The Politics of Separation: Review of Philip Hamburger's "Separation of Church and State"

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The Supreme Court's Establishment Clause jurisprudence has been the subject of intense media and public interest in recent years. This past Term, for example, the Court issued a ruling in *Zelman v. Simmons-Harris* relating to the permissibility of certain forms of indirect government aid to religious institutions that potentially could have broad-ranging impact.[1] The Court ruled that states could provide public school students with vouchers that could be used to attend, among other institutions, religiously-affiliated schools without running afoul of the Constitution's prohibition against establishment of religion. Such decisions have been the subject not only of intense public interest, but also significant scholarly attention,[2] as they arguably evidence a willingness on the part of the majority of the Justices to curtail the Court's prior interpretation of the Establishment Clause as effecting a rigid "separation" of church and state.[3]

The Supreme Court adopted this separation principle wholeheartedly during the latter half of the twentieth century. In a series of decisions under the Establishment Clause, the Court struck down various government actions it deemed to evidence an improper "entanglement"

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[1] Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002); *see also* Good News Club v. Milford Cen. Sch., 533 U.S. 98 (2001); Mitchell v. Helms, 530 U.S. 793 (2000); Sante Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Michael W. McConnell, *State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681, 681 (2001) (noting "the long-running religion wars on the Supreme Court").

[2] *See, e.g.*, STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995); Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693 (1997); Thomas C. Berg, *Slouching Towards Secularism: A Comment on* Kiryas Joel School District v. Grumet, 44 EMORY L.J. 433 (1995); David O. Conkle, Lemon *Lives*, 43 CASE W. RES. L. REV. 865 (1993); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995); Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373 (1992); Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453 (2000); Michel W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992); Michael W. McConnell, *The Supreme Court's Earliest Church-State Cases: Windows on Religious Cultural-Political Conflict in the Early Republic*, 37 TULSA L. REV. 7 (2001); Michael Stokes Paulsen, Lemon *is Dead*, 43 CASE W. RES. L. REV. 795 (1993); Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 WM. & MARY L. REV. 663 (2001); Steven D. Smith, *The Religion Clauses in Constitutional Scholarship*, 74 NOTRE DAME L. REV. 1040 (1999); J. Clifford Wallace, *The Framers' Establishment Clause: How High the Wall?*, 2001 BYU L. REV. 755; John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371 (1996).

[3] *See* Jeffries & Ryan, *supra* note 2, at 290 ("Today, change is underway. Although the Court remains committed to secularism in public education and shows no signs of wavering in its hostility to school prayer, the no-aid policy is faltering." (footnote omitted)).

with religion.[4] In announcing this principle, the Court relied significantly upon isolated statements regarding separation made after ratification of the Establishment Clause, such as those contained in Thomas Jefferson's widely-cited letter to the Danbury Baptist Association: "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"[5] Based on such isolated statements, members of the Court have concluded that the "purpose [of the Establishment Clause] was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[6] While the Court has at times disavowed requiring a "total separation between church and state"[7] and has stated that the "wall" separating church and state is a "blurred, indistinct, and variable barrier,"[8] its holdings have often suggested quite the opposite. In fact, the Court has held that "[n]either a state nor the Federal Government can, openly or secretly, participate in

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[4] Under the three-part test announced by the Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), "to satisfy the Establishment Clause a governmental practice must (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion." Lee v. Weisman, 505 U.S. 577, 584-85 (1992); *see also Zelman*, 122 S. Ct. at 2476 (applying *Lemon* test); Agostini v. Felton, 521 U.S. 203, 232 (1997) ("[T]o assess entanglement, we have looked to 'the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.'" (quoting *Lemon*, 403 U.S. at 615)). *But cf.* Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 269 (1987) ("Although the *Lemon* test has survived for over a decade and a half, few have found the formulation satisfactory."); Benjamin S. Genshaft, Note, *With History, All Things Are Secular: The Establishment Clause and the Use of History*, 52 CASE W. RES. L. REV. 573, 576 (2001) ("[T]he Supreme Court has voiced concerns about the [*Lemon*] test, and consequently courts have not applied *Lemon* consistently. Furthermore, many courts have expressly criticized *Lemon* and its progeny.").

[5] Everson v. Bd. of Ed., 330 U.S. 1, 16 (1947).

[6] *Weisman*, 505 U.S. at 601 (Blackmun, J., concurring) (quoting *Everson*, 303 U.S. at 31-32 (Rutledge, J., dissenting)).

[7] *Lemon*, 403 U.S. at 614 ("Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable."); *see also Agostini*, 521 U.S. at 233 ("Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, . . . and we have always tolerated some level of involvement between the two. Entanglement must be 'excessive' before it runs afoul of the Establishment Clause.").

[8] *Lemon*, 403 U.S. at 614 ("Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."); *cf.* Jeffries & Ryan, *supra* note 2, at 288 (concluding that "the strict separationism of *Everson* did not apply universally or uniformly" in the Court's subsequent Establishment Clause decisions).

the affairs of any religious organizations or groups and *vice versa*."[9] Nonetheless, more recent decisions such as *Zelman* arguably evidence a willingness on the part of the Court to interpret the Establishment Clause less rigidly, allowing government action that previously might have been construed to violate the establishment norm.

Given the recent developments in the Court's Establishment Clause jurisprudence, Philip Hamburger's book, *Separation of Church and State*, is particularly timely.[10] In his latest work, Professor Hamburger traces the evolution of public understanding concerning the establishment norm from the Founding Generation to the Supreme Court's seminal decision in *Everson v. Board of Education*.[11] Professor Hamburger argues that the interpretation of the Establishment Clause as embodying a rigid "separation" between church and state has very little support in contemporaneous understandings.[12] Rather, Professor Hamburger demonstrates that this interpretation began to gain favor as a result of powerful political forces that arose beginning in the nineteenth century.

Professor Hamburger certainly is not the first to dispute the separationist interpretation of the Establishment Clause. Both commentators[13] and certain members of the Court[14] have noted the lack

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[9] *Everson*, 330 U.S. at 16.

[10] PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002); *see also* Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 295 SUP. CT. REV. 336 (1992).

[11] 330 U.S. 1 (1947).

[12] *See* HAMBURGER, *supra* note 10, at 191 ("According to the modern myth, separation of church and state has been an American ideal and even a constitutional right since the eighteenth century."); *id.* at 481 ("As should be clear from the contrast between separation and the religious liberty guaranteed by the First Amendment, the constitutional authority for separation is without historical foundation.").

In fact, Professor Hamburger goes so far as to argue that "[t]he separation of church and state not only departed from the religious liberty guaranteed by the U.S. Constitution but also undermined this freedom" by being used to advocate against the use of religious argument in political discourse. *Id.* at 483. "Put more generally, separation has barred otherwise constitutional connections between church and state. It even has discriminated among religions, for it has placed especially severe limitations upon persons whose religion is that of a 'church' or religious group rather than a mere individual religiosity." *Id.* at 484. Ironically, Professor Hamburger's book was cited by Justice Breyer in support of his dissent in *Zelman* in which he argued that "the Establishment Clause required 'separation,' in part because an 'equal opportunity' approach was not workable." 122 S. Ct. at 2504 (Breyer, J., dissenting).

