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RELIGION, DIVISION, AND THE FIRST AMENDMENT

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The Priest and me, we lived by the same principles.
It was only faith [that] divided us.

William "Bill the Butcher" Cutting[1]

Introduction

Nearly thirty-five years ago, in *Lemon v. Kurtzman*, Chief Justice Warren Burger declared that state programs or policies could "excessive[ly]" – and, therefore, unconstitutionally – "entangle" government and religion, not only by requiring or allowing intrusive public monitoring of religious institutions and activities, but also through what he called their "divisive political potential."[2] Government actions burdened with such "potential," he reasoned, pose a "threat to the normal political process" and "divert attention from the myriad issues and problems that confront every level of government."[3] Chief Justice Burger asserted also, and more fundamentally, that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[4] And from this Hobbesian premise[5] about the "inten[t]" animating the First Amendment, he proceeded on the assumption that the Constitution authorizes those charged with its interpretation to protect our

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[1] THE GANGS OF NEW YORK (Miramax 2002).

[2] 403 U.S. 602, 622 (1971).

[3] *Id.* at 622, 623.

[4] *Id.* at 622.

[5] *See, e.g.*, Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1249 (2000) ("The great end of government, for Hobbes, is to prevent civil disorder.")(discussing and citing THOMAS HOBBES, LEVIATHAN pt. III, ch. 42, 43 (C.B. Macpherson ed., 1968) (1651)).

"normal political process" from a *particular kind* of strife and to purge a *particular kind* of disagreement from politics and public conversations about how best to achieve the common good.

This Article provides a close and critical examination of the argument that observations or predictions of "political division along religious lines" should supply the content, or inform the interpretation and application, of the Religion Clause. The examination is timely, not only because of the sharp polarization that is said to characterize contemporary politics, but also because of the increasing prominence of this "political division" argument. Justice Breyer, for example, in his crucial concurring opinion in one of the recent Ten Commandments cases, identified "avoid[ing] that divisiveness based on religion that promotes social conflict" as one of the "basic purposes of [the Religion] Clauses."[6] He then voted to reject the First Amendment challenge to the public display at issue in part because, in his view, to sustain it "might well encourage disputes" and "thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."[7] Justice Stevens went even further, referring to "Government's *obligation* to avoid divisiveness and exclusion in the religious sphere."[8] In another arena, a prominent young scholar has offered both a diagnosis of and a cure for our "church-state problem" – namely, that we are "Divided by God." This problem, he warns, poses a "fundamental challenge to the project of self-government."[10] In a similar vein, the religion-related cover story of a recent issue of one of our leading newsmagazines reported, "Divided, We Stand."[11] It appears that the political-divisiveness argument is and will for some time remain at the heart of our discussions about the meaning of religious freedom and the content

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[6] Van Orden v. Perry, 545 U.S. ___, Slip op. at 1 (Breyer, J., concurring).

[7] 545 U.S. ___, Slip op. at 7 (Breyer, J., concurring).

[8] *Id.* at ___, Slip op. at 3 (Stevens, J., dissenting).

[10] NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH STATE PROBLEM – AND WHAT WE SHOULD DO ABOUT IT 251 (2005). Feldman suggests, intriguingly, that "[p]erhaps . . . it might be said that God has divided us, by virtue of the profound religious diversity that we have long had and that is daily expanding. Since Madison, this diversity has often been called a blessing and a source of strength or balance, yet it also remains, as it always has been, a fundamental challenge to the project of self-government."

[11] Jay Tolson, *Divided, We Stand: America's Long Struggle to Balance Church and State Isn't Getting Any Easier*, U.S. NEWS & WORLD REP., Aug. 8, 2005, at ___.

of the First Amendment.

The inquiry and analysis that follow have empirical, doctrinal, and normative components: What, exactly, is "religiously based social conflict" – or, as the Court put it in *Lemon*, "political . . . divisiveness on religious lines"?[12] What, exactly, is the relevance of such conflict to the wisdom, morality, or constitutionality of state action? How plausible, and how normatively attractive, are the political-divisiveness argument and the "principle" it is intended to vindicate? How well do this argument and this principle cohere with the relevant text, history, traditions, and values? And what does the recent resurfacing of this argument in the Religion Clause context reveal and portend about the state and trajectory of First Amendment theory and doctrine more generally?[13]

Working through these questions, I am mindful of John Courtney Murray's warning that we should "cherish only modest expectations with regard to the solution of the problem of religious pluralism and civic unity."[14] Accordingly, while I hope this Article will contribute to our conversations about the role of religious expression, belief, believers, and institutions in public life, my more specific goal is to identify and analyze, critically, carefully, and contextually, a specific and salient line of constitutional argument.

This Article proceeds as follows: Part One sets the stage with an overview of the relevant social and political context, and also of the political-divisiveness argument's current revival. Part Two provides a comprehensive history of the argument, tracing its development and cataloging its deployments, with particular emphasis on its most detailed and significant use by Chief Justice Burger in *Lemon*. This review suggests, among other things, that the "political division along religious lines" argument (hereinafter "the Argument") has – until recently, anyway –

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[12] *Lemon*, 403 U.S. at 623.

[13] *Cf.* Steven D. Smith, *Believing Persons, Personal Believings: The Neglected Center of the First Amendment*, 2002 ILL. L. REV. 1233, 1239 n.19 (noting the "underlying unity among constitutional commitments to free expression, free exercise, and non-establishment" and that "[t]hough often treated as independent or even conflicting, these commitments have a common textual source, and a common early history, so it would be helpful to have an account that captures their common themes") (citing Prince v. Massachusetts, 321 U.S. 158, 164-65 (1944) ("[T]he great liberties insured by the First Article . . . are interwoven . . . . They have unity in the charter's prime place because they have unity in their human sources and functionings.")).

[14] JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 23 (1988).

rarely been outcome-determinative or done much real judicial work.[15] Instead, it seems to have served primarily as a rhetorical device or as a concluding flourish to the application of one or another doctrinal "tests." This account highlights, among other things, the Argument's amorphousness – or, perhaps, its adaptability. Put differently, the analytical narrative provided in Part Two reveals that not only is it unclear precisely what work the Argument *does*, it is just as unclear precisely what the Argument *is*. Accordingly, in Part Three, I unpack and re-assemble the Argument, considering a number of versions and casting it in a variety of ways. I conclude, though, that none of these variations is convincing. That concerns about "political division along religious lines" are real and reasonable does not mean that they can or should supply the enforceable content of the First Amendment's prohibition on "establishment[s]" of religion.

At the end of the day, this Article offers a reminder that – again, in Murray's words – "pluralism [is] the native condition of American society" and that the unity toward which Americans have aspired – *e pluribus unum* – is a "unity of a limited order."[16] Those who crafted our Constitution believed that both authentic freedom and effective government could be secured through checks and balances, rather than standardization, and by harnessing, rather than homogenizing, the messiness of democracy.[17] It is both misguided and quixotic, then, to employ the First Amendment to smooth out the bumps and divisions that are an unavoidable part of the political life of a diverse and free people[18]--after all, to "call for a division" is, under *Robert's Rules*, to request a vote—and, perhaps, best regarded as an indication that society is functioning well.[19]

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[15] However, Justice Breyer's recent concurring – and controlling – opinion in *Van Orden* might suggest that this is changing. *See supra* at notes 6 and 7 and accompanying text.

[16] MURRAY, *supra* note 14, at 23.

[17] *See, e.g.*, McConnell, *supra* note 5, at 1254 ("The structure of American democracy was based on pluralism and diversity—the balance of power among sects and factions—rather than on a contrived homogeneity.") (citing THE FEDERALIST No. 10 (James Madison)); JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 46-48 (2d ed. 2005) (discussing the role of "religious pluralism" in the thinking of the Founding generation).

[18] *See, e.g.*, Andrew Sullivan, *Federal Express*, THE NEW REPUBLIC, Dec. 13, 2004, at 6 ("[C]ultural polarization is emphatically not a problem. It's a sign of political health, a bellwether of a society that has not given up on debating first-principle issues of human morality."); Jonathan Rauch, *Bipolar Disorder: Is America Divided?*, ATLANTIC MONTHLY (January 2005) ("Politically speaking, our fifty-fifty America is a divisive, rancorous place. The rest of the world should be so lucky.").

[19] *See, e.g.*, CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT (2003) (contending that

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The word "religion" comes from *ligare*, which means to tie or bind together.[20] Today, however, many appear to regard religion's purported tendency to "divide" – its capacity to cause, in Chief Justice Burger's words, "political . . . divisiveness on religious lines"[21] – as its necessary, near-defining feature.[22] In the culture and in the academy, pluralism, difference, and diversity are celebrated; dissent, non-conformity, boundary-testing, and competition are, most of us agree, well and good; but the division – or worse, the "divisiveness" – allegedly fomented by religious beliefs, claims, and expression is widely seen as cause for alarm. Indeed, according to Richard Dawkins, "only the willfully blind could fail to implicate the divisive force of religion in most, if not all, of the violent

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"well-functioning societies [should] take steps to discourage conformity and to promote dissent").

[20] THE OXFORD ENGLISH DICTIONARY, Vol. XIII (2d ed. 1989); J. AYTO, DICTIONARY OF WORD ORIGINS 438 (1991). The Middle French derivative is *relier*, "to connect, fasten together." A. REY, DICTIONNAIRE HISTORIQUE DE LA LANGUE FRANCAISE 2017-18, 3161 (2000).

[21] *Lemon*, 403 U.S. at 623.

[22] *See, e.g.*, Steven G. Gey, *Unity of the Graveyard and the Attack on Constitutional Secularism*, 2004 B.Y.U. L. REV. 1005, 1011 ("Religion is *by its very nature* exclusionary, which means that *by its very nature* religion is incapable of producing . . . unity. . .. [P]olitical unity . . . is actually antithetical to religion's entire reason for existing.")(emphasis added); FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE 12 (1995) (describing the "secular individualist view" in which religion is regarded as "an irrational and regressive antisocial force that must be strictly confined to private life in order to avoid social division, violence, and anarchy"); William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L. J. 843, 854 (1993) (referring to the "'dark side' of religion and religious belief – the side of religion that is inherently intolerant and persecutory"). *See also Luke* 12:51 ("Think ye that I am come to bring peace on earth? I tell you, no; but separation.") (Douay-Rheims Ver.). *Cf., e.g.*, John C. Danforth, *Leaders Can Find Unity in What Divides Us*, ST. LOUIS POST-DISPATCH, Nov. 10, 2002 ("The root meaning of the word suggests that religion is supposed to bind us together. If this is so, then those 'religions' that are divisive should be called by another name. To call a belief that is designed to be a wedge a religion is deceptive to the point of being fraudulent."); Alan E. Brownstein, *Justifying Free Exercise Rights*, 1 U. ST. THOMAS L. J. 504, 539 (2003) ("Religion is exclusionary. It doesn't have to be, but it often is."). More recently, commenting on the Court's two Ten Commandments cases, Danforth asserted that "efforts to haul references of God into the public square, into schools and courthouses, are far more apt to divide Americans than to advance faith." John C. Danforth, *Onward Moderate Soldiers*, N.Y. TIMES, June 17, 2005, at A27 (quoted in *Van Orden*, 545 U.S. ___, Slip op. at 3 (Stevens, J., dissenting)).

enmities in the world today."[23] More specifically, because religious commitments and religion's influence are viewed by many as particularly and perniciously divisive – as Justice Souter argued recently, in one of the Ten Commandments cases, "the divisiveness of religion in current life is inescapable"[24] – they are often framed as pressing challenges for political communities, democratic theory, and constitutional law.

Indeed, the argument that "political division along religious lines"[25] is constitutionally significant – as well as politically, culturally, or aesthetically troubling – appears to be enjoying something of a comeback, after a time on the doctrinal back burner.[26] A few years ago, in *Zelman v. Simmons-Harris*, the Supreme Court of the United States held that the First Amendment permits Ohio to include religious schools in that State's school-choice program.[27] Writing for a narrow majority, Chief Justice Rehnquist concluded that Ohio had not unconstitutionally established or endorsed religion by permitting the program's low-income beneficiaries to direct their scholarship funds to otherwise-eligible religious schools.[28]

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[23] RICHARD DAWKINS, A DEVIL'S CHAPLAIN: REFLECTION ON HOPE, LIES, SCIENCE AND LOVE (2003).

[24] *McCreary*, 545 U.S. at ___, Slip op. at 33.

[25] *Lemon*, 403 U.S. at 622.

[26] *See* Mitchell v. Helms, 530 U.S. 793, 825 (2000) (plurality op.) ("The dissent resurrects the concern for political divisiveness that once occupied the Court but that post-*Aguilar* cases have rightly disregarded."). *But see id.* at 872 n. 2 (Souter, J., dissenting) ("The Court may well have moved away from considering the political divisiveness threatened by particular instances of aid as a practical criterion for applying the Establishment Clause case by case, but we have never questioned its importance as a motivating concern behind the Establishment Clause, nor could we change history to find that sectarian conflict did not influence the Framers who wrote it.").

[27] 536 U.S. 639 (2002).

[28] According to the Chief Justice, "the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious." *Zelman*, 536 U.S. at 662-63.

In my view, *Zelman* was correctly decided and defensibly reasoned, and the decision's conclusion and premises are normatively attractive. *See generally* Richard W. Garnett, *The Right Questions About School Choice: Education, Religious Freedom, and the Common Good*, 23 CARDOZO L. REV. 1281 (2002); Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 TEX. REV. LAW & POLITICS 301 (2000); Richard W. Garnett, Brown*'s Promise, Blaine's Legacy*, 17 CONST. COMM. 651 (2000) (reviewing JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (1999)). For a comprehensive analysis of the *Zelman* decision and opinions, *see, e.g.*, Mark Tushnet, *Vouchers After* Zelman, THE SUPREME COURT REVIEW 1 (2002); Ira C. Lupu & Robert W. Tuttle, Zelman*'s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE

Justice Breyer dissented, writing separately "to emphasize the risk that publicly financed voucher programs pose in terms of religiously based social conflict" and to note his belief that, whatever the policy merits of such programs,[29] the need to "protect[] the Nation's social fabric from religious conflict pose[d] an overriding obstacle" to the Ohio experiment.[30]

For Justice Breyer, in other words, avoiding "religiously based social conflict" and "social dissension" is not merely a policy desideratum, or the irenic aspiration of prudent leaders and civic-minded citizens, or an injunction of political morality.[31] It is, instead, a fundamental "principle" of Religion Clause jurisprudence.[32] And while he seemed careful to avoid embracing a strict, no-aid form separationism,[33] Justice Breyer nonetheless warned that:

[i]n a society composed of many different religious creeds, I fear

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DAME L. REV. 917 (2003); and Thomas C. Berg, *Vouchers and Religious Schools, The New Constitutional Questions*, 72 U. CINN. L. REV. 151 (2003).

[29] *Zelman*, 536 U.S. at 717 (Breyer, J., dissenting) (noting that Ohio's voucher program was "well-intentioned").

[30] *Ibid.* Justice Breyer also repeatedly voiced concerns about "divisiveness" during the oral arguments in the Ten Commandments cases, *Van Orden v. Perry* and *McCreary County v. American Civil Liberties Union of Kentucky*. Transcript of Oral Argument, *Van Orden v. Perry* (03-1500), at *16 ("There is no way to [determine whether the government has gone too far in allowing a religious display] other than to look at the divisive quality of the individual display case by case. And when I do that, I don't find much divisiveness here."); Transcript of Oral Argument, *McCreary County v. ACLU* (03-1693), at *34-35 ("The government is not absolutely forbidden by the establishment clause to recognize the religious nature of the people nor the religious origins of much of our law . . . but it's easy to go too far and . . . you are [treading] on eggs to become far more divisive than you hoped and really end up with something worse than if you stayed out in the first place. In other words, it's a very delicate matter and it's very easy to offend people.").

[31] *See* Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Is Not Illegitimate in a Liberal Democracy*, 36 WAKE FOREST L. REV. 217, 229 (2001) (distinguishing, for purposes of the debate over the role of religiously grounded arguments in public discourse, between the demands of constitutional law and those of a liberal democracy's political morality).

[32] *Zelman*, 536 U.S. at 723, 724 (Breyer, J., dissenting).

[33] "Separation" and "separationism" are, in the context of legal and academic conversations about religious freedom and the Religion Clause, more complex notions than this introductory characterization of Justice Breyer's aims suggests. *See generally, e.g.*, PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002); Douglas Laycock, *The Many Meanings of Separation*, 70 U. CHI. L. REV. 1667 (2003) (reviewing HAMBURGER, *supra*); John Witte, Jr., *That Serpentine Wall of Separation*, 101 MICH. L. REV. 1869 (2003) (reviewing HAMBURGER, *supra*); Steven D. Smith, *Separation as a Tradition*, 18 J. L. & POL. 215 (2002); Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994).

> that this present departure [*i.e.*, upholding Ohio's voucher program] from the Court's earlier understanding risks creating a form of religiously based social conflict potentially harmful to the Nation's social fabric. . . . [T]he Establishment Clause was written in part to avoid this kind of conflict[.][34]

Justice Breyer's point, then, is not simply that absence of such strife is a happy result of scrupulous judicial enforcement of the Establishment Clause – *i.e.*, one that confirms the Clause's wisdom and policy merits – or a motivating hope of those who drafted and ratified it. Instead, his claim is that the identification, prevention, and elimination of "religious strife" are integral parts of the Court's interpretive, expositive, and enforcement tasks. That is, the construction of a "social fabric" free of "religiously based social conflict" is more than a desirable result of obeying and enforcing our Constitution's no-establishment command—it is the command itself.[35]

Now, in *Zelman*, Chief Justice Rehnquist responded only briefly to Justice Breyer's invocation of the "invisible specters of 'divisiveness' and 'religious strife.'"[36] With respect to the proposed constitutional "principle"

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[34] *Zelman*, 536 U.S. at 728-29 (Breyer, J., dissenting). Justice Breyer also stated that, in a "society as religiously diverse as ours, we must rely on the Religion Clauses of the First Amendment to protect against religious strife." *Id.* at 725 (Breyer, J., dissenting). *See also id.* at 686 (Stevens, J., dissenting) ("I have been influenced by my understanding of the impact of religious strife on the decisions of our forebears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another. Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy."); *id.* at 716-717 (Souter, J., dissenting) (stating that "[i]f the divisiveness permitted by today's majority is to be avoided in the short term, it will be avoided only by action of the political branches").

Professor Feldman, in *Divided By God*, endorses Justice Breyer's view, insisting that "state financial aid for religious institutions does not encourage common values; it creates conflict and division." He warns also that legislative and other debates about the details of voucher programs are a "recipe for real and deep division." FELDMAN, *supra* note 9, at 245, 246. I disagree. *See, e.g.*, Garnett, *The Right Questions*, *supra* note 28, at 1299-1300.

[35] *See, e.g.*, Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 198 (1992) (noting that the Establishment Clause "extinguished" "inter-denominational strife"); *id.* at 209-10 (contending that the Establishment Clause forbids certain government measures "*because* [they] cause profound divisiveness and offense") (emphasis added). *Cf.* Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 125 (2002) (stating that "[e]ndorsing some citizens' [religious] beliefs and repudiating others, as [Justice Scalia's reading of the Establishment Clause] would do, would be politically divisive[,]" and therefore "out of sync with the reasons for the the Establishment Clause").

[36] 536 U.S. at 662 n.7. Chief Justice Rehnquist had previously expressed skepticism about the constitutional relevance in Religion Clause cases of "political divisiveness." *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 617 n.14 (1988)("We also disagree with the

of "avoiding religiously based social conflict," the Chief Justice thought it was "unclear exactly what sort of principle Justice Breyer [had] in mind, considering that the program has ignited no 'divisiveness' or 'strife' other than this litigation."[37] He also wondered "where [in the Constitution] Justice Breyer would locate [the] presumed authority to deprive Cleveland residents of a program that they have chosen but that we subjectively find 'divisive.'"[38] Here, the Chief Justice might just as well have quoted Chief Justice Burger's concession in *Lemon* that, "[o]rdinarily[,] political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government[.]"[39] Judicial squeamishness toward contentious and messy politics, he might have suggested, is not a particularly sound doctrinal tool, let alone a reliable constitutional benchmark.[40]

Still, Justice Breyer's arguments and concerns seem to fit the times: In the popular press and culture, hardly a day goes by without bold-print, full-volume reminders from pollsters and pundits that American society is fractured, split, polarized, partisan – even at "war"[41]; and that it is, about

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District Court's conclusion that the AFLA is invalid because it is likely to create political division along religious lines. . . . It may well be that because of the importance of the issues relating to adolescent sexuality there may be a division of opinion along religious lines as well as other lines. But the same may be said of a great number of other public issues of our day."); Mueller v. Allen, 463 U.S. 388, 403 n.11 (1983) (stating that the question of "political divisiveness" should be "regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools.").

[37] *Zelman*, 536 U.S. at 662 n.7. Justice O'Connor made a similar point, nearly 20 years ago, dissenting in *Aguilar:* "It is curious indeed to base our interpretation of the Constitution on speculation as to the likelihood of a phenomenon which the parties may create merely by prosecuting a lawsuit." Aguilar v. Felton, 473 U.S. 402, 429 (1985), *overruled*, Agostini v. Felton, 521 U.S. 203 (1997).

