



UNC
SCHOOL OF LAW

FIRST AMENDMENT LAW REVIEW

Volume 7 | Issue 2

Article 4

3-1-2009

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Recommended Citation

Stephen M. Feldman, *Divided We Fall: Religion, Politics, and the Lemon Entanglements Prong*, 7 FIRST AMEND. L. REV. 253 (2018).
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DIVIDED WE FALL: RELIGION, POLITICS, AND THE *LEMON* ENTANGLEMENTS PRONG

STEPHEN M. FELDMAN*

ABSTRACT:

The 2008 campaign for the presidency should remind Americans that mixing religion and politics can be dangerous. Polls show that more than half of American voters would hesitate to support a Mormon candidate. In terms of Establishment Clause doctrine, the entanglements prong of the Lemon test provides a mechanism for protecting political equality by ensuring against religiously-inspired political divisiveness. Yet, in recent years, numerous scholars and Supreme Court Justices have attacked the entanglements prong. Indeed, the Court has poked so many holes in the entanglements inquiry that it may no longer exist. This Article defends the political-divisiveness component of the entanglements prong. The political theory of pluralist democracy, the social science research documenting the power of religious identity, and the history of religious discrimination in the United States demonstrate that the importation of religious divisions into the political realm can thwart the pluralist democratic process. Pluralist democracy demands that each and every citizen be afforded a full and fair opportunity to participate, to assert his or her interests and values in the democratic arena. Citizens, then, must be willing to negotiate and compromise with other citizens, who are equally entitled to assert their interests and values. But religiously-inspired political positions sometimes cannot be compromised; they are absolutes. Moreover, when political stances form around religious orientations, religious outsiders inevitably lose merely because they are minorities. Through-

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out American history, dominant religious groups have translated their values into political goals and imposed them on minorities. Given this, the Court should promote political equality and protect religious minorities from the ravages wrought by religiously-inspired political divisiveness. To do so, the Court should interpret the Establishment Clause to proscribe governmental programs funding religious activities and institutions and governmental displays of religious symbols.

INTRODUCTION

For three decades, conservatives in the United States have championed a reliance on religious values and dogma in political deliberations.¹ Yet, historical and current events from around the world illustrate what can happen when religion and politics are combined: they can make for a volatile mix. In the 1640s, for example, conflict between the Anglican and Catholic-leaning King Charles I and a (Protestant) Puritan-led Parliament catapulted England into civil war (and led to the King's eventual beheading).² Today, current events in Iraq demonstrate how political strife engendered by religious divisions—between Sunni and Shiite Muslims, in particular—might thwart efforts to implement democracy.³ Nonetheless, Americans can too easily dismiss distant events from the past and from other nations. Religion might hinder democracy elsewhere, but it couldn't happen here—or so, at least, many Americans apparently believe.

1. See, e.g., BARRY A. KOSMIN & SEYMOUR P. LACHMAN, *ONE NATION UNDER GOD: RELIGION IN CONTEMPORARY AMERICAN SOCIETY* 197-99 (1993); STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* (1993); RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1984); Richard John Neuhaus, *A New Order of Religious Freedom*, in *LAW AND RELIGION: A CRITICAL ANTHOLOGY* 89 (Stephen M. Feldman ed., 2000).

2. STEPHEN M. FELDMAN, *PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE* 84-92 (1997) [hereinafter FELDMAN, *PLEASE DON'T*].

3. Seymour M. Hersh, *The Redirection*, *THE NEW YORKER*, Mar. 5, 2007, at 54; Sabrina Tavernise, *Sunni-Shiite Violence Points to Religious War*, *INT'L HERALD TRIB.*, May 28, 2005, § News at 3 http://www.iht.com/articles/2005/05/27/news/sunn_i.php. For an optimistic assessment of the compatibility of democracy with forms of Islam, see NOAH FELDMAN, *AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY* (2003).

The campaign for the 2008 presidential nominations, however, should bring home to Americans why mixing religion and politics can be dangerous. Mitt Romney, former governor of Massachusetts, carried the conservative credentials that seemed to cast him as an ideal Republican presidential candidate, but for one flaw.⁴ One poll after another revealed that a substantial percentage of Americans and an even higher percentage of Republicans would hesitate to vote for Romney solely because of his religion: he is a member of the Church of Jesus Christ of Latter-Day Saints.⁵ The *Washington Post* reported polls showing that 24 percent of Americans would not vote for a Mormon for president, while 42 percent of Republicans “would either not vote for a Mormon or would do so with some level of doubt.”⁶ According to an *NBC News/Wall Street Journal* poll, a whopping 53 percent of Americans “were very uncomfortable or [had] some reservations” about voting for a Mormon presidential candidate.⁷

Given these numbers, rival Republican presidential candidate Mike Huckabee unsurprisingly prodded Republican voters on the campaign trail to remember that he is an ordained Southern Baptist minister, that Romney is Mormon, and that Huckabee is therefore more trustworthy. With feigned innocence, Huckabee asked, “Don’t Mormons believe that Jesus and the devil are brothers?”⁸ In fact, many

4. See Amy Sullivan, *Mitt Romney’s Evangelical Problem*, WASH. MONTHLY, Sept. 2005, at 13, available at <http://www.washingtonmonthly.com/features/2005/0509.sullivan1.html>.

5. Thomas Burr, *Poll Shows Romney’s Faith Speech Did Little To Sway Mormon-shy Voters*, SALT LAKE TRIB., Dec. 12, 2007, Local Politics, available at http://www.sltrib.com/ci_7698653; Jill Lawrence, *Will Mormon Faith Hurt Bid for White House?*, USA TODAY, Mar. 12, 2007, at 10A, available at http://www.usatoday.com/news/washington/2007-02-12-romney-cover_x.htm; Howard Berkes, *Faith Could Be Hurdle in Romney’s White House Bid*, NATIONAL PUBLIC RADIO, Feb. 8, 2007, <http://www.npr.org/templates/story/story.php?storyId=7245768>.

6. Parsing the Polls: Answering the Mormon Question, http://blog.washingtonpost.com/thefix/2007/02/parsing_the_polls_the_mormon_q.html / (Feb. 14, 2007, 5:30 EST).

7. Berkes, *supra* note 5.

8. Foxnews.com, *GOP Hopeful Mike Huckabee Asks if Mormons Believe Jesus, Devil are Brothers*, <http://www.foxnews.com/story/0,2933,316507,00.html> (last visited Feb. 6, 2009).

evangelical churches teach that Mormonism is an anti-Christian cult that worships Satan.⁹ One televangelist declared, "If you vote for Mitt Romney, you are voting for Satan!"¹⁰ Leading up to the Iowa caucuses on January 3, 2008, Huckabee repeatedly reminded voters that he was the Christian candidate¹¹ and aired commercials proclaiming himself a "Christian leader."¹² His strategy apparently helped: he won Iowa, where 60 percent of the Republican caucus participants were evangelicals.¹³

Iowa was just the beginning. At the national level, approximately 26 percent of Americans and 30 percent of Republicans are evangelical Christians.¹⁴ Moreover, as reported in the recent Pew Forum *Religious Landscape Survey*, "[t]he South, by a wide margin, has the heaviest concentration of members of evangelical Protestant churches."¹⁵ Thus, when nearly half the states held primaries and caucuses on Super Tuesday, February 5, 2008, the results were all-too-predictable. As summarized in the *Washington Post*, "Huckabee domi-

9. Sullivan, *supra* note 4.

10. Jonathan Chait, *Pray Tell*, NEW REPUBLIC, Nov. 19, 2007, at 5, available at <http://www.tnr.com/politics/story.html?id=be6da81d-7fb1-414d-b65c-f734c7ee07a3&p=1>.