[13] *See, e.g.*, SMITH, *supra* note 2, at 14 ("Scholars and judges have squeezed and tortured the words of the religion clauses for all the meanings those words can give, but those meanings remain meager and, usually, controversial."); Ira Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994); Witte, *supra* note 2, at 374 ("The Court's entire record on religious liberty has become vilified for its lack of consistent and coherent principles and its uncritical use of mechanical tests and empty metaphors.").

of historical evidence supporting an interpretation of the clause that would require rigid separation. Yet, Professor Hamburger's analysis presents one of the most comprehensive pictures to date of the political forces that may have been responsible, in part, for the rise of separationism.[15]

Moreover, Professor Hamburger's analysis may be extended and generalized to other areas of constitutional interpretation. From "due process" to "privileges and immunities" to "commerce," critical provisions of the Constitution are based on language that was understood by those who included it in the constitutional text to have a highly technical legal meaning. Over time, however, much like the concept of "establishment," such terms have been particularly subject to re-interpretation in the face of prevailing political forces. Accordingly, Professor Hamburger's analysis presents an example of a more general phenomenon: the susceptibility of technical legal terminology to shifting interpretation when confronted with powerful social and political forces that are at odds with the original meaning.

I. THE RISE OF SEPARATIONISM

According to Professor Hamburger, the early opponents of religious establishment never advocated a separation of church and state. Rather, they were concerned primarily with state-sponsored religious discrimination. Moreover, statements by individuals such as Jefferson coming after ratification of the religion clauses were isolated, and as Hamburger demonstrates, often politically motivated. It was only during the latter part of the nineteenth century that separationism began to gain ground. At first, efforts were undertaken to amend the Constitution to reflect more clearly the separationist norm. After such efforts failed, however, proponents of the separationist view maintained that the unamended text already supported such an interpretation. These efforts culminated during the middle of the twentieth century, with the Supreme Court's *Everson* decision, which firmly embedded the

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[14] Professor Hamburger, himself, observes that "in 1985, Justice William H. Rehnquist, in a dissent, argued that separation is a standard that lacks historical support and has 'proved all but useless as a guide to sound constitutional adjudication.'" HAMBURGER, *supra* note 10, at 7 (quoting Wallace v. Jaffree, 472 U.S. 38, 107 (1985)); *see also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring) (observing that the Court's "Establishment Clause jurisprudence is in hopeless disarray").

[15] Professor Hamburger maintains that his analysis goes beyond prior commentary in that "the commentators who question separation do not even attempt to dislodge the phrase 'separation of church and state.'" HAMBURGER, *supra* note 10, at 8.

notion of separation in the Court's Establishment Clause jurisprudence. Thus, as Professor Hamburger shows, the separationist reading of the Establishment Clause finds little support during the Founding Generation, but rather appears to be the result of political forces that emerged much later.

A. Original Understanding

Professor Hamburger begins his analysis with the generation responsible for ratifying the Establishment Clause. First, he canvases the views of those who advocated against state-supported establishment of religion. He concludes that these forces did not seek to wall off religion from government, but rather objected to state-supported religious discrimination: "the American constitutions that were drafted to accommodate the antiestablishment demands of dissenters guaranteed religious liberty in terms of . . . limits on discrimination by civil laws and on the subject matter of civil laws."[16] In particular, opponents of the state establishments objected to certain "special privileges" afforded to the established religions such as government-funded clerical salaries.[17]

According to Professor Hamburger, "the dissenters who campaigned for constitutional barriers to any government establishment had no desire more generally to prevent contact between religion and government."[18] In fact, allegations that opponents of state establishments were seeking to separate religion from government were widely viewed as derogatory "accusations."[19] In the eyes of many opponents of the state establishments, government was inextricably

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[16] *Id.* at 12; *see also id.* at 19 ("Almost none of the dissenters who struggled for their liberty from religious establishments revealed any desire for a separation of church and state or for a separation of religion and government.").

[17] *Id.* at 94 ("Most immediately, these evangelical dissenters hoped to secure constitutional provisions preventing civil government from legislating clerical salaries or other special privileges on account of religious differences."); *see also* SMITH, *supra* note 2, at 41 ("The Massachusetts Constitution was understood to permit state subsidization of religion, religious qualifications for public office, blasphemy prosecutions, and stringent Sabbath laws."); McConnell, *The Supreme Court's Earliest Church-State Cases*, *supra* note 2, at 8 (observing that in Virginia, the Episcopal Church "enjoyed numerous official advantages, including grants of land, financial support through mandatory tithes, enforcement of compulsory worship, and prohibition of competitors"); William W. Van Alstyne, *What Is "An Establishment of Religion"?*, 65 N.C. L. REV. 909, 910 (1987) ("As of 1787, when the Constitution was proposed, a number of states maintained established religions, i.e., specific churches and ministries officially favored by state government, religions thus themselves 'established' by state law.").

[18] HAMBURGER, *supra* note 10, at 13.

[19] *Id.* at 65.

bound with religion, which was viewed as "a necessary basis of the morality required for government."[20] It was only "a few somewhat anticlerical intellectuals" who "sought versions of separation of church and state."[21] Indeed, the mainstream opponents of state establishment "resented" the charge that they were seeking a "separation" of religion and government.[22]

Such notions of religious liberty framed the debate over the religion clauses embodied in the First Amendment. Professor Hamburger argues that the First Amendment adopted a "bifurcated approach," similar to the state constitutional provisions that recognized a distinction between natural rights and those that were conventional "special privileges."[23] This approach both guaranteed the natural right of free exercise of religion and forbade legislation "respecting" religious establishments, thereby ensuring that the federal government could not enact unequal governmental "privileges" for particular religions.[24] Thus, the

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[20] *Id.* at 67; *see also id.* at 71 n.7 ("[W]ithout using the words 'connection' or 'separation,' numerous proponents of an establishment suggested that dissenters and their allies were blind to what seemed the obvious significance of religion and the morality it inculcated for government, liberty, and civil blessings.").

[21] *Id.* at 65 ("[I]n the late eighteenth-century controversies over religious liberty, it was the advocates of establishments who alluded to a sort of separation — the separation of religion and government — and following the example of Richard Hooker, they treated separation as an accusation.").

[22] *Id.* at 73.

[23] Professor Hamburger observes that such unequal "special privileges" persisted under state establishments despite state constitutional provisions that were designed to guarantee an equality of "civil rights," including an equal right to worship freely. *See id.* at 97-98. According to Professor Hamburger, these provisions could be reconciled with the state establishments and their accompanying unequal privileges by interpreting the former provisions as guaranteeing only an equality of natural rights, and not an equality of privileges given out by the government, rights that "presuppos[ed] government" and therefore "could not exist in the state of nature." *Id.* at 98.

