

Liberal Suppression: Section 501(c)(3) and the Taxation of Speech. By Philip Hamburger. Chicago: University of Chicago Press, 2018. Pp. 432. \$55.00 (cloth); \$55.00 (digital). ISBN: 9780226521947.

The presenting issue in Philip Hamburger's *Liberal Suppression* is the internal tension within section 501(c)(3) of the US Internal Revenue Code. On the one hand, that celebrated provision exempts churches, schools, and charities (collectively, "idealistic organizations") from federal taxation; on the other, it denies exemption to the same entities if they engage in political speech. Thus, in Hamburger's view, the section both upholds and undermines the First Amendment at the same time.

In part one of the book, Hamburger traces the development of "liberal fears" in eighteenth- and nineteenth-century America, which he believes laid the foundations for what he considers the suppressive effect of section 501(c)(3)'s speech restrictions.

A strength of Hamburger's account is his insistence that a connection exists between American "liberalism" in the cultural and political sense on the one hand and theological assumptions on the other. Hamburger writes that the "place of theology in the development of contemporary American thought is one of the great untold stories of American life" (22). By "liberalism," Hamburger does not mean the political left. He means a theological stance that is shaped by Protestant suspicion of "church organizations, their clergy, their creeds . . . their authoritative voice, dogma, and harsh tone" (23). He argues that this fear-based liberalism particularly targeted the Catholic Church at first but then evolved during the nineteenth century into a distrust of large corporations and sometimes the government.

In chapter 3, Hamburger helpfully shows that such theological liberals as Unitarians and many Protestants saw themselves as a "beleaguered minority" in eighteenth-century America but that Catholics and more orthodox Protestants soon came to view themselves as the targets of the resulting "liberal anxiety." Early on, Thomas Jefferson and his allies sought to delegitimize "the political speech of theologically orthodox clergy" (108). A culture of mutual suspicion developed. Hamburger argues that idealistic associations, including religious ones, enjoyed considerable freedom of speech in the eighteenth and nineteenth centuries but have been increasingly silenced since then in response to widespread fear that churches and other religious entities "threatened the mental freedom of Americans" (37).

By treating section 501(c)(3) as a specific instance and illustration of American cultural liberalism, Hamburger is able to show in detail how the conflicting trends within this kind of liberalism developed. John Rawls's philosophy, for example, takes on concrete legal implications. Hamburger sees more than an echo of "the old theologically liberal anxieties about orthodoxies" (157) in Rawls's exclusion from public discourse of traditional Catholic and other orthodox types of Christian belief. Illuminating the actual effects, or at least reflections, of Rawlsian political philosophy in something as technical as the Internal Revenue Code is itself a valuable contribution.

In part two, Hamburger attributes the enactment and use of section 501(c)(3) in the twentieth century to "anti-Catholicism, anticommunism, and more general liberal anxieties about the role of private associations in a democracy" (14). Hamburger shows how theologically liberal worries about the Catholic Church evolved into political anxieties as "[f]ears of Catholic influence gradually legitimized concerns about a broader range of associational influences on politics"

(78). Many Americans and even Congress, Hamburger notes, referred to section 501(c)(3)'s speech restrictions as necessary to prohibit "propaganda" (73, 90).

By 1919, in Hamburger's account, the "popular anxiety that the Catholic Church, the churches, or more broadly idealistic associations threatened independent thought and democracy" had become so pervasive that the Bureau of Internal Revenue (the forerunner of the Internal Revenue Service) acted on its own initiative in issuing regulations excluding from the early tax-exemption provision "associations formed to disseminate controversial or partisan propaganda" (93). This moment, according to Hamburger, "was the beginning of liberal conformism in tax law" (94). The IRS incorporated into the provision a much broader restriction on "propaganda" in 1934. The restriction on campaigning and "campaign speech" was added to section 501(c)(3) in 1954 (112). It was at this point in the story, Hamburger believes, that the speech restrictions became significant enough to alter the "very nature" of idealistic associations (122).

These developments, naturally, were defended and praised as necessary advances of the separation of church and state (107). They were in fact motivated, according to Hamburger, by anti-Catholic, anticommunist, and then—after the fading of McCarthyism—a more genteel form of anti-Catholic sentiment that spread in the 1960s to other religious groups.