11. See generally Rebecca Sinderbrand, *New Huckabee Ad Appeals to Christian Conservatives*, CNN.com, Jan. 1, 2008, <http://www.cnn.com/2008/POLITICS/01/01/huckabee.christians/index.html>; Michelle Vu, *Huckabee Defends Jesus as Point of Christmas*, CHRISTIAN POST, Dec. 25, 2007, http://www.christianpost.com/article/20071225/30638_Huckabee_Defends_Jesus_as_Point_of_Christmas.htm; Amy Sullivan, *Huckabee's Bid for the Christian Right*, TIME, Oct. 22, 2007, <http://www.time.com/time/politics/article/0,8599,1674340,00.html>.

12. Huckabee Ad: *I am the True Christian Candidate*, <http://www.godlikeproductions.com/forum1/message472456/pg1> (last visited Feb. 6, 2009).

13. Michael Luo & David D. Kirkpatrick, *At Huckabee Central, Cheers for Evangelical Base*, N.Y. TIMES, Jan. 4, 2008, http://www.nytimes.com/2008/01/04/us/politics/04repubs.html?_r=1&oref=slogin.

14. See THE PEW FORUM ON RELIGION AND PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 5 (2008) [hereinafter RELIGIOUS LANDSCAPE SURVEY] (reporting that 26.3 percent of Americans belong to evangelical churches), <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>; Sullivan, *supra* note 4 (reporting percentage of Republicans).

15. RELIGIOUS LANDSCAPE SURVEY, *supra* note 14, at 8; see KOSMIN & LACHMAN, *supra* note 1, at 49-55 (discussing geographical distribution of Baptists).

nated the South, winning his native Arkansas as well as Georgia, Tennessee, Alabama, and West Virginia.”¹⁶ Facing these results, Romney, the Republican “candidate straight from central casting,”¹⁷ dropped out of the race.¹⁸

Whether or not we admit it, Americans are “divided by God,” in the words of Noah Feldman.¹⁹ Religious divisions propel many Americans into political disputes—over abortion, same-sex marriage, the death penalty, and a host of other issues. Recent Supreme Court cases confronting Establishment Clause issues, such as the constitutionality of public displays of the Ten Commandments, “raise the central challenges of citizenship and peoplehood: who belongs here? To what kind of nation do we belong?”²⁰ In terms of democracy, the question becomes one of political equality: who is entitled to participate as a member of equal status in the American polity?²¹

With regard to Establishment Clause doctrine, such questions of belonging—of equal participation in the democratic polity—can be addressed under the entanglements prong of the *Lemon* test. In *Lemon*

16. Perry Bacon, Jr., *Gamble Paid Off for Huckabee on Tuesday*, WASH. POST, Feb. 7, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/06/AR2008020604125.html?hpid=topnews>; see Michael Kranish, *Evangelical Voters Bolster Huckabee in Southern States*, BOSTON GLOBE, Feb. 6, 2008, available at http://www.boston.com/news/nation/articles/2008/02/06/evangelical_voters_bolster_huckabee_in_southern_states/ (discussing effect of evangelical voters).

17. Scott Lehigh, *Unpersuasive to the End*, BOSTON GLOBE, Feb. 8, 2008, available at http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2008/02/08/unpersuasive_to_the_end/.

18. John Sullivan & Michael Luo, *Romney Exits, Saying He Has to ‘Stand Aside for Our Party,’* N.Y. TIMES, Feb. 7, 2008, available at http://www.nytimes.com/2008/02/07/us/politics/07cnd-repubs.html?_r=1&ref=us&oref=slogin.

19. NOAH FELDMAN, *DIVIDED BY GOD* (2005) [hereinafter FELDMAN, *DIVIDED*]. According to Feldman (for what it’s worth, we are not relatives), “[t]he deep divide in American life . . . is not primarily over religious belief or affiliation—it is over the role that belief should play in the business of politics and government.” *Id.* at 6.

20. *Id.* at 7.

21. See Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 674-93 (2002) [hereinafter Feldman, *From Liberty*] (arguing that, after World War II, the Court increasingly interpreted the Establishment Clause as protecting political equality).

v. Kurtzman,²² the Supreme Court articulated a three-pronged standard for resolving Establishment Clause issues. "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.'"²³ *Lemon* arose from challenges to two state statutes that provided funding to religious schools for teachers' salaries, books, and other instructional materials to be used when teaching secular subjects. Chief Justice Warren Burger's majority opinion reasoned that these state programs violated the third *Lemon* prong by generating two impermissible types of governmental entanglements with religion.

One type of entanglement was administrative. When the government supplies money to a religious institution for secular purposes—such as funding for teachers in parochial schools—then the government will need to monitor the use of the funds to insure that they are not diverted for religious activities. Such governmental surveillance (and potential control) of a religious institution amounts to unconstitutional entanglement.²⁴

More central to this Article, the second type of impermissible entanglement arose because the governmental actions were likely to engender political divisiveness corresponding with religious differences.²⁵ Burger concluded: "The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow."²⁶

This constitutional protection against religiously inspired political divisiveness provides a doctrinal means for policing against political inequality. When religious differences are translated into political differences, then religious minorities will likely be the losers. They will be precluded from participating equally in the democratic polity precisely because their religious beliefs and practices set them apart.

22. 403 U.S. 602 (1971).

23. *Id.* at 612-13 (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968) and quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

24. *Id.* at 614-22.

25. *Id.* at 622-24.

26. *Id.* at 623.

Religious differences will be transformed into diminished political power—into a reduced capacity to influence political debates. Even so, despite the apparent importance of the entanglements prong, with its political divisiveness component, numerous scholars and justices have attacked it. Most recently, Richard W. Garnett advocated abandoning the judicial enforcement of the entanglements prong because, he reasoned, the Establishment Clause should not be invoked as a mechanism to standardize or homogenize the people and their political desires. If the people politically divide along religious lines, so be it.²⁷ Noah Feldman has argued that the Court's reliance on the Establishment Clause to protect political equality both departs from the original purpose of the Clause and leads to untoward doctrinal consequences.²⁸ The justices, meanwhile, have poked so many holes in the entanglements prong that it may no longer exist.

This Article defends the *Lemon* entanglements prong, particularly its political divisiveness component. If the Court were to stop protecting against religiously-inspired political divisiveness, the Court would contravene the conception of democracy that it has persistently articulated and developed since the late 1930s.²⁹ In a pluralist democracy, such as we have in the United States today, the Court should generally ensure that all Americans have a fair and equal opportunity to

27. Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006); see MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE 288-90 (2008) (criticizing the entanglement prong for being excessively vague).

28. According to Noah Feldman, the original purpose of the Establishment Clause was to protect liberty of conscience. FELDMAN, DIVIDED, *supra* note 19, at 19-56; See Feldman, *From Liberty*, *supra* note 21, at 679-84; see also Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002). Doctrinally, Feldman argues that the protection of political equality has led the Court, first, to articulate tenuous distinctions between public and private actions—where the establishment clause limits do not apply to private actions—and, second, to allow some governmental funding of religious activities if the funding is supplied equally (or neutrally) to non-religious activities and institutions. Feldman, *From Liberty*, *supra* note 21, at 718-30.

29. STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 291-382 (2008) [hereinafter FELDMAN, FREE EXPRESSION]; see also Stephen M. Feldman, *Unenumerated Rights in Different Democratic Regimes*, 9 U. PA. J. CONST. L. 47, 62-98 (2006) [hereinafter Feldman, *Unenumerated Rights*].

participate in the democratic arena.³⁰ More specifically, the Court should implement the Establishment Clause as a mechanism for protecting religious minorities' participatory equality.³¹ American history unfortunately provides numerous examples where the religious majority not only has disregarded minorities, slighting their interests and values in democratic deliberations, but also has purposefully persecuted them.