[24] *Id.* at 101. Professor Hamburger maintains that the term "privileges" was often used to refer to the conventional rights or benefits that could exist only after government was established. *Id.* at 98. In contrast, "natural rights" were viewed as existing in a state of nature. *Id.* As I have argued elsewhere in discussing the Privileges or Immunities Clause of Section One of the Fourteenth Amendment, often the term "privileges" was used (at least during the nineteenth century) synonymously with the terms "natural rights" or "fundamental rights" — particularly in the discussion of privileges "of citizenship" or "fundamental privileges," whereas the phrases "civil rights" or "special privileges" were often used to denote regulations governing the mode or manner in which privileges of citizenship could be exercised — i.e., the conventional "rights" that could exist conceptually only after government was established. *See, e.g.*, Douglas G. Smith, *A Lockean Analysis of Section One of the Fourteenth Amendment*, 25 HARV. J.L. & PUB. POL'Y 1095, 1166-67 (2002) ("The framers' choice of the terms 'privileges' and 'immunities,' as opposed to the term 'rights,' which was incorporated into early drafts of Section One, shows an intent to guarantee only those fundamental rights existing anterior to the establishment of

Establishment Clause did not preclude "all legislation with respect to religion."[25] Rather, the clause left room for non-discriminatory governmental action in the area of religion. Thus, Professor Hamburger concludes that "it is misleading to understand either eighteenth-century religious liberty or the First Amendment in terms of separation of church and state."[26]

B. Political Forces Contributing to Separationism

The rise of separationism, according to Professor Hamburger, is a nineteenth-century phenomenon.[27] The widely-cited statements of individuals such as Thomas Jefferson[28] that seemed to advocate in favor

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government and to make clear that Congress was not free to prescribe any particular mode or manner in which such fundamental rights might be exercised."); Douglas G. Smith, *Fundamental Rights and the Fourteenth Amendment: The Nineteenth Century Understanding of "Higher" Law*, 3 TEX. REV. L. & POL. 225, 263 (1999) ("[T]he 'privileges' and 'immunities' that were guaranteed did not encompass all of the 'rights' that might be granted under a particular government. Rather, . . . [t]he privileges and immunities of citizens were those fundamental capacities of citizens that existed prior to the establishment of government."); *see also supra* note 23 and accompanying text.

Whatever the terminology used, however, the conceptual notion of a sharp distinction between those powers or capacities conceived of as existing in a state of nature and the conventional rights or regulations governing those fundamental capacities that were a product of the government seems to be similar in both the generation responsible for the First Amendment and that responsible for the Fourteenth.

[25] HAMBURGER, *supra* note 10, at 101.

[26] *Id.* at 9; *cf.* Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) ("Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions."); Jeffries & Ryan, *supra* note 2, at 281 (observing that "the modern Establishment Clause dates not from the founding but from the mid-twentieth century"); *id.* at 281 ("In terms of the conventional sources of 'legitimacy' in constitutional interpretation, the Supreme Court's Establishment Clause decisions are at least very venturesome, if not completely rootless."); Wallace, *supra* note 2, at 756 ("Several Supreme Court cases interpret the Establishment Clause as creating an impenetrable wall that prohibits any relations between a government and the churches within its borders. However, nowhere in the Constitution are the words 'separation of church and state' to be found." (footnote omitted)).

[27] *See* HAMBURGER, *supra* note 10, at 109 ("In the opening years of the nineteenth century some Republicans, including eventually Thomas Jefferson, began to advocate versions of separation. In so doing, they intimated for the first time that the religious liberty protected by American constitutions should be understood as a separation between religion and government or, at least, between church and state.").

[28] In *Weisman*, Justice Blackmun maintained that the Court had "in *Reynolds* accepted Thomas Jefferson's letter to the Danbury Baptist Association 'almost as an authoritative declaration of the scope and effect' of the First Amendment." 505 U.S. at 599 n.1 (Blackmun, J., concurring); *see also* Wallace, *supra* note 2, at 767 ("The Supreme Court has heavily relied on Jefferson's writings concerning church-state matters, especially his statement that the Establishment Clause erected 'a wall of separation between church and

of a rigid separation between church and state did not occur until years after ratification of the First Amendment and its religion clauses.[29] Even when such sentiments did find expression, their emergence as a powerful force in shaping constitutional jurisprudence took over a century to develop.

Moreover, according to Professor Hamburger, these forces were profoundly political in nature.[30] In discussing Jefferson's famous statements regarding separation of church and state, for example, Professor Hamburger concludes that while they are "[o]ften assumed to have been a demand for religious liberty," they were in reality "a rather less elevated attempt to deter Federalist clergyman from exercising their freedom of religion and speech" by supporting political candidates opposing Jefferson's political party.[31]

Further, at the time Jefferson expressed such views, they were not "widely published or even noticed."[32] And the response to such views, even among those who might be expected to support them, was decidedly negative. For example, Professor Hamburger musters significant evidence showing that those opposing the state establishments, "especially Baptist[s]," objected to the separationist views espoused by Jefferson.[33] Rather, as they had been during the eighteenth century when the religion clauses were ratified, such "establishment dissenters" were concerned with religious liberty as opposed to the intermixture of religion and government.[34] Indeed, Professor Hamburger concludes that even Jefferson did not "directly

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State.'").

[29] *See* Wallace, *supra* note 2, at 767 (observing that Jefferson's "'wall of separation' comment was made in a letter fourteen years after the First Congress passed the First Amendment — hardly contemporary with the adoption of the First Amendment").

[30] *Cf.* Jeffries & Ryan, *supra* note 2, at 280 (contending that "the entire body of Establishment Clause jurisprudence can profitably be viewed from a political perspective").

[31] HAMBURGER, *supra* note 10, at 111 ("The idea so frequently portrayed as one of Jefferson's profound contributions to American liberty was introduced into the presidential campaign of 1800 by leading Republican intellectuals as a means with which they hoped simultaneously to attract antiestablishment votes and to browbeat Federalist clergy for preaching about politics.").

[32] *Id.* at 162; *cf. id.* at 482 (contending that "in the history of separation, Jefferson is but a passing figure, less important for what he wrote than for the significance later attributed to it").

[33] *Id.* at 162.

[34] *Id.* at 177 ("[O]nly a handful of Baptists, if any, and no Baptist organizations made separation their demand. Instead, Baptists focused on other, more traditional, claims of religious liberty. What Baptists sought not only differed from separation of church and state but also conflicted with it.").

advocate separation" in later years.[35] Rather, "Republican advocacy of separation was sporadic and was not of a character likely to win wide approval."[36]

It was not until much later that separationism began to gain ground. These more successful efforts to impose separationism were also political in nature. During the nineteenth century, separationist efforts were marked by a "movement to impose an aggressively Protestant 'Americanism' on an 'un-American' Catholic minority."[37] According to Professor Hamburger, "the separation of church and state became popular mostly as an anti-Catholic and more broadly antiecclesiastical conception of religious liberty."[38] Nonetheless, even during this period the Protestant advocates of the "separation" principle often "assum[ed] that such a separation would not undermine the ties between religion and government."[39]

C. Efforts at Amendment

Even during the nineteenth century, many of those advocating separationism did not believe that the Constitution mandated such a principle. Rather, the initial efforts by proponents of separationism involved attempts to amend the Constitution: "Only in the twentieth century, after the amendment process had been abandoned, did an interpretive approach prevail, and, by this means, separation became part of American constitutional law."[40] Those in favor of a more rigid separation of church and state put forth proposals such as the Blaine Amendment which, according to Professor Hamburger, were designed as "anti-Catholic measure[s]."[41] However, even these measures did not

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[35] *Id.* at 181 ("After writing to the Danbury Baptist Association in 1802, Jefferson himself apparently did not again directly advocate separation. He continued to denounce the union of church and state, but he seems not to have expressly urged separation.").

[36] *Id.*

[37] *Id.* at 191; *see also id.* at 193 ("In the middle of the nineteenth century some Americans employed the idea of separation of church and state against Catholicism and thereby made it a popular 'American' principle.").

[38] *Id.* at 252.

[39] *Id.* at 268; *see also id.* at 287 ("In the 1870s and 1880s anti-Christian secularists organized a national campaign to obtain a constitutional amendment guaranteeing a separation of church and state.").

[40] *Id.* at 285 ("Contrary to what may be expected, the nineteenth-century advocates who desired the separation of church and state as a constitutional right did not rely upon constitutional interpretation to secure this goal.").

