Yet in stating that “Congress shall make no law,” the Amendment forbids the creation of a law that prohibits an individual’s free exercise of religion. Accordingly, a court can never, on the basis of the First Amendment, simply exempt an individual from the application of a law. If Congress makes a law that in any way prohibits the free exercise of religion—even if only through its application to one individual—the entire law fails.\textsuperscript{76}

By the same token, in establishment cases, the amendment leaves no room for judges to reach the narrow conclusion that a particular application of a statute is unconstitutional. If the statute in any way respects an establishment of religion, then the making of the law violates the First Amendment. For example, if a Congressional statute authorizes the distribution of federal funds to all private schools of a certain size, and if the receipt of such funds by religious schools amounts to an establishment of religion, then it is difficult to decide that this particular application of the act violates the First Amendment without concluding that Congress violated the amendment by its making of the law.\textsuperscript{77}

"respecting an establishment of religion." The First Amendment forbids Congress from making any law “respecting an establishment of religion.” It is a curious phrase, but not unrevealing.

By prohibiting Congress from making any law “respecting an establishment of religion,” the First Amendment leaves open the possibility of laws regarding religion. Historically, this was an important point. For theological reasons (such as that Christ’s


\textsuperscript{76} Of course, judges could interpret the statute so as to avoid a potentially unconstitutional application, but this would be a different approach than that of holding the application unconstitutional.

\textsuperscript{77} This raises questions about the \textit{Chevron} doctrine and, more generally, about any attempt to treat administrative regulations and acts as indicative of the requirements of statutes. If administrative regulations or acts are authoritative interpretations or in some sense extensions of laws made by Congress, an unconstitutional application of a regulation may have implications for the constitutionality of the statute itself or otherwise carries out. Accordingly, if an administrative regulation is to be considered a “law” for purposes of the First Amendment, this conclusion probably should be reached without any presumption that might be understood to suggest that the regulation is an authoritative interpretation of the statute.
kingdom is not of this world), many late-eighteenth-century American religious dissenters assumed that religion was beyond the jurisdiction of civil government, and on this basis some dissenters demanded that government make no law taking cognizance of religion or even that government itself take no cognizance of religion. Such a position, however, seemed to other dissenters to go too far, as it would have prohibited all of the laws that mentioned religion in order to protect the property and other rights of religious groups and individuals. For example, whereas some American dissenters had doubts about the incorporation of religious societies, others recognized that incorporation laws might be essential for the protection of church property. Although some dissenters came to view marriage as an entirely civil contract, most hoped that the marriages conducted by their ministers would be recognized by the state.\textsuperscript{78} Not least, although there were dissenters who objected to religious exemptions in militia statutes and other laws, most dissenters accepted that some such exemptions were unavoidable. Apparently on account of these various concerns, a substantial number of dissenters hesitated to endorse a constitutional prohibition on all laws regarding religion.

James Madison prominently took the radical perspective, but seems to have been aware of the more cautious point of view. In the mid-1780s, he took the radical position that religion was “not within the purview of Civil Authority.”\textsuperscript{79} In contrast, he summarized the prevailing anti-establishment position in Virginia as “the general principle that no Religious Establishments was within the purview of Civil authority . . . .”\textsuperscript{80} Evidently, Madison understood that the typical anti-establishment position excluded only religious establishments rather than all religion from the jurisdiction of civil government. This was different from his own position, as he

\textsuperscript{78} On account of the territories, the District of Columbia, and other federal enclaves, such issues were not clearly irrelevant even for the federal government.

\textsuperscript{79} Notes of Debate on Assessment Act (1784) in 8 PAPERS OF JAMES MADISON 198 (Robert A. Rutland & William M. E. Rachal eds., 1975).