Part I of this Article reviews Burger's *Lemon* reasoning on political divisiveness, follows the justices' development of the entanglements prong, and then discusses the Court's recent retreat from the entanglements inquiry.³² Part II defends the entanglements prong on the basis of democratic theory, social science research, and American history.³³ Why, precisely, should courts seek to protect against religiously-inspired political divisiveness? Part III identifies types of governmental actions that the entanglements prong should proscribe.³⁴ What governmental actions are likely to generate religiously-inspired political divisiveness? Part IV, the conclusion, responds to Garnett's and Noah Feldman's arguments and ends with a coda on religion in the 2008 presidential race.³⁵

I. *LEMON*, POLITICAL DIVISIVENESS, AND JUDICIAL RETREAT

A. *On Lemon*

While Chief Justice Burger explicated a three-pronged test in *Lemon*—purpose, effects, and entanglement—his majority opinion fo-

30. See generally JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980) (arguing that the Court should police the democratic process).

31. Cf. Christopher L. Eisgruber & Lawrence G. Sager, *Equal Regard*, in *LAW AND RELIGION: A CRITICAL ANTHOLOGY* 200, 203 (Stephen M. Feldman ed., 2000) (arguing that the religion clauses embody a broad principle of "equal regard," which "demands that the interests and concerns of every member of the political community should be treated equally, that no person or group should be treated as unworthy or otherwise subordinated to an inferior status").

32. See *infra* text accompanying notes 36-133.

33. See *infra* text accompanying notes 134-215.

34. See *infra* text accompanying notes 216-257.

35. See *infra* text accompanying notes 258-264.

cused on the third prong.³⁶ He reasoned that the disputed governmental funding programs violated the first amendment because they generated excessive administrative entanglement and political divisiveness along religious lines.³⁷ With regard to political divisiveness, Burger explained:

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. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.³⁸

Quite sensibly, Burger sought to bolster his position by discussing the workings of democracy. He began with a reasonable point that numerous justices had reiterated since World War II. "Ordinarily po-

36. The judicial concern with protecting against excessive entanglements had been developing in cases preceding *Lemon*, including *Abington School District v. Schempp*, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring) (stating that the first amendment protects against governmental involvement in sectarian affairs that might give rise to "divisive influences"); *Board of Education v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring) (quoting Goldberg's *Abington* concurrence on "divisive influences"); and *Walz v. Tax Commission of New York City*, 397 U.S. 664, 694-99 (1970) (Harlan, J., concurring) (articulating a concern for entanglements that included political divisiveness and administrative entanglements). The idea of protecting political equality under the compass of the Establishment Clause began to take shape in even earlier First Amendment cases. Feldman, *From Liberty*, *supra* note 21, at 679-93.

37. *Lemon v. Kurtzman*, 403 U.S. 602, 614-24 (1971).

38. *Id.* at 622.

litical debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government”³⁹ Then, citing a law review article by Paul Freund, Burger asserted a historical fact of questionable accuracy. Although vigorous political division and debate was normal, “political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.”⁴⁰ Regardless of whether this historical assertion was correct, Burger followed with another reasonable point about democracy: “The potential divisiveness of such [religiously-inspired political] conflict is a threat to the normal political process.”⁴¹ Why might that be? Here again, Burger’s opinion came up short. The mixing of church and state not only could engender gov-

39. *Id.* A similar point was made by the Court in 1949 when it said: “[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). The Court made the same point in 1969:

[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunch-room, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Tinker v. Des Moines Indep. Comty. Sch. Dist., 393 U.S. 503, 508-509 (1969).

40. *Lemon*, 403 U.S. at 622 (citing Paul Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969)). Freund himself made this historical assertion without providing evidence or citing historical sources. In fact, the history of the adoption of the First Amendment religion clauses is ambiguous and complex. The first Congress and the framing generation probably were not contemplating potential political divisiveness when they adopted the Establishment Clause. See FELDMAN, PLEASE DON’T, *supra* note 2, at 145-74 (discussing the emergence of the First Amendment against the background of the American Revolution and the constitutional framing in general); FELDMAN, DIVIDED, *supra* note 19, at 19-56 (discussing the origins of the religion clauses).

41. *Lemon*, 403 U.S. at 622.

ernmental interference with religious institutions, Burger reasoned, but also the converse—religion could interfere with governmental practices. Religiously-inspired political divisiveness “could divert attention from the myriad issues and problems” confronting governmental officials and institutions.⁴² In the *Lemon* case itself, “[t]o have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency.”⁴³

While the Court continues to invoke the *Lemon* test more than thirty-five years after its introduction,⁴⁴ numerous justices have criticized it,⁴⁵ and Court majorities have referred to it as merely a “helpful signpost.”⁴⁶ The justices’ dissatisfaction with *Lemon* has prompted some to suggest (and sometimes to apply) alternative doctrinal tests for resolving Establishment Clause disputes. The coercion test, initially delineated by Justice Anthony Kennedy, has two parts: first, the “government may not coerce anyone to support or participate in any religion or its exercise,”⁴⁷ and second, the government “may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact ‘establishes a [state] religion or religious faith, or tends to do so.’”⁴⁸ The endorsement test, introduced by Justice Sandra Day O’Connor, also has two parts. First, does the state action create excessive governmental entanglement with religion? Second, does the state action amount to governmental endorsement or disapproval of religion?⁴⁹ Indeed, when O’Connor originally articulated the endorsement test, she suggested that it might be interpreted in two

42. *Id.* at 623.

43. *Id.* at 622-23.

44. *See, e.g.,* *McCreary County v. ACLU*, 545 U.S. 844, 859-61 (2005) (refusing to abandon the *Lemon* purpose test).

45. *E.g., id.* at 889-90 (Scalia, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 110-11 (1985) (Rehnquist, J., dissenting).

46. *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (citing *Hunt v. McNair*, 413 U.S. 734, 741 (1973)).

47. *County of Allegheny v. ACLU*, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring and dissenting).

48. *Id.* (Kennedy, J., concurring and dissenting) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

49. *Donnelly*, 465 U.S. at 687-88 (O’Connor, J., concurring).

ways. On the one hand, the endorsement test might be read as no more than a reformulation of the *Lemon* test,⁵⁰ or on the other hand, it might be interpreted as emphasizing the protection of political equality.⁵¹ O'Connor wrote: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."⁵² Religion cannot be a ground for diminishing an individual's connection to or participation in the democratic arena. "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."⁵³

No part of the *Lemon* test has proven more controversial than the entanglements prong. In his concurring and dissenting opinion in *Lemon*, Justice Byron White accepted the purpose and effects prongs, which the Court had previously articulated,⁵⁴ but questioned the majority's focus on entanglements. He criticized the Court's reasoning as "a curious and mystifying blend"⁵⁵ and claimed that the entanglements prong created "an insoluble paradox."⁵⁶ The second *Lemon* prong, proscribing religious effects, required the government to ensure that any public funding supplied to religious schools was not used to advance religion. Yet, governmental monitoring of religious schools—to track the use of public funds—was likely to be deemed excessive entanglement.

50. *Id.* at 689 (O'Connor, J., concurring) (that the endorsement test "clarifies the *Lemon* test as an analytical device").

51. Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 594 (1986).

52. *Donnelly*, 465 U.S. at 688 (O'Connor, J., concurring).

53. *Id.* at 687 (O'Connor, J., concurring).

54. *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968) (citing *Sch. Dist. Of Abington v. Schempp*, 374 U.S. 203, 222 (1963)).

55. *Lemon v. Kurtzman*, 403 U.S. 602, 666 (1971) (White, J., concurring and dissenting).

56. *Id.* at 668 (White, J., concurring and dissenting).