[38] *Zelman*, 536 U.S. at 662 n.7.

[39] *Lemon*, 403 U.S. at 622. *Cf.* Steven J. Heyman, *Ideological Conflict and the First Amendment*, 78 CHI.-KENT L. REV. 531, 559 (2003) (suggesting that "conflict" between "differing views of justice and the common good" is an "inherent part of law and politics in a liberal democratic society").

[40] *See* Frank Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337, 1359 (1990) (criticizing, as "idolatry," the "kind of aversion and squeamishness towards open political conflict displayed by [supporters of a Flag-burning amendment]"); *cf., e.g.*, Rochin v. California, 342 U.S. 165, 172 (1952) ("[T]he proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience."). *See also* Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 717 (2001) (noting that "in the political realm, we cling . . . tenaciously to the fear that too much politics, or too competitive a political system, will bring instability, fragmentation, and disorder").

[41] *See, e.g.*, JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE

many things and in many ways, "divided."[42] We are, according to Gertrude Himmelfarb, "One Nation, Two Cultures."[43] We are, political guru Michael Barone tells us, "Hard America" and "Soft America."[44] We are, as commentator David Brooks and many others have colorfully described,[45] Bobos and Patio Men, Left Coast and Flyover Country, Metro and Retro, *Fahrenheit 911* and *The Passion*,[46] Bible and Porn Belts, Latte and Sprinkler Towns, Wal-Mart and Whole Foods,[47] "values evangelicals" and "legal secularists,"[48] even Roundheads and Cavaliers.[49] United we stand, perhaps; seated at table, though, we seem intractably divided by Brooks's "meatloaf line."[50] Even our book-buying habits, *The New York Times* reported not long ago, reveal a sharply and starkly "polarized nation"; in

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AMERICA (1991).

[42] *See, e.g.*, ROGER SIMON, DIVIDED WE STAND: HOW AL GORE BEAT GEORGE BUSH AND LOST THE PRESIDENCY (2001).

[43] GERTRUDE HIMMELFARB, ONE NATION, TWO CULTURES: A SEARCHING EXAMINATION OF AMERICAN SOCIETY IN THE AFTERMATH OF OUR CULTURAL REVOLUTION (2001). *See also, e.g.*, STANLEY B. GREENBERG, TWO AMERICAS: OUR CURRENT POLITICAL DEADLOCK AND HOW TO BREAK IT (2004); David Von Drehle, *Political Split Is Pervasive*, WASH. POST, April 25, 2004, at A1 ("American politics appears to be hardening into uncompromising camps, increasingly identified with the two parties."); David Finkel, *For a Conservative, Life Is Sweet in Sugar Land, Tex.*, WASH. POST, April 26, 2004, at A1 (profiling one of the Nation's "reddest" counties); David Finkel, *A Liberal Life in the City by the Bay*, WASH. POST, April 27, 2004, at A1 (profiling one of the Nation's "bluest" areas); E.J. Dionne, *One Nation, Deeply Divided*, WASH. POST, Nov. 7, 2003, at A31 ("The red states get redder, the blue states get bluer, and the political map of the United States takes on the coloration of the Civil War.").

[44] MICHAEL BARONE, HARD AMERICA, SOFT AMERICA: COMPETITION VS. CODDLING AND THE BATTLE FOR AMERICA'S FUTURE (2004).

[45] Brooks is one of the sharpest and most amusing observers and interpreters of contemporary American society's features and fault lines. *See generally, e.g.*, DAVID BROOKS, ON PARADISE DRIVE: HOW WE LIVE NOW (AND ALWAYS HAVE) IN THE FUTURE TENSE (2004); DAVID BROOKS, BOBOS IN PARADISE: THE NEW UPPER CLASS AND HOW THEY GOT THERE (2001); David Brooks, *One Nation, Slightly Divisible*, THE ATLANTIC MONTHLY (Dec. 2001); David Brooks, *People Like Us*, THE ATLANTIC MONTHLY (Sept. 2003).

[46] Sharon Waxman, *Two Americas of "Fahrenheit" and "Passion,"* N.Y. TIMES, July 13, 2004, at B1.

[47] *See* William Powers, *The Great Shopping Divide*, NATIONAL JOURNAL, Dec. 11, 2004, at 3700 ("Are you a Wal-Mart person, or a Whole Foods person?").

[48] NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM, AND WHAT WE SHOULD DO ABOUT IT 7-8 (2005).

[49] Joel Kotkin, *A Nation Divided*, WASH. POST, March 28, 2004, at ___ (comparing the state of political affairs in mid-17th century England to those that obtain in the United States today).

[50] David Brooks, *One Nation, Slightly Divisible*, *supra* note 45("I've crossed the Meatloaf Line; from here on there will be a lot fewer sun-dried-tomato concoctions on restaurant menus and a lot more meatloaf platters.").

line at Borders and Barnes & Noble, we are still two Americas, "Red" and "Blue."[51] These alleged two Americas have different radio networks,[52] they live in increasingly segregated counties,[53] they use different on-line dating services,[54] they inhabit and move through different parts of the "blogosphere,"[55] and it has even been suggested that they ought to fly different airlines.[56] The cultural cleavage is so deep, some say, that meaningful disagreement and argument are no longer possible.[57]

To be sure, these "two cultures" and "Red State, Blue State" arguments are controversial and contestible. The political-polarization thesis should not be pushed too far, and our divisions should not be exaggerated.[58] Nonetheless, there would seem to be no avoiding the fact

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[51] *Readers Split, Left, Right (And Center)*, N.Y. TIMES, March 13, 2004, at B7 ("A study of purchase patterns of political books reveals that buyers of liberal books . . . tend to buy only other liberal books, while buyers of conservative books . . . usually buy only other conservative books.").

[52] *See* Howard Kurtz, *Making a Left at the Mike: New Liberal Network To Take Liberal Leap*, WASH. POST, Mar. 21, 2004, at D1.

[53] *See* Bill Bishop, *The Growing Cost of Political Uniformity*, AUSTIN AM.-STATESMAN, April 8, 2004, at A-1 (noting that "[m]ost Americans live in counties that haven't changed their party preference in presidential elections in more than a generation" and, in recent decades, "[p]lace aligned with ideology, which aligned with party. Like-minded people came to live in the same place, which made it more likely that the group would polarize."); David Brooks, *People Like Us*, ATLANTIC MONTHLY (Sept. 2003) ("[E]very place becomes more like itself. . . . Once [people] find a town in which people share their values, they flock there, and reinforce whatever was distinctive about the town in the first place.").

It is worth noting, though, that American counties – and particularly suburban ones – are increasingly *less* segregated on the basis of race. According to data compiled by John Logan of the Mumford Center for Comparative Urban and Regional Research, segregation between blacks and whites at the county level declined by 3.7 percent during the same time that segregation by major-party affiliation increased by 47 percent.

[54] Noah Schachman, *Online Matchmakers Give Dating a Partisan Tilt*, N.Y. TIMES, July 22, 2004, at G8.

[55] Lada Adamic & Natalie Glance, *The Political Blogosphere and the 2004 U.S. Election: Divided They Blog* (March 4, 2005) (on file with author).

[56] David Brooks, *Fly the Partisan Skies*, N.Y. TIMES, April 6, 2004, at A23.

[57] CHRISTOPHER LASCH, THE REVOLT OF THE ELITES 80-81 (1995) ("Having sealed [ourselves] off from arguments and events that might call [our] own convictions into question, . . . "[w]e no longer attempt to engage [our] adversaries in debate.").

[58] *See, e.g.* MORRIS P. FIORINA ET AL., CULTURE WAR? THE MYTH OF A POLARIZED AMERICA (2005); ALAN WOLFE, ONE NATION AFTER ALL: WHAT AMERICANS REALLY THINK ABOUT GOD, COUNTRY, FAMILY, RACISM, WELFARE, IMMIGRATION, HOMOSEXUALITY, WORK, THE RIGHT, THE LEFT, AND EACH OTHER (2000); Jonathan Rauch, *Bipolar Disorder: Is America Divided?*, ATLANTIC MONTHLY (January 2005) ("America today is divided over the question whether America is divided."); Michael Robinson & Susan Ellis, *Purple America*, WEEKLY STANDARD, August 16 & 23, 2004, at

that, as Justice Breyer feared, our social and political fault-lines often trace, even if they are not reducible or even attributable to, religious convictions and denominational differences. "We are," Professor Feldman has recently observed, "increasingly, a nation divided by God."[59] In Barone's words, "Americans increasingly vote as they pray, or don't pray."[60] Accordingly, two other social scientists have proposed that one of our two major political parties is most usefully and accurately characterized as "secularist."[61] And, as if to return the favor, members of that party are sometimes heard to charge that the other, presumably non-"secularist," party is in the grip of the "Taliban wing of American politics."[62]

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27 ("The theory of red states versus blue states is about as wide of the mark as it is widely accepted."); John Tierney, *A Nation Divided? Who Says?*, N.Y. TIMES, June 13, 2004, at ___; Robert J. Samuelson, *Polarization Myths*, WASH. POST, Dec. 3, 2003, at A29 ("What's actually happened is that our political and media elites have become polarized, and they assume that this is true for everyone else. It isn't.").

[59] FELDMAN, *supra* note 9, at 235.

[60] Amy Sullivan, *Do The Democrats Have a Prayer?*, WASH. MONTHLY (June 2003) ("Today, conventional wisdom holds that the best way to predict a person's party affiliation is to ask how often they go to church. As political commentator Michael Barone has noted, 'Americans increasingly vote as they pray, or don't pray.'"). A widely noted Pew Forum study appears to confirm Barone's quip. *See* The Pew Forum on Religion and Public Life, *Religion and Politics: Contention and Consensus* (July 24, 2003) ("Religion is a critical factor these days in the public's thinking about contentious policy issues and political matters."). A more recent Pew Forum study confirms that "[b]y far the most powerful new reality at the intersection of religion and politics is this: Americans who regularly attend worship services and hold traditional religious views increasingly vote Republican, while those who are less connected to religious traditions and more secular in their outlook tend to vote Democratic." The Pew Forum on Religion and Public Life, *Religion and Public Life: A Faith Based Partisan Divide* (Jan. 2005). *See also, e.g.*, The Pew Research Center for the People and the Press, *Evenly Divided and Increasingly Polarized: 2004 Political Landscape* (Nov. 5, 2003) ("[T]his remains a country that is almost evenly divided politically yet further apart than ever in its political values."); James L. Guth, *et al.*, *America Fifty / Fifty*, FIRST THINGS 19-26 (October 2001) ("[T]here is a new religious order in American electoral politics, one characterized not only by the distinctive partisanship of religious traditions, but also by theological polarization within the nation's three largest traditions."); *ibid.* ("Religion played a key role in determining both the partisan polarization and the disengagement that characterized the public in 2000.").

[61] Louis Bolce and Gerald DeMaio, *Our Secularist Democratic Party*, THE PUBLIC INTEREST (Fall 2002). Sociologist Alan Wolfe, however, suggests that the Democratic Party is itself "divide[d]" over the question of "religion . . . and the role it ought to play in public life." Alan Wolfe, *The God Gap: How Religion Divides the Democrats*, THE BOSTON GLOBE, Sept. 19, 2004.

[62] *See, e.g.*, *Democrats Eye Janklow's House Seat*, WASH. POST, May 31, 2004, at A6 (noting Sen. Tim Johnson's expressed desire to "send a message to the 'Taliban wing' of the Republican party"); Charles Krauthammer, *What Makes the Bush Haters So Mad?*, TIME, Sept. 22, 2003 (noting that Julian Bond of the N.A.A.C.P. "speaks of [President] Bush's staffing his Administration with 'the Taliban wing of American politics'"). *See also* Bolce & DeMaio, *supra* note 61 (contending that "[o]ne has to reach back to pre-New

Justice Breyer's solicitude for our "social fabric" and his concern about "social dissension" resonate not only with the hand-wringing of cultural critics and with internet-salon chatter. They are timely in other ways, too. For example, an exchange between Chief Justice Rehnquist and *pro se* litigant Michael Newdow regarding the assertedly "divisive" character of the terms "Under God" was among the highlights of the oral arguments in the Pledge of Allegiance case a few years ago.[63] In her concurring opinion in that case, Justice O'Connor found support for her view that the Pledge is constitutionally permissible in her observation that "the practice has been employed pervasively without engendering significant controversy."[64] And, of course, the deciding fifth vote to allow a Ten Commandments monument on the grounds of the Texas State Capitol hinged on Justice Breyer's conclusions that, on balance, and all things considered, the "display [was] unlikely to prove divisive" and that, in fact, a ruling *against* the display could "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."[65]

Deal America, when political divisions between Catholics and Protestants encapsulated local ethno-cultural cleavages over Prohibition, immigration, public education, and blue laws, to find a period when voting behavior was influenced by [the current] degree of antipathy toward a religious group [*i.e.*, 'fundamentalists']").

[63] Elk Grove Unified Sch. Dist. v. Newdow, Transcript of Oral Argument, March 24, 2004. Mr. Newdow observed that "the country went [berserk] because people were so upset that God was going to be taken out of the Pledge of Allegiance," and suggested that this fact tended to show that the inclusion by Congress of the term "Under God" in the Pledge was "divisive." *Id.* at 44. Chief Justice Rehnquist then asked "what the vote was in Congress apropos of divisiveness to adopt the Under God phrase?" *Ibid.* When told by Mr. Newdow that the vote was "apparently unanimous," the Chief Justice observed wryly, "Well, that doesn't sound divisive." *Ibid.* Mr. Newdow's retort – "that's only because no atheist can get elected to public office" – was apparently greeted with boisterous applause. *Id.* at 44-45.

[64] Elk Grove Unified School District v. Newdow, 542 U.S. 1, 61 (2004) (O'Connor, J., concurring in the judgment). Indeed, she continued, "[g]iven the vigor and creativity of [Establishment Clause challenges over the years], I find it telling that so little ire has been directed at the pledge." *Id.* at 63.

[65] *Van Orden*, 545 U.S. ___, Slip op. at 7 (Breyer, J., concurring). *Cf.* Slip op. at 11 (Souter, J., dissenting) ("I doubt that a slow walk to the courthouse, even one that took 40 years, is much evidentiary help in applying the Establishment Clause.").

Justice Breyer's conclusion that, on balance, the divisiveness "costs" of removing the display were likely to outweigh removal's cohesiveness "benefits" is consonant with the argument – advanced, for example, by both Chris Eberle and Michael Perry – that the "disivenessness" argument against the employment of religiously grounded moral arguments is, in the end, a consequentialist argument. *See* MICHAEL J. PERRY, UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY 155-56 n. 12, 162 n. 41 (2003) (discussing, *inter alia*, e-mail correspondence with Chris Eberle).

It is worth noting that the theme sounded in these and other Religion Clause cases is consonant with a number of important debates and developments in First Amendment law: In recent court decisions and scholarship addressing campaigns, advertising, political parties, and elections – and particularly in the commentary, advocacy, and litigation surrounding the "Bipartisan Campaign Reform Act"[66] – the argument is often pressed that the First Amendment not only permits, but also implies and perhaps even requires, government action aimed at managing benevolently the arena, content, and tone of political discourse.[67] On this view, excessive divisiveness is a form of what Professor Meiklejohn called "mutilation of the thinking process of the community," against which, he believed, "the First Amendment . . . is directed."[68] With respect to the Court's government-speech and public-forum lines of cases,[69] a similar claim seems to be at the heart of the tension between what Professors Volokh and BeVier have called an "enhancement" or "elite management" model, on the one hand, and a "distortion" model, on the other.[70] The increasing uneasiness in some quarters with relying solely on counter-speech and thick skins to remedy the pain and offense, and the strife and division, caused by racist expression and hateful speech seems also of a piece with Justice Breyer's division-based Establishment Clause argument.[71] Even the controversy surrounding the Boy Scouts' asserted expressive-association right to exclude openly gay Scout leaders and spokesmen might fairly be cast as a debate about how far into civil society,

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[66] Bipartisan Campaign Reform Act of 2002, 116 Stat. 81 (2002).

[67] *See, e.g.*, Hon. Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 252-53 (2002) ("The First Amendment's constitutional role is not simply one of protecting the individual's 'negative' freedom from governmental restraint. The Amendment in context also forms a necessary part of a constitutional system designed to sustain that democratic self-government. The Amendment helps to sustain the democratic process both by encouraging the exchange of ideas needed to make sound electoral decisions and by encouraging an exchange of views among ordinary citizens necessary to their informed participation in the electoral process.").

[68] ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 28 (1960).

[69] *See generally, e.g.*, Richard W. Garnett, *Less Is More: Justice Rehnquist, the Freedom of Speech, and Democracy, in* C. BRADLEY, ED., THE REHNQUIST LEGACY (forthcoming 2005); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377 (2001); Randall P. Bezanson, *The Government Speech Forum:* Forbes *and* Finley *and Government Speech Selection Judgments*, 83 IOWA L. REV. 953 (1998); Michael W. McConnell, *The Selective Funding Problem: Abortion and Religious Schools*, 104 HARV. L. REV. 989 (1991).

[70] *See* Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258 (1994); Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 118 (1992); Eugene Volokh, *Shift Shows*, NATIONAL REVIEW ONLINE, June 28, 2002.

[71] *See, e.g.*, OWEN M. FISS, THE IRONY OF FREE SPEECH (1998).

and into the realm of voluntary associations, the government's discourse-shaping authority and anti-"division" efforts may reach.[72]

These and other developments might seem to provide support for Roberto Unger's observation, a decade ago, that one of the "dirty little secrets of contemporary jurisprudence" is "its discomfort with democracy."[73] But one need not question the "comfort" of scholars like Owen Fiss[74] and Cass Sunstein[75] with democracy to note the consonance between the political-divisiveness argument, on the one hand, and positions they and others have staked out and defended regarding the extent to which the First Amendment not only authorizes, but perhaps even demands, efforts by government to "promot[e] a well-functioning system of free speech."[76] In a similar vein, the recent publication – to glowing reviews[77] – of Justice Stephen Breyer's Tanner Lectures confirms that we can expect continued and vigorous defenses of the role of courts in interpreting and applying the Constitution, and in employing the power of judicial review, to promote conditions in society and capacities in citizens that are thought – by Justice Breyer, anyway – conducive to better politics.[78] At the same

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[72] Boy Scouts of America v. Dale, 530 U.S. 640, 664 (2000) (Stevens, J., dissenting) (noting that "every state law prohibiting discrimination is designed to replace prejudice with principle").

[73] ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 72 (1996). Unger notes that this "discomfort with democracy shows up in every area of contemporary legal culture," including "in an ideal of deliberative democracy as most acceptable when closest in style to a polite conversation among gentlemen in an enghteenth-century drawing room[.]" ID. at 72-73.

[74] *See, e.g.*, FISS, *supra* note 71 at 19 ("The phrase 'freedom of speech' implies an organized and structured understanding of freedom, one that recognizes certain limits as to what should be included and excluded. This is the theory upon which speech regulation that aims to protect national security or public order is sometimes allowed; it should be equally available when the state is trying to preserve the fullness of debate. Indeed, the First Amendment should be more embracing of such regulation, since that regulation seeks to further the democratic values that underlie the Amendment itself.").

[75] *See, e.g.*, CASS SUNSTEIN, REPUBLIC.COM 200 (2001) ("For citizens in a republic, freedom requires exposure to a diverse set of topics and opinions. This is not a suggestion that people should be forced to read and view materials that they abhor. But it is a claim that a democratic polity, acting through democratic organs, tries to promote freedom, not simply by respecting consumer sovereignty, but by creating a system of communication that promotes exposure to a wide range of issues and views."). *See also* ID. at 142 ("My basic argument . . . is that the free speech principle, properly understood, . . . does not bar government from taking steps to ensure that communications markets serve democratic self-government and other important social values.").

[76] SUNSTEIN, *supra* note 19 at 109.

[77] *See, e.g.*, Benjamin Wittes, *Memo to John Roberts*, WASH. POST, Sept. 25, 2005, at BW 05; Cass Sunstein, *The Philosopher-Justice*, THE NEW REPUBLIC, Sept. 19, 2005.

[78] STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC

time, Richard Pildes, Mark Tushnet, and others have expressed and developed their concern that, "in the political realm, judges and others cling . . . tenaciously to the fear that too much politics, or too competitive a political system, will bring instability, fragmentation, and disorder."[79]

Returning to *Zelman:* the Chief Justice was correct to observe that the Court in recent years has "disregarded" – or, at least, carefully cabined – the "concern for political divisiveness that once occupied the Court[.]"[80] At the same time, though, Justice Breyer was able to marshal a number of precedents, and a plausible historical narrative, to support his proffered no-strife "principle." His observation in *Van Orden* that a "basic purpose[]" of the Religion Clause was to "avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike" would seem to enjoy similar support.[81] And so, Chief Justice Rehnquist's (perhaps rhetorical) questions need to be answered: "What sort of principle" *did* Justice Breyer have in mind, and where *would* he locate the Court's "authority to deprive Cleveland residents of a program that they have chosen but that [the Justices] subjectively find 'divisive'"? This Article seeks to answer these and other questions.