[41] *Id.* at 298; *see also id.* at 364 ("Liberals shared this anti-Catholic Protestant view of separation as far as it went, but they were disappointed that it was not generally anti-Christian and completely secular."); *cf.* Mitchell v. Helms, 530 U.S. 793, 829 (2000).

seek to effect a complete separation between government and Protestant religious influence.

Ultimately, these various efforts at amendment of the religion clauses met with little success. Moreover, Professor Hamburger notes that they provide evidence that even advocates of separation during the nineteenth century did not believe that this principle was already embodied in the Constitution. For example, secularists who advocated amendments to the Constitution explicitly argued that amendment was necessary because "the U.S. Constitution had not guaranteed a separation of church and state."[42] The significant efforts at amendment demonstrate that decades after ratification even those with the most intense interest in the separation principle did not read the religion clauses as requiring a rigid separation of church and state.

D. Re-Interpretation

As Professor Hamburger observes, it was only "[a]fter the failure of the . . . proposal for a constitutional amendment" that "advocates of separation focused on constitutional interpretation."[43] While many proponents of separationism switched their tactics "quite deliberately," according to Professor Hamburger, "[m]ost . . . seem to have responded much less self-consciously, perceiving their constitution in accord with their hopes and wishful expectations."[44] Nonetheless, as secularists "switched strategies from seeking amendment to seeking influence, they quietly, but quite self-consciously, suppressed their position that the Constitution had failed completely to guarantee separation."[45] In fact,

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[42] HAMBURGER, *supra* note 10, at 300; *see also id.* at 302 ("In contrast to earlier nativists and other Protestants, who adopted separation in opposition to Catholics, Liberals ecumenically applied it to all Christians.").

[43] *Id.* at 335.

[44] *Id; see also id.* at 342 ("The Liberals shifted their account of separation's constitutional history by the end of the nineteenth century. Following the example of mid-century nativists, the Liberals and their liberal Christian allies had once described separation as a principle evident throughout American constitutions and other founding documents—not as a right guaranteed in the First Amendment or any other specific clause of the U.S. Constitution.").

[45] *Id.* at 343; *see also id.* at 482 ("Gradually, . . . as it became clear that hopes for an amendment to the U.S. Constitution were unrealistic, advocates of separation easily persuaded themselves and others that separation was the religious liberty already guaranteed by the First Amendment."). *But see id.* at 344 ("In contrast to Liberals and their allies, who had particular reason to understand that they were switching from amendment to interpretation, most Americans adopted the new approach more unwittingly, as may be illustrated by the various religious denominations that competed for the honor of having first introduced religious liberty to America.").

one of the most important contributions of Professor Hamburger's book is in cataloguing the dynamics behind the shift by proponents of separationism from attempts at constitutional amendment to arguments regarding the proper interpretation of the Constitution.

According to Professor Hamburger, this movement which began in the nineteenth century and was motivated in part by anti-Catholic bias,[46] ultimately resulted in a fundamental reconceptualization of constitutional norms regarding religion. As a result, increasingly "vast numbers of Americans from remarkably diverse backgrounds perceived separation to be an 'American' constitutional right, which protected Americans from Catholic or, more broadly, ecclesiastical subjugation."[47] "[S]eparation became established in popular opinion and eventually even in judicial opinions as a fundamental First Amendment freedom."[48]

The link between this prevailing popular view and constitutional decisionmaking is arguably more tenuous. Professor Hamburger focuses in particular on Justice Black, the author of the *Everson* opinion, which injected the separation principle into the Court's jurisprudence, as being heavily influenced by the prevailing political and social forces clamoring for separation. According to Professor Hamburger, "Black's distaste for Catholicism did not diminish" after his appointment to the Court: "[h]olding such views . . . Black in 1947 led the Court to declare itself in favor of the 'separation of church and state.'"[49]

Whatever one's view of Professor Hamburger's arguments concerning Justice Black's motivations and their role in the evolution of the Court's jurisprudence, his ultimate conclusion that "[b]y the middle of the twentieth century, the idea of separation between church and state had become an almost irresistible American dogma" certainly is supported by the evidence.[50] Nonetheless, given the Court's subsequent jurisprudence and academic commentary, in recent years there has been some movement in the opposite direction.

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[46] In fact, Professor Hamburger discusses at length the fact that "[s]eparation became a crucial tenet of the [Ku Klux] Klan." *Id.* at 408.

[47] *Id.* at 391.

[48] *Id.*

[49] *Id.* at 463; *cf.* Jeffries & Ryan, *supra* note 2, at 285-86 ("The *Everson* Court not only ascribed to the Establishment Clause separationist content; it imagined a past to confirm that interpretation.").

[50] HAMBURGER, *supra* note 10, at 478; *see also* Jeffries & Ryan, *supra* note 2, at 281-82 (observing that "public secularism appears on the face of Supreme Court opinions and is deeply embedded in Establishment Clause doctrine").

II. AN ALTERNATIVE DYNAMIC FACILITATING SEPARATIONISM

In addition to the powerful political forces addressed by Professor Hamburger, there are other, perhaps complementary explanations for the rise of separationism. As Professor Hamburger observes, the "evolution" of constitutional understanding regarding the religion clauses "occurred under the cover of an historical myth that conveniently allowed Americans to avoid perceiving the changing character of their constitutional law."[51] Thus, "Americans . . . gradually forgot the character of their older, antiestablishment religious liberty and eventually came to understand their religious freedom as a separation of church and state."[52]

One factor potentially contributing to the shifting understanding regarding the Establishment Clause is a loss of historical memory regarding technical terms at the heart of that provision.[53] While "establishment" of religion may have been well understood in the minds of those responsible for drafting, and perhaps those responsible for ratifying, the First Amendment, it is nonetheless a highly technical legal concept. Consequently, it is more readily subject to eroded understanding.

Indeed, this dynamic may be a more general phenomenon. There are a number of terms used in the Constitution that had a highly technical and specific legal meaning when they were embodied in the text whose

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[51] HAMBURGER, *supra* note 10, at 483 (observing that "once the fig leaf [of Jefferson's letter regarding separation] is stripped away, it becomes clear that the constitutional religious freedom of Americans developed in accord with popular expectations — that minority rights were redefined to satisfy majority perceptions of them"); *see also id.* at 48 (observing that "[s]eparation of church and state is an attractively simple metaphor. Like so many beguiling metaphors, however, it is an oversimplification, and on account of its appeal, it has gradually rendered Americans ever less inclined to appreciate the more measured positions advanced by eighteenth-century evangelical dissenters.").

[52] *Id.* at 492.

[53] *Cf.* Michael A. Ross, *Pamela Brandwein, Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth*, 20 LAW & HIST. REV. 416, 416 (2002) (book review) ("During the past decade, historians interested in the process by which people shape and reshape their identities have posed fresh questions about historical memory. By arguing that memories are constructed rather than reproduced, historians have shed new light on conventional sources and topics and have shown how individuals, ethnic groups, political parties, and even nations as a whole, omit, distort, or reorganize their memories in ways that affect popular and personal understandings of historical truth.").