B. Application of the Entanglements Prong

Despite White's initial reservations about *Lemon's* third prong, the justices continued for more than a decade to apply the prong. They determined in numerous establishment-clause cases whether the governmental action created excessive entanglements. In *Tilton v. Richardson*,⁵⁷ decided the same day as *Lemon*, a five-justice majority upheld a federal statute that provided grants to colleges and universities, including religious schools, for the construction of buildings devoted to secular education. In discussing the issue of administrative entanglement, Burger's plurality opinion emphasized the differences between primary and secondary schools, on the one hand, and schools of higher education, on the other hand. The Catholic institutions of higher education involved in the case predominantly aimed "to provide their students with a secular education."⁵⁸ Consequently, unlike the funding programs invalidated in *Lemon*, the government here did not need to monitor closely the schools' activities to ensure that public monies were not diverted to religious purposes.⁵⁹ Two years later, in *Hunt v. McNair*,⁶⁰ the Court followed the *Tilton* reasoning to uphold a state program that authorized revenue bonds for a sectarian college, but that same day, in *Committee for Public Education and Religious Liberty v. Nyquist*,⁶¹ the Court invalidated a state law funding religious primary and secondary schools. Because the *Nyquist* Court resolved the case based on the effects prong, it did not discuss potential administrative entanglement. Nonetheless, in dictum, the Court cautioned against the likelihood of engendering political divisiveness; public funding of religious schools "carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion."⁶²

57. 403 U.S. 672, 689 (1971).

58. *Id.* at 687.

59. *Id.*

60. 413 U.S. 734, 743-45 (1973).

61. 413 U.S. 756, 798 (1973).

62. *Id.* at 794. The same day, the Court decided additional establishment-clause cases. In *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472 (1973), the Court invalidated, pursuant to the *Lemon* effects prong, a state program that funded testing in religious schools. *Id.* at 482. In *Sloan v. Lemon*, 413

The Court continued with such fact specific analyses of entanglement in subsequent cases. In *Meek v. Pittenger*,⁶³ decided in 1975, the Court invalidated a state program that provided teachers and counselors to elementary and secondary religious schools for the performance of auxiliary services, such as remedial instruction, on school premises. The Court reasoned that the state failed the entanglements prong because of both administrative entanglement and political divisiveness. Although the teachers and counselors were public employees, they would be “performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained.”⁶⁴ The state therefore needed not only to impose restrictions on the employees to ensure that they “remain religiously neutral,”⁶⁵ but also to “engage in some form of continuing surveillance to ensure that those restrictions were being followed.”⁶⁶ This degree of contact between state and religious personnel and the monitoring involved constituted excessive administrative entanglement. Moreover, the Court reasoned that the state funding program was likely to generate religiously-inspired “political strife,”⁶⁷ further contravening the entanglements prong. “The recurrent nature of the appropriation process [engendered] the prospect of repeated confrontation between proponents and opponents of the auxiliary-services program [and would create] successive opportunities for political fragmentation and division along religious lines.”⁶⁸

Yet, the next year, in *Roemer v. Board of Public Works of Maryland*,⁶⁹ the Court upheld in a five-to-four decision a statute providing for “annual noncategorical grants to private colleges,” including religious schools, so long as the funds were not used for “sectarian pur-

U.S. 825 (1973), the Court invalidated also pursuant to the effects prong a state program providing for reimbursement of tuition paid to private schools. *Id.* at 835.

63. 421 U.S. 349, 372 (1975), *overruled by* *Mitchell v. Helms*, 530 U.S. 793 (2000).

64. *Id.* at 371.

65. *Id.* at 372.

66. *Id.*

67. *Id.* (quoting *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 794 (1973)).

68. *Id.*

69. 426 U.S. 736, 739, 767 (1976).

poses.”⁷⁰ Justice Harry Blackmun’s plurality opinion, joined by only two other justices, reasoned that, under this program, “[t]he need for close surveillance of purportedly secular activities” was minimal and that, consequently, excessive administrative entanglement did not arise.⁷¹ Moreover, even though this program required annual reconsideration of the funding, it was unlikely to generate political divisiveness, partly because more than two-thirds of the private colleges eligible under the program were secular.⁷²

One year later, in *Wolman v. Walter*,⁷³ the Court confronted a complex state statute that supplied various types of aid to primary and secondary religious schools. A divided Court, with multiple opinions, upheld most of the provisions. For instance, with regard to the supplying and scoring of standardized tests, a four-justice plurality reasoned that “the inability of the school to control the test eliminates the need for the supervision that gives rise to excessive [administrative] entanglement.”⁷⁴ But with regard to the funding of field trips, a majority concluded that administrative entanglement existed because the public school officials would need to keep the religious-school teachers under “close supervision” to ensure that funds were not diverted for religious purposes.⁷⁵

Aguilar v. Felton,⁷⁶ decided in 1985, arose from a challenge to a New York City program that used federal funds (pursuant to federal statute) to pay teachers for remedial instruction of religious school students on school premises. The city assigned the teachers as well as supervisory personnel, who monitored the teachers to assure that the funding was used for secular rather than religious education.⁷⁷ In a five-to-four decision, the Court held this program unconstitutional primarily because of administrative entanglement. To operate under the

70. *Id.* at 736.

71. *Id.* at 762.

72. *Id.* at 765.

73. 433 U.S. 229, 232 (1977), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

74. *Id.* at 240-41.

75. *Id.* at 254.

76. 473 U.S. 402, 405 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

77. *Id.* at 406-07 (1985).

program, city and school personnel would need to cooperate closely. While such close contact alone could violate the establishment clause,⁷⁸ the Court reasoned that the “ongoing” inspections that were required exacerbated the constitutional violation.⁷⁹ “Agents of the city must visit and inspect the religious school regularly, alert for the subtle or overt presence of religious matter in [the] classes.”⁸⁰ The Court concluded by obscurely suggesting a tie between, on the one hand, the governmental surveillance that manifested administrative entanglement and, on the other hand, political divisiveness. “The numerous judgments that must be made by agents of the city concern matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations. As government agents must make these judgments, the dangers of political divisiveness along religious lines increase.”⁸¹ In a concurring opinion, Justice Lewis Powell explained political divisiveness differently. Like the Courts in *Meek* and *Nyquist* (in dictum), Powell reasoned that if religious schools can pursue public funding in the legislative arena, then ongoing political battles are likely to generate political divisiveness in accordance with religious divisions. Catholics will seek funding for Catholic schools; Baptists will seek funding for Baptist schools; Jews will seek funding for Jewish schools; and so forth.⁸²

78. *Id.* at 413.

79. *Id.*

80. *Id.* The Court added:

The critical elements of the entanglement proscribed in *Lemon* and *Meek* are thus present in this case. First, as noted above, the aid is provided in a pervasively sectarian environment. Second, because assistance is provided in the form of teachers, ongoing inspection is required to ensure the absence of a religious message. In short, the scope and duration of New York City’s Title I program in *Aguilar* would require a permanent and pervasive state presence in the sectarian schools receiving aid.

Id. at 412-13 (citations omitted).

81. *Id.* at 414.

82. *Id.* at 416-17 (Powell, J., concurring). Powell wrote:

[T]here remains a considerable risk of continuing political strife over the propriety of direct aid to religious schools and the proper allocation of limited governmental resources. As

C. Judicial Retreat

From 1971, when the Court decided *Lemon*, to 1985, when the Court decided *Aguilar*, an unmistakable trend emerged regarding the entanglements prong. For a period of time after *Lemon*, the Court accepted and applied its third prong with equanimity. The cases, it seemed, turned on the facts. Gradually, however, an increasing number of justices began to express dissatisfaction and even hostility toward the entanglements inquiry. Of course, this dissatisfaction started with White's opinion in *Lemon*, when he claimed that an entanglements inquiry created "an insoluble paradox."⁸³ In 1976, White reiterated this critique and recommended the abandonment of the entanglements prong in his *Roemer* concurrence, joined by Justice William H. Rehnquist.⁸⁴ Even in those first years after *Lemon*, as between the two types of entanglement, the justices tended to stress administrative entanglement over political divisiveness. While *Lemon* appeared to accord equal importance to the two types of entanglement, administrative entanglement quickly assumed a position of prominence, as the justices focused on governmental surveillance and control over religious schools in a variety of public funding scenarios. In fact, the Court never found political divisiveness without first finding administrative entanglement.⁸⁵

this Court has repeatedly recognized, there is a likelihood whenever direct governmental aid is extended to some groups that there will be competition and strife among them and others to gain, maintain, or increase the financial support of government.