In part three, Hamburger explains his conclusion that section 501(c)(3) is unconstitutional. To reach his constitutional conclusions, Hamburger first dismisses the argument that section 501(c)(3) is a tax expenditure—that is, a form of spending that serves as a kind of subsidy—and thus that its speech restrictions are merely conditions that do "not impose the force of law" (173). Hamburger points out the absurdity of claiming, in effect, that the government can impose speech restrictions on anyone or anything that it refrains from taxing. He also shows that income taxation was always widely understood not to apply to nonprofit organizations; by definition idealistic organizations have never been regarded as existing for the purpose of acquiring income.

Even if section 501(c)(3)'s restrictions were mere conditions on spending, Hamburger continues, they would nevertheless be unconstitutional because they "are disproportionate and nongermane" (15, 182). Hamburger writes: "[W]here the government places an otherwise unconstitutional condition on one of its grants and the condition is disproportionate or irrelevant to the grant, the condition reveals itself to be an unconstitutional constraint" (182). In Hamburger's opinion, section 501(c)(3)'s speech restrictions cannot possibly be germane or proportionate under the expenditure theory because much of the speech so restricted involves no expenditure whatsoever by either the organization or the government—as when a preacher campaigns from the pulpit.

But is the condition in question (that is, the section's speech restrictions) "otherwise unconstitutional?" Hamburger argues that it, in fact, violates First Amendment freedoms of speech and religion (both free exercise and establishment rights) (15). Section 501(c)(3)'s speech restrictions violate freedom of speech because they single out political speech for constraint, which the Supreme Court has said (as in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)) Congress cannot do (191). Furthermore, Hamburger writes, the First Amendment guarantees the right to petition—also known as "lobbying," "propagandizing," or "influencing"—and section 501(c)(3)'s restrictions directly target the ability of groups to petition in this sense (199).

The restrictions also violate the First Amendment's free exercise clause, Hamburger argues, because they "exact the silence" from religious organizations with the "threat of taxation" (204). And the speech restrictions violate the First Amendment's establishment clause because they "establish religion" (208). They do so by establishing liberal theology—"not merely theological liberalism and its vision of limited ecclesiastical speech, but . . . a government-defined version of this perspective" (210). This perspective Hamburger calls a true civil religion, that is, a religion that supports the state by remaining "quiescent in elections and lobbying" (211). Nor does a

“compelling government interest” exist for the speech restrictions. Contrary to the various arguments advanced in favor of such a government interest, Hamburger argues, (1) the government “has no interest in money that is not owed to it as a tax” (227); (2) the government has no relevant interest in protecting the political process because, in fact, the Constitution grants it no such interest at all; (3) the government has no interest in equalizing political speech because, as the American experience should teach us all too well, freedom and equality are often at odds; and (4) the government has no interest in a separation of church and state based in the First Amendment. With regard to the last point, Hamburger makes clear that he rejects the Jeffersonian idea of separation of church and state as mere theologically liberal anxiety and reads the First Amendment as leaving open the possibility that Congress can make laws respecting religion as long as those laws do “not go so far as to concern an establishment of it” (236).

In part four, Hamburger places the entire presenting question in a broader philosophical and political context, arguing that section 501(c)(3) represents a tendency in the United States to allow Americans only fractions of their rights and to homogenize opinion by subduing “outlying perspectives” (17). Hamburger makes it abundantly clear that he does not wish to attribute bad motives to anyone. Those who paved the way, and those who enacted, section 501(c)(3), most likely “thought they were preserving liberal democracy” (268). This is a point worth emphasizing in today’s charged political and social environment. *Liberal Suppression* can serve as a caution to all Americans that actions and words may seem in the moment to be laudable and necessary but may in the end lead to suppression of the kind that Hamburger decries.