CONSTITUTION (2005). *See also* Breyer, *supra* note 67.

[79] Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 130 (2004) ("In my view, constitutional law should be oriented more toward the dangers of legislative and partisan self-entrenchment and less toward a perceived judicial need to ensure a democratic stability adequately secured already by the underlying institutional structures of American democracy."). *See also, e.g.,* Mark TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

[80] *Zelman*, 536 U.S. at 662 n.7 (quoting *Mitchell*, 530 U.S. at 825 (plurality op.)).

[81] *Van Orden*, 545 U.S. ___, Slip op. at 1. I should emphasize here that it is not necessary, for purposes of this Article's critique of the political-divisiveness argument, to dispute that many of those who called for, drafted, debated, and ratified the First Amendment hoped that the provision would, among other things, forestall or reduce strength-sapping, religion-based social conflict. Professor Feldman supplies a nice quotation, from an "anonymous Virginia Federalist" who brushed off concerns that Congress might establish religion: Such a move, he said, would "disturb the union, [] destroy justice, excite civil commotions and religious feuds, and [] annihilate religious liberty." Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 400 (2002) (citation omitted). Still, as Justice Brennan observed, concurring in *McDaniel*, "[t]he mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a [less preferred] status[.]" *McDaniel*, 435 U.S. at 640 (Brennan, J., concurring). What's more, Kurt Lash has observed that "[w]hatever constitutional life 'political divisiveness' had at the Founding, it was extinguished with the passage of the Fourteenth Amendment. . . . [T]hose who supported the Fourteenth Amendment not only intended to protect 'divisive' political / religious activity, they most likely celebrated its most recent accomplishment.").

II.

The prominence of concerns about religion and division in Justice Breyer's opinions in *Zelman* and *Van Orden*, and in popular and political discourse more generally, suggests a renewal of interest in the Argument. Before turning to the Argument's content and the implications of its revival, I sketch in this Part its genealogy, canvassing its pre-*Lemon* roots and antecedents as well as its post-*Lemon* deployment and development.

A. The Origins of the Argument

To be sure, warnings about division, and calls for unity, are nothing new: Madison famously warned, after all, in his *Memorial and Remonstrance*, that "intermedd[ling] with Religion" by government could only "destroy . . . moderation and harmony" and was an "enemy to the public quiet."[82] They have long been a staple of American politics and even the American creed. The same is true of concerns about the alleged balkanizing effects of religion and about the tendency of religious belief and expression to unsettle, by spilling over into, political life. (Of course, it is no less true that American leaders and citizens have turned and appealed to faith – a broad, non-sectarian faith – as a vehicle for arriving at civic unity.[83]) Thus, the separationism of Thomas Jefferson and other turn-of-the-Century Republicans reflected, at least in part, their irritation at the political effects of Federalist clergy's preaching.[84] After the Civil War, the

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[82] J. Madison, *Memorial and Remonstrance Against Religious Assessments* (1785). In an October 3, 1785 letter to George Mason, George Washington sounded a similar tone, expressing his wish that the Assessment Bill – about which he was not particularly "alarmed" -- "could die an easy death," which would "be productive of more quiet to the State, than by enacting it into a Law."

[83] *See, e.g.*, Robert N. Bellah, *Civil Religion in America*, 96 DAEDALUS 1 (1967) (citing and discussing, *inter alia*, Lincoln's Second Inaugural and Gettysburg Addresses). *See also* Martin E. Marty, *The Widening Gyres of Religion and Law*, 45 DEPAUL L. REV. 651, ___ (1996) ("The eighteenth-century framers of constitutionalism . . . made clear during three decades of argument . . . that they did understand religion's potential for defining and 'binding' a people, just as it had the potential for unsettling them and being disruptive in their civic life.").

[84] *See, e.g.*, HAMBURGER, *supra* note 33, at 111-43. As Professor Hamburger puts it, "Federalist ministers felt obliged to bring their faith to bear upon party politics, especially against the man who . . . was notorious for suggesting that religion and morality and thus also religion and politics were specialized, less than fully integrated, features of human life." *Id.* at 112. At the same time, some Republicans warned – also foreshadowing contemporary discussions – that "[p]olitical wranglings, and party strife . . . [would] inflict . . . deep and dangerous wounds" on religious communities and congregations. *Id.* at 131.

tumult surrounding the threats to American nationhood thought to be posed by Catholic immigration and religion often included prominent and passionate invocations of unity, and denunciations of division and sectarianism.[85] James Blaine, for instance, highlighting the need for the proposed constitutional amendment that bears his name, insisted that the Grant-era debates over the school question "inevitably arouse[] sectarian feelings, and lead[] to the bitterest and most deplorable of all strifes, the strifes between religious denominations."[86] Later, during another time of national reflection about unity and cohesion, public intellectuals like Paul Blanshard lamented the persistence and influence of Catholic schools, "the most important divisive instrument[s] in the life of American children."[87] This complaint was consonant with Justice Frankfurter's call in *McCollum* that, in the interest of "promoting our common destiny" through the public schools, these schools must be purged and protected of all "divisive forces."[88] Indeed, as Professor Feldman has described, a concern for the construction and maintenance of "national unity," religious pluralism notwithstanding, runs through a number of Justice Frankfurter's mid-Century opinions.[89] He wrote, for example, in the *Gobitis* case that "[t]he ultimate foundation of a free society is the binding tie of cohesive sentiment," emphasizing that "the flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution."[90]

It still remained, though, for these and the many other strands of anti-division, civic-unity arguments to be captured and operationalized in

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[85] *See generally, e.g.*, CHARLES L. GLENN, THE MYTH OF THE COMMON SCHOOL (1988); LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL (1987); JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM: A HISTORY 91-126 (2003); ID. at 93 (noting the worry of many "leading Republican politicians, ministers, and editors" that "an international church threatened national unity").

[86] Quoted in FELDMAN, DIVIDED BY GOD, *supra* note 9, at 75.

[87] *Id.* at 166 (quoting PAUL BLANSHARD, AMERICAN FREEDOM AND CATHOLIC POWER (1949).

[88] Illinois *ex rel.* McCollum v. Bd. Of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring). *See generally, e.g.*, Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 684-87, 695-98 (2002).

[89] FELDMAN, DIVIDED BY GOD, *supra* note 9, at 153-63.

[90] Minersville School District v. Gobitis, 310 U.S. 586, 586,596 (1940). Just a few years later, of course, the Court changed course, and effectively repudiated its *Gobitis* ruling, in *Barnette*, 319 U.S. 624 (1943). "For Frankfurter," Professor Feldman notes, "the *Barnette* case was fundamentally about the relationship between religion and American national idenity, and in his view, the key to that relationship was transcendence of religious difference or particularity at the national level." FELDMAN, DIVIDED BY GOD, *supra* note 9, at 160.

Religion Clause doctrine. Commenting in 1969 on the Court's decision in *Board of Education v. Allen*[91], in which the Justices rejected an Establishment Clause challenge to a New York law authorizing public schools to loan textbooks in secular subjects to students attending parochial schools, Professor Paul Freund concluded his short essay with these thoughts:

> Ordinarily I am disposed, in grey-area cases of constitutional law, to let the political process function. Even in dealing with basic guarantees I would eschew a single form of compliance and leave room for different methods of implementation . . .. The religious guarantees, however, are of a different order. While political debate and division is normally a wholesome process for reaching viable accommodations, *political division on religious lines is one of the principal evils that the first amendment sought to forestall*. It was healthy when President Kennedy, as a candidate, was able to turn off some of the questions addressed to him on church-state relations by pointing to binding Supreme Court decisions. Although great issues of constitutional law are never settled until they are settled right, still as between open-ended, ongoing political warfare and such binding quality as judicial decisions possess, I would choose the latter in the field of God and Caesar and the public treasury.[92]

These reflections were constitutionalized – that is, they were incorporated into one step of a three-part constitutional "test" – not many months later, by Chief Justice Burger in *Lemon*.[93] In that case, the Court ruled that the First Amendment does not permit state actions that "foster[] 'an excessive government entanglement with religion'"[94], and also announced – relying explicitly on not much more than Freund's comment – that a policy or program's "divisive political potential" not only indicates, but also

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[91] 392 U.S. 236 (1968).

[92] Paul Freund, Comment, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1691-92 (1969) (emphasis added). *Cf.* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 866-67 (1992) (joint op.) ("Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.")

[93] *Lemon*, 403 U.S. at 622 (citing Paul Freund, Comment, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969)).

[94] 403 U.S. at 613 (quoting *Walz*, 397 U.S. at 674).

constitutes, such impermissible entanglement.[95] *Lemon* serves, then, as the fountainhead – and perhaps also the zenith – of the political-divisiveness argument, and so is worth discussing in a bit more detail.

B. The Lemon *"Test" and Political Divisiveness on Religious Lines*

Lemon's "test" is so familiar to lawyers and law students that few remember the particulars of the laws considered or the details of the doctrine gathered and applied. The Court invalidated two state statutes – one involving "salary supplements" paid by Rhode Island to teachers at nonpublic schools, and the other authorizing the purchase by Pennsylvania of "secular educational services" from such schools[96] -- on the ground that "the cumulative impact of the entire relationship arising under the statutes involves excessive entanglement between government and religion."[97] Although this "relationship" was carefully structured "to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former,"[98] the Court determined that the supervision, oversight, monitoring, and evaluation necessary to make good on that guarantee violated the Constitution no less than the harm these legislatures were trying to avoid.

Chief Justice Burger opened the Court's opinion with what today seems a striking understatement: "Candor compels acknowledgment . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."[99] In his view, the

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[95] 403 U.S. at 622 ("A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity."). *See also* Edward McGlynn Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U. L. J. 205, 214 (1980) (noting that "Burger did not cite any primary sources for his opinion [concerning the First Amendment's purpose]").

[96] 403 U.S. at 606-07 ("Pennsylvania has adopted a statutory program that provides financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island has adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary.").

[97] *Id.* at 614.

[98] *Id.* at 613.

[99] *Id.* at 612. Even in the course of setting the stage with what Chief Justice Burger no doubt believed was an uncontroversial observation, he begs the question, "what, exactly, is so 'extraordinarily sensitive' about this area of law"? Does the political-divisiveness

Lemon cases – like Religion Clause cases generally – were made even more difficult by the fact that the First Amendment "[does] not simply prohibit the establishment of a state church or a state religion," but rather "command[s] that there should be 'no law *respecting* an establishment of religion.'"[100] The Amendment imposes, in other words, a *broader* prohibition than a mere ban on establishments: "A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment."[101] Accordingly, the challenge for the Court, as Burger saw it, was to devise an analytical method appropriate to the Court's sweeping mandate to identify and forestall both the "end" *and* all possible "step[s] toward it."

Now, Chief Justice Burger was probably mistaken about the import of the Framers' use of the word "respecting."[102] In any event, having elected to assume that the Establishment Clause bans more than establishments, he was left with the task of distinguishing those "steps" that portend establishments from those that do not. And, again, the fruit of

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argument, which this characterization foreshadows, rest in the end on anything more than the Chief Justice's *ipse dixit* concerning "this area of law"?

[100] *Ibid.*

[101] *Ibid.* See also, e.g., *Nyquist*, 413 U.S. at 771.

[102] That is, the term "respecting" probably did not indicate a desire to forbid government actions that were "step[s] toward," or that might tend to result in, establishments of religion. *See, e.g.,* JOHN T. NOONAN, THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM (1998); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 481-82 (1991) ("[T]he historical record is clear that when the religious language was first adopted it was designed to restrain the federal government from interfering with the variety of state-church arrangements then in place.").

Regarding the significance of the word "respecting," Judge Noonan supplies the following imaginary dialogue between a "new judge" and his law clerk:

> New Judge: I would have thought 'respecting an establishment' meant 'taking into account an establishment' – in other words, the phrase in the Bill of Rights assumed that religious establishments existed and instructed Congress not to take any establishment into account, either by endowing a state-established church or by penalizing one. Am I being too simple?
>
> Clerk: "You're being pretty perceptive, but you're a bit out of date. Everyone's agreed that 'respecting an establishment' now means 'establishing.' They call it the 'Establishment Clause.' It'd be sheer pedantry to stick to the original language."

NOONAN, *supra,* at 182-83.

Burger's efforts is the often-maligned, but still breathing,[103] three-part *Lemon* "test": "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'"[104] The Justices satisfied themselves quickly that the laws in question had the requisite secular purpose,[105] and elected not to decide whether the arrangements created by these laws had the prohibited primary effect of advancing religion.[106] Instead, the Court determined that the third part of its newly consolidated "test" – *i.e.*, the "excessive entanglement" element – was sufficient to invalidate the statutes.[107]

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[103] *Cf., e.g.*, Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795 (1993) (contending that the Court in *Weisman* replaced the *Lemon* test with a new "coercion" test); Ira C. Lupu, *Which Old Witch? A Comment on Professor Paulsen's* "Lemon *Is Dead*," 43 CASE W. RES. L. REV. 883 (1993) (arguing that, although the *Lemon* test may not be applied mechanically by the Court in future cases, the test and its themes will continue to shape Establishment Clause doctrine and to control in lower-court decisions).. Or, as Justice Scalia once put it, "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again[.]" *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (concurring op.).

[104] *Lemon*, 403 U.S. at 612-13.

[105] The Court stated that "the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws." *Id.* at 613. On the other hand, or put differently, it seems clear that the law was intended to assist the *Catholic* schools in staying open and retaining teachers, so as to avoid the burdens on the State's public schools that would result from the closing of Catholic schools. On the "secular purpose" requirement, see generally Andrew Koppelman, *Secular Purpose*, *supra* note 35.

[106] *Lemon*, 403 U.S. at 613-14 (avoiding question whether "legislative precautions" employed to "guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former" "restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses"). In Justice Brennan's view, however, the salary-supplement programs in question were unconstitutional wholly and apart from the "too close a proximity", or "entanglement", issue. *Id.* at 652 (Brennan, J., concurring). For Justice Brennan, the direct subsidy by government, standing alone, to religious schools violated the Constitution. *Ibid. See also id.* at 640 ("We have announced over and over again that the use of taxpayers' money to support parochial schools violates the First Amendment.") (Douglas, J., concurring).

[107] *Id.* at 614 ("[T]he cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion."). Strangely, though, Chief Justice Burger provided little by way of historical or theoretical explanation of why, exactly, "entanglement" is to be avoided, or is prohibited by the Constitution. Justice Brennan, however, elaborated in his concurring opinion on the "real dangers of 'the secularization of a creed.'" *Id.* at 649 (Brennan, J., concurring).

The "objective" of the Court's entanglement review, Chief Justice Burger stated, "is to prevent, as far as possible, the intrusion of either [that is, of government or religion] into the precincts of the other."[108] True, "total separation is not possible in an absolute sense" and "[s]ome relationship between government and religious organizations is inevitable." "Judicial caveats against entanglement must recognize," he acknowledged, "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."[109] The Court then turned to these "circumstances" and, after reviewing the "character and purposes of the institutions" affected by the Rhode Island and Pennsylvania laws, the "nature of the aid that the State provide[d]," and "the resulting relationship between the government and the religious authority," concluded that "both statutes foster[ed] an impermissible degree of entanglement."[110]

Now, at this point, one might have thought that more than enough had been said for the Court to invalidate the Pennsylvania and Rhode Island

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[108] *Id.* at 614.

[109] *Ibid.*

[110] *Id.* at 615. The Court observed that Rhode Island had "carefully conditioned its aid with pervasive restrictions," the administration of which, the Court was confident, would "inevitably" require "comprehensive, discriminating, and continuing state surveillance" and would involve "excessive and enduring entanglement between state and church." *Id.* at 619. And, the same was true, the Chief Justice noted, with respect to the Pennsylvania program, which provided aid for teachers' salaries directly to schools "controlled by religious organizations" and that "have the purpose of propagating and promoting a particular religious faith." *Ibid.* *See also* 403 U.S. at 628 ("[T]he *raison d'etre* of parochial schools is the propagation of a religious faith. They also teach secular subjects; but they came into existence in this country because Protestant groups were perverting the public schools by using them to propagate their faith. The Catholics naturally rebelled.") (Douglas, J., concurring); *id.* at 635 ("No matter what the curriculum offers, the question is, what is *taught?* We deal not with evil teachers but with zealous ones who may use any opportunity to indoctrinate a class.") (citing L. BOETTNER, ROMAN CATHOLICISM 360 (1962)); *ibid* ("It is well known that everything taught in most parochial schools is taught with the ultimate goal of religious education in mind."); *id.* at 635-36 ("One can imagine what a religious zealot, as contrasted to a civil libertarian, can do with the Reformation or with the Inquisition."); *id.* at 657 (Brennan, J., concurring) ("[Teaching of secular subjects] cannot be separated from the environment in which it occurs, for its integration with the religious mission is both the theory and the strength of the religious schools."); *but see id.* at 663 (White, J.) ("Our prior cases have recognized the dual role of parochial schools in American society: they perform both religious and secular functions.").

As these quotations illustrate, and as I discuss in more detail below, the *Lemon* Court's premises and conclusions with respect to the monitoring and supervision of teachers and other activities in religious schools reflect a striking suspicion toward Catholic schools and their mission.

laws: Again, the laws required monitoring and oversight of religious teachers, schools, and instruction – and, indeed, the Establishment Clause itself would require such monitoring, to avoid funding religious "indoctrination" – and, in turn, these required entanglements themselves invalidated the law.[111] However, Chief Justice Burger went on to identify what he called a "broader base of entanglement of yet a different character," namely, that "presented by the divisive political potential of these state programs."[112] After all, "[i]n a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity"; "partisans of parochial schools . . . will inevitably champion this cause and promote political action to achieve their goals" while "[t]hose who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and

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[111] In other words, the monitoring required by the Establishment Clause rendered the programs unconstitutional under the Establishment Clause. *Cf. Lemon*, 403 U.S. at 627 (Douglas, J., concurring) ("The surveillance or supervision of the States needed to police the grants involved in these three cases, if performed, puts a public investigator into every classroom and entails a pervasive monitoring of these church authorities by the secular authorities. Yet if that surveillance or supervision does not occur the zeal of religious proselytizers promises to carry the day and make a shambles of the Establishment Clause."); *id.* at 634 (Douglas, J., concurring) ("Under these laws, . . . school prayers, the daily routine of parochial schools, must go if our decision in [*Engel*] is honored. If it not honored, then the state has established a religious sect."). *Cf. id.* at 668 ("The Court thus creates an insoluble paradox for the State and the parochial schools.").

In *Tilton v. Richardson* – which was decided the same day as *Lemon* – the Court concluded that the Constitution was *not* violated by a federal program providing construction grants for buildings at church-related institutions of higher education. 403 U.S. 672 (1971). For Chief Justice Burger, the chief distinction seemed to be that the colleges in question in *Tilton* – unlike the Roman Catholic elementary schools at issue in *Lemon* – "were characterized by an atmosphere of academic freedom rather than religious indoctrination." *Id.* at 681. With respect to the "entanglement" question that was outcome-determinative in *Lemon*, the Court concluded that because college students are less impressionable and subject to "indoctrination," the colleges themselves are "characterized by a high degree of academic freedom," the aid itself is "nonideological," and the appropriations are not part of an annual budget process, the Constitution would not require monitoring of federal grant monies to ensure that they were not put to religious use (in other words, the Constitution did not require monitoring that was itself unconstitutional). *Id.* at 686 *et seq.* The Court's entanglement-based conclusions were "merely reinforced" by the observation that "there was political division over the primary school aid programs, but not the college grant programs." NOWAK & ROTUNDA, CONSTITUTIONAL LAW § 17.4, at 1193 (4th ed. 1991).

[112] 403 U.S. at 622. *See also, e.g.*, Brief *Amicus Curiae* of Protestants and Other Americans United for Separation of Church and State, 1970 WL 116836 ("It does not take any great cerebration to realize what a pandora's box of religious strife will be opened if this new erosion of the principle of the separation of church and state is permitted to undermine the foundation of the First Amendment.").

employ all of the usual political campaign techniques to prevail."[113] In such a struggle, the Court asserted – without, it should be noted, citations to any empirical evidence[114] – "[i]t would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith."[115]

The Chief Justice anticipated the obvious objection to this line of argument – *i.e.*, "yes, people will fight about this . . . so what?" He conceded, as had Professor Freund, that "[o]rdinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[116] And, to this historical claim about the "inten[t]" underlying the First Amendment, Burger adds an argument that sounds more in political theory, or "politics," full stop: Even putting aside the aims of the framers and ratifiers, "[t]he potential divisiveness of such conflict is a threat to the normal political process" because division on these issues "would tend to confuse and obscure other issues of great urgency."[117] We have, in other words, more important business to attend to:

> We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and

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[113] *Id.* at 622. It is interesting to note that, to Chief Justice Burger, those who support public assistance to parochial schools and their students are "partisans," while those who oppose school aid are assumed to do so for "constitutional, religious, or fiscal reasons." *Cf., e.g.*, Brief *Amicus Curiae* of the United States, 1970 WL 116843, * 22 (noting that the divisiveness claim is "necessarily conjectural and is not subject to empiric demonstration. It poses difficult political problems that are more appropriate for legislative than for judicial resolution").