Id. at 416 (Powell, J., concurring). In a companion case, the Court invalidated under the effects prong a similar funding program that lacked the supervisory mandates of the New York City program. *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985) *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997).

83. *Lemon v. Kurtzman*, 403 U.S. 602, 668 (1971) (White, J., concurring and dissenting).

84. *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 768-69 (1976) (White, J., concurring in the judgment).

85. *E.g.*, *Meek v. Pittenger*, 421 U.S. 349, 372 (1975) (holding that a state law providing assistance to nonpublic religious schools caused both political divisiveness

In the 1980s, the justices' skepticism toward the entanglements prong intensified, with particular suspicion directed toward the political-divisiveness component. In *Mueller v. Allen*,⁸⁶ decided in 1983, the Court upheld a state law granting tax deductions to parents who paid tuition to religious schools. Writing for a five-justice majority, Rehnquist briefly dismissed the possibility of administrative entanglements, and then dropped a footnote that sought to narrow the reach of the political-divisiveness component.⁸⁷ This footnote can be construed as dictum because, as Rehnquist acknowledged, "[n]o party to this litigation has urged" that the state tax law contravened this component of entanglements.⁸⁸ Regardless, the majority reasoned that *Lemon* should be strictly limited to its facts, so findings of impermissible political divisiveness would be "confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools."⁸⁹ The next year, in *Lynch v. Donnelly*,⁹⁰ the Court upheld a governmental exhibition of a crèche as part of an extensive Christmas display in Pawtucket, Rhode Island. After quickly finding no administrative entanglement,⁹¹ the Burger majority opinion cited the *Mueller* footnote and explained that the Court did not even need to discuss political divisiveness. "This case does not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions, and hence no inquiry into potential political divisiveness is even called for."⁹² Despite thus limiting the political-divisiveness inquiry, Burger added that, for forty years, until the filing of the lawsuit, nobody had complained about the crèche display and that, therefore, political divisiveness did not exist.⁹³ O'Connor joined Burger's majority opinion but also wrote a concurrence, where she introduced the endorsement test. Even though

and administrative entanglement), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000).

86. 463 U.S. 388, 403 (1983).

87. *Id.* at 403-404 n.11.

88. *Id.* at 403 n.11 (noting that an amicus curiae brief raised the issue of political divisiveness).

89. *Id.* at 404 n.11.

90. 465 U.S. 668, 671-72 (1984).

91. *Id.* at 684.

92. *Id.*

93. *Id.* at 684-85.

O'Connor suggested that her new establishment-clause standard might be interpreted to protect political equality, she nonetheless insisted that "political divisiveness along religious lines should not be an independent test of constitutionality."⁹⁴ To inquire into whether a particular governmental action generated political divisiveness was, according to O'Connor, "too speculative an enterprise."⁹⁵ The "constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself. The entanglement prong of the *Lemon* test is properly limited to institutional entanglement."⁹⁶

The justices' assault on the entanglements prong continued in 1985. In *Wallace v. Jaffree*,⁹⁷ the Court held that a state statute authorizing a period of silence for "meditation or voluntary prayer" violated *Lemon's* purpose prong. Rehnquist dissented, returning to Justice White's argument that the entanglements prong left governments facing "an insoluble [sic] paradox."⁹⁸ In the school funding cases, "we have required aid to parochial schools to be closely watched lest it be put to sectarian use, yet this close supervision itself will create an entanglement."⁹⁹ According to Rehnquist, the entanglements prong was practically unworkable and should, therefore, be abandoned (in fact, he attacked the entirety of the *Lemon* test).¹⁰⁰

Next came *Aguiar*, in which the majority relied heavily on the entanglements prong to invalidate the governmental funding program. O'Connor dissented, joined by Rehnquist, and she denounced the entanglements prong even more vigorously than she had in her *Lynch* concurrence. She argued that the Court should overrule *Meek*, which had held that a funding program violated the *Lemon* prohibition against administrative entanglement. The *Meek* Court had reasoned that surveillance was needed to ensure that public school teachers taught only secular lessons when working in religious school classrooms.

94. *Id.* at 689 (O'Connor, J., concurring).

95. *Id.*

96. *Id.*

97. 472 U.S. 38, 41, 55-57 (1985).

98. *Id.* at 109 (Rehnquist, J., dissenting).

99. *Id.*

100. *Id.* at 110-11.

O'Connor now maintained that such surveillance was unnecessary and that, consequently, administrative entanglement did not exist.¹⁰¹ Going further, O'Connor not only repudiated the political-divisiveness component of the entanglements prong, she also argued that the Court should no longer inquire into "institutional" entanglements.¹⁰² Rehnquist wrote his own dissent, reiterating his position that the Court had created a "'Catch-22' paradox."¹⁰³

When Antonin Scalia and Anthony Kennedy joined the Court in 1986 and 1988 respectively, Rehnquist and O'Connor had the votes needed to pronounce their hostilities toward the entanglements prong in majority opinions (White did not retire until 1993). In *Bowen v. Kendrick*,¹⁰⁴ decided in 1988, the Court upheld a federal grant program that funded organizations, including religious ones, dealing with adolescent sexuality and pregnancy. Writing for a five-justice majority, Chief Justice Rehnquist admitted that the federal statutory program required the government to monitor the use of the public funds to some extent. Rehnquist, however, would not be caught on the horns of "yet another 'Catch-22' argument [whereby] the very supervision of the aid to assure that it does not further religion renders the statute invalid."¹⁰⁵ He refused to find administrative entanglement because, he reasoned, the funded organizations were not as "pervasively sectarian" as parochial schools,¹⁰⁶ and the governmental monitoring was not pervasive enough to constitute "excessive entanglement."¹⁰⁷

Matters came to a head in 1997 when the Court reconsidered the federal funding program held unconstitutional in *Aguilar*. Such a program would allow New York City to pay teachers for remedial instruction of religious school students on school premises. In *Agostini v. Felton*,¹⁰⁸ a five-to-four decision with a majority opinion by O'Connor,

101. *Aguilar v. Felton*, 473 U.S. 402, 427-28 (1985) (O'Connor, J., dissenting).

102. *Id.* at 429.

103. *Id.* at 420-21 (Rehnquist, J., dissenting) (stating that "aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement").

104. 487 U.S. 589 (1988).

105. *Id.* at 615.

106. *Id.* at 616.

107. *Id.* at 617.

108. 521 U.S. 203 (1997).

the Court overruled *Aguilar* and upheld the funding statute. Since the *Aguilar* Court had relied on the entanglements prong, O'Connor enthusiastically and predictably sought to break the supports of the *Aguilar* holding by attenuating the entanglements inquiry. She began by reasoning that, generally, the Court had considered the same factors to ascertain governmental effects, under the second *Lemon* prong, and excessive entanglements, under the third *Lemon* prong. "[T]o assess entanglement, we have looked to 'the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.'"¹⁰⁹ Because of these overlapping analyses, O'Connor concluded, "it is simplest"¹¹⁰ to "treat"¹¹¹ entanglement "as an aspect of the inquiry into a statute's effect."¹¹² *Lemon*, it seemed, had become a two-pronged test, examining purpose and effects. Turning specifically to *Aguilar*, O'Connor reasoned that it had "rested on three grounds," none of which could any longer sustain the weight of the decision.¹¹³ When it came to administrative entanglement, O'Connor explained that the Court no longer assumed that governmental officials needed to monitor the teachers, and that, moreover, the Court now found that a reasonable degree of cooperation and surveillance did not constitute excessive entanglement. Finally, O'Connor concluded that political divisiveness was "insufficient"¹¹⁴ by itself "to create an 'excessive' entanglement."¹¹⁵ The federal funding program did not contravene the effects prong, including its entanglements component.¹¹⁶

109. *Id.* at 232 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971)).

110. *Id.* at 233.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 233-34.

116. The Court wrote:

To summarize, New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.

Id. at 234.