\textsuperscript{80} Letter from James Madison to Richard Henry Lee (Nov. 14, 1784), in 9 THE PAPERS OF JAMES MADISON 430 (Robert A. Rutland & William M. E. Rachal eds., 1975). The perspective that a constitutional prohibition on an establishment of religion should leave room for government to make some laws concerning religion was most clearly enunciated by the lay Presbyterians who opposed an establishment. See HAMBERGER, supra note 8, at 102-05.
emphasized in 1785 when he wrote: "Religion is wholly exempt from its [civil government's] cognizance."\textsuperscript{81}

By 1789, however, during the debates over the First Amendment, Madison no longer insisted on this more severe position. The New Hampshire ratification convention had proposed that "Congress shall make no Laws touching Religion"—a phrase in the same radical tradition with which Madison had aligned himself in the mid-1780s.\textsuperscript{82} Yet now in 1789 Madison merely proposed that "[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed."\textsuperscript{83} Although Congress did not employ these words in its prohibition on an establishment, it adopted the moderate position that it should make no law "respecting an establishment of religion"—a standard permissive of statutes regarding religion and similar to the principle Madison had earlier attributed to anti-establishment forces in Virginia: "that no Religious Estab[lishmen]ts was within the purview of Civil authority."\textsuperscript{84} In sum, the history

\textsuperscript{81} Memorial and Remonstrance (ca. June 20, 1785), \textit{reprinted in 8 THE PAPERS OF JAMES MADISON}, at 299 (Robert A. Rutland & William M. E. Rachal eds., 1973).

\textsuperscript{82} Amendments Proposed by the New Hampshire Convention (June 21, 1788), \textit{in CREATING THE BILL OF RIGHTS, supra note 60}, at 17.

\textsuperscript{83} Madison's Resolution (June 8, 1789), \textit{in CREATING THE BILL OF RIGHTS, supra note 60}, at 12.

\textsuperscript{84} \textit{9 THE PAPERS OF JAMES MADISON, supra note 80}, at 430. Another explanation of the word "respecting" is that the First Amendment's establishment clause merely precluded federal interference with state establishments. \textit{See, e.g., Kurt T. Lash, The Second Adoption of the Establishment Clause, supra note 39, at 1086; Steven Smith, Foreordained Failure, 22-26 (1995); Joseph M. Snee, Religious Disestablishment and the Fourteenth Amendment, 1954 WASH. U. L. Q. 371, 406; Steven D. Smith, The Constitution & the Pride of Reason, 31-47 (1998). Yet the establishment clause also clearly stood in the way of a federal establishment. The relations between civil government and religion had been discussed in jurisdicational terms since early Christian times, and therefore the jurisdictional wording of a provision prohibiting an establishment can hardly be taken to suggest that the provision was not substantive. As seen above in the text, the notion that civil government had no cognizance of religion—or at least no cognizance of establishments of religion—was understood as a substantive claim against establishments. Versions of the no-cognizance standard had been much discussed as barriers to state establishments, and it therefore is difficult to believe that when Americans employed such a standard in the federal constitution, they did not understand it to prohibit a federal establishment. As one might expect, there is no evidence that advocates of an enumerated right against a federal establishment felt that the First Amendment failed to accomplish this goal. On the contrary, Americans (including religious dissenters) were confident that the amendment prohibited a federal establishment of religion.}

For a suble account of the relationship between New England's establishments and the First Amendment, \textit{see Arkin, supra note 60}, at 763.
suggests that the First Amendment set forth a version of a familiar anti-establishment standard—a standard permitting legislation regarding religion (as long as the legislation did not concern an establishment of religion). Even without the history, however, the First Amendment does not seem to apply to all law concerning religion. Instead, it forbids Congress from making any law “respecting an establishment of religion.”

The Amendment’s mention of “religion” rather than “a religion” also seems significant. Once again, the history confirms what is evident from the words, for in 1789, as shown by Douglas Laycock, the Senate rejected the proposal that “Congress shall make no law establishing any particular denomination of religion in preference to another.” Notwithstanding such history, some commentators have attempted to narrow the meaning of “religion” to a religion—an understanding that would allow Congress to make a law establishing multiple religions as long as the law did not establish any one of them. Precisely because such a meaning of the word “religion” is equivalent to inserting the word “a” prior to the word “religion,” it seems difficult to sustain.

Of course, what should or should not be called “religion” is not altogether clear. For example, in the nineteenth century, many self-described “secularists” and even some “atheists” considered themselves religious. They often understood themselves to be cultivating their “religious” emotions and needs, and they thought that they thereby were developing substitutes for traditional religion. Accordingly, it is ambiguous whether their beliefs and activities should be considered religion.