[114] *Cf.* Kenneth F. Ripple, *The Entanglement Test of the Religion Clauses – A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195, 1219-24 (1980); *id.* at 1226 (noting the "assumption" that "religiously motivated activity has a particularly grave potential for causing discord in the civil society").

[115] *Id.* at 622. Of course, Chief Justice Burger's appeal to "realis[m]" here begs the question: "What is it about 'issues of this kind,' and not other 'kinds,' that should cause us to fear voting 'align[ed] with . . . faith'?"

[116] *Ibid* (citing Freund, *supra* note 92, at 1692).

[117] 403 U.S. at 622-23. The Court relies on *Walz v. Tax Comm'n* (separate opinion of Harlan, J.) and *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (Goldberg, J., concurring).

problems that confront every level of government.[118]

True, "adherents of particular faiths and individual churches frequently take strong positions on public issues"; indeed, "[w]e could not expect otherwise."[119] Still, the Chief Justice insisted, the programs at issue in *Lemon* raised the specter of "successive and very likely permanent annual appropriations that will" – unlike, he was careful to note, the tax exemption that the Court had upheld in *Walz*[120] – "benefit relatively few religious groups. Political fragmentation and divisiveness along religious lines are thus likely to be intensified."[121]

Chief Justice Burger's opinion closes, finally, with a nod to the slippery-slope argument.[122] True, the Court in *Walz* had rejected, in light of the "more than 200 years of virtually universal practice embedded in our colonial experience and continuing into the present," the argument that the tax exemption upheld in that case would "prove to be the first step in an inevitable progression leading to the establishment of religion." In *Lemon*, however, this "progression" argument was found "more persuasive."[123] The programs at issue were, the Court asserted, "something of an innovation" and – like all government programs – were likely to be "self-perpetuating" and "self-expanding."[124] Chief Justice Burger reminded his readers that "in constitutional adjudication some steps, which when taken were thought to approach 'the verge,' have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop."[125] Thus, entanglement between government and religion is not only an "independent evil against which the Religion Clauses were intended to

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[118] 403 U.S. at 623.

[119] *Ibid.*

[120] 397 U.S. 664 (1970).

[121] *Id.* at 623. In his concurring opinion, Justice Douglas warned of yet another cause, or locus, of division. In his view, the pervasive monitoring that the Constitution both required and prohibits would *itself* – wholly and apart from the public and political debates about the programs and funding – breed "dissension" and "division." *See* 403 U.S. at 636 ("[P]olicing these grants to detect sectarian instruction would be insufferable to religious partisans and would breed division and dissention between church and state."); *id.* at 640 (noting that the "surveillance needed" to avoid violating the Establishment Clause "would breed only rancor and dissension").

[122] For a detailed and provocative examination of slippery-slope arguments generally, *see* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

[123] 403 U.S. at 624.

[124] *Id.* at 624.

[125] *Ibid.*

protect," it serves also as a "warning signal" that further evils are menacing.[126]

In sum, then, Chief Justice Burger proposes in *Lemon* that the First Amendment's Establishment Clause prohibits not only "establishments" of religion, but also "step[s] that could lead to [them]"[127]; that unlawful "excessive . . . entanglement"[128] between government and religion exists not only when the former's laws purport to require or authorize intrusive oversight and monitoring of the internal workings of the latter, but also when the state action in question has "divisive political potential"[129]; that, with respect to certain issues – particularly those involving education funding – "many people . . . will find their votes aligned with their faith"[130]; and, that "[t]he potential divisiveness" fomented by this alignment is – unlike, apparently, other, non-religious alignments and divisions – "a threat to the normal political process" because it "tend[s] to confuse and obscure other issues of great urgency"[131]; and that "political division along religious lines" is an evil against which the Establishment Clause was designed to protect and against which the Court is therefore authorized to fight. Animating all this, it appears, is Burger's fundamental, but unexamined, premise that our "Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice[.]"[132] Religion is "divisive," then, because it is private; and constitutional doctrine that forestalls religion-caused division is warranted, and justifiable, in part because such doctrine is not seen as burdening religion, but rather as confirming its nature and keeping it in its appropriate sphere.

As I noted earlier, Chief Justice Burger provided little by way of authority for his empirical observations and predictions about the "division" associated with certain issues or for his implicit political judgment that certain issues are less important, and more distracting, than others. Perhaps more curious, though, is the fact that he offered little more authority for his central constitutional claim, *i.e.*, that the political division associated with,

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[126] *Id.* at 624-25.
[127] *Id.* at 612.
[128] *Id.* at 613 (quoting *Walz*, 397 U.S. at 674).
[129] *Id.* at 622.
[130] *Ibid.*
[131] *Id.* at 622-23; *id.* at 623 ("It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government."). *Cf., e.g.*, Sullivan, *Religion and Liberal Democracy*, *supra* note 35.
[132] *Id.* at 625.

or predicted to attend, certain government programs is relevant to the question whether those programs violate the First Amendment's Establishment Clause. Instead, Burger relies for support for his "broader base of entanglement" argument entirely on the few already-quoted sentences from Professor Freund's 1969 comment,[133] and on concurring opinions by Justices Harlan and Goldberg in the *Walz, Allen,* and *Schempp* cases.[134]

In *Walz,* the Court rejected an Establishment Clause challenge to a tax exemption for religious properties used for religious worship. While endorsing without reservation the result reached by the Court, Justice Harlan wrote separately to emphasize his view that "[w]hat [was] at stake" in the case "as a matter of policy is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point."[135] For Justice Harlan, "neutrality" and "voluntarism" – the two touchstones in Establishment Clause cases[136] -- stand in most cases as "barriers against the most egregious and hence divisive kinds of state involvement in religious matters."[137]

But not always: Also invoking Professor Freund, Harlan noted that "governmental involvement, while neutral, may be so direct or in such degree as to engender a risk of politicizing religion."[138] Observing that "religious groups inevitably represent certain points of view and not infrequently assert them in the political arena," Harlan insisted that "history cautions that political fragmentation on sectarian lines must be guarded

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[133] Freund, Comment, *Public Aid to Parochial Schools, supra* note 92 .

[134] Walz v. Tax Comm'n, 397 U.S. 664, 695 (1970) (Harlan, J., concurring); Board of Educ. v. Allen, 392 U.S. 236, 249 (1968) (Harlan, J., concurring); Abington School Dist. v. Schempp, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring). Indeed, Professor Gaffney, in his 1980 study, traced the political-divisiveness argument to a "seed" planted by Justice Harlan in his concurring opinion in *Walz.* Gaffney, Jr., *Political Divisiveness Along Religious Lines, supra* note 95

[135] 397 U.S. at 694 (Harlan, J., concurring).

[136] 397 U.S. at 694-95.

[137] 397 U.S. at 695. It is worth underscoring that Justice Harlan's concerns are cast in terms of involvement *by the state* in *religious* matters, and not the other way around.

[138] *Ibid.* By considering whether state action "politicizes" religion, Justice Harlan appears to miss the significance of his own observation that religious believers and groups have views, and – not surprisingly – often express these views. It is not entirely clear, then, what the difference is between politicization by the state of religion, and sanctification of politics by religion. Is religious activism an indication that religion has been politicized by the state, or simply that religion is doing what it does?

against."[139] And, even under a neutral program that "entangles the state in details of administration and planning," the state's participation "may escalate to the point of inviting undue fragmentation."[140] Justice Harlan was satisfied, however, that the tax exemption at issue in *Walz* "neither encourages nor discourages participation in religious life" – and therefore satisfied the "voluntarism" requirement – and also that the law was appropriately "neutral."[141]

Justice Harlan had also highlighted his concern about political divisiveness a few years earlier in *Allen*.[142] In that case – over bitter dissents by Justices Black and Douglas – the Court upheld a New York law requiring local public-school authorities to loan "secular" textbooks to students at private and religious schools. Justice Harlan agreed with the result but, as he would in *Walz*, wrote separately to "emphasize certain of the principles which I believe to be central to the determination of this case."[143] His central points were that "the attitude of government toward religion must . . . be one of neutrality" and that "[n]eutrality is . . . a coat of many colors."[144] In the end, he concluded, the Religion Clauses do not forbid activities that do not "significantly and directly" involve the State "in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom[.]"[145] Similarly, in *Schempp*, Harlan joined Justice Goldberg's opinion concurring with the Court's invalidation of state laws requiring readings from the Bible in public schools, an opinion that warned against "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious."[146] These Justices agreed, however,

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[139] *Id.* at 695. Professor Gaffney suggests that Justice Harlan's worries here should be put in the context of the "intense political involvement" of certain religious leaders and ministers at the time, particularly with respect to the war in Vietnam. Gaffney, *Political Divisiveness*, *supra* note 95, at 210 n. 29. *See also Walz*, 397 U.S. at 670 ("Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right.").

[140] *Id.* at 695 (citing also Justice Harlan's concurring opinion in *Allen* and Justice Goldberg's concurring opinion in *Schempp*).

[141] *Id.* at 696.

[142] 392 U.S. 236 (1968).

[143] *Id.* at 249 (Harlan, J., concurring).

[144] *Ibid.*

[145] *Ibid.* It is curious that Justice Harlan casts the matter in terms of *state* involvement in the *sectarian* realm causing "divisive influences and inhibitions of freedom." Presumably, though, the concern in mind is not for inhibitions of *churches'* or *believers'* freedoms.

[146] *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring). *See also ibid* ("Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and

that such state-mandated uses of Scripture in government schools crossed into "the realm of the sectarian, . . . giv[ing] rise to those very divisive influences and inhibitions of freedom which both religion clauses of the First Amendment preclude."[147]

C. The Argument's Development and Deployment in Funding Cases

In the end, then, it appears that the majority in *Lemon* constitutionalized Chief Justice Burger's short-form understanding of an unexamined, law-office history of the Religion Clause and the cautionary reservations and amorphous unease of Professor Freund and Justices Harlan and Goldberg. And if, in *Lemon,* the Argument was presented as *lagniappe*, as a "broader base of entanglement of yet a different character"[148], it seemed to "[take] on a life of its own" just a few years later in *Nyquist.*[149] The program at issue in that case authorized direct money grants to designated nonpublic schools for maintenance and repair of school buildings, and also involved tuition grants and a tax-benefit package, both of which targeted the low income parents of nonpublic school children.[150] Here, it was not the reality of administrative entwining – a reality that was arguably present in *Lemon* – but the felt prospects for political conflict, that did the work, serving as the predicate for the Court's finding of unconstitutional entanglement.[151]

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personal values derive historically from religious teachings.").

[147] *Ibid. See also* FELDMAN, DIVIDED BY GOD, *supra* note 9, at 180 (observing that the "question of divisiveness" was "squarely in view" in Schempp). Note Justice Goldberg's juxtaposition here – as if they were the same or of similar constitutional import – of "divisive influences" and "inhibitions of freedom."

[148] 403 U.S. at 622.

[149] NOWAK & ROTUNDA, *supra* note 111, at 1193. In *Nyquist*, "a form of completely neutral aid – a tuition voucher plan – was stricken in part because of the belief that any significant aid to students in sectarian schools caused political division." *Ibid.* In *Zelman*, of course, the Justices upheld a school-voucher plan, but were able to distinguish *Nyquist* by noting that the program at issue in that case provided aid only to private schools and private-school students, while many of the benefits of the program at issue in *Zelman* were available to students attending public schools, as well. The Court in *Zelman* stated that "we now hold that *Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion." 536 U.S. at 662.

[150] Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 761-69 (1973) (describing programs and laws at issue).

[151] The Court acknowledged the valid, secular "purpose" behind the measures at issue, *id.* at 773, but concluded that they had the impermissible primary effect of "advancing religion," *id.* at 774-89.

Now, the precise role of judicial observations and predictions about division in what Justice Powell called the "weighing process" remained vague.[152] Still, Powell's elaboration of the Argument added to, or expanded upon, Chief Justice Burger's in several interesting respects.[153] Justice Powell took pains to establish, for example, that it was the bare fact of political strife – and not the unattractiveness, on the merits, of the end-results of that strife – that was constitutionally significant.[154] Like Burger, Powell conceded that "the prospect of . . . divisiveness may not alone warrant the invalidation of state laws," while insisting that "it is certainly a 'warning signal' not to be ignored."[155] A "warning signal," though, of what? In *Nyquist*, the conflict that appeared to occupy Powell's mind was not merely the predictable and tedious squabbling about annual appropriations.[156] More dramatic and ominous, it was the specter of "competition among religious sects for political and religious supremacy"[157] that served to warn of nothing less than the disruption of the political order.[158]

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[152] "One factor of recurring significance in [the] weighing process [*i.e.*, the process of "weighing" the States' "substantial reasons" against "the relevant provisions and purposes of the First Amendment"] is the potentially divisive political effect of an aid program." *Id.* at 795. In other words, the *potentially* divisive *effects* of a program are *significant* in a *weighing process* . . .

[153] Because of "the importance of the competing societal interests implicated here," Justice Powell added and expanded upon the observation that "apart from any specific entanglement of the State in particular religious programs, assistance of the sort here involved carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion." *Id.* at 794.

[154] *Id.* at 795 & n. 53 (noting, *inter alia*, that "[f]ew would question most of the legislative findings supporting this statute" and that the "underlying reasons" for the laws were "substantial reasons"; and quoting the lower-court's statement that "[t]his litigation is, in essence, a conflict between two groups of extraordinary good will and civic responsibility").

[155] *Id*. at 797-98.

[156] *Cf. id.* at 797 & n.56 (observing that the political realities of expenditures – particularly annual ones – in times of scarcity, and the "self-perpetuating tendencies of any form of governmental aid to religion" – when combined with the fact that "the underlying issue is the deeply emotional one of Church-State relationships" are such that "the potential for seriously divisive political consequences needs no elaboration").

[157] *Id*. at 796 (noting that such competition has "occasioned considerable strife, generated in large part by competing efforts to gain or maintain the support of government").

[158] *Ibid* (quoting *Walz*, 397 U.S. at 694 ("[W]hat is at stake . . . is preventing that kind and degree of governmental involvement in religious life that . . . frequently strains a political system to the breaking point.")). This concern with the efficient operation and integrity of the political system is a consistent theme in Justice Powell's Religion Clause work.

During the decade or so following *Nyquist*, the Court time and again confronted efforts by governments to provide educational aid, in various forms, to children attending religious schools. In the published decisions that resulted, the Justices' efforts to apply the *Lemon* test to programs involving slide projectors, atlases, maps, standardized testing, and school-bus transportation for field trips were – as the Justices could not help admitting[159] -- not always edifying. In these cases, observations about and predictions of sectarian strife or political division along religious lines were frequently offered as relevant, if not outcome-determinative, to the question of a school-aid program's constitutional validity.

Thus, in *Meek v. Pittinger*[160], the Court employed the "clearly stated, if not easily applied" *Lemon* test to invalidate a series of Pennsylvania laws that authorized, among other things, state-funded auxiliary services for children at non-public schools.[161] Along the way, the majority noted that, because the programs would require continued annual appropriations, "the prospect of repeated confrontation between proponents and opponents of the [program]" creates potential divisiveness along religious lines.[162] Chief Justice Burger, now in dissent, responded to this "prospect" by predicting that there was "at least as much potential for divisive political debate in opposition to the crabbed attitude the Court shows in this case."[163]

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[159] *See, e.g., Wolman*, 433 U.S. at 262 ("Our decisions in this troubling area draw lines that often must seem arbitrary.") (Powell, J., concurring in part and dissenting in part).

[160] 421 U.S. 349 (1975).

[161] *Id.* at 358. These "auxiliary services" included remedial and accelerated instruction, guidance counseling, testing, and speech and hearing services, psychological counseling, "and such other secular, neutral, nonideological services as are a benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth." *Id.* at 353. Pennsylvania had also authorized the loaning of state-owned textbooks to children in non-public schools, and this policy was – in light of *Allen* – easily upheld.

[162] *Id.* at 372. Justice Brennan, in his separate opinion, expanded on this observation, and insisted that the majority had erred in too quickly equating the textbook provision at issue with the program upheld in *Allen.* The latter case, he now believed, had not appreciated the importance of the political-divisiveness specter – nor had he, in *Lemon,* he conceded. *Id.* at 383 n.3 (Brennan, J., concurring in part and dissenting in part). In fact, he maintained, the Argument, if applied in *Meek*, compelled the invalidation of the textbook provisions as well. *Id.* at 378 (Brennan, J., concurring in part and dissenting in part).

[163] *Id.* at 386. It would seem that this criticism could be applied with equal force to Chief Justice Burger's own opinion in *Lemon.* In his view, though, the provision of auxiliary services that are equally available to public school children cannot create the same political divisiveness along religious lines as did the subsidized teacher provisions in *Lemon*.

A few years later, in *Wolman v. Walter*[164], the Court considered a challenge to an Ohio law that authorized the use of public funds to pay for a wide range of educational assistance, from standardized tests and test-scoring to maps, film projectors, and bus service.[165] Some portions of the program were upheld, and others were struck down.[166] The Argument appeared only at the margins, and was employed much as it had been in *Meek*.[167] Justice Brennan, for example, recoiled from the "divisive political potential of unusual magnitude [that] inhere[d] in the Ohio program."[168] Justice Marshall also emphasized that the aid to be provided to religious schools "[was] certain to be substantial," and concluded that it should not be provided "*because of* the dangers of political divisiveness on religious lines."[169] However, Justice Marshall's primary divisiveness-related concern appears not to have been the costs associated with the aid – because he appears to concede that even expensive "general welfare programs that serve children in sectarian schools" could be permissible – but instead with the "sectarian functions of denominational schools."[170] On the other hand,

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[164] 433 U.S. 229 (1977).

[165] *Id.* at 233-34.

[166] Ohio's efforts to loan to students or their parents certain non-religious "instructional materials" – projectors, tape records, maps, *etc.* – were invalidated on the ground that "[s]ubstantial aid to the education function of [religious] schools . . . necessarily results in aid to the sectarian school enterprise as a whole." *Id.* at 250 (quoting *Meek*, 421 U.S. at 366). The use of public funds for "field trip transportation and services" for students in non-public schools was also invalidated. *Id.* at 254 ("[T]he public school authorities will be unable adequately to insure secular use of the field-trip funds without close supervision of the nonpublic teachers. This would create excessive entanglement[.]"). On the other hand, as in *Meek*, the Court permitted the lending of "secular" textbooks to students attending non-public (and, in practice, overwhelming Catholic) schools. *Id.* at 237-38.

[167] In several of the parties' briefs and briefs *amicus curiae*, however, the argument was prominently invoked. *See, e.g.*, Reply Brief for Appellants, 1977 WL 189137, *21-22 ("Nor has there been a lack of political divisiveness. In Ohio, as elsewhere, groups have formed on both sides of these issues . . . who have sought, often bitterly, to impress their points of view upon the legislature[.]"); Brief *Amicus Curiae* of the State Convention of Baptists in Ohio, *et al.*, 1977 WL 189147, *26-27 ("The Ohio legislature, bowing to intensive lobbying, has attempted time and again to thread the needle between *Allen* and the various other standards established by the Courts. . . . Rather than ending religious divisiveness, the adoption of each new test and each attempt to distinguish *Allen* has brought new litigation and increased religious-political strife.").

[168] *Id.* at 256 (Brennan, J., concurring in part and dissenting in part).

[169] *Id*. at 259 (emphasis added).

[170] *Id*. at 259-60 ("[B]ecause general welfare programs do not assist the sectarian functions of denominational schools, there is no reason to expect that political disputes over the merits of those programs will divide the public along religious lines.").

Justice Marshall also stated that an appropriate appreciation for the "divisive political potential" of "programs of aid to sectarian schools" required that *Allen* be overruled. *Id.* at 258 (Marshall, J., concurring in part and dissenting in part) ("*Allen* did not

Justice Powell conceded that the Court's constitutional analysis should take appropriate account of the fact that "[t]he risk of significant religious or denominational control over our democratic processes or even of deep political division along religious lines is remote."[171]

During the following few years, one perceives something of a move away from the political-divisiveness inquiry, as part of a general slackening of enthusiasm for finding excessive entanglement in cases involving aid to religious schools and their activities.[172] That said, assumptions and assertions about religion and divisiveness certainly seemed to set the tone, if not to determine the outcomes, in two of the Court's more ill-starred Religion Clause cases, *Ball* and *Aguilar*.[173] In *Ball*, the Court struck down a school district's "community education" and "shared time" programs on the ground that they "advanced" religion;[174] the Justices did not, in any depth, consider administrative-entanglement or political-divisiveness arguments.[175]

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consider the significance of the potential for political divisiveness inherent in programs of aid to sectarian schools.").

[171] *Id.* at 263 (Powell, J., concurring in part and dissenting in part). As in *Meek*, Justice Powell's concern seems to go beyond the division that might naturally attend the appropriations process; he sounds a broader alarm, about "denominational control."