While some justices, particularly Stephen Breyer and David Souter, still invoke political-divisiveness concerns in some guise,¹¹⁷ a majority of justices have continued after *Agostini* to spurn the entanglements inquiry, especially the political-divisiveness component. In *Mitchell v. Helms*,¹¹⁸ decided in 2000, a six-justice majority upheld a federal funding program that provided for the loan of educational materials, such as library and computer equipment, to primary and secondary schools, including religious schools. Writing for a plurality, Justice Clarence Thomas emphasized the changes to the *Lemon* test that *Agostini* had wrought:

Whereas in *Lemon* we had considered whether a statute (1) has a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion, in *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors. We . . . recast *Lemon's* entanglement inquiry as simply one criterion relevant to determining a statute's effect. We also acknowledged that our cases had pared somewhat the factors that could justify a finding of excessive entanglement.¹¹⁹

Then, quoting from *Agostini*, Thomas iterated the "three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement."¹²⁰ Regardless, despite Thomas's efforts to dim the already-fading lights of the entanglements prong, he then ad-

117. See, e.g., *McCreary County v. ACLU*, 545 U.S. 844, 859-63 (2005) (discussing endorsement-political divisiveness concerns as part of purpose prong); *Zelman v. Simmons-Harris*, 536 U.S. 639, 717-29 (2002) (Breyer, J., dissenting) (emphasizing the establishment-clause protection against political divisiveness).

118. 530 U.S. 793 (2000).

119. *Id.* at 807-808 (internal citations omitted).

120. *Id.* at 808 (quoting *Agostini v. Felton*, 521 U.S. 203, 234 (1997)).

mitted that the Court did not need to address the entanglements issue because the litigants had not actually raised it.¹²¹

In 2002, *Zelman v. Simmons-Harris*¹²² upheld a school voucher program from Cleveland, Ohio, which allowed parents to use public money to help pay for private-school education, including at religious schools. Breyer, joined by Justices Souter and John Paul Stevens, dissented, elaborating at length the dangers of political divisiveness that the voucher program engendered.¹²³ But Rehnquist's majority opinion, joined by O'Connor, Scalia, Thomas, and Kennedy, dismissed these concerns in a footnote, refusing to consider "the invisible specters of 'divisiveness' and 'religious strife.'"¹²⁴ Instead, Rehnquist applied only the purpose and effects prongs. He focused on effects but did not articulate specific factors encompassed within that prong (such as entanglements); rather he emphasized that, under the voucher program, the government remained neutral (providing money for public and private schools, including religious ones)¹²⁵ and that parents retained "private choice" to decide where they would spend their vouchers.¹²⁶ Besides joining Rehnquist's majority opinion, O'Connor concurred, adding that *Agostini* had "folded the entanglement inquiry" into the effects prong.¹²⁷

121. *Id.* Thomas nonetheless concluded that *Meek* and *Wolman* were "no longer good law." *Id.*

122. 536 U.S. 639 (2002).

123. *Id.* at 717-29 (Breyer, J., dissenting).

124. *Id.* at 662 n.7. Rehnquist explained:

Justice Breyer would raise the invisible specters of 'divisiveness' and 'religious strife' to find the program unconstitutional. It is unclear exactly what sort of principle Justice Breyer has in mind, considering that the program has ignited no 'divisiveness' or 'strife' other than this litigation. Nor is it clear where Justice Breyer would locate this presumed authority to deprive Cleveland residents of a program that they have chosen but that we subjectively find 'divisive.' We quite rightly have rejected the claim that some speculative potential for divisiveness bears on the constitutionality of educational aid programs.

Id. (internal citations omitted).

125. *Id.* at 648-63.

126. *Id.* at 649-53.

127. *Id.* at 668 (O'Connor, J., concurring).

Currently, then, the justices generally maintain that the *Lemon* test—or at least, its first two prongs (purpose and effects)—is, for the most part, still good law. But the justices have so vigorously assailed the entanglements prong, including especially its political divisiveness element, that its vitality is uncertain. The Court's treatment of two Ten Commandments cases in 2005 illustrates this indefiniteness. In *McCreary County v. American Civil Liberties Union*,¹²⁸ a five-to-four decision, the Court invalidated the posting of the Ten Commandments in county courthouses, but in *Van Orden v. Perry*,¹²⁹ also a five-to-four decision, the Court upheld a display of the Ten Commandments etched on a monument that sat in a monument park surrounding the Texas state capitol (there were seventeen monuments and twenty-one historical markers). Breyer was the swing vote, belonging to the majority in each case. In *McCreary*, he joined Souter's majority opinion, but in *Van Orden*, he refused to join Rehnquist's opinion, which thus represented a four-justice plurality. Souter's *McCreary* opinion maneuvered warily through the *Lemon* thicket. Souter began by stating that *Lemon* had "summarized . . . three familiar considerations for evaluating Establishment Clause claims," but he never expressly articulated the three prongs.¹³⁰ He consequently avoided taking a clear stance on the entanglements prong. Instead, he focused on the county governments' purposes in posting the Ten Commandments. Yet, within this discussion of purposes, Souter embedded political-divisiveness concerns, quoting O'Connor's explication of her endorsement test as protecting political equality. "By showing a purpose to favor religion, the government 'sends the . . . message to . . . nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members . . .,'"¹³¹ Meanwhile, in *Van Orden*, Rehnquist's plurality opinion brushed aside all of the *Lemon* prongs as "not useful in dealing" with the Ten Commandments display.¹³² Instead, Rehnquist emphasized that the gov-

128. 545 U.S. 844 (2005).

129. 545 U.S. 677 (2005).

130. *McCreary County v. ACLU*, 545 U.S. 844, 859 (2005).

131. *Id.* at 860 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984)) (O'Connor, J., concurring).

132. *Van Orden*, 545 U.S. at 686.

ernment, throughout history, had similarly displayed religious symbols and communicated religious messages; the tradition should be sustained.¹³³ To Rehnquist, the potential political divisiveness of religious symbols and displays, like the Ten Commandments, was beside the point.

II. IN DEFENSE OF THE ENTANGLEMENTS PRONG

Chief Justice Burger's opinion in *Lemon* did not persuasively justify the entanglements-prong protection against political divisiveness. While Burger's failure does not necessarily impugn the political-divisiveness component, it does demand a response. This Part of the Article draws on political theory, supported by social science research, and American history to justify judicial efforts to diminish religiously-inspired political divisiveness.

A. Political Theory

Political theory, bolstered by social science evidence, justifies a judicial concern for religiously-inspired political divisiveness. From the framing through the 1920s, the United States operated as a republican democracy. Citizens and elected officials were supposed to be virtuous: in the political realm, they were to pursue the common good or public welfare rather than their own private interests.¹³⁴ The pursuit of "private and partial interests" was the corruption of republican government.¹³⁵ To be sure, during the nineteenth and early-twentieth centuries, the conceptions of virtue and the common good transformed. For instance, in the 1790s, Americans condemned political parties as factional groups bent on satisfying their own interests. Political parties

133. *Id.* at 686-90.

134. FELDMAN, FREE EXPRESSION, *supra* note 29, at 14-45, 153-208; see Feldman, *Unenumerated Rights*, *supra* note 29, at 50-57 (explaining republican democracy and republican democratic judicial review).

135. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 59 (1969).

threatened the welfare of the republic.¹³⁶ By the middle of the nineteenth century, however, the political party had become an accepted institution of republican democracy. Parties, it now seemed, promoted the common good by encouraging the average person to participate in the democratic process.¹³⁷ In fact, with the acceptance of political parties, voter turnout increased dramatically during the first part of the nineteenth century. In 1824, voter turnout for the presidential election was only 16.2 percent, but with the help of political parties, turnout soared to an antebellum high of 77.5 percent in 1840. After the Civil War, turnout continued to climb, reaching a high of 82.4 percent for the 1876 election.¹³⁸

While republican democracy proved flexible and resilient, a variety of forces, including industrialization, urbanization, and immigration, placed it under tremendous strain in the late-nineteenth and early-twentieth centuries.¹³⁹ In the late 1920s and early 1930s, the regime finally collapsed and was replaced by a new one: pluralist democracy. In the republican system, an alleged lack of civic virtue could preclude one from participating in democratic processes. On this ground, the exclusion of African Americans, Irish-Catholic immigrants, and other peripheral groups was supposedly justified.¹⁴⁰ Under pluralist democracy, however, one did not need to demonstrate civic virtue to qualify as a participant. During the thirties, many ethnic and immigrant urbanites who had previously been discouraged from partaking in national politics became voters and actively cast their support for the New Deal.¹⁴¹ But with more widespread participation, the point of democ-

136. STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 596-617 (1993).

137. EDWARD PESSEN, *JACKSONIAN AMERICA: SOCIETY PERSONALITY AND POLITICS* 197-232 (rev. ed. 1985); HARRY L. WATSON, *LIBERTY AND POWER* 171-74 (1990).

138. ERIK W. AUSTIN, *POLITICAL FACTS OF THE UNITED STATES SINCE 1789*, at 378-79 (1986) (Table 3.12: National Voter Turnout, 1824-1984).

139. FELDMAN, *FREE EXPRESSION*, *supra* note 29, at 166-97.

140. Stephen M. Feldman, *The Theory and Politics of First-Amendment Protections: Why Does the Supreme Court Favor Free Expression Over Religious Freedom?*, 8 U. PA. J. CONST. L. 431, 434-35 (2006) [hereinafter Feldman, *Theory and Politics*].

141. WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL* 332 (1963).

matic politics changed: politics became the pursuit of self-interest rather than the common good. Interest-group efforts to satisfy preexisting values and desires became normal and legitimate. Governmental goals could no longer be condemned as contravening the common good; all such substantive goals were determined through interest-group bargaining, coalition building, negotiation, and compromise. Ultimately, then, pluralist democracy was defined through a process that ensured full and fair participation, the assertion of one's interests and values, especially in the legislative arena.¹⁴²

Pluralist democracy emerged first as a social and political reality in the early 1930s, though by the end of the decade, political and constitutional theorists were struggling to explicate and justify this new form of democratic practice.¹⁴³ After World War II, Robert A. Dahl emerged as, perhaps, the foremost theorist of pluralist democracy.¹⁴⁴ Dahl began by emphasizing the crucial difference between republican and pluralist democracies. "[T]he ancient belief that citizens both could and should pursue the public good rather than their private ends became more difficult to sustain, and even impossible, as 'the public good' fragmented into individual and group interests."¹⁴⁵ Because pluralist (or polyarchal) democracy accepted the inexorable pursuit of self-interest—rather than the pursuit of an ideal substantive goal (the common good)—pluralist democracy required the institutionalization of a "process" that would allow the people to determine which interests would be at least temporarily enshrined as communal goals.¹⁴⁶ A

142. FELDMAN, *FREE EXPRESSION*, *supra* note 29, at 291-348; EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* 197-266 (1973). Early theorists of pluralist democracy included Walter Lippmann, John Dewey, Joseph A. Schumpeter, and Carl J. Friedrich. WALTER LIPPMANN, *AN INQUIRY INTO THE PRINCIPLES OF THE GOOD SOCIETY* (1937); JOHN DEWEY, *FREEDOM AND CULTURE* (1939); JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (1942); CARL J. FRIEDRICH, *THE NEW BELIEF IN THE COMMON MAN* (1942).

143. *E.g.*, DEWEY, *supra* note 142; LIPPMANN, *supra* note 142.

144. ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989) [hereinafter *DEMOCRACY*]; ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956) [hereinafter *PREFACE*].

145. *DEMOCRACY*, *supra* note 144, at 30.

146. *Id.* at 83, 106; *PREFACE*, *supra* note 144, at 67-71. "Democracy means, literally, rule by the people In order to rule, the people must have some way of ruling, a *process* for ruling." *DEMOCRACY*, *supra* note 144, at 106. When Dahl uses

communal goal was legitimate only if the conditions for democracy were satisfied—if the proper process was followed. Thus, Dahl's primary aim was to identify the conditions or prerequisites for the operation of a democratic process.¹⁴⁷ For instance, in an election, the weight of each individual's vote must be "identical," and a candidate or policy alternative "with the greatest number of votes [must be] declared the winning choice."¹⁴⁸ But the first and foremost condition for democracy, Dahl explained, is "effective participation."¹⁴⁹

Throughout the process of making binding decisions, citizens ought to have an adequate opportunity, and an equal opportunity, for expressing their preferences as to the final outcome. They must have adequate and equal opportunities for placing questions on the agenda and for expressing reasons for endorsing one outcome rather than another.¹⁵⁰

During the post-World War II era, pluralist democracy achieved hegemonic status as the correct theory and practice of democracy.¹⁵¹ Even during the heights of the so-called "civic republican revival" of the late-twentieth century—when historians and political scientists rediscovered the republican democratic roots of the nation—pluralist democracy retained its predominant position.¹⁵² Few histori-

the precise term, "pluralist democracy," he refers to a democratic government where "[i]nstead of a single center of sovereign power there [are] multiple centers of power, none of which are or can be wholly sovereign." ROBERT A. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES* 24 (1967); see ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY* 4-5 (1982) (discussing elements of pluralist democracy).

147. "What are the distinctive characteristics of a democratic process of government?" *DEMOCRACY*, *supra* note 144, at 106.

148. *PREFACE*, *supra* note 144, at 67; see *DEMOCRACY*, *supra* note 144, at 109-11 (discussing voting equality).

149. *DEMOCRACY*, *supra* note 144, at 109.

150. *Id.*

151. FELDMAN, *FREE EXPRESSION*, *supra* note 29, at 329-48, 383-419.

152. *Id.* at 680 n.4. Key books in the civic republican revival included the following: Wood, *supra* note 135; BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT* (1975); see Stephen M. Feldman, *Republican Revival/Interpretive Turn*, 1992 WIS.

ans of republican democracy doubted that, at some point in American history, pluralist democracy (or some type of liberalism) supplanted civic republicanism; the scholarly debates revolved largely around the timing of the transition.¹⁵³ Given this unequivocal primacy of pluralist democracy, the issue of religiously-inspired political divisiveness, vis-à-vis the establishment clause, should be approached from within pluralist democratic parameters.

Pluralist democracy assumes that citizens bring diverse, preexisting interests and values to the democratic arena, that they jostle for advantage, and that they try to win the democratic battles—but also that they negotiate and compromise when expedient.¹⁵⁴ Crucially, while pluralist democratic citizens might strongly hold and pursue their preexisting interests and values, they must always be willing to accommodate the interests and values of others.¹⁵⁵ “Compromise [and] unreflective practicality” lubricate the gears of a pluralist democratic regime,¹⁵⁶ while all forms of “moralistic absolutism” bring the machine to a halt.¹⁵⁷ Thus, the difficulty of religiously-inspired political positions: some religious beliefs are absolutes. They are not merely strongly held positions; they are convictions, imbued with certitude, excluding doubt. For instance, the Southern Baptist Convention’s *Baptist Faith and Message*, adopted in the year 2000, begins as follows:

The Holy Bible was written by men divinely inspired and is God’s revelation of Himself to man. It is a perfect treasure of divine instruction. It has God for its author, salvation for its end, and truth,

L. REV. 679, 682-701 (discussing the influence of the civic republican revival on legal scholarship).

153. Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11, 24 (1992); see, e.g., HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993) (arguing that republican democracy collapsed in the 1930s).

154. See, e.g., DEWEY, *supra* note 142, at 175-76 (discussing the importance of negotiation in democratic processes).

155. See DEMOCRACY, *supra* note 144, at 260 (arguing that polyarchies or pluralist democracies fail when distinctive subcultures cannot accommodate each other).