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85 Jed Rubenfeld argues that the First Amendment “does not only prohibit Congress from establishing religion; it prohibits Congress from dictating to the states how to legislate religion. The First Amendment excludes Congress from an entire legislative subject matter” and thus “[d]isables Congress from dictating church-state relations” to the states. Jed Rubenfeld, Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional, 95 Mich. L. Rev. 2347, 2350 (1997). As he acknowledges, however, his argument draws upon historical sources that allude to the limited powers of Congress, and it therefore may be an exaggeration to state the argument exclusively in terms of the First Amendment. See id. at 2354-57.


87 See Laycock, supra note 86, at 875.

88 Hamburger, supra note 8, at 312-21. Some freethinkers and other secularists even had their own hymnbook, churches, and services. See id. at 320-21.
Although the application of the word "religion" may be problematic, the wording of the First Amendment helps. In particular, those who apply the First Amendment may have difficulty using the word "religion" differently for the establishment clause than for the free exercise clause. The First Amendment begins: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Thus, the word "religion" in the establishment clause is the same one to which the free exercise clause refers. Rather than an instance of the same word being used twice and thus perhaps in different ways, this is a situation in which two clauses rely upon the identical word. Thus, the word "religion" of the establishment clause is not different from the word "religion" upon which the free exercise clause relies. This may have been simply the result of the drafters' desire to avoid inelegant repetition, but it is a felicitous reminder that the advantages of the free exercise clause and the disadvantages of the establishment clause fall upon the same characteristic: religion.

How then, finally, can the phrase "an establishment of religion" be applied? There are numerous possibilities, only several of which can be mentioned briefly here. At a minimum, the Constitution's phrase can, yet again, be contrasted with the phrase "separation of church and state." Separation of church and state and an establishment of religion are very different metaphors. Whereas separation involves keeping two things apart, establishment is a matter of one thing instituting, authorizing, or founding another. Accordingly, if the words "separation of church and state" are not substituted for the words of the establishment clause, it becomes difficult to apply the First Amendment generally to connections between government and religion. Instead, the amendment's establishment clause seems to refer to government's establishment of religion.

Of course, this conclusion still leaves open many possibilities. For example, the words "an establishment of religion" could be understood to mean all types of government support for religion—even if under general, secular laws that do not single out religion for special treatment. Yet it should be clear immediately that so broad an understanding of an establishment is improbable. Government protects churches and religious individuals from injury under general laws. Indeed, it legislates exemptions and other privileges to religious individuals and organizations—often on the basis of their religion. Much of this sort of legislation seems important as a means
of assisting Americans in the enjoyment of their religious freedom. It therefore is difficult to believe that the First Amendment condemns all such support as an establishment of religion. In other words, a plausible account of an establishment must distinguish among different types of government support.

A more popular understanding of "an establishment of religion" focuses on financial benefits for churches and religious schools. Typically, this understanding of "establishment" does not generally condemn the laws under which religious groups or individuals receive protection or privileges. It does not even condemn the laws that single out individuals and organizations for special privileges on the basis of their religion—for example, laws on military exemptions, tax status, marriage ceremonies, and incorporation. Instead, from this perspective, "an establishment of religion" means all government subsidies and other financial aid for churches and religious schools, even if distributed on the basis of purely secular qualifications (for example, even if it is handed out to all private secondary schools). Obviously, this understanding has no foundation in the eighteenth century, for at that time an establishment was understood by dissenters to arise from laws that distinguished among individuals on the basis of religion—indeed, usually, on the basis of religious differences. More radically, some dissenters understood an establishment to involve laws that concerned or took cognizance of religion. From both points of view, as Jefferson wrote, "all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities."89 Yet in the nineteenth and twentieth centuries (at the same time as the popularization of separation of church and state), many Americans came to assume that the phrase "an establishment of religion" applied to the receipt of government aid by "sectarian" schools, even if under legislation that did not make distinctions on the basis of religion. As suggested in Part I, this separationist perspective developed largely in response to prejudiced fears of Catholicism and ecclesiastical influence and therefore should be rejected.90 Nonetheless, having developed in the

89 Jefferson, supra note 29, at 546; see also An Act for Establishing Religious Freedom (1786), supra note 30, at 86.
90 Laycock, supra note 31 at 50-51; Jeffries & Ryan, supra note 31, at 281; HAMBURGER, supra note 8, at chs. 8, 10, 13 & 14.
context of these long standing concerns, this conception of “an establishment of religion” seems plausible to many Americans and so would not be prevented by any experimental application of the establishment clause. It thus is a useful reminder that this experimental application of the Constitution’s words is only an initial precaution, and that further means—such as a study of history—are also necessary to avoid prejudice.