[172] *See, e.g.*, Roemer v. Maryland Public Works Bd., 426 U.S. 736, 765-66 (1976) (endorsing, as "entirely sound," the conclusion that the aid program in question was constitutionally – and not excessively divisive – because, *inter alia*, of the "substantial autonomy of the colleges" receiving the aid); Committee for Public Education v. Regan, 444 U.S. 646, 661 n.8 (1980) ("We find no merit whatever in appellants' argument . . . that the extent of entanglement here is sufficient to raise the danger of future political divisiveness along religious lines."); Bowen v. Kendrick, 487 U.S. 589, 617 n.14 (1988) ("We also disagree with the District Court's conclusion that the [Act] is invalid because it is likely to create political division along religious lines. . . . It may well be that because of the importance of the issues relating to adolescent sexuality there may be a division of opinion along religious lines as well as other lines. But the same may be said of a great number of other public issues of our day."). *See generally, e.g.*, NOWAK & ROTUNDA, *supra* note 111, at 1195 *et seq.* (describing developments).

[173] School Dist. and City of Grand Rapids v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 473 U.S. 402 (1985). Both of these decisions have, of course, been substantially or entirely overruled.

[174] 473 U.S. at 375-79 (describing the programs, and the "sectarian" character of many of the schools at which the programs operated).

[175] *Id*. at 397 n.14. The trial court had concluded, though, that the programs in question "entailed an unacceptable level of entanglement, both political and administrative, between the public school systems and the sectarian schools." *Id*. at 380-81. In several of the briefs filed in the case, though, the Argument was invoked or engaged. *See, e.g.*, Brief *Amicus Curiae* of Churches of Christ, *et al.*, 1984 WL 565398, *26 (warning that judicial approval of "schemes" like the one at issue in *Ball* "would create divisiveness along religious lines the likes of which this country has not seen. The current anti-clericalism would be multiplied many fold"); Brief *Amicus Curiae* of the United States, 1984 WL 565395, *24 (noting that it is "difficult to know which side in a religiously-related dispute

Still, animating the entire enterprise of the Court's review was Justice Brennan's cautionary observation that "just as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies"[176], and also his defense of the *Lemon* "test" in school-aid cases on the ground that "[t]he government's activities in this area can have a magnified impact on impressionable young minds, and the occasional rivalry of parallel public and private school systems offers an all-too-ready opportunity for divisive rifts along religious lines in the body politic."[177]

In similar fashion, in *Ball*'s companion case, *Aguilar v. Felton,* the Justices invalidated a New York City program which used federal "Title I" funds to pay the salaries of public-school employees who taught non-religious, remedial subjects on-site in parochial schools.[178] As in *Lemon,* the Court concluded that the government's "supervisory" system, designed to make sure that the content of publicly funded education remained entirely non-religious, "inevitably results in the excessive entanglement of church and state."[179] In other words, New York's effort to prevent its policy from having the "effect" of "advancing" religion brought it into conflict with the no-entanglement rule.[180]

Justice Brennan also observed, without dwelling on the matter, that the required monitoring of religious schools' activities could "increase . . . the dangers of political divisiveness along religious lines[.]"[181] For

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should prevail when a court determines that the political divisiveness of the controversy is too great to permit resolution by elected officials").

[176] *Id*. at 382. The way through this tension – a solution which Justice Brennan attributes to the Founders – is the privatization of religion. *Id*. at 382 ("The solution to this problem adopted by the Framers . . . is jealously to guard the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality. . . .").

[177] *Id*. at 383.

[178] *Aguilar,* 473 U.S. at 404 ("The City of New York uses federal funds to pay the salaries of public employees who teach in parochial schools."). The Court also noted that the funds were used to pay for the teaching of "remedial reading, reading skills, remedial mathematics, [and] English as a second language" to Title I's low-income beneficiaries. *Id.* at 406.

[179] *Id.* at 409. As in *Lemon,* this conclusion depended crucially on the Court's characterization of the parochial schools at issue as "pervasively sectarian," and therefore in need of careful monitoring to prevent the funding of religious activities. *Id.* at 411-13.

[180] Put differently, the Establishment Clause simultaneously requires and forbids the careful supervision and monitoring of publicly funded teachers in parochial schools. *See id.* at 420 (Rehnquist, J., dissenting) (quoting Wallace v. Jaffree, 472 U.S. 38, 109 (1985) (Rehnquist, J., dissenting)) (referring to "Catch-22 paradox").

[181] *Id*. at 414.

Brennan, though, the primary dangers associated with this monitoring were the interference and "secularization" that it posed *to* religion,[182] not so much the risks of political discord associated with efforts to implement Title I. The Argument played a more prominent role, however, in the concurring – and crucial – opinion of Justice Powell. Conceding that the programs in both *Ball* and *Aguilar* had "done so much good and little, if any, detectable harm,"[183] he nonetheless emphasized the "considerable risk of continuing political strife over the propriety of direct aid to religious schools and the proper allocation of governmental resources."[184]

Justice Powell's separate opinion is noteworthy for being more specific about what, exactly, the harm *is* that triggers the Argument: The fear is not, he confesses, that Title I could result in the "establishment of a state religion"; nor is it even that local efforts to implement Title I could "result in significant religious or denominational control over our democratic processes."[185] Instead, the point is that implementing programs are, unavoidably, products of the political system, and will therefore "spark political disagreement."[186] The "proper allocation of limited government resources" is, necessarily, a contentious subject, and so programs like these pose a "considerable risk of continuing political strife" over their propriety.[187] What's more, he reasoned, even a healthy political community – one that is generally able to weather the storms of division and disagreement – is endangered by the *kind* of "strife" and religion-related divisiveness that is associated with public assistance to parochial-school students.[188] The "*potential* for such divisiveness" provided, for Justice

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[182] *Id*. at 413 (noting the Establishment Clause's objective of "prevent[ing] intrusion of either [church or state] into the precincts of the other"); *id*. at 414 ("[T]he picture of state inspectors prowling the halls of parochial schools . . . surely raises more than an imagined specter of governmental 'secularization of a creed.'") (quoting *Lemon*, 403 U.S. at 650 (opinion of Brennan, J.)).

[183] *Id*. at 415 (Powell, J., concurring).

[184] *Id.* at 416.

[185] *Ibid* (citing *Wolman*, 433 U.S. at 263 (Powell, concurring in part and dissenting in part)). *Cf. Nyquist*, 413 U.S. at at 796 ("[W]hat is at stake . . . is preventing that kind and degree of governmental involvement in religious life that . . . frequently strain a political system to the breaking point.").

[186] *Aguilar*, 473 U.S. at 417 (Powell, J., concurring).

[187] *Id.* at 416 (Powell, J., concurring); *ibid* (stating that there will, unavoidably, be "competition and strife", and that it will, unavoidably, be the case that "politics will enter into any state decision to aid parochial schools").

[188] *Id.* at 417 (quoting *Walz*, 397 U.S. 664, 694 (Harlan, J.) ("[A]id to parochial schools of the sort at issue here potentially leads to 'that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.'"). Justice Powell's opinion here raises the question whether the "involvement" at issue here – the involvement that

Powell, "a strong *additional* reason" for invaliding the programs at issue.[189]

Chief Justice Burger, in dissent, remained unhappy with the uses to which his opinion in *Lemon* – and, in particular, his discussion of "political divisiveness along religious lines" – was being put by his colleagues.[190] It was Justice O'Connor, though, who responded most directly to Justice Powell's invocation of the potential for strife and division. In her view, neither in *Meek* and *Wolman*, nor in *Aguilar* and *Ball*, had parties presented any real evidence that publicly funded instruction in parochial schools "would produce political divisiveness."[191] And, the weakness in the division-based argument was not simply a matter of the weight of the evidence; Justice O'Connor questioned also the very idea of according constitutional significance to predictions of political disagreement,[192] highlighting the "hecker's veto" character of the Argument.[193]

D. Variations on the Argument in Other Contexts

During these years, the possibility of "political divisiveness along religious lines" – or something like it – was invoked and treated as having doctrinal significance not only in school-funding cases.[194] That said, by the

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purportedly triggers the objectionable strife – is the monitoring or the funding itself.

[189] *Id*. at 417.

[190] *Id*. at 419 (Burger, C.J., dissenting) (expressing "concern that the Court's obsession with the criteria identified in [*Lemon*] has led to results that are 'contrary to the long-range interests of the country'"). *See also id.* at 421 (Rehnquist, J., dissenting) (complaining that the Court had "traveled far afield from the concerns which prompted the adoption of the First Amendment when we rely on gossamer abstractions to invalidate a law which obviously meets an entirely secular need").

[191] 473 U.S. at 427 (O'Connor, dissenting). *Id*. at 429 ("There is little record support for the proposition that [the program] has ignited any controversy other than this litigation."); *ibid* (insisting that to rely on the "potential for political divisiveness as evidence of undue entanglement is . . . unpersuasive").

[192] *Id*. at 429. As Justice O'Connor noted, the Court in *Mueller* had "confined" the "elusive inquiry" into political divisiveness "to a narrow category of parochial aid cases." *Ibid*. And, in Lynch v. Donnelly, 465 U.S. 668 (1984), the "concurring opinion . . . suggest[ed] that Establishment Clause analysis should focus solely on the character of the government activity that might cause political divisiveness" and that "the entanglement prong of the *Lemon* test is properly limited to institutional entanglement." *Ibid*.

[193] *Id*. at 429 ("It is curious indeed to base our interpretation of the Constitution on speculation as to the likelihood of a phenomenon which the parties may create merely by prosecuting a lawsuit.").

[194] *See, e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982) (invalidating Massachusetts zoning statute that prohibited the granting of a liquor license to an establishment located within 500 feet of a church *if* the church objected, noting that, by vesting an effective "veto" with religious institutions, Massachusetts created the danger of political divisiveness along religious lines and therefore failed the *Lemon* test); *cf.*,

mid-1980's, a majority of the Justices purported to have "confined" the "elusive inquiry" into political divisiveness "to a narrow category of parochial aid cases."[195] As if to confirm its "elusive" nature, though, the Argument has resisted confinement. Although the Court has, it appears, put aside Chief Justice Burger's formulation – *i.e.*, the potential for "political divisiveness along religious lines" is a *kind* of "excessive entanglement," within the meaning of the *Lemon* test's third prong[196] – the Argument has

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McDaniel v. Paty, 435 U.S. 618, 628-29 (1978) (Brennan, J., concurring) (agreeing that Tennessee law prohibiting ministers from serving at a constitutional convention was unconstitutional, and emphasizing that it was impermissible to assume that ministers elected to public office "will necessarily exercise their powers and influence to promote the interests of one sect or thwart the interests of another, thus pitting one against the others, contrary to the anti-establishment principle with its command of neutrality").

[195] *Aguilar*, 473 U.S. at 429 (O'Connor, J., dissenting). *See also* Mueller v. Allen, 463 U.S. 388, 403 n.11 (1983) (upholding a Minnesota provision that permitted taxpayers to deduct educational expenses from their state income-tax returns, whether those expenses were associated with public or private schooling, and stating that *Lemon*'s "political divisiveness" language should be "confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools"); Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 339 n. 17 (1987) ("[T]his Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct. And we decline to so hold today. This case does not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions, and hence no inquiry into political divisiveness is even called for[.]") (quoting *Lynch*, 465 U.S. at 684); Bowen v. Kendrick, 487 U.S. 589, 617 n.14 (1988) (upholding Adolescent Family Life Act, which provided grants to religious and other institutions providing counseling on teenage sexuality, and stating that "the concept of political divisiveness should be confined to cases involving government aid to parochial schools"); Mitchell v. Helms, 530 U.S. 793, 827 (2000) (plurality op.) (upholding federal law authorizing loan of educational equipment to schools, including private and religious schools, and rejecting any "resurrect[ion]" of the political-divisiveness inquiry, which was "rightly disregarded" after *Aguilar*). In neither *Bowen* nor *Mueller* was it explained what it was about the political-divisiveness argument, or the arguments pressed in *Lemon*, that justified such a limitation. *See also, e.g.*, Lambeth v. Bd. of Comm. of Davidson County, 407 F.3d 266, 273 (4th Cir. 2005) (stating that "[t]he Court's 'political divisiveness' rubric is . . . inapplicable" to cases outside the parochial-school-funding context).

To be sure, the cabining or confining of the argument from division has not been without exceptions. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 800-01, 805 (1983) (Brennan, J., dissenting) (insisting that "any group of law students" would, employing *Lemon*, invalidate Nebraska's practice of allowing a paid chaplain to open legislative sessions with a prayer and noting that legislative prayer was often a partisan issue that exacerbated already existing political divisions).

[196] *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 233-34 (1997) (re-structuring *Lemon* and rejecting the idea that "administrative cooperation" and "political divisiveness" represent independent bases for invalidating state actions).

Claims about division have also been pressed in cases that turned on another of *Lemon*'s "prongs." In *Edwards v. Aguillard*, 482 U.S. 578 (1987), for example, the Court invalidated – as lacking the required "secular purpose" – Lousiana's "Balanced Treatment

nonetheless continued to be employed in a wide variety of cases and in many different ways. The Argument, in other words, has proved versatile and protean; its premises and the concerns to which it speaks are hardy, and easily transplantable.

For example, one encounters these same premises and concerns throughout the Court's flirtation with, and embracing of, Justice O'Connor's "endorsement test."[197] In *Lynch v. Donnelly*,[198] the Justices considered a challenge to the City of Pawtucket, Rhode Island's annual Christmas display, which included a crèche. Chief Justice Burger downplayed the significance of the *Lemon* test,[199] focusing instead on the history of religious displays and expression in American public life.[200] In a concurring opinion, though, Justice O'Connor set out her views concerning the importance in Establishment Clause cases of government "endorsement" of religion.[201] Now, with respect to the argument from division, she stated that the presence or absence of political divisiveness "should not be an independent test of constitutionality."[202] In fact, though, the exposition and application of the "endorsement test" has in practice invariably involved something *like* the search for "political divisiveness along religious lines," in that asking whether a "reasonable observer" would regard herself as having been cast by state action as an outsider in the "political community" seems consonant with, if not equivalent to, asking whether that same state action does or could cause "political

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for Creation-Science and Evolution-Science in Public Schools Instruction Act." Dissenting from this disposition, Justice Scalia offered the reminder that "political activism by the religiously motivated is a part of our heritage. . . . Today's religious activism may give us the Balanced Treatment Act, but yesterday's resulted in the abolition of slavery, and tomorrow's may bring relief for famine victims"). *Id.* at 615 (Scalia, J., dissenting).

[197] *Cf.* Lupu & Tuttle, Zelman*'s Future, supra* note 28, at 953-54 (concluding that the Argument has "kept a small toehold" in the area of Religion Clause challenges to government speech on religious issues).

[198] 465 U.S. 668 (1984).

[199] "We have repeatedly emphasized our unwillingness to be confined to any single test in this sensitive area." *Id.* at 679.

[200] *Id.* at 675 ("Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders."); *id.* at 680 (City's display need not be considered an unconstitutional endorsement of religion, but instead a celebration of a "significant historical religious event long celebrated in the Western World").

[201] *Id.* at 688 (O'Connor, J., concurring).

[202] *Id.* at 689; *ibid* ("[W]e have never relied on divisiveness as an independent ground for holding a governmental practice unconstitutional."). *Cf. id.* at 703 (Brennan, J., dissenting) (suggesting that "the quiescence of those opposed to the crèche may have reflected nothing more than their sense of futility in opposing the majority").

divisiveness."[203] Thus, in *Allegheny v. American Civil Liberties Union*, for example, Justice O'Connor evaluated the constitutionality of the holiday displays at issue in terms of the messages of exclusion or favoritism that were or were not communicated by government.[204] But as Justice Stevens reminded her, the question whether religious minorities or outsiders perceive such exclusion or favoritism is not easily separable from observations and predictions about religion-based divisions in the political community.[205] Similarly, in the *Newdow* case – although a majority of the Justices concluded that principles of standing counseled against resolving definitively constitutional questions surrounding the recitation of the Pledge of Allegiance in public-school classrooms – Justice O'Connor found it both telling and constitutionally relevant, in her concurring opinion, that "so little ire has been directed at the Pledge."[206]

Justice Kennedy's coercion-based method of analysis is also hospitable to a revised or translated form of the Argument.[207] The method's most prominent deployment was in *Lee v. Weisman*, in which the Court invalidated a non-sectarian prayer offered by an invited rabbi at a middle-school graduation.[208] Writing for a narrow majority, Justice Kennedy purported to reject an invitation to "reconsider" *Lemon*[209]; still, his analysis

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[203] *See Lynch*, 465 U.S. at 687 (framing inquiry in terms of whether government makes religion relevant to one's "standing in the political community").

[204] 492 U.S. 573, 623-27 (1989)(O'Connor, J., concurring); *id.* at 627("If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community").

[205] *Id.* at 651 n.10 (Stevens, J., concurring in part and dissenting in part) ("These cases illustrate the danger that governmental displays of religious symbols may give rise to unintended divisiveness, for the net result of the Court's disposition is to disallow the display of the creche but to allow the display of the menorah.").

[206] 542 U.S. at ___, Slip op. at 7 (O'Connor, J., concurring in the judgment). Justice O'Connor also cited the observation, made in *Lynch*, that the display in question there had "caused no political divisiveness[.]" *Id.* at 6-7 (quoting *Lynch*, 465 U.S. at 692-93). The question of the Pledge's "divisiveness" was also, as has already been noted, a topic on which Chief Justice Rehnquist and Mr. Newdow exchanged views during oral argument.

[207] This notwithstanding the fact that the "coercion" test is often framed – and appears to be regarded by the Justices – as departing in significant and important ways from the concerns animating the "endorsement test." *Compare, e.g., Allegheny*, 492 U.S. at 627-32 (O'Connor, J., concurring), *with id.* at 655-64 (Kennedy, J., concurring in part and dissenting in part).

[208] 505 U.S. 577, 580 (1992) ("The question before us is whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment.").

[209] *Id*. at 587.

owed little to that case's three-part test. Instead, it was enough to establish – or, in any event, to conclude – that the relevant state actors had "creat[ed] a state-sponsored and state-directed religious exercise in a public school."[210]

Certainly, Justice Kennedy's core claims were that the government was "compel[ling] . . . student[s] to participate in a religious exercise" and that such compulsion is forbidden by the Establishment Clause.[211] Nonetheless, the decision owes as much as any post-*Lemon* opinion to claims and predictions about politics, division, and religion. At times, the Argument is explicit[212]; in other places, its work is more subtle.[213] But although Justice Kennedy takes pains to disavow any sweeping "no division" mandate, and to locate his argument in a particular context, one that – in his view – presents special dangers of coercion,[214] premises about "political divisiveness" run through Justice Kennedy's typically high-flying rhetoric about the nature and purpose of schooling in a "pluralistic society."[215]

Eventually, Justice Kennedy pulls back to more modest claims about the perceptions of the "nonbeliever or the dissenter" in the setting of a

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[210] *Ibid.*

[211] *Id.* at 599.

[212] *Id.* at 587 ("The reason for the choice of a rabbi is not disclosed by the record, but the potential for divisiveness over the choice of a particular member of the clergy . . . is apparent.").

[213] *See, e.g.*, at 597-98 ("We know . . . that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity[, but] . . . the conformity required . . . in this case was too high an exaction to withstand the test of the Establishment Clause."); *id.* at 596 ("To say that a student must remain apart from the ceremony at the opening invocation and closing benediction is to risk compelling conformity in an environment analogous to the classroom setting, where we have said the risk of compulsion is especially high."). The Argument's work here is "subtle," but still being done, in the sense that Justice Kennedy is concerned that the cost to a student of protecting her conscience, or of avoiding pressures to conform, is that she "must remain apart from the ceremony"—that she must, in a sense, be divided and separated from the community, by government-sponsored religious activity.

[214] *See, e.g., id*. at 587-88 ("Divisiveness, of course, can attend any state decision respecting religions, and neither its existence nor its potential necessarily invalidates the State's attempts to accommodate religion in all cases."); *id.* at 597 ("We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive.").

[215] *See, e.g.*, at 590-91 ("To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse toward the end of a tolerant citizenry. And, tolerance presupposes some mutuality of obligation. . . . . Against this background, students may consider it an odd measure of justice to be subjected during the course of their educations to ideas deemed offensive and irreligious, but to be denied a brief, formal prayer ceremony that the school offers in return.").

public-school graduation.[216] And, in the end, the case probably turns more on "peer pressure" than on political fissures.[217] It remained for Justice Blackmun, in dissent, to pick up and run with the argument from division. To underscore his insistence that "it is not enough that the government restrain from compelling religious practices,"[218] Blackmun states that "[t]he mixing of government and religion can be a threat to free government, even if no one is forced to participate" *because* "[o]nly 'anguish, hardship and bitter strife' result 'when zealous religious groups struggl[e] with one another to obtain the government's stamp of approval.'"[219] Echoing the worry that Justice Powell often expressed in the parochial-school-aid cases, Blackmun warned that "[s]uch a struggle can 'strain a political system to the breaking point.'"[220] He supplemented these claims about strife with a quotation from the *Memorial and Remonstrance*, invoking the specter of the Inquisition, and with an anecdote supplied by a lawyer for the American Civil Liberties Union concerning the "volatil[ity]" of the school prayer issue.[221] Not far below the surface is the charge that religion, because it is

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[216] *Id.* at 592. This reliance on "perceptions" might come as a surprise, given that the "coercion" test is offered as, among other things, an *alternative* to the "endorsement" test.