The shifting understanding regarding the meaning of technical terminology used in the Constitution may be further facilitated by the "growing popular ignorance of the Constitution and the American system of government." *See* Thomas L. Jipping, *From Least Dangerous Branch to Most Profound Legacy: The High Stakes in Judicial Selection*, 4 TEX. REV. L. & POL. 365, 367 (2000).

interpretation has been subject to latitudinarian and shifting constructions with each passing generation. After all, technical legal terms are less likely to have broadly-held or well-accepted meanings. Rather, the understanding of such terms within the legal community may be far superior to that of the public at large. Moreover, because dialogue within the legal community is often adversarial in nature, it is likely that at one point or another, legal advocates have argued for almost every interpretation of terms with even relatively well-established meanings. As a result, provisions revolving around technical terminology may not have the widespread support that would prevent their erosion.[54]

A few examples may support this proposition. Concepts such as "due process," "commerce," "privileges and immunities," and "establishment" have all been the subject of shifting constructions. The one thing that these concepts all have in common is that at the time they were embodied in the constitutional text, they functioned as technical legal terms of art that had specific meanings within the legal community. Because these terms may not have been well understood outside that community, such terms may have been more readily subject to shifting constructions. In sum, political barriers to re-interpretation would not be as formidable where there was not a widespread, common, and continuous understanding of such terms.

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[54] *Cf.* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1387 (2001) ("[E]ven where it is possible to identify a jurisprudential basis for judicial decisions, if those familiar with the Court's decisions do not believe those decisions to be socially correct, the work of judges will be seen as illegitimate.").

The use of technical legal terms may pose some difficulty when it comes to theories of constitutional interpretation. As Judge Bork has observed, the understanding of those who drafted particular constitutional provisions is important insofar as it reflects the views of the public — the body that actually is vested with the authority to ratify and approve the constitutional text: "What the men of the First Congress took the Constitution to mean is illuminating not because we are swayed by each man's individual understanding, but 'because what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean.'" Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 860 (2002) (quoting ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 32 (1990)). However, in the case of technical legal terminology, those responsible for drafting a particular constitutional provision may have vastly superior knowledge concerning the provision's meaning when compared with that of the public. Perhaps such difficulties can be surmounted, however, insofar as the public understands that constitutions by their very nature often employ technical legal terminology, and although they may not fully understand all aspects of the meaning of that terminology, intend that such terminology be interpreted according to its accepted understanding within the legal community.

A. Due Process

One of the most widely-discussed legal terms of art found in the Constitution is "due process" of law. This concept has its roots in the Magna Carta,[55] and had a long and significant legal pedigree before its incorporation in the Constitution. Yet, over time, the Due Process Clause has been re-interpreted to have new meaning. Sometimes that meaning has involved an expansion, and sometimes a contraction, of the scope of the constitutional guarantee under the clause. While the phrase as originally understood most likely guaranteed certain procedural rights,[56] over time the phrase has acquired substantive content. In sum, the concept of "due process" has morphed from the primarily procedural to embodying different and various substantive guarantees. As a result, there has been a substantial shift in understanding of the clause and its meaning.

Commentators have attributed the shift in meaning, at least in part, to powerful political forces. For example, legal scholars have frequently attributed the Supreme Court's decisions in cases such as *Lochner v. New York*[57] to conservative political forces bent on opposing certain forms of government regulation.[58] "With the expansion of economic regulation in the wake of the Great Depression, collisions between regulatory legislation and constitutional doctrine became more frequent and

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[55] *See* Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 948 ("The ancestry of the due process clause is universally traced to chapter 39 of the Magna Carta, which was signed by King John and his rebellious barons on the field of Runnymede in June 1215.").

[56] As Professor Harrison has observed: "[T]he whole idea that the Due Process Clauses have anything to do with the substance of legislation, as opposed to the procedures that are used by the government, is subject to the standard objection that because 'process' means procedure, substantive due process is not just an error but a contradiction in terms." John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 494 (1997); *see also* Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3, 3 (1999) ("To many, the Due Process Clause means what it says, that is, it merely requires states to follow certain procedures before depriving someone of liberty."). *But see* EDWARD KEYNES, LIBERTY, PROPERTY, AND PRIVACY: TOWARD A JURISPRUDENCE OF SUBSTANTIVE DUE PROCESS (1996); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993); Riggs, *supra* note 55, at 943, 946 (maintaining that while "most commentators agree that due process originally embraced only procedural, not substantive rights, . . . the available evidence [shows] that the 'procedure only' interpretation of the fifth amendment cannot be sustained by the historical facts").

[57] 198 U.S. 45, 57 (1905).

[58] *See, e.g.*, Friedman, *supra* note 54, at 1385 ("Until recently, scholars painted *Lochner* as the primary example of judicial activisim, symbolic of an era during which courts inappropriately substituted their view as to proper social policy for those of representative assemblies.").

severe."[59] In contrast, other commentators have attributed the Court's later disavowal of *Lochner* and its progeny to the prevailing political view of the time that such legislation was necessary to combat the significant economic upheaval associated with the Great Depression.[60]

Indeed, even before *Lochner* was decided, nineteenth-century courts had employed notions of due process to guarantee "vested rights" of property.[61] Professor Harrison traces this notion to cases such as *Dred Scott v. Sandford*,[62] in which the Court indicated that the government could not take certain action that would deprive slaveholders of their right to their slave property. The Court continued to apply versions of this vested rights interpretation in a "number of cases from the 1870s," such as *Bartemeyer v. Iowa*, *Munn v. Illinois*, and *Davidson v. New Orleans*.[63] Thus, even the nature of the substantive guarantee under the Due Process Clause had evolved over time, from focusing on deprivations of property in these early decisions to deprivations of personal liberty in later cases such as *Lochner* and its progeny.[64] In fact, Professor Harrison contends that "the seeds of the structural vested rights reading were

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[59] Daniel A. Farber, *Who Killed* Lochner?, 90 GEO. L.J. 985, 990 (2002) (observing that "[i]n 1935, the Supreme Court dealt a number of major blows to the New Deal").

[60] *See, e.g., id.* at 985-86 (observing that commentators have argued that the Supreme Court shifted its position in response to "political developments" such as President Roosevelt's court-packing plan: "They argue that the Court, particularly in the person of the swing voter, Justice Roberts, bowed to the overwhelming political force of the New Deal, as reflected in the 1936 election returns and FDR's threat to pack the Court."). *But see* Friedman, *supra* note 54, at 1385 ("Today, many scholars are engaged in an effort to legitimize judicial review during the *Lochner* era on the ground that decisions during that era reflected established jurisprudence, and thus were 'law,' and not 'politics.' . . . Revisionist scholars now assert that a firm jurisprudential basis for the *Lochner*-era decisions existed in nineteenth-century legal thought.").

Professor Farber attributes the demise of *Lochner* to more pervasive political forces: "In short, *Lochner* was not merely a victim of FDR's New Deal, though in time no doubt it would have succumbed anyway under the weight of new Democratic appointments. It died because the 'party of business,' the Republicans, withdrew their support. The key opinions were written by Hughes, a former Republican Governor and a law partner of Paul Cravath." Farber, *supra* note 59, at 1006.

[61] *See, e.g.*, Harrison, *supra* note 56, at 519.

[62] 60 U.S. (19 How.) 393 (1856).

[63] Harrison, *supra* note 56, at 513-19 (discussing Davidson v. New Orleans, 96 U.S. 97 (1878), Munn v. Illinois, 94 U.S. 113 (1877), and Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129 (1874)). For an interesting discussion of the rise of substantive due process before *Lochner* in cases such as *Munn*, see PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 157-66 (1997).

[64] *See, e.g.*, Harrison, *supra* note 56, at 519 ("The vested rights due process reading seems to have receded from the judicial mind, but it is hard to pinpoint when. By the time of *Lochner*, substantive due process doctrine tended to discuss deprivations of liberty more than property.").

sown before the Constitution was adopted"[65] and thus may in fact be part of the original meaning of "due process."