Another of Hamburger’s points about the First Amendment deserves highlighting. He notes that First Amendment freedoms have been interpreted in such a narrow way that “the individualistic understanding” of those freedoms is almost (but not quite) “a legal doctrine.” That is, only individuals have access to them in the view of the courts and the public, to the point at which the access of “nonindividuals” is seriously undermined (277). Hamburger sides with Tocqueville in arguing that individual speech is simply not an adequate bulwark against unlimited government. Hamburger thus gestures to a paradox in the conception and practice of American liberalism: American suspicion of associations and entities and, above all, the government itself, immobilizes the very instrument—that is, associations—through which Americans can “engage in free-ranging public persuasion” (277). At the heart of the argument of *Liberal Suppression* lies the assumption that associations of all kinds help form public opinion, are essential for allowing individuals “to feel common cause with others and to express themselves effectively,” and hold other Americans (not least, politicians) accountable to ideals held by at least some members of society (47). Humans do not exist first in a place of neutrality. As useful as a Rawlsian “original position” may be in evaluating policy decisions, it has no basis in reality, and Hamburger has done a service in exposing the dangers and inconsistencies in the typically American tendency to elevate the moral status of individuals over that of groups. In the end, the government’s powers to shape speech and thought—the “new orthodoxy” (333)—go unchallenged.

Of course, as Hamburger is aware, that paradox is an outgrowth of the liberal conviction that religion is a private matter between the individual and God, with no place in the public square. He admirably shows how deeply embedded such an understanding of religion is in the American psyche, even if it resides there uneasily and inconsistently.

One might be tempted to question why Hamburger places so much weight on one particular provision of the Internal Revenue Code. But that strategy is a strength rather than a weakness of the book. Much of American political philosophy operates at a level of high abstraction; this book provides a lesson in finding and examining the fallout of avowedly hypothetical constructs like Rawls’s veil of ignorance and original position.

If anything, I found myself looking for an even higher-level analysis of section 501(c)(3) as I read *Liberal Suppression*. Hamburger provides numerous valuable insights into the First Amendment, but I kept wondering if more could be said. What if the First Amendment itself is part of the difficulty here? The narrative and argument are compelling; I found myself persuaded by the history that Hamburger recounts. But perhaps the tension within section 501(c)(3) reflects a deeper tension between free speech and the establishment clause, or even between the free exercise and establishment clauses, if the establishment clause is given an expansive reading. After all, those who read the First Amendment in a Jeffersonian way have no trouble basing the broadest possible construction of separation of church and state in the language of the establishment clause.

Hamburger highlights what is likely to be a controversial point, but one that deserves attention. He writes that liberalism of the type he describes operates with a blind spot toward liberal *theology*. “Theologically liberal reasoning,” he contends, has tended to get a free pass in the operation of Rawlsian political philosophy. Even though liberal ideas were openly theological, Hamburger writes, “they were viewed as neutral civil or secular reasoning for other purposes” (163). Thus, liberal Protestant theology has often been able to take its place in the public square while other Christian theologies have been denied admittance. This privilege, indeed, is central to Hamburger’s argument that section 501(c)(3) establishes a religion and thus violates the First Amendment’s establishment clause.

But I found myself wondering if Hamburger’s constitutional argument—that section 501(c)(3) is unconstitutional—goes too far. First, although liberal or mainline Protestant theology may well have supported the American state historically, it is not at all clear that it is currently “quiescent” and cooperative. In fact, it often voices the loudest criticisms of the neoliberal consensus that currently dominates political, economic, and social policy decisions in the United States. Many would argue that more outspokenly orthodox theology has assumed the role of sycophant. Secondly, Hamburger’s argument is somewhat circular. If section 501(c)(3) bars religious voices of all varieties from engaging in political speech, how can we determine which of those voices would remain silent even in the absence of the provision’s speech restrictions and which would become more politically vocal?

Another difficulty with Hamburger’s constitutional argument—this one more narrowly focused on taxation—lies in his contention that the government has no property interest in money that is not owed to it as a tax (and, thus, that there is no compelling government interest in the speech restrictions). This argument, too, is circular. How can we determine what is owed to the government as a tax if we cannot first determine in what property the government has an interest? If Hamburger’s assumption were correct, justifying tax would become a political impossibility, and we would be left with the classic libertarian quandary: tax revenue is essential, but the only valid tax is no tax.

These minor concerns aside, *Liberal Suppression* is worth the read for anyone concerned about the limits of free speech in the United States today. There is hardly a more pressing concern at this moment in the nation’s history.

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