Another popular understanding of “an establishment of religion” is the favoring of religion by government—in particular, the unequal benefiting of any group or individual on the basis of their religion. This meaning might threaten some laws that give privileges on the basis of religion, but perhaps not if the laws also offer the same or at least similar privileges on the basis of secular qualifications—as is familiar from federal tax laws that exempt both religious and charitable organizations. Although this understanding has much appeal, it may seem improbable to some Americans because it would condemn laws exempting individuals from military service on account of religious but not other beliefs—laws that seemed constitutional for much of the history of the United States.

Without pretending to exhaust the possibilities, this essay will close with one more understanding of the phrase “an establishment of religion.” Whether or not more plausible than the others mentioned here, it is only a further illustration of the different meanings of “an establishment of religion” that could be adopted for purposes of applying these words. Roughly drawing upon late-eighteenth-century history for assistance, this understanding would recognize that an establishment involves inequalities but would not rigidly equate an establishment with all inequalities. The framers of the Bill of Rights were very familiar with sophisticated equality or non-discrimination tests—not least from the campaign against state establishments.91 Yet they did not adopt the words “equality” or “discrimination” in the First Amendment. Therefore perhaps the word “establishment” should not be reduced to a simple question of inequality. Although anti-establishment Americans clearly believed that establishments were produced by laws that discriminated on the basis of religion or at least religious differences, they did not so clearly understand all such inequalities to amount to an establishment. In particular, most dissenters did not see an

91 Hamburger, supra note 9 at 295-96; see also HAMBERGER, supra note 8, at ch. 4.
establishment in all legislation that generally recognized or favored religion. Indeed, such legislation (whether for the incorporation of religious societies or the exemption of conscientious objectors) often seemed essential for the religious freedom of individuals and their churches and for the tolerant character of American society. Although not required as a constitutional right, these laws preserved and enlarged the freedom Americans enjoyed under their constitutions. Thus, some such legal inequalities were necessary to accommodate religion and even to secure its freedom. In accord with this line of reasoning, perhaps "an establishment of religion" could be understood to involve not all laws that create inequalities on the basis of religion, but only those that more substantively institute, authorize, or otherwise establish religion.

In the end, however, this sort of historical understanding has no special claim to legitimacy in this essay, for all that is required in the experiment proposed here is the application of the words of the establishment clause. Indeed, because this is only an experiment, the particular meaning of the words hardly matters here. Enough has been done if it has become apparent that the application of the establishment clause is likely to have very different consequences than the application of the phrase "separation of church and state." Evidently, the application of the words of the Constitution can reveal the different implications of other words (such as "separation of church and state") and thus can help judges to become more self-conscious about the choices they make when applying words not in the Constitution.

CONCLUSION

Two centuries have elapsed since Jefferson and other Americans began to discuss the First Amendment in terms of "separation of church and state." Gradually, many Americans have come to perceive the First Amendment in such terms and have come to perceive separation as the Constitution's authoritative, practicable, neutral, and tolerant standard of religious liberty.

Yet the phrase "separation of church and state" is a poor interpretation of the First Amendment. This phrase has no special constitutional authority. It establishes a dangerously impracticable standard. It even penalizes religion and discriminates against religious groups in ways that the words of the First Amendment do
not—thus undermining the Constitution’s religious liberty. Of course, this discriminatory character of separation should hardly be surprising. Separation became popular and was adopted as a constitutional doctrine on the basis of anti-Catholic and broader anti-ecclesiastical prejudices—attitudes largely founded on the theological fears and animosities of a powerful majority. For all of these reasons, separation should be viewed with skepticism and even suspicion.

More generally, the substantive dangers of separation point to a broader methodological problem in constitutional interpretation. The experience of Americans with the phrase “separation of church and state” suggests that there is a substantial risk that judges will constitutionalize prejudice and discrimination when they adopt and apply words not in the Constitution itself. Although this risk cannot be entirely eliminated, it surely can be minimized. As an initial precaution against this danger, judges and other Americans should pause before applying their own words and should first apply the Constitution’s words, so that they have a chance to consider the distinctive effect of the words they choose. By applying the Constitution’s words, even if only experimentally, they could become more self-conscious of their choices and thus could have a greater chance of becoming aware of the prejudiced and discriminatory tendencies of some of their own words.