Decades later, when the Due Process Clause was invoked in support of a constitutionally-protected right to obtain an abortion, commentators again attributed the Court's decisionmaking to prevailing political forces. While some commentators flatly stated that the Court's decision in *Roe v. Wade*[66] was the result of politically-motivated decisionmaking,[67] other commentators viewed the Court's subsequent decision in *Planned Parenthood v. Casey*[68] as a politically-motivated erosion of the *Roe* doctrine.[69] Not surprisingly, others interpreted *Casey* as a politically-motivated reaffirmation of the *Roe v. Wade* decision.[70] In contrast to the political forces at work during the *Lochner* era, these later forces related to social — not economic — issues.[71] Nonetheless, the clause was

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[65] *Id.* at 553.

[66] 410 U.S. 113 (1972).

[67] Representative of this view are recent statements by Thomas Jipping: "Perhaps the best example of an activist approach yielding liberal political results is *Roe v. Wade.* In this decision, an exercise of 'raw judicial power,' the Supreme Court re-wrote the Fourteenth Amendment to create a right to abortion that those who put that provision in the Constitution never intended and that no court had ever recognized. Even those who agree with the result admit it was an improper interpretation of the Constitution." Jipping, *supra* note 53, at 385; *see also* Joan L. Larsen, *Constitutionalism Without Courts?*, 94 NW. U. L. REV. 983, 1000 (2000) (observing that commentators have concluded "that political forces — a national political majority in *Brown*, and a constituency of 'Country-club Republican[s]' in *Roe* — ultimately accounted for the Court's results in those cases" (quoting MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 143, 149 (1999) (footnote omitted)).

[68] 505 U.S. 833 (1992).

[69] *See, e.g.*, Kristofor J. Hammond, *Judicial Intervention in a Twenty-First Century Republic: Shuffling the Deck Chairs on the Titanic?*, 74 IND. L.J. 653, 701 (1999) (contending that *Casey* "claims to uphold *Roe* even as it cuts back dramatically on the scope of that decision. This aspect, when combined with the opinion's candid (and transparently pragmatic) assessment of the political consequences of overruling *Roe*, results in the impression that the Court handed down a political compromise which cannot satisfy the interest groups who propelled the case into court.").

[70] *See, e.g.*, ROBERT F. NAGEL, THE IMPLOSION OF AMERICAN FEDERALISM 146 (2001) ("If for a moment we can drop the conventional frame that imparts a habitual sense of respectability to judicial opinions, we can see how *Planned Parenthood v. Casey* combines grandiosity and inaccuracy in a way that is not far different from the somber phoniness found in that apex of the culture of political celebrity, the presidential campaign film.").

[71] *See* Meese, *supra* note 56, at 4-5 ("[M]any influential scholars embrace the distinction drawn by modern constitutional doctrine between economic liberties and so-called personal rights. Predictably, this bifurcation between economic and other rights has led to the charge that the Supreme Court and the scholars who endorse this bifurcation have invoked substantive due process selectively, in furtherance of value choices not discernible from the Constitution."); *id.* at 11 ("If the Due Process Clause contains a substantive component, the dominant account does not provide a valid explanation for the differential treatment of economic rights and so-called personal rights, such as the right of privacy.").

invested, again, with new meaning.

Whatever one's view about whether the Due Process Clause originally embodied only a procedural guarantee or whether it contained both substantive and procedural aspects, at a minimum it is indisputable that the nature of the substantive guarantee under the clause has evolved and been reinterpreted at various points in time. Consequently, the Due Process Clause presents a prominent example of a provision using highly technical legal terminology that has undergone significant re-interpretation since its embodiment in the Constitution.[72] Indeed, when members of Congress sought to incorporate the due process guarantee in Section One of the Fourteenth Amendment, there were members of Congress who professed ignorance as to its meaning.[73] Where there is such little understanding concerning the meaning of a constitutional provision, the political barriers to judicial re-interpretation are effectively nonexistent.

B. Commerce Among the States

Another provision that has been the subject of much recent commentary in light of Supreme Court decisions such as *United States v. Lopez*[74] and *United States v. Morrison*,[75] is the Commerce Clause of Article I of the Constitution.[76] As a number of commentators have observed, the

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[72] *See, e.g.*, Harrison, *supra* note 56, at 494 (observing that "many of the most significant and controversial aspects of the Supreme Court's work are ostensibly derived from the Due Process Clauses and now bear the name substantive due process").

[73] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (comment of Rogers and response of Bingham).

[74] 514 U.S. 549, 561-63 (1995) (striking down part of the Gun-Free School Zones Act). For a powerful critique of *Lopez*, *see* NAGEL, *supra* note 70, at 17-20; *see also* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 5 (1999) ("The *Lopez* Court properly recognized its duty to enforce the restraints imposed by Article I. None of the opinions, however, provides workable guidance in discerning when those limits have been exceeded — as evidenced by the struggles of lower federal courts and Congress to ascertain the meaning and implications of *Lopez*.").

[75] 529 U.S. 598, 627 (2000) (striking down parts of the Violence Against Women Act); *see also* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 103-04 (2001) ("Now that in *United States v. Morrison* the Court has found another statute to be unconstitutional because it exceeded Congress's power under the Commerce Clause, it appears that the Court is serious about finding some limit on the power to regulate commerce among the states.").

[76] *See, e.g.*, Barnett, *supra* note 75; Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695 (1996); Bork & Troy, *supra* note 54; Jay S. Bybee, *Insuring Domestic Tranquility:* Lopez, *Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1 (1997); Steven G. Calabresi, *A Government of*

scope of congressional authority under the commerce provision has expanded dramatically in a manner that deviates significantly from the original understanding. In fact, some commentators have concluded that "the scope of the commerce power has expanded so far beyond the original understanding of that power's boundaries that any attempt to adhere strictly to its original meaning today would likely be futile and inappropriate."[77] In the process, courts have allowed Congress to regulate any activity that may have a "substantial effect" on interstate commerce.[78] In doing so, however, the courts have empowered Congress to regulate many activities that the Framers never contemplated would fall under the heading "commerce among the States."

Thus, for example, a number of legal scholars have observed that activities such as agriculture, industry, and manufacturing were thought of as distinct from commerce, or trade, and therefore were not contemplated as falling within congressional regulatory authority under the clause.[79] Similarly, commentators have convincingly argued that

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Limited and Enumerated Powers: In Defense of United States v. Lopez, 94 MICH. L. REV. 752 (1995); Stephen R. McAllister, *Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause?*, 44 KAN. L. REV. 217 (1996); Thomas W. Merrill, *Toward a Principled Interpretation of the Commerce Clause*, 22 HARV. J.L. & PUB. POL'Y 31 (1998); Nelson & Pushaw, *supra* note 74; Ronald D. Rotunda, *The Commerce Clause, the Political Question Doctrine, and* Morrison, 18 CONST. COMMENT. 319 (2001); Gordon G. Young, *The Significance of Border Crossings:* Lopez, Morrison *and the Fate of Congressional Power to Regulate Goods, and Transactions Connected with Them, Based on Prior Passage Through Interstate Commerce*, 61 MD. L. REV. 177 (2002).

[77] Bork & Troy, *supra* note 54, at 851 ("There is no possibility, today, of adhering completely to the original constitutional design. Such a daring plan would require overturning the New Deal, the Great Society, and almost all of the vast network of federal legislation and regulation put in place in the last two-thirds of the twentieth century. It appears that the American people would be overwhelmingly against such a change and no court would attempt to force it upon them."); *see also* Berger, *supra* note 76, at 695 (concluding that "the Commerce Clause has been a judicial whirligig that responds to shifting personal preferences as the Court's personnel changes. Such shifts undermine the rule of law and foster suspicion that the Constitution is merely what the fluctuating majority of the Justices says it is.").