[217] *See id.* at 593-96. *Cf. id*. at 632 (Scalia, J., dissenting) (describing the majority's "instrument of destruction, the bulldozer of its social engineering, . . . a boundless, and boundlessly manipulable, test of psychological coercion").

Another, more recent, school-prayer case also connects the "no coercion" rule with concerns about "divisiveness." In *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), the Court reviewed a Texas public high school's practice of electing a student council chaplain to lead public prayer before home football games. The Court disapproved the practice, stating among other things that "the realities of the situation plainly reveal . . . both perceived and actual endorsement of religion." *Id.* at 305. In addition, though, the majority offered as a justification for embracing a facial challenge to the policy the belief that the election system "encourages divisiveness along religious lines and threatens the imposition of coercion upon those students not desiring to participate in a religious exercise." *Id.* at 317. *See also id.* at 311 ("The mechanism encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause."). It is worth noting that while Justices had expressed in the earlier school-aid cases a fear that state action *concerning* schools would cause political division along religious lines, here the focus has shifted to "divisiveness along religious lines" *in* the "public school setting."

[218] *Lee*, 505 U.S. at 604 (Blackmun, J., concurring).

[219] *Id*. at 606-07 (quoting *Engel*, 370 U.S. at 429).

[220] *Id*. at 607 (quoting *Walz*, 397 U.S. at 694). In his separate opinion, Justice Souter hinted at a similar theme. 505 U.S. at 617-18 ("We have not changed much since the days of Madison, and the judiciary should not willingly enter the political arena to battle the centripetal force leading from religious pluralism to official preference for the faith with the most votes.").

[221] *Id*. at 607 & n. 10 ("Religion has not lost its power to engender divisiveness"). Justice Blackmun quoted the lawyer's report that "[o]f all the issues the ACLU takes on . . . [a]side from our efforts to abolish the death penalty, [school prayer] is the only issue that elicits death threats." *Ibid.* To this claim, Justice Scalia could, and did, respond in dissent:

divisive, is dangerous to democracy.[222]

Perhaps the most difficult of the Court's recent Religion Clause cases to categorize, or to assimilate to the current doctrinal structure, is *Kiryas Joel*.[223] New York had, had, by special statute, created a school district specifically for the Village of Kiryas Joel, "a religious enclave of Satmar Hasidim."[224] Justice Souter, writing for the Court, saw the statute as "tantamount to an allocation of political power on a religious criterion" and, therefore, as a violation of the Establishment Clause.[225] If only out of habit,

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"The Founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration – no, an affection – for one another than voluntarily joining in prayer together, to the God whom they all worship and seek." *Id.* at 646 (Scalia, J., dissenting).

[222] *Id*. at 607-08 ("Democracy requires the nourishment of dialog and dissent, while religious faith puts its trust in an ultimate divine authority above all human deliberation. . . . When the government appropriates religious truth, . . . [t]hose who disagree no longer are questioning the policy judgment of the elected but the rules of a higher authority who is beyond reproach. . . . Democratic government will not last long when proclamation replaces persuasion as the medium of political exchange."). In other words, the influence of "religion" is divisive because religion is unreasoning; democracy, on the other hand, must be policed so as to remain the realm of "persuasion." *See also, e.g.*, *Wolman*, 433 U.S. at 264 (Stevens, J., concurring in part and dissenting in part) (quoting Clarence Darrow's claim that "[t]he realm of religion . . . is where knowledge leaves off, and where faith begins[.]").

In his separate opinion, Justice Souter hinted at a similar theme. 505 U.S. at 617-18 ("We have not changed much since the days of Madison, and the judiciary should not willingly enter the political arena to battle the centripetal force leading from religious pluralism to official preference for the faith with the most votes.").

[223] Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, *et al.*, 512 U.S. 687 (1994).

[224] *Id.* at 690. Governor Cuomo remarked, when he signed the bill creating the district, that it was "'a good faith effort to solve th[e] unique problem' associated with providing special education services to handicapped children in the village." *Id*. at 693.

[225] *Id.* at 690. *See also id.* at 696 (stating that the law creating the school district "departs from [the First Amendment's 'neutrality' command] by delegating the State's discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercise neutrally."); *id.* at 696-708 (analyzing the district in light of *Larkin*). *But see id.* at 746 (Scalia, J., dissenting) (criticizing Justice Souter's reading of *Larkin*).

It was only the school district, and not the Village itself – even though the district followed the Village's lines – that was invalidated. And, the "boundaries of the village of Kiryas Joel were drawn to include just the 320 acres owned and inhabited entirely by Satmars." *Id.* at 691. It is also worth noting that the impetus for the creation of the school district was the Court's decisions in *Aguilar* and *Ball*, which cast doubt on the validity of earlier efforts to provide special-education services to Satmar children attending religious schools. *Id.* at 692; *id* at 730-31 (Kennedy, J., concurring).

Justice Souter added that, in *Lemon*'s terms, this unlawful "allocation of power" had the impermissible "effect" of "advancing" religion.[226] But even if *Lemon* and its three-part test were cast in, at best, a background role, the Argument nonetheless was prominently on display. Even in setting the stage, and reciting the facts, Justice Souter reported that "[n]eighbors who did not wish to secede with the Satmars [had] objected strenuously" to the Village's creation.[227] And, at the heart of his analysis was unease about "legislative favoritism along religious lines,"[228] and the concern, if not the conviction, that the "next similarly situated group seeking a school district of its own [would] receive one."[229]

The dangers of political division and social segregation were flagged also in several of the Justices' separate opinions. Justice Stevens, for example, echoed Justice Douglas's *Yoder* dissent, couching his arguments not so much in terms of the strife that might attend the legislative creation of school districts like *Kiryas Joel*, but rather in terms of the sectarianism and separation that would *result* from this legal accommodation. Thus, what the district's supporters likely regarded as a program aimed at assisting, in a religion-sensitive way, certain special-needs children,[230] Justice Stevens characterized as a "religious sect's interest in segregating itself and preventing its children from associating with their neighbors."[231]

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[226] *Id.* at 697. Justice Blackmun wrote separately to "note [his] disagreement with any suggestion that today's decision signals a departure from the principles described in [*Lemon*]." *Id.* at 710 (Blackmun, J., concurring). He also insisted that the Court's analysis was functionally similar to an application of *Lemon*'s "effect" and "entanglement" prongs. *Id.* at 710. Justice O'Connor, however, welcomed the Court's lack of emphasis on *Lemon*. *Id.* at 718 ("[S]etting forth a unitary test for a broad set of cases may sometimes do more harm than good."); *id.* at 721 ("[T]he case law will better be able to evolve towards [a unified test] if it is freed from the *Lemon* test's rigid influence."). *See also id.* at 750 (Scalia, J., dissenting) (referring to the Court's "snub of *Lemon*").

[227] *Id.* at 691.

[228] *Id.* at 704.

[229] *Id.* at 703. *But see id.* at 722 (Kennedy, J., concurring) ("This rationale seems to me without grounding . . . and a needless restriction upon the legislature's ability to respond to the unique problems of a particular religious group."); *id.* at 726 (noting that "no party has adduced any evidence that the legislature has denied another religious community like the Satmars its own school district under analogous circumstances").

[230] *Cf., id.* at 716 (O'Connor, J., concurring) (stating that the law creating the district "single[d] out a particular religious group for favorable treatment" and was not a "general accommodation").

[231] *Id.* at 711 (Stevens, J., concurring). *But see id.* at 749 (Scalia, J., dissenting) ("Justice Stevens' statement is less a legal analysis than a manifesto of secularism. It surpasses mere rejection of accommodation, and announces a positive hostility to religion—which, unlike all other noncriminal values, the State must not assist parents in transmitting to their children.").

For him, it was not only a social and civic but also a constitutional flaw in the district's creation that it "increased the likelihood that [Satmar children] would remain within the fold."[232]

Taking a different tack, Justice Kennedy emphasized the fact that the legislature had employed, or exploited, "political or electoral boundaries" in crafting what, in his view, could otherwise stand as a commendable accommodation of religion.[233] That is, it was the conflation of political and religious lines – a conflation that presented "the danger of stigma and stirred animosities" – and not speculation concerning the outcome of future legislative battles, that troubled him[234]:

> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together become separatist; antagonisms that related to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.[235]

To be sure, Justice Kennedy insisted that he was not confusing the "democratic ideal" with assimilation or cultural homogeneity:

> [T]he Establishment Clause must not be construed as some sort of homogenizing solvent that forces unconventional religious groups to choose between assimilating to mainstream American culture or

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[232] *Id.* at 711 (Stevens, J., concurring) (describing the law as one that "provided official support to cement the attachment of young adherents to a particular faith."). As in some of the Court's earlier school-aid cases, then, the controlling concern in Justice Stevens's opinion is not so much the division surrounding a decision to fund education in religious schools, but instead the division that created by religious education itself.

[233] *Id.* at 728 (Kennedy, J., concurring).

[234] *Ibid* (noting that a "fundamental limitation" imposed by the Establishment Clause is that "government may not use religion as a criterion to draw political or electoral lines"); *ibid* (the "Establishment Clause forbids the government to use religion as a line-drawing criterion"); *id.* at 732 ("The Establishment Clause forbids the government to draw political boundaries on the basis of religious faith."). For Justice Kennedy, the "lines" or divisions in question have the advantage of being more concrete than those presumed or invoked by, say, Chief Justice Burger in *Lemon.*

[235] *Id.* at 728-29 (quoting Wright v. Rockefeller, 376 U.S. 52, 67 (1964) (Douglas, J., concurring)). Note the tension between this proclamation and Justice Kennedy's observation that "people who share a common religious belief or lifestyle may live together without sacrificing the basic rights of self-governance that all American citizens enjoy[.]" *Id.* at 730.

> losing their political rights. There is more than a fine line, however, between the voluntary association that leads to a political community comprised of people who share a common religious faith, and the forced separation that occurs when the government draws explicit political boundaries on the basis of peoples' faith.[236]

E. The Revival of the Political-Divisiveness Argument

In a nutshell: since *Lemon*, the argument that "political divisiveness along religious lines" is a phenomenon that judges are authorized and competent to identify and that is relevant to the constitutionality of government action has been employed in dozens of cases by dozens of courts.[237] In fact, and as I suggested at the outset, the Argument's purchase appears to have revived somewhat in recent years, providing the structure and animating theme for Justice Breyer's dissent in *Zelman*, and also a powerful rhetorical flourish for Michael Newdow in his pledge-case oral arguments.[239] Justice Breyer opened the door, suggesting to Newdow that the Pledge of Allegiance "isn't that divisive if . . . you have a very broad understanding of God," and that, perhaps, the Pledge "serves a purpose of unification at the price of offending a small number of people like you."[240] Newdow, not surprisingly, resisted this proposed constitutionalization of the "law disregards trifles" maxim,[241] insisting that "there's [nothing] in the Constitution that says what percentage of people get separated out."[242]

Most recently, of course, Justice Breyer's conclusions about the "division" caused, or not caused, by Ten Commandments displays in Texas and Kentucky were outcome-determinative last Term in *Van Orden v. Perry* and *McCreary County v. ACLU*.[243] Speaking through ten separate opinions,[244] the Justices invalidated, for lack of a "secular purpose",

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[236] *Id.* at 730 (Kennedy, concurring).

[237] For only a few of many examples, *see, e.g.*, American Family Ass'n, Inc., v. City and County of San Francisco, 277 F.3d 1114 (9th Cir. 2002); Doe v. Beaumont Independent School Dist., 240 F.3d 462 (5th Cir. 2001); Ehlers-Renzi v. Connelly School of the Holy Child, Inc., 224 F.3d 283 (4th Cir. 2000); American Civil Liberties Union of New Jersey ex rel. Lander v. Schundler, 168 F.3d 92 (3d. Cir. 1999).

[239] Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004).

[240] *Newdow*, Oral Arg. Tr. at 43.

[241] *See, e.g.*, Cal. Civ. Code § 3533 (West 2004). *See generally* Jeff Nemerofsky, *What Is a "Trifle" Anyway?*, 37 GONZAGA L. REV. 315 (2001/2002).

[242] *Newdow*, Oral Arg. Tr. at 43.

[243] 545 U.S. ___ (2005), 545 U.S. ___ (2005).

[244] According to news reports, the number of separate opinions in *Van Orden* and *McCreary County* prompted Chief Justice Rehnquist to quip, "I didn't know we had that many people on our Court." Linda Greenhouse, *Justices Allow a Commandments Display*,

displays in two Kentucky county courthouses,[245] while permitting a 6-foot-high stone monolith, inscribed with the Commandments, on the grounds of the Texas State Capitol.[246] Although Justice Souter's opinion for the Court in *McCreary* focused on the secular-purpose question, he did tie, in several places, that inquiry and its importance to claims about "divisiveness" and religion-based conflicts. He noted, for example, that for government to act with a prohibited religious "purpose" would "clash[] with the 'understanding reached . . . after decades of war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens[,]'"[247] and also warned of the "civic divisiveness that follows when the Government weighs in on one side of religious debate."[248] "Nothing," after all, "does a better job of roiling society."[249] Justice O'Connor sounded similar themes in her concurring opinion – her final opinion, as it happened – as she pronounced us "fortunate" that "[o]ur regard for constitutional boundaries" between religion and government has "protected us" from the "violent consequences of the assumption of religious authority by government."[250]

In the *Van Orden* case, Chief Justice Rehnquist had nothing to say specifically about the divisiveness, or lack of it, associated with the Texas monument. But again, Justice Breyer – whose departure from the *McCreary* majority supplied the deciding vote – certainly did. He highlighted as a "basic purpose[]" of the Religion Clause the need to "avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike."[251] He several times disclaimed any reliance on a "single mechanical formula"[252] *en route* to his

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Bar Others, N.Y. TIMES, June 28, 2005, at A6.

[245] *McCreary*, 545 U.S. ___ (2005).

[246] *Van Orden*, 545 U.S. ___ (2005). *See* Slip op. at 12 (op. of Rehnquist, C.J.) ("The inclusion of the Ten Commandments monument in this group [of monuments on the Capitol grounds] has a dual significance, partaking of both religion and government.").

[247] *McCreary*, 545 U.S. at ___, Slip op. at 12.

[248] *Id*. at 28.

[249] *Ibid*. *See also id.* at 33 ("We are centuries away from the St. Bartholomew's Day massacre and the treatment of heretics in early Massachusetts, but the divisiveness of religion in current public life is inescapable.").

[250] *McCreary*, 545 U.S. at ___, Slip op. at 1,2 (O'Connor, J., concurring). *See also id.* at 3 (O'Connor, J., concurring) ("Allowing government to be a potential mouthpiece for competing religious ideas risk the sort of division that might easily spill over into suppression of rival beliefs.").

[251] *Van Orden*, 545 U.S. at ___, Slip op., at 1 (Breyer, J., concurring). *Cf., e.g.*, *Lemon*, 413 U.S. at 622 ("The potential divisiveness of such conflict is a threat to the normal political process.").

[252] *Van Orden*, 545 U.S. at ___, Slip op. at 2 (Breyer, J., concurring). *See also id.* at 3

conclusion that the monument is not constitutionally impermissible because it is "unlikely to prove divisive."[253] And, perhaps most interestingly, Justice Breyer invoked the possibility of "religiously based divisiveness" resulting from a contrary ruling as an additional reason for permitting the monument.[254] That is, his predictions about political divisiveness along religious lines resulting from state action served not as such predictions usually have – *i.e.,* as a reason for invalidating the action being challenged as an unconstitutional establishment of religion – but instead as a reason for staying the Court's hand.[255] At the same time, though – while recognizing that *Van Orden* presented a "difficult borderline case[]"[256] – Justice Breyer emphasized that the monument's 40-year, controversy-free history provided a reason to conclude that its message was not perceived as religious or exclusionary.[257]

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The foregoing account is sufficient to establish that the Argument has been put to a variety of uses and has taken many forms. And, if courts have been neither clear nor consistent with respect to the *role* that the Argument plays in resolving Religion Clause disputes,[258] they have been no

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("I see no test-related substitute for the exercise of legal judgment.").

[253] *Id.* at ___, Slip op. at 7 (Breyer, J., concurring). For Justice Breyer, this conclusion was supported by the fact that "[t]his display has stood apparently uncontested for nearly two generations." *Ibid.* Justice Breyer's conclusion that the Texas monument was not so divisive as to require invalidation prompted Justice Souter to quip, "I doubt that a slow walk to the courthouse, even one that took 40 years, is much evidentiary help in applying the Establishment Clause." *Id.* at ___, Slip op. at 11 (Souter, J., dissenting).

[254] *Van Orden*, 545 U.S. at ___, Slip op. at 7 (Breyer, J., concurring).

[255] *Cf., e.g.*, Mellen v. Bunting, 341 F.3d 312, 324 (4th Cir. 2003) (Wilkinson, J., dissenting from denial of rehearing *en banc*)("There is a danger that in overturning long and widely accepted accommodations, courts will divide a community, rather than unite it. A primary aim of the Establishment Clause is to prevent divisiveness over matters of religion.").Utah Gospel Mission v. Salt Lake City Corp., 316 F. Supp. 2d 1201, 1238, 1240 (D.Utah 2001) (rejecting argument that City violated the First Amendment by selling a pedestrian easement in the Main Street Plaza to the Church of Jesus Christ of Latter Day Saints, noting that the City's desire to "bring[] an end to the divisiveness in the community" and "put[ting] to rest an extremely divisive issue" were valid "secular purposes").

[256] *Van Orden*, 545 U.S. at ___, Slip op. at 3 (Breyer, J., concurring).

[257] *Id.* at 6, 7 ("This display has stood apparently uncontested for nearly two generations. That experience helps us understand that as a practical matter of *degree* this display is unlikely to prove divisive.").

[258] NOWAK & ROTUNDA, *supra* note 111, at 1193 (noting that the Argument has done very little real "work," but has instead served only "to reinforce the conclusions of the Court"). In similar fashion, Professor Tribe noted that although "the Court has not yet delineated this inquiry's independent power," it has "emphasized divisiveness as a factor in

less slippery when it comes to the phenomenon itself: Sometimes, the "divisiveness" doing the job – whatever that job is – seems to refer to the fact that members of the political community will argue about, and line up on different sides of, legislative proposals – particularly proposals that involve the allocation of public funds. This "dividing of the house" is thought to be particularly pernicious when the resulting fault lines appear to track religious or denominational lines. In some opinions, though, the division that is treated as constitutionally significant, and troubling, has less to do with election-day tallies than with tone of public discourse, the texture of civil society, and the dispositions of citizens, schoolchildren in particular. In still others, the use of the Religion Clause by judges as a way to monitor and curb "political divisiveness along religious lines" seems, in fact, to reflect a determination that certain results are substantively undesirable, and therefore impermissible.[259]

Because "political divisiveness along religious lines" has meant and can mean so many different things, and observations or predictions about it can be put to a variety of doctrinal uses, it can be difficult to respond, critically and on the merits, both to the Argument itself and to its application in particular cases. It is hard to engage an argument that will not stand still.

III.

Again, in the cases surveyed above, and as a general matter, it is not always clear what is the alleged connection between the existence or prediction of political disagreement; the "religious" nature of the subject matter about which people disagree; the "religious" beliefs or affiliations of those people who are doing the disagreeing; and the test, history, structure, and purpose of the Establishment Clause. Nonetheless, it is fair to say that, in the years since *Lemon*, there has waxed and waned such an argument, and that the argument involves a complicated combination of claims about the effects of certain policies or legislative proposals on the public, about

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striking down various programs, particularly aid to parochial schools." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-14, at 1278 (1988). What's more, "the Court has specifically declined to hold that the threat of divisiveness is alone sufficient to strike a program down." *Ibid* (citing, *e.g., Lynch v. Donnelly*, 465 U.S. 668, 684 (1984) ("The Court of Appeals correctly observed that this Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct.")).

[259] *Cf.* TRIBE, *supra* note 258, at 1278 n.19 ("[T]he Court has suggested that state aid to parochial schools possesses a uniquely divisive potential."); *id.* at 1278 ("[T]he Court has suggested that the inquiry applies only in a limited set of cases.").

the connection between such effects and religious affiliations and belief, about the history and purpose of the First Amendment, about the role of courts, and about principles and norms of political morality.

In this Part, I take up the merits of the argument, as it is presented in *Lemon* itself and as it is generally presented or summarized by courts and scholars. The principal aim for this Part, however, is to examine, and even to determine, exactly what it is that those who assert or presume a working doctrinal relationship between constitutional validity and "division" or "strife" are claiming. What, in other words, *is* the "political divisiveness" argument? Even if, in the end, a pat answer is not available, the effort is worthwhile, as the examination takes us a long way down the road of assessing the normative attractiveness of its premises and several incarnations.

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The Argument's staying power, and its apparent revival, are perhaps surprising, given that it has been frequently and strongly criticized, and has rarely received an energetic defense, even by judges who invoke and apply it and scholars who concede sympathy for it. In what appears to remain, after nearly twenty-five years, the only article-length treatment of the Argument, Professor Gaffney asserted provocatively that the Court had inflicted a "wound" on itself by "introduc[ing] into the standards of constitutional adjudication the dubious proposition that judges are empowered to invalidate legislation if that legislation might have the tendency to create 'political division along religious lines.'"[260] Similarly – though, perhaps, less aggressively – Professor Tribe long ago characterized as "troubling" the "suggestion that religion . . . be kept away from politics[.]"[261]

The scholarly criticisms of the Argument develop a number of similar, overlapping themes. Professor Tribe, for example, has observed that this move purports to authorize a constitutional standard that is

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[260] Gaffney, Jr., *Political Divisiveness Along Religious Lines, supra* note 95, at 206. *See also, e.g.,* GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 4-9 (1987); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse,* 140 U. PA. L. REV. 149, 207-10 (1991); Ripple, *The Entanglement Test of the Religion Clauses, supra* note 114, at 1219-24.

[261] TRIBE, *supra* note 258, at 1276 *et seq.* (1988). Professor Tribe also grouped the "political divisiveness inquiry" with the Court's "secular purpose" test as two doctrines "suggesting that, when religious believers arrive at political debates, they must check their beliefs at the door or risk losing their efficacy." *Id.* at 1278, 1277.

"unusually difficult to administer."[262] Others have objected to the *Lemon* line of argument by challenging its employers' premise, namely, that religious commitments are more divisive, or that divisions along religious lines should be more troubling, than others.[263] Still others have highlighted the sweeping, and therefore the quixotic, nature of the Argument, reminding us that religious conflict, and attendant political disputes, are inevitable and will always be with us.[264] Indeed, as Professors Nowak and Rotunda have noted, it could well be that judicial efforts to impose tranquility and cohesion – or, at least, to exclude certain forms of dissent – actually exacerbate the conflicts, and sharpen the cleavages, that the political-divisiveness inquiry purports to police.[265] And, relatedly, it has been observed that some efforts to soothe the social irritation of religion-related strife have the effect – an effect that should be regretted, in a democracy committed to equal-respect and full-political-participation norms – of silencing or excluding from public deliberation those citizens whose views

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[262] ID. at 1280.

[263] *See, e.g.*, PERRY, UNDER GOD, *supra* note 65, at 40 ("[R]eligiously grounded moral discourse is not necessarily more sectarian than secular moral discourse."); ID. at 154-55 n. 11 ("American history does not suggest that debates about religious (theological) issues are invariably more divisive than debates about political issues."); Smith, *Believing Persons, supra* note 13, at 1248 (noting the objection that "religion has been no more generative of conflict in modern America than various other issues and movements"); Philip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 830 (1984) (describing as "problematic" the "factual assumption" that "religious disputes and religious people are particularly contentious"); Michael Stokes Paulsen, *God Is Great, Garvey Is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597, 1608 (1997) ("[I]f political peace is the goal, the religion clauses are not at all well tailored to achieve it. They are radically underinclusive in the subjects of possible divisiveness that they cover."); *cf.* Marshall, *The Other Side of Religion, supra* note 22, at 859 n. 80 (noting that "religion's unique relationship to one of humanity's deepest fears suggests that it possesses an inherent volatility that secular ideologies do not").

[264] *See, e.g.*, NOWAK & ROTUNDA, *supra* note 111, at 1193 ("If the political divisiveness test is in fact being used by the majority to ban religious conflict, the attempt would appear to be futile at best."); TRIBE, *supra* note 258, at 1281 ("[S]ome degree of division is inevitable[.]");

[265] NOWAK & ROTUNDA, *supra* note 111, at 1194. *See also* Smith, *Believing Persons, supra* note 13, at 1248 ("[I]t is not clear that any particular constitutional provision on this subject is well calculated to eliminate contention: excluding religion from some area of the public domain can be as controversial as including it."); Johnson, *Concepts and Compromise, supra* note 263, at 830 ("One sure way to encourage conflict . . . is to encourage people to think that what seem to be minor irritations are in reality violations of some sacred principle for which they have a duty to fight."); Berg, *Vouchers and Religious Schools, supra* note 26, at 192 ("Currently, considerable political and social strife stems from the denial of educational choice[.]"); Lupu & Tuttle, Zelman's *Future, supra* note 28, at 954 (suggesting that Justice Breyer's position and opinion in *Zelman* is "a cause, not a cure, of social strife"). Justice Breyer's concurring opinion in *Van Orden* recognized as much. 545 U.S. at ___, Slip op. at 7.

and values are connected to, or emerge from, their religious commitments.[266]

At the same time, there is in the relevant commentary a recognition – or, a claim – that, while misplaced as a matter of constitutional doctrine, the Argument hits on, and points toward, some important truths of political morality. Thus, Professor Tribe frames his critique around an acknowledgement that the Argument begins from "two valid precepts": First, "it correctly focuses on outsiders' reactions as importantly measuring establishment clause violations"; and, second, it "correctly notes that religious cleavages could fragment politics, and that the first amendment in part reduces this danger."[267] At the same time, he continues, it does not follow from the fact that the First Amendment, properly understood, is useful in reducing religion-based strife, that the Constitution authorizes, "requires, or even permits, whatever steps might be needed to reduce religion-based political divisiveness."[268]

Still, the question remains, what exactly *is* the Argument? To answer this question, assume a regulatory, spending, or expressive policy ("the Policy") – either proposed or enacted – and assume also that the Policy's opponents contend, citing *Lemon, etc.*, that it is unconstitutional because of its "divisive political potential" or because, more specifically, of the observed or predicted "political division along religious lines" associated with it.[269] If pressed, how would an opponent of the Policy articulate precisely her objection? In the remainder of this Part, I consider a number of possibilities and identify the flaws in each.

The Policy is unconstitutional because many people disagree with it, or about it. Our imagined objector to the Policy would, almost certainly, have more to say – and would have to say more – than this. Neither our Constitution nor any sane charter would require unanimity, or even consensus, as a prerequisite for legal validity; no reasonable person would expect or desire it. Disagreement and discord, standing alone, tell us nothing about the merits – let alone the constitutionality – of a measure, other than that the measure has been composed by, and proposed to, human

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[266] *See, e.g.*, FELDMAN, DIVIDED BY GOD, *supra* note 9, at 222-27; PAUL J. WEITHMAN, RELIGION AND THE OBLIGATIONS OF CITIZENSHIP (2002); PERRY, *supra* note 65 at 32-33.

[267] Smith, *Believing Persons, supra* note 13, at 1279.

[268] *Id.* at 1279 (citing judicial criticisms of the inquiry). *See also, e.g.*, Alan Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L. J. 692 (1968) (questioning whether the state's conceded "interest" in "secular unity" makes maintaining such unity an enforceable "constitutional requirement").

[269] *Lemon*, 403 U.S. at 622.

beings.[270] "Disagreement on matters of principle is," Jeremy Waldron has underscored, "not the exception but the rule in politics."[271] Even if one concedes that sharp disagreements and divisions over public policy are undesirable, it would be a long way from that concession to a conclusion either that such disagreements reveal or create constitutional infirmity, or that a court is authorized to exercise the power of judicial review to soothe or remove them.[272] Professor Schwarz put it well, nearly forty years ago: "If avoidance of strife were an independent constitutional value, no legislation could be adopted on any subject which aroused strong and divided feelings."[273]

All this might seem to go without saying. And so, one might object, why say it? But for purposes of this Article's examination of the political-divisiveness argument – that is, of the argument that political division along religious lines not only correlates with, but defines and determines unconstitutional state action – the point is worth emphasizing: We always have, and always will, disagree about and divide over things that matter. As Jeremy Waldron puts it:

> There are many of us, and we disagree about justice. That is, we disagree not only about the existence of God and the meaning of life; we disagree also about what counts as fair terms of co-operation among people who disagree about the existence of God and the

[270] *Cf., e.g., Lemon*, 403 U.S. at 622 ("Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government[.]"); Freund, *supra* note 92, at 1691 ("[P]olitical debate and division is normally a wholesome process for reaching viable accommodations[.]").

[271] JEREMY WALDRON, LAW AND DISAGREEMENT 15 (1999). *See also, e.g.*, PERRY, *supra* note 65, at 21 ("[W]e are perennially divided about the proper role of religious grounded morality in our politics. This is due in substantial part, no doubt, to the fact that we are perennial divided in our judgments about a host of important moral issues – and about a host of connected political issues.").

[272] Indeed, there is reason to think that the contrary is true; that is, that government policies and state action motivated by a dislike for disagreement are, for that reason, suspect. *See, e.g.*, Vieth v. Jubelirer, 541 U.S. ___ (2004), slip op. at 9 (opinion of Scalia, J.) (insisting that "[t]he Constitution . . . does not share appellants' alarm at the asserted tendency of partisan gerrymandering" to produce "hard-core Democrats" rather than "wishy-washy Democrats"); California Democratic Party v. Jones, 530 U.S. 567, 582 (2000) (noting the "inadmissibility" of an alleged state interest in "producing nominees and nominee positions other than those the [political] parties would choose if left to their own devices."); Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 578 (1995) (rejecting asserted state interest in "requir[ing] speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own").

[273] Schwarz, *supra* note 268, at 711.

meaning of life.[274]

From the outset, then, it would seem reasonable to put on those who would calibrate a measure's constitutionality to the consensus surrounding it a heavy burden of explaining how the supposed fact of political divisiveness along religious lines is so different from the unremarkable and unavoidable fact of real persons' political lives that it authorizes invalidation, on Religion Clause grounds, by reviewing judges of democratically enacted measures.

The Policy is unconstitutional because it concerns a "religious matter," and *because many people disagree with it, or about it.* This argument re-works the previous one, and seeks to cure the initial contention's absurdity, by limiting the applicability of the proposed connection between discord and invalidity to "religious matters." In other words, it is not disagreement, division, partisanship, or faction-generation that invalidates a measure, and against which the First Amendment protects; rather, it is division, partisanship, or faction-generation *concerning "religious matters"* that either indicates or constitutes a constitutional violation.

There are, however, (at least) four problems with this re-tooled objection. First, the attempt to narrow the applicability, or shorten the reach, of the anti-divisiveness principle to "religious matters" depends on the possibility of *identifying* such matters and *distinguishing* them meaningfully from other "matters" about which people strenuously and deeply disagree.[275] It is not enough to respond here that "religious matters" include matters of religious liturgy, ritual, membership, and creed. After all, no "political division along religious lines" doctrine is necessary to prohibit government from legislating with respect to such things. Existing, and far less controversial, First Amendment rules – the "secular purpose" requirement, for example,[276] or the "no religious decisions" principle[277] –

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[274] JEREMY WALDRON, LAW AND DISAGREEMENT 1 (1999).

[275] *See generally, e.g.*, Steven D. Smith, *The "Secular", the "Religious", and the "Moral": What Are We Talking About?*, 36 WAKE FOREST L. REV. 487 (2001) (examining and challenging "the categories and distinctions that pervade the modern discourse of religious freedom—distinctions between the "religious" and the "secular" and between "religion" and "morality"); Steven D. Smith, *Separation and the "Secular": Reconnstructing the Disestablishment Decisions*, 67 TEX. L. REV. 955, 1009-1010 (1989); Christine L. Niles, Note, *Epistemological Nonsense? The Secular / Religious Distinction*, 17 NOTRE DAME J. L. ETHICS & PUB. POL'Y 561 (2003) (contending that "no coherent line separates the 'secular' from the 'religious'").

[276] *See generally, e.g.*, Koppelman, *Secular Purpose*, *supra* note 35; *see also* KENT

and fairly well entrenched commitments to church autonomy would preclude almost any imaginable Policy addressing such matters.[278] What, then, would the objector have in mind in declaring unconstitutional controversial state action touching on "religious matters"? Most religions, after all, purport to speak to the complete human experience, in its solitary and communal dimensions. Religion might be a "private matter,"[279] but it certainly purports to speak to more than the interior life. For many religious people, much or even all that they do – whether or not it is done in the context of prayer, liturgy, or ritual – is "religious."[280]

A second objection to this revised, narrowed argument is that it depends on another, unarticulated claim, namely, a descriptive or predictive claim that disagreements about *some* matters are not only more searing, difficult, or regrettable than others, but also that disagreements about *some* matters, but not others, render unconstitutional legislation touching on those matters.[281] But what it is, exactly, about disagreements concerning "religious" matters – as opposed to others – that creates this effect? As Justice Brennan once put it, "[t]hat public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection."[282] If the mere fact of disagreement about the Policy cannot seriously be regarded as enough to invalidate it, what is it about the proposed sub-set of disagreements – *i.e.*, disagreements about "religious matters" – that make them more objectionable or, more precisely, unconstitutional?

It should not be enough simply to assert that our "traditions"

GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 90-91 (1988) ("A liberal society . . . has no business dictating matters of religious belief and worship to its citizens.").

[277] *See generally, e.g.*, EUGENE VOLOKH, THE FIRST AMENDMENT: PROBLEMS, CASES, AND POLICY ARGUMENTS 826-40 (2001); TRIBE, *supra* note 258, at 1226, 1231 (2d ed. 1988).

[278] *But see, e.g.*, Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d. 67 (Cal. 2004) (upholding California's law requiring all employers within the state to provide contraceptive coverage to their employees in the face of the argument that an organization describing itself as "an organ of the Roman Catholic Church" should be exempt from a law requiring conduct violates Catholic moral teaching).

[279] *Lemon*, 403 U.S. at 625 ("[T]he Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice[.]").

[280] *See generally, e.g.*, Smith, *What Are We Talking About?*, *supra* note 275, at 500 (discussing, among other things, the "ontotheological synthesis").

[281] Certainly, this premise is asserted explicitly, if not defended in any detail, both in Chief Justice Burger's *Lemon* opinion and in the Freund comment on which Burger relied.

[282] *McDaniel*, 435 U.S. at 640 (Brennan, J., concurring).

authorize, let alone compel, such a conclusion.[283] As was noted above, "warnings about division, and calls for unity, are nothing new." However, that those who drafted and ratified the Constitution knew about, and hoped to avoid repeating, the history of religion-related strife, division, persecution, and violence does not mean – contrary to Justice Breyer's claim – that it is a "basic purpose" of the Religion Clause to "avoid that divisiveness based upon religion that promotes social conflict"[284] or, more specifically, that such a "purpose" provides the enforceable, substantive content of the Clause. As Professor Smith has explained, the founding generations fears, hopes, and expectations regarding the First Amendment's social effects – that is, regarding the political and other consequences of adopting and enforcing it – should be distinguished from the Amendment's meaning.[285] (In fact, he insists, the better reading of the Establishment Clause is one that makes no claims about "principles" of religious freedom or social life at all.[286]) The point is, observations about the extent to which we have regarded, and reasonably regard, "religious" disagreements as particularly searing, or "religion" as something that is particularly likely to be divisive, do not – standing alone – justify the conclusion that the First Amendment authorizes judges to invalidate laws touching on or relating to "religion." The claim here is not that "religion" is not different, or that religion's difference does not matter;[287] it is that the asserted salience or intensity of political divisiveness along *religious* lines does not authorize the invalidation on Religion Clause grounds of assertedly divisive state actions.

Third, and in any event, it is not clear what additional "work" the

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[283] *But see, e.g., Lemon*, 403 U.S. at 623 ("It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government.").

[284] *Van Orden*, 545 U.S. ___, Slip op. at 1 (Breyer, J., concurring).

[285] *See McDaniel*, 435 U.S. at 642 (Brennan, J., concurring) ("[The Establishment Clause's] prohibitions naturally tend, as they were designed to, to avoid channeling political activity along religious lines and to reduce any tendency toward religious divisiveness in society. Beyond enforcing these prohibitions, however, government government may not go. The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas, and their platforms to rejection at the polls.").

[286] *See generally, e.g.*, SMITH, FOREORDAINED FAILURE, *supra* note 102; Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal* (draft on file with author).

[287] *See* Michael W. McConnell, *Singling Out Religion*, 50 DEPAUL L. REV. 1, 3 (2000) ("It is virtually impossible impossible to understand our tradition of the separation of church and state without recognizing that religion raises political and constitutional issues not raised by other institutions or ideologies.").

existence of disagreement or division really does, even in the revised argument. Is the new claim that (a) disagreement and division are unavoidable, and therefore constitutionally permissible; (b) state action or policy touching on religious matters is, or can be, constitutionally permissible; but (c) state actions or policies (i) touching on religious matters *and* (ii) about which people disagree strongly are *not* constitutionally permissible? One would think that if "religious matters", and state actions touching on or directed toward them, are identifiable by reviewing judges, then the better rule might be simply to invalidate such actions, period, without inquiring further into the existence *vel non* of "division," given that, as was noted above, division-by-itself cannot plausibly serve as a component, or even an indicator, of unconstitutionality. But, of course, it is *not* the case that laws relating to, or touching upon "religious matters" are, for that reason, unconstitutional.[288]

Fourth, there remains the quantification problem, with this and any other version of the Argument. Even assuming that we have shortened the Argument's leash, so that it is not disagreement, discord, and strife that indicates or causes unconstitutionality, but only disagreement about *certain things*; and assuming also that these things – *i.e.*, "religious" matters – can meaningfully be segregated from the run of issues about which people in a free society disagree; *how much* disagreement will invalidate a measure touching upon such matters?[289] Relatedly, whose disagreement or objections will count?[290] "Reasonable" people only? Non-religious people particularly? Members of religious minorities especially?[291] Is

[288] It is widely accepted, for instance, that governments may accommodate, without unconstitutionally establishing, religion. *See, e.g.*, Cutter v. Wilkinson, 125 S.Ct. 2113 (2005) (rejecting Establishment Clause challenge to Religious Land Use and Institutionalized Persons Act provisions accommodating religious exercise in prison). *See generally,* McConnell, *Singling Out Religion, supra* note 287, at 3 (2000) ("My thesis is that 'singling out religion' for special constitutional protection is fully consistent with our constitutional tradition.").

[289] *Cf., e.g.*, Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713 (2001) (proposing an empirical method for determining whether the government has violated the Establishment Clause by endorsing religion).

[290] *Compare, e.g.*, Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 765-69 (1995), *with id.* at 778-82 (O'Connor, J., concurring) (noting that a "reasonable observer" should be aware of the history and context of a public park where diverse groups engage in expressive conduct, and therefore should not perceive the display of a cross by a private speaker as government "endorsement" of religion), *and id.* at 807-12 (Stevens, J., dissenting) (arguing that a "reasonable observer" should not be presumed to have detailed knowledge of the history of the relevant forum, and that the "endorsement test" should take more seriously the perspective of dissenters and outsiders).

[291] *Cf.* FELDMAN, supra note 9, at 238-44 (arguing that one "way toward greater national unity in the face of our religious diversity" is for "legal secularists" to appreciate

"divisiveness" constitutionally unobjectionable, so long as it taints relations and conversations only between unreasonable people? Surely, the fact that there is a plaintiff – *i.e.*, that someone has created "division" by filing a lawsuit, which by definition involves a dispute, a "versus" – does not indicate, let alone establish, "divisiveness" of the kind that might raise concerns of a constitutional dimension? True, words like "strife" and "divisiveness", fairly understood, carry a connotation of *substantial* conflict, not just trivial disagreements. Nevertheless, this and any other version of the Argument that purports either to deduce or infer unconstitutionality from "political divisiveness along religious lines" appears vulnerable to a "how much?" objection.

The Policy is unconstitutional because it concerns a "religious matter" and people tend to *disagree, or* have historically disagreed*, or are* assumed, as a matter of law, to disagree *about such matters.* "Religious matters," in other words, are *inherently* divisive.[292] This version of the Argument seems to avoid the "who counts?" and "how much?" challenges, just discussed.[293] For this version to work, all that needs to be established is that the policy in question concerns such a matter.[294] This version also responds, in a way, to the second and third objections to the previous version of the Argument. Like the previous version, this one begs the question whether and how "religious matters" can be identified, but it purports to avoid difficult empirical or sociological inquiries into the existence or intensity of contemporary disagreements about the specific Policy at issue. This is because, once it has been determined that the Policy

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that "so long as all citizens have the same right to [speak as individuals or as groups], no one group or person should be threatened or excluded by the symbolic or political speech of others, much as they may disagree").

[292] *Cf., e.g.*, Martin E. Marty, *The Widening Gyres of Religion and Law, supra* note 83, at ___ ("[R]eligion, when vital, is never easily contained within a defined and disciplined sphere. Religion is never self-contained, never unconnected. It always stands the potential of being 'widened.'"). *But see, e.g.*, Mellen v. Bunting, 341 F.3d 312, 321 (4th Cir. 2003) (Wilkinson, J., dissenting from denial of rehearing *en banc*) ("Religious expression can be divisive, but it need not be so. The disparate strands of belief can come together in a broader unity much as streams unite into a river.").