[78] Bork & Troy, *supra* note 54, at 881 ("Beginning in 1937, the Court allowed Congress to regulate acts that have a 'substantial effect' on interstate commerce.").

[79] *Id.* at 852 ("The Commerce Clause does not seem to have granted Congress the power directly to regulate manufacturing, labor, agriculture, or industry, although the Court long ago expanded the Clause to cover such subjects."); *see also* Barnett, *supra* note 75, at 112, 146 (observing that "commerce" was meant to encompass "trade" or "exchange" and that "the use of the term 'commerce' in the drafting and ratification process was remarkably uniform"); Berger, *supra* note 76, at 702 ("The focus on trade alone was not fortuitous; the Framers were fastidious in their choice of words. For them, 'trade' did not, for example, include agricultural production, which plainly was 'local.'"); Bork & Troy, *supra* note 54, at 861 ("'Commerce' was defined in the early years of the Union as trade, intercourse, navigation, traffic, and transportation for profit."); Gary Lawson, *The Rise and*

"commerce among the States" was never intended to reach wholly intrastate activities.[80] Rather, the clause was intended primarily to ensure that the federal government could "protect commerce between the States from the discriminatory interference of self-interested States."[81] The need for such authority was evident given the experience under the Articles of Confederation where states had erected barriers to trade that were detrimental to the young nation.[82]

As in the case of the Due Process Clause, the expansion of the commerce power may be attributable to powerful political forces. As the nation continued to grow beyond a primarily agrarian society to an industrial behemoth, political forces clamored for increasing congressional regulation of economic activities.[83] Moreover, periodic instances of significant economic downturn such as the Great Depression led to calls for increased governmental action and involvement in the economy, which were associated with a concomitant expansion of the accepted reach of the commerce power. As in the case of the Due

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Rise of the Administrative State, 107 HARV. L. REV. 1231, 1234 (1994) ("The Commerce Clause clearly leaves outside the national government's jurisdiction such important matters as manufacturing (which is an activity distinct from commerce) . . . .").

Nelson and Pushaw dispute this view of the original understanding of the term "commerce": "To be sure, 'commerce' sometimes conveyed a narrower sense, referring solely to the buying and selling of goods. It is unlikely that the Constitution incorporated this limited definition, however, because contemporary writers invariably placed the phrase 'to regulate' (or 'regulations of') before 'commerce' to signify that the latter word should be given its usual broader scope. Thus, 'to regulate commerce' had a specific, standard meaning — to enact rules to govern all gainful activities, including subjects as diverse as trade, navigation, agriculture, manufacturing, industry, mining, fisheries, building, employment, wages, prices, banking, insurance, accounting, bankruptcy, business associations, securities, and bills of exchange." Nelson & Pushaw, *supra* note 74, at 17.

[80] *See, e.g.*, Nelson & Pushaw, *supra* note 74, at 44 (observing that "many prominent delegates [to the constitutional convention] made this point explicitly, interpreting 'among the several States' as applicable only to commerce that occurred 'between the states' or that otherwise affected more than one state. The Ratification debates, particularly the Federalist Papers, reflected a similar understanding").

[81] Bork & Troy, *supra* note 54, at 852; *see also* Nelson & Pushaw, *supra* note 74, at 21 ("The Framers of the Commerce Clause intended to authorize Congress to prevent states from pursuing protectionist economic policies and to promote national commerce, and the Constitution's ratifiers shared this understanding.").

[82] *See, e.g.*, Barnett, *supra* note 75, at 133 (observing that "[u]nder the Articles of Confederation, the states had 'fettered, interrupted and narrowed' the flow of commerce from one state to another by protective legislation of all sorts").

[83] *Cf.* Nelson & Pushaw, *supra* note 74, at 6 (arguing that "even if the original understanding [of the Commerce Clause] were restricted to interstate sales, the Court could not adopt it without invalidating almost every law enacted under the Commerce Clause, which would wreak havoc on America's nationally integrated economy").

Process Clause, given the rather technical meaning of the term "commerce" as used in Article I of the Constitution, it is not surprising that such political forces have not met much resistance, leading to a radical redefinition of congressional regulatory authority.

C. Privileges or Immunities

The Court's interpretation of the Privileges or Immunities Clause provides a third example of shifting interpretation of a provision using highly technical terminology, arguably motivated in part by political forces. As many commentators have observed,[84] when the Supreme Court was first asked to apply the clause to strike down local regulations governing stockyards in *The Slaughter-House Cases*,[85] the Court essentially "eviscerated" the clause by interpreting it as providing a guarantee solely of certain specific "national" privileges and immunities.[86] The Court specifically disavowed any interpretation of the clause that would guarantee more broadly all privileges and immunities enjoyed by citizens of the several states, thereby significantly limiting the scope of the clause.

The *Slaughter-House* ruling was the subject of immediate and significant scholarly criticism. It is at odds with the understanding of the drafters, and arguably the public responsible for ratifying the Fourteenth Amendment, who sought to enshrine a constitutional guarantee for certain fundamental privileges and immunities of citizenship. Moreover, the Court's interpretation is arguably at odds with the text itself. Indeed, one must strain to read any such constraint into the language of Section

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[84] *See, e.g.*, Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1599 (1995) ("Following the Court's decision in *The Slaughter-House Cases*, the Privileges or Immunities Clause was a dead letter. The Court had struck out in a direction neither side in Congress had proposed.").

[85] 83 U.S. (16 Wall.) 36, 80 (1873).

[86] *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 37, 166 (1990) (*Slaughter-House* rendered the Privileges or Immunities Clause a "dead letter"); MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 124 (1994) (noting scholarly disagreement with the *Slaughter-House* majority and concluding that the Fourteenth Amendment "was meant to include all the privileges and immunities citizens enjoy under state law"); Sanford Levinson, *Some Reflections on the Rehabilitation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 71, 73 (1989) (Supreme Court in *Slaughter-House* "ruthlessly eviscerated" the clause of "practically all operative meaning"); Smith, *Fundamental Rights*, *supra* note 24, at 271 ("Ever since the Supreme Court's ruling in *The Slaughter-House Cases*, the courts have under-applied the [Fourteenth] amendment by refusing to extend its protections to certain privileges of citizenship contemplated by the ratifiers." (footnote omitted)).

One. Nonetheless, as a result of the *Slaughter-House* decision, the Court has rarely cited the clause since as a boundary to state infringement of fundamental rights.[87]

The Court's interpretation of the Privileges or Immunities Clause in *Slaughter-House* may have been motivated, in part, by concerns that the newly-enacted Fourteenth Amendment would unduly expand the powers of the federal government at the expense of the states. In particular, the Court may have been concerned that the highly technical language of the clause might be subject to misinterpretation in subsequent decisions in a manner that would be detrimental to state powers. By constraining the text to guarantee only those privileges and immunities that were "national" in character, the Court limited federal authority over the states.

Such a ruling may have been facilitated so soon after the amendment's ratification by the highly technical language of the clause. While the phrase "privileges and immunities of citizens" had an established legal pedigree, and arguably was well understood within the legal community at the time, a more widespread understanding of such technical terms among the populace at large may have been lacking. In fact, the phrase "privileges and immunities of citizens" had been borrowed from a similar provision in Article IV, Section 2 of the original Constitution. In the decades following ratification of the Constitution those terms had received a fair amount of judicial gloss in a number of decisions under the predecessor clause.[88] Yet, even members of Congress responsible for approving Section One claimed that they were not sure of its meaning.[89]

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[87] A recent exception is the Court's decision in *Saenz v. Roe*, 526 U.S. 489 (1999). *See generally* Douglas G. Smith, *A Return to First Principles?:* Saenz v. Roe *and the Privileges or Immunities Clause*, 2000 UTAH L. REV. 305; Laurence Tribe, Saenz *Sans Prophecy: Does The Privileges or Immunities Revival Portend the Future — Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110 (1999).