[293] It also seems quite close both to the heart of Chief Justice Burger's complaint in *Lemon*, and to Justice Breyer's concerns in *Zelman.* Both of these Justices linked the argument from division to certain assertions and presumptions about the history of our debates about public education and parochial schools.

[294] *Cf., e.g.*, Freund, *supra* note 92, at 1692 ("Although great issues of constitutional law are never settled until they are settled right, still as between open-ended, ongoing political warfare and such binding quality as judicial decisions possess, I would choose the latter in the field of God and Caesar and the public treasury."); FELDMAN ,*supra* note 9, at 245 (asserting that school vouchers "create[] conflict and division").

concerns a "religious matter," "political divisiveness" is presumed, and the Policy is invalid. This version collapses, then, into the claim, "any law concerning a 'religious matter' – because such matters cause divisiveness – violates the Establishment Clause." But again, this claim cannot possibly be right, given that laws accommodating religion are permissible,[295] and, in any event, whatever workable content this version of the argument has would seem to be provided by other, more plausible, First Amendment doctrines, including *Lemon*'s "secular purpose" requirement.[296] What's more, it is not at all clear that religion has been a "*distinctively* divisive force in our society."[297] After all, as Judge McConnell has urged, "[r]eligious differences have never generated the civil discord experienced in political conflicts over such issues as the Vietnam War, racial segregation, the Red Scare, unionization, or slavery."[298]

Another variation on the Argument might turn from the nature of the issues or conduct addressed by the Policy to the nature of the arguments and motivations supporting and behind it. In other words, instead of examining the Policy's *content,* the objector would highlight its *purpose*. Instead of asking "does this Policy concern a 'religious matter'", a challenger would instead ask "why, or for what reasons, was the Policy proposed or enacted?" This version of the Argument, then, would go something like this: *The Policy is unconstitutional because many people support it for "religious" reasons.*[299] The Policy has been rendered unconstitutional not so much because of its *subject matter*, but because its supporters have been insufficiently attentive to their purported obligation to invoke in support of government action "accessible" arguments sounding in "public reason."[300]

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[295] *See supra* note 288.

[296] Chief Justice Rehnquist's own trimmed-down version of the Argument – in which its applicability is confined strictly to cases concerning public funds and parochial schools – is not unlike this version. *See Mueller,* 463 U.S. at 404 n.11 (stating that the question of "political divisiveness" should be "regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools").

[297] Smith, *The Rise and Fall of Religious Freedom*, *supra* note 260, at 208 (emphasis added).

[298] Michael W. McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. REV. 405, 413.

[299] Of course, one might just as well add, to this formulation, "or oppose it."

[300] *See generally, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 212-54 (1993) (defending an ethos of "public reason" that requires, *inter alia*, that arguments about public policy be couched in terms that are "accessible" to all citizens and that do not presuppose adherence to any religion or other "comprehensive" philosophy); William Marshall, *The Other Side of Religion,* 44 HASTINGS L. J. 843, 844 (1993) (contending that religion and religious conviction "are purely private matters that have no role or place" in the political arena).

This claim is not very different from *Lemon*'s "secular purpose" requirement.[301] Remember, though, that the Court's most prominent deployment of the secular-purpose requirement – in *Edwards v. Aguillard*[302]– was animated precisely by a desire to exclude "divisive forces" from the public schools, and by the view that the public school "is at once the symbol of our democracy and the most pervasive means for promoting our common destiny."[303] On the other hand, the focus of courts' inquiry under the secular-purpose requirement seems less on public *reaction* to or *effects* of a proposal than on the "purpose that animated [its] adoption[.]"[304] What is not clear in the cases, though, is whether the absence of a "secular purpose" invalidates a law because laws lacking such a purpose are, constitutionally speaking, *ultra vires;* because such laws are, precisely in that they lack a secular purpose, outside the *competence* of secular actors; or, because such laws are thought likely to have undesirable social effects, including causing "divisiveness."

In his important treatment of the secular-purpose requirement, Professor Koppelman appears to point toward this latter rationale, defending the requirement's necessity in part on the ground that the "doctrine cannot be discarded . . . without effectively reading the Establishment Clause out of the Constitution altogether. The result would be heightened civil strife, corruption of religion, and oppression of religious minorities."[305] That said, the core, for Koppelman, of the secular-purpose requirement is not its instrumental value in achieving civic peace or political unity, but is rather the fundamental "principle" that "government may not declare religious truth."[306] And, Koppelman takes care to

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[301] *Lemon,* 403 U.S. at 612. More recently, of course, the Court invalidated the Ten Commandments display at issue in *McCreary County* on the ground that it lacked a "secular purpose." *McCreary County v. ACLU,* 545 U.S. ___, Slip op. at 33. And, Justice Souter explicitly linked the secular-purpose inquiry with judicial concerns about, and perhaps a constitutional duty to avoid, religious divisiveness. *See, e.g., id.* at 28, 33.

[302] 482 U.S. 578 (1987).

[303] *Id.* at 584 (quoting McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948) (opinion of Frankfurter, J.)). *See also* Good News Bible Club v. Milford Central Sch. Dist., 533 U.S. 98 (2001) (Stevens, J., dissenting) ("Such recruiting meetings may introduce divisiveness and tend to separate young children into cliques that undermine the school's educational mission.").

[304] *Id.* at 585. *See also ibid* ("The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion.") (quoting and citing Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).

[305] Koppelman, *Secular Purpose, supra* note 35, at 88.

[306] *Id.* at 89. For a more detailed discussion of this point, see, *e.g.*, Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine,* 51 U.C.L.A. L. REV. 1645 (2004). *See also, e.g.,* Steven D. Smith, Barnette*'s Big Blunder,*

emphasize that the secular-purpose requirement, properly understood, "focuses on what government is saying rather than on who supported any particular law[.]"[307] As expounded by Koppelman, it turns out that the secular-purpose requirement reflects not so much constitutional squeamishness about "political divisiveness" as it does a worry that, without it, government would be too powerful, its sphere of imagined competence too vast, and that a government so empowered or deluded would pose serious threats to the freedom of conscience.[308] For Koppelman, an increase in division and strife might be a foreseeable consequence of jettisoning the secular-purpose requirement, but it does not appear that the secular-purpose requirement is, for him, merely a translation of Justice Burger's equation in *Lemon* of divisiveness and entanglement.

Returning, then, to the current version of the argument – *i.e.*, "The Policy is unconstitutional because many people support it for 'religious' reasons" – we can say that the argument is convincing, as a constitutional matter, only to the extent we believe that the Constitution in fact incorporates Rawlsian or similar restrictions on political argument and action.[309] But even if one embraces Koppelman's defense of the secular-purpose requirement, one is not therefore required to accept – and, in fact, we should not accept – the suggested incorporation into the First Amendment of "public reason" rules for political activity. The case has not been made, in other words, that the Constitution – or, more specifically, the its prohibition on "establishment[s]" of religion – prohibits the use of religiously grounded arguments in public life or about public matters, or requires the invalidation of policies that were supported, by some, using such arguments.[310]

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78 CHI.-KENT L. REV. 625 (2003).

[307] Koppelman, *supra* note 35, at 93.

[308] *Id.* at 166 ("[T]he case for the secular purpose requirement goes beyond the purposes of the Establishment Clause. Religious justification is a powerful thing. If there were no restraints on the ability of the state to rely on such justifications, then the state could invoke such justifications whenever it wanted to override any constitutional constraint. Such justifications are by their nature so powerful as to override any countervailing constraint, for what could be more important than carrying out the will of God?").

[309] It should be noted that the Rawlsian objection to reliance upon or invocation of "comprehensive" doctrines in the political arena sweeps more broadly than does the Argument, which is designed for employment – so say its employers – in the Religion Clause context only.

[310] *See generally, e.g.*, Perry, *supra* note 65, at 20-34. For a small, but still representative, sampling of the legal and political-theory literature on this issue, see, for example, Symposium, *Religiously Based Morality: Its Proper Place in American Law and Public Policy?*, 36 WAKE FOREST L. REV. 217 (2001); Symposium, *Religion in the Public*

Next, a slight variation on the version of the Argument just considered: *The Policy is unconstitutional because many people disagree with, or about it,* and *many of those who support or oppose it have advanced religious arguments for doing so.* This version re-incorporates what was missing in the previous one, namely, the fact of political disagreement or division relating to the Policy. Remember, that a policy fails *Lemon*'s secular-purpose requirement does not mean that it is divisive (unless one has taken such divisiveness as given, without regard to actual public sentiment or reaction). In fact, it is easy to imagine, in many jurisdictions, proposals that, under *Edwards*, lack a "secular purpose" but that are not, in any meaningful or worrisome sense, politically divisive. This version of the Argument combines the fact of observed or predicted social division with claims about the *reasons* underlying the contending factions' positions. Political disagreement alone could hardly be treated as evidence, let alone conclusive evidence, of unconstitutionality; but political disagreement that *proceeds from* or *rests upon* religious disagreements, it is claimed, is more threatening to democracy and is therefore constitutionally suspect in light of the First Amendment.[311]

In light of what has already been said, though, this variation is no more convincing than the others. If disagreement, standing alone, should not (and cannot) raise constitutional red flags; and if we are not inclined to accept as a foundational premise the constraint that political argument and action comply with certain prominent philosophers' versions of "public reason"; then it is not clear – either as a matter of political morality or as a matter of constitutional law – why the combination of two innocuous features of a particular Policy, or of the public debate about it, should point toward its invalidity. Certainly, if one elects to proceed from "public reason" premises – if one decides, *ex ante*, that we are, or will be deemed to be, acting within a constitutionally established "secular public moral order"[312] – then this version of the argument might seem plausible, even

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Square, 42 WM. & MARY L. REV. 647 (2001); RELIGION AND CONTEMPORARY LIBERALISM (Paul J. Weithman ed., 1997); ROBERT AUDI & NICHOLAS WOLTERSTORFF, RELIGION IN THE PUBLIC SQUARE (1997); Symposium, *The Role of Religion in Public Debate in Liberal Society*, SAN DIEGO L. REV. 643 (1993); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988).

[311] As the discussion in Part I illustrated, Justice Powell's use of the argument from division appears tightly connected to his concerns for the stability of the political process, and his belief that arguments cast in religious language, or concerning certain matters, posed special risks to that process.

[312] Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 198 (1992); *cf.* CASS SUNSTEIN, THE PARTIAL CONSTITUTION (1999) (contending that the

appealing. Nonetheless, it is worth highlighting the fact that the workability and attractiveness of this and other versions of the Argument depend crucially on the given-ness, or demonstrable correctness, of what are in fact contestable and controversial claims about political morality, activity, relations, and arguments.

Accordingly, we might adjust the Argument even further: *The Policy is unconstitutional because many people disagree with or about it*, and *the "lines" of disagreement appear to "track" religious "divisions."* This version does not address the *purpose* or *subject matter* of the Policy; nor, unlike the previous one, does it address the *motives* or *supporting arguments* of the Policy's fans and detractors. Rather, it purports to reduce the Argument's predicates entirely to sociological data: The claim is that the lines separating the Policy's supporters and opponents overlap, resemble, or track other existing lines – *i.e.*, religious or denominational lines – in the polity, and that the Policy is therefore constitutionally suspect. Again, however, what is doing the "work" in this claim is not – and cannot reasonably be – the mere fact of disagreement. Rather, the point is that the political and cultural fault lines created or exposed by the Policy coincide with pre-existing divisions, namely, religious divisions. Under this version, the objector need not establish, or even offer, an *explanation* for this coincidence; perhaps it not *because of* religion, and has nothing to do with doctrine or discipline.

Because two innocuous facts, when combined, are no more troubling than one, the claim must be that lines of disagreement that track or reveal *religious* differences are, *for that reason*, worse than those that track or reveal *other* cultural, social, and political differences (*e.g.*, race, gender, age, ethnicity, class, *etc.*). But it is far from clear that we should accept this claim. At the very least, one advancing it should be required to explain why – as a matter of *constitutional law*, and not societal aesthetics – public reactions to a policy that follow, say, racial or gender fault-lines do not, for that reason, tend to invalidate the policy, while reactions that follow purported religious divisions do. "Division" in society, and in politics, might well be unattractive and troubling to some; it remains to explain, however, why it would be that religious divisions – which are themselves taken as given in and, in fact, protected by the Constitution – that manifest

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Constitution set up "a secular liberal democracy in a way that is intended to minimize religious tension."); Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofits Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417, 426(2000) ("[T]he Constitution was designed to undermine the political influence of narrow and insular forms of zealotry.").

themselves in response to state actions or legislative proposals should be relevant to the validity of such actions.

If this last version of the argument turned away from the *motives* or *supporting arguments* of the Policy's supporters and detractors, yet another version might return the focus to the motives or purposes of government officials: *The Policy is unconstitutional because the government has acted in order to, or with the intent to, "divide" the polity along religious lines.* This version of the Argument seems plausible, at first, if only because, as the current political season illustrates, we all probably regard state action designed merely to "divide" – let alone to divide along religious lines – as unseemly and unworthy. At first blush, it seems unlikely that any American government or state actor would ever act with this *purpose* – or, at least, solely with this purpose. Is it sensible or worthwhile, then, to construct Establishment Clause doctrine around a predicted or feared phenomenon that is so strange, and therefore so unlikely? To be sure, governments *do* act, and can hardly avoid acting, with the knowledge – perhaps with the sure knowledge – that the people will be divided in response. Such division is, government actors can and so reasonably conclude, inevitable.

In fact, though, the challenger might insist, government official and legislators *do* act, often, with the purpose of "dividing" the public. What in the world of political pundits are known as "hot button" or "wedge" issues are, one might say, matters concerning which legislators act not only with the awareness that their actions will be controversial, but with the desire to create controversy, to sharpen disagreements, to stir up engagement and activism, and so on. Anyone familiar with the work of Congress knows that issues are often brought to a head, and put to a vote, primarily to require one's political opponents to make a public decision that will, it is hoped, be offensive or infuriating to certain people. Symbolic votes on symbolic policies are regularly engineered, then, precisely to "divide." Given, however, that these votes and policies are an unremarkable staple of political life in our democracy, it is hard to accept an argument whose conclusion is that they are unconstitutional.

Perhaps, though, the objection to such moves is more focused. That is, even if intentionally "divisive" state actions on "hot button" matters are unavoidable and, in a free society, unobjectionable, state actions that are intended to cause, or exploit, divisions along *religious* lines are particularly offensive. Such a motive by legislators or officials is so base, it is argued, that a policy animated by it should be invalid. Divisions over policies – even divisions along religious lines – might well be unavoidable, but these

latter divisions in particular should not and may not be exploited.[313] Like the previous version, though, this argument collapses in the end into a claim that religious divisions are just *worse*, and that their worse-ness is constitutionally relevant. If a legislative motive to exploit cultural or other divisions for political purposes does not (and cannot) invalidate a policy animated by such a motive, then it remains to be explained why, exactly, the conclusion should be any different when the divisions in question track religious lines.

Finally, there is the perhaps-most-modest version of the argument, in which it is not maintained that the existence of "political divisiveness along religious lines" concerning a Policy, or an official desire to create or exploit such divisiveness, is *by itself* what invalidates a policy. Rather, the now-chastened objector's claim is that *the existence of "political division along religious lines" concerning the Policy serves as a 'warning signal' that the Policy could be unconstitutional, and triggers careful scrutiny, using other doctrinal tools, the application of which determines the Policy's validity.*[314] Importantly, the existence, or prediction, of such division does not *itself* serve as such a doctrinal tool; to the extent that Chief Justice Burger suggested otherwise in *Lemon*, he was simply mistaken, or carried away.[315]

In fact, this version goes, when one considers carefully what the Court actually did in *Lemon*, and in the many other cases – reviewed in Part One – where "political divisiveness along religious lines" is invoked in the context of Establishment Clause review, one sees that division is, in the end, doing the work of a "signal," not of an actual constitutional standard or tool.

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[313] Just as earlier versions of the Argument ran up against the problem of distinguishing, in a non-question-begging way, between "religious" and other subject matters, this version invites the question, "what *are* 'religious lines'?" Are the "lines" that we do not want our political splits to overlay the lines between the irreligious and the religious? Among Christian denominations? Between the orthodox and the latitudinarian? And so on.

[314] *See* TRIBE, *supra* note 258, at 1282 (1988) (stating that division should serve as a "warning signal[,] suggesting stricter judicial scrutiny but not serving to condemn what government has done"). *See also Nyquist*, 413 U.S. 797-98 (quoting *Lemon*, 403 U.S. at 625 (Douglas, J., concurring)) ("While the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a 'warning signal' not to be ignored."). Professors Larry Solum and Larry Alexander made a similar point when I presented this Article at the University of San Diego Law School's faculty workshop.

[315] *Lemon*, 403 U.S. at 624-25. Chief Justice Burger contended that entanglement between government and religion is *both* an "independent evil against which the Religion Clauses were intended to protect" *and* a "warning signal" that further evils are menacing.

Difficult questions remain, certainly, about what doctrinal tools should be employed, and how, in the wake of a "divisiveness"-based "warning signal"; nevertheless, "political divisiveness along religious lines" remains relevant to, but not outcome-determinative of, the question of a Policy's constitutional validity.

At first, this version of the argument seems reasonable, and restrained. It also appears, at first, to capture accurately what most courts are actually doing with their observations about and predictions of "political divisiveness along religious lines." That is, this version is consonant with the observation above that, in the courts' cases, the political-divisiveness argument seems to have served primarily as a rhetorical device, or as a concluding flourish to the application of one or another doctrinal "tests." Still, we should ask, what is it about "political divisiveness along religious lines" that should trigger the application of tools that would, presumably, not be applied in its absence? What does an observation or prediction about the presence or threat of "division" add to the set of facts presented in a complaint alleging a violation of the Establishment Clause? Do such observations and predictions trigger the deployment by judges of different First Amendment tests and tools? Are there two layers of scrutiny: Establishment Clause analysis in the absence of division, and such analysis in its presence? Or, is it that the usual tests and tools are applied, in cases involving such observations and predictions, with greater zeal or precision? A constitutional rule applied with "greater zeal or precision" in a certain kind of case is, however, a *different* rule from the one applied on another kind of case.

Even this final reformulation of the *Lemon* "political divisiveness" test requires its defenders to explain what is meant by a "warning signal," and whether the issuing or perceiving of the signal works any change in the doctrine or standard being applied. In addition, though, this "warning signal" variation calls for an explanation of why the presence of division or divisiveness should serve as a "warning signal" of anything at all, let alone that something is constitutionally amiss. That a Policy is prompting "political divisiveness along religious lines" certainly tells us *something* about the Policy, and also about religion; it is not clear, though, that it tells us anything about the Policy's merits, let alone its constitutional validity. Stated simply, while "political divisiveness along religious lines" might well be undesirable and unattractive, and might well "signal" problems in the political life of a community, and might well *attend* violations of the Establishment Clause, it nonetheless should play no role in the evaluation by judges of Religion Clause-based challenges to state action, because what

it "signals" – *i.e.*, disagreement, pluralism, and the exercise of religious freedom – is, in the end, constitutionally protected.

Conclusion

Few epithets in contemporary discourse are as wounding, yet tedious and vacuous, as the charge that a person, claim, argument, proposal, or belief is "divisive." The term – like "controversial," "extremist," and "partisan" – often seems to do little more than signal the speaker's disapproval, and his desire that the offending target either be quiet, or change his tune. The point of this Article has been to investigate, in a more precise way, the claim being made about the relation between what is asserted or assumed to be a real-world fact – *i.e.*, "political fragmentation on sectarian lines"[316] – and the constitutionality *vel non* of challenged state action.

James Madison acknowledged, in *The Federalist No. 10*, that "[t]he instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished," and he conceded that the "violence of faction" was such governments' "dangerous vice."[317] The solution, though, was not and could not be the suppression or elimination of disagreement and faction. He explained:

> The diversity in the faculties of men . . . is . . . an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors ensures a division of the society into different interests and parties. . . .
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> The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society.[318]

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[316] Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 695 (1970) (Harlan, J., concurring).

[317] *The Federalist No. 10* (James Madison) (Clinton Rossiter ed., 1961).

[318] *Ibid*. *See also, e.g.*, Sullivan, *Federal Express*, *supra* note 18, at 6 ("The U.S. Constitution was devised not as a means to avoid social and cultural polarization, but as a

At present, the divisions that run through our politics and communities make appealing to many a more managerial approach to politics and public life. Division and disagreement, though – about important things – is, this side of Heaven, a fact.[319] However, Madison's warning remains as powerful as ever: "Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency."[320]

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way to manage it without splitting the country apart.").

[319] AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 360 (1996) (noting that "[m]any theorists of democracy refuse to face up to [the] moral fact of political life" that, "given the intractable sources of disagreement, citizens canot expect to reach mutually justifiable agreement over the whole range of significant issues in politics").

[320] *The Federalist No. 10* (James Madison) (Clinton Rossiter ed., 1961). *See also Abington*, 374 U.S. at ___ n. 8 ("Madison suggested in the Fifty-first Federalist that the religious diversity which existed at the time of the Constitutional Convention constituted a source of strength for religious freedom, much as the multiplicity of economic and political interests enhanced the security of other civil rights.").