[88] *See generally* Douglas G. Smith, *The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 809 (1997) (discussing case law under the Article IV Privileges and Immunities Clause prior to ratification of the Fourteenth Amendment).

[89] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866) (Sen. Johnson) ("I am decidedly in favor of the first part of the section which defines what citizenship shall be, and in favor of that part of the section which denies to a State the right to deprive any person of life, liberty, or property without due process of law, but I think it is quite objectionable to provide that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' simply because I do not understand what will be the effect of that.").

D. Establishment of Religion

The evolution of the understanding of the Establishment Clause is consistent with that of the due process, privileges or immunities, and commerce provisions. In fact, members of the Court have expressly drawn parallels between terms such as "due process" and "establishment" of religion.[90] Much like these provisions, the technical language employed in the Establishment Clause has arguably made it more susceptible to political forces advocating separationism. It is easy to see how there might be a loss of historical memory concerning a technical, legal term of art such as "establishment of religion."[91] In particular, it is easy to see how there could be a loss of historical memory concerning subtle distinctions embodied in the religion clauses between "natural rights" existing in a state of nature before the establishment of government and the "conventional rights" that were the product of government regulations.

The erosion of historical understanding of such terms over time arguably facilitated the political forces described by Professor Hamburger seeking to impose separationism as a constitutional norm. The dynamic is not dissimilar to that described in the cases above. For example, the expansion of the term "commerce" may have been due in large part to the political forces seeking a larger role for the federal government in regulating the nation's economy. Over time, various forces have viewed a stronger federal government as a necessity as the economy has become more complex and international competition has increased. Similarly, the evisceration of the Privileges or Immunities Clause may be attributable (albeit temporarily) to political forces that viewed the clause as potentially imposing too great a limitation on the state governments and a corresponding increase in federal authority. Finally, the re-interpretation of the Due Process Clause to encompass substantive norms has been criticized variously as motivated by a desire to impose certain ideological economic views or as furthering certain specific social goals.

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[90] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 620 (1992) (Souter, J., concurring) ("Like the provisions about 'due' process and 'unreasonable' searches and seizures, the constitutional language forbidding laws 'respecting an establishment of religion' is not pellucid.").

[91] In fact, commentators have maintained that "establishment" had a number of different meanings at the time the term was embodied in the constitutional text. *See, e.g.*, Witte, *supra* note 2, at 401 ("The term 'establishment of religion' was a decidedly ambiguous phrase — in the eighteenth century, as much as today. The phrase was variously used to describe compromises of the principles of separationism, pluralism, equality, free exercise, and/or liberty of conscience.").

Thus, it may be generally true that the provisions of the Constitution that revolve around certain technical terms with specific legal meanings are more readily susceptible to political forces that seek to change constitutional norms. Drafters of such provisions might expect that they would be the *least* susceptible to such re-interpretation given that they contain legal terms of art with very specific and precise legal meanings that may have been developed over centuries. In fact, however, it may be that in many cases, because the populace as a whole often is relatively unfamiliar with that background, such provisions are among the *most* susceptible to altered interpretations.[92]

One potential objection to this thesis is that there have been significant disputes concerning the meaning of provisions that arguably do not involve highly technical legal terminology. For example, one might point to the disputes over the meaning of "free exercise" of religion as used in the First Amendment as undergoing a process of re-interpretation over time.[93] Similarly, one might point to the shifting meaning attributed to the First Amendment's guarantee of "free speech," which at various times has been interpreted as merely a bar to prior restraints but now stands as a broad prohibition against many different forms of governmental interference with public speech or expression.[94]

Despite these examples, however, arguably the shift in the meaning of the provisions that employ technical legal terminology has been even more significant. For example, the shift in the meaning attributed to the Privileges or Immunities Clause, which has been all but read out of the Constitution, is demonstrably more extreme than the varied

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[92] *But cf.* Barnett, *supra* note 75, at 110 ("Constitutional constructions . . . are not wholly 'political.' The choices among possible constructions, while not dictated by original meaning interpretation, can be and often are limited by that meaning. In this way, constitutional constructions, though not identical with the text nor deduced immediately from it, are not unconnected or unconstrained by the text.").

[93] For a discussion of the various interpretations of the Free Exercise Clause over time, *see generally* SMITH, *supra* note 2.

[94] *See, e.g.*, John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 49 (1996) ("For about the last fifty years, free speech has been the pre-eminent constitutional right, continually expanded by Supreme Court justices of varying jurisprudential views to protect ever more varied and vigorous expression."); Suzanna Sherry, *All the Supreme Court Really Needs to Know It Learned from the Warren Court*, 50 VAND. L. REV. 459, 460 (1997) ("The paradigmatic protection of individual liberty is the Free Speech Clause of the First Amendment, which first received its most expansive interpretations at the hands of the Warren Court."). *But cf.* Jeffery A. Smith, *Prior Restraint: Original Intentions and Modern Interpretations*, 28 WM. & MARY L. REV. 439, 470 (1987) ("In the case of the first amendment, historical evidence supports the absolutists' position that the Framers intended that the press clause prohibit not only prior restraint, but also all content-based controls available to government.").

interpretations of freedom of speech over the years. Moreover, often the shifts in understanding regarding such apparently common terminology have been facilitated where there is some technical legal interpretation attributed to that terminology. The gloss on the First Amendment "free speech" guarantee as a bar to prior restraints is a good example. While the "free speech" terminology may have appeared common enough, the Framers may have had in mind a technical, legal interpretation of that terminology when it was embodied in the Constitution. Thus, the shift in understanding regarding "free speech" may in fact be another example where technical legal terminology (albeit terminology that may have had a more common, broadly-understood meaning) was the subject of substantial re-interpretation.

CONCLUSION

Separation of Church and State is a timely and profound critique of the accepted wisdom concerning the Establishment Clause. Professor Hamburger presents a convincing body of evidence cataloguing the influence of political forces during the nineteenth and early twentieth centuries in shaping the current interpretation of the clause as requiring a "separation" of church and state. Moreover, his account is consistent with a more general phenomenon that may be observed with respect to a number of provisions in the Constitution containing similarly technical legal terminology. Such provisions appear to be particularly susceptible to political forces advocating novel interpretations. As a result, while the drafters of such provisions might expect that they would be the least susceptible to shifting interpretation, often they appear to be the most pliable in the face of political opposition to traditional interpretations.

If any criticism may be raised regarding Professor Hamburger's book it is that it leaves the reader wanting a more extensive discussion of the affirmative explanation of the Establishment Clause's meaning. While Professor Hamburger effectively collects and analyzes the evidence in opposition to the separationist view, he does not fully present corresponding evidence concerning the accepted meaning attributed to the clause by the generation responsible for its ratification. Nonetheless, this was not the stated purpose of Professor Hamburger's book, which was more limited: to examine the origins and validity of a prominent interpretation that has garnered widespread adherence. To that end, *Separation of Church and State* is a work that must be considered in any future account of the scope and effect of the Constitution's prohibition on laws "respecting an establishment of religion."

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