156. PURCELL, *supra* note 142, at 253.

157. *Id.*

without any mixture of error, for its matter. Therefore, all Scripture is totally true and trustworthy. It reveals the principles by which God judges us, and therefore is, and will remain to the end of the world, the true center of Christian union, and the supreme standard by which all human conduct, creeds, and religious opinions should be tried.¹⁵⁸

By the very nature of such religious convictions, they sometimes cannot be accommodated to other interests and values, whether in the democratic arena or elsewhere. A religious individual should not be expected to compromise an absolute truth derived from God's Scripture. Former presidential candidate Mike Huckabee openly proclaimed his religiosity: "My faith is my life—it defines me. My faith doesn't influence my decisions, it drives them."¹⁵⁹ Unsurprisingly, on the issue of abortion, Huckabee emphasized his resoluteness: "My convictions regarding the sanctity of life have always been clear and consistent, without equivocation or wavering."¹⁶⁰ Most important, then, religious convictions at times cannot be harmonized readily with the pluralist democratic process, which requires the willingness of citizens to negotiate and compromise. Indeed, according to Dahl, democracy might be said to rest "upon compromise."¹⁶¹ Yet, as the Lutheran pastor and renowned professor of religious history Martin Marty explains, some religious believers "resist efforts at finding consensus."¹⁶² From their perspective, the religious should not be sacrificed to the profane.¹⁶³

158. Southern Baptist Convention, *The Baptist Faith and Message* (2005), <http://sbc.net/bfm/bfm2000.asp>. (follow the link to "Download the 2000 Baptist Faith and Message in PDF format" for the full text in PDF format).

159. Huckabee Ad: *Faith and Politics*, <http://www.youtube.com/watch?v=HsH42NzFF2A> (last visited Apr. 8, 2009) (original site no longer active, http://www.mikehuckabee.com/?FuseAction=Issues.View&Issue_id=9).

160. Huckabee Ad: *Sanctity of Life*, <http://www.youtube.com/watch?v=7vParuSo9GE> (original site no longer active http://www.mikehuckabee.com/?FuseAction=Issues.View&Issue_id=11).

161. PREFACE, *supra* note 144, at 4.

162. Martin E. Marty, *The Widening Gyres of Religion and Law*, in *LAW AND RELIGION: A CRITICAL ANTHOLOGY*, *supra* note 1, at 24, 31.

163. Some theorists argue that religious beliefs should not be relied upon in political debates; secular reasons should be offered in any public debate because religious convictions are likely to inhibit the free and open discussion and negotiation

Besides impeding compromise, religiously-inspired political divisiveness is likely to interfere with the pluralist democratic process in another way. When religious convictions permeate political debates, religious minorities probably will be the losers—precisely because they depart from the religious mainstream. According to Dahl, a criterion requisite to pluralist democracy is that participants possess certain enforceable legal rights, such as freedom of speech.¹⁶⁴ One right essential to the pluralist democratic process—arising from the process itself—is political equality.¹⁶⁵ Each citizen must be afforded a full and fair opportunity to influence political debates, regardless of religious beliefs, racial makeup, sexual orientation, and so on. Significantly, Dahl insists that, as a matter of logic, a democratic majority cannot impair such crucial rights, like political equality, while acting in accordance with democratic processes. “[I]n such a case the majority would not—could not—be acting by ‘perfectly democratic procedures’ [because these rights] are integral to the democratic process.”¹⁶⁶ Without the protection of “primary political rights,”¹⁶⁷ individuals would be unable “to participate fully, as equal citizens, in the making of all the collective decisions by which they are bound.”¹⁶⁸ Moreover, Dahl seeks a “‘real’ political equality,”¹⁶⁹ not merely a “‘formal’” equality.¹⁷⁰ In Dahl’s terminology, “political resources” must be distributed relatively equally.¹⁷¹ If governmental actions diminish the political influence of religious minorities qua religious minorities, then from Dahl’s perspective, the formal requirements for pluralist democracy cannot possibly be satisfied.¹⁷² To be sure, religious minorities will unavoidably be on

that pluralist democracy demands. Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, in *LAW AND RELIGION: A CRITICAL ANTHOLOGY*, *supra* note 1, at 69.

164. DEMOCRACY, *supra* note 144, at 169-73.

165. *Id.* at 130-31.

166. *Id.* at 170.

167. *Id.*

168. *Id.* at 175. Democracy has limits “built into the very nature of the process itself. If you exceed those limits, then you necessarily violate the democratic process.” *Id.* at 172.

169. *Id.* at 130.

170. *Id.*

171. *Id.* at 178.

172. *Id.* at 131.

the losing side in some political disputes. Winning and losing are the constant companions of democratic rule; no individual or societal group can be guaranteed victory. But the government should not be permitted to take actions that persistently push religious minorities onto the losing side. Religious minorities are entitled to political equality, to the right to influence political debates equally with all other citizens.¹⁷³

Unshakable religious convictions not only threaten to thwart the pluralist democratic process, they also threaten to weaken the American commitment to democratic culture. Dahl maintains that pluralist democracy can be sustained only if the people maintain a culture conducive to the democratic process.¹⁷⁴ "In practice . . . the democratic process isn't likely to be preserved for very long unless the people of a country preponderantly believe that it's desirable and unless their belief comes to be embedded in their habits, practices, and culture."¹⁷⁵ The democratic culture encompasses an ethos that facilitates negotiation and compromise. If individuals are inflexible, if they refuse to find a middle ground, the democratic process cannot get off the ground. Thus, when a religion inculcates absolutes, and when those absolutes are translated into political agendas and goals that are non-negotiable, the mix of religion and politics diminishes the culture of democracy. And legal doctrine, Dahl argues, cannot overcome a deficient culture; courts cannot compel an undemocratic people to govern itself in accord with the pluralist democratic process.¹⁷⁶ Even so, courts might help nurture the democratic culture—by proscribing governmental actions that would encourage the people to inject their religious beliefs into the public square and political debates.

173. This argument for protecting the political equality of religious minorities is closely related to John Ely's representation-reinforcement argument for protecting discrete and insular minorities. ELY, *supra* note 30; *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

174. "To assume that this country has remained democratic because of its Constitution seems to me an obvious reversal of the relation; it is much more plausible to suppose that the Constitution has remained because our society is essentially democratic." PREFACE, *supra* note 144, at 143; see DEWEY, *supra* note 142, at 134 (emphasizing the importance of culture to democracy).

175. DEMOCRACY, *supra* note 144, at 172.

176. *Id.* at 169-70, 172-73, 175.

But when governmental actions generate religiously-inspired political divisiveness, then the government likely undermines both political equality and democratic culture. Psychological studies demonstrate that identity with or membership in social groups strongly influences individual attitudes toward others. An individual tends to disfavor outgroup members while simultaneously favoring "in-group members in the allocation of rewards, in their personal regard, and in the evaluation of the products of their labor."¹⁷⁷ In other words, as a normal function of social group identity, people favor their own group members while discriminating against others. Social group identity is so powerful that even the most basic emotional reactions and assessments of self-interest vary with group membership.¹⁷⁸ "[A]n individual will discriminate against a member of an out-group even when there is no conflict of interest and there is no past history of intergroup hostility."¹⁷⁹ Moreover, empirical research suggests that religious membership not only is an especially salient source of group identification but also often shapes political outlooks.¹⁸⁰ Religious orientation influences even judges, who are (supposedly) obligated professionally to decide cases neutrally, in accordance with the rule of law. In one empirical study of Establishment Clause and Free Exercise Clause cases in the

177. Samuel L. Gaertner, et al., *Reducing Intergroup Bias: The Benefits of Recategorization*, 57 J. PERSONALITY & SOCIAL PSYCHOL. 239, 239 (1989).

178. See Marilyn B. Brewer, *The Social Self: On Being the Same and Different at the Same Time*, 17 PERS. & SOC. PSYCH. BULLETIN 475, 476 (1991); Marilyn B. Brewer & Sherry K. Schneider, *Social Identity and Social Dilemmas: A Double-edged Sword*, in SOCIAL IDENTITY THEORY 169, 170 (Dominic Abrams & Michael A. Hogg eds., 1990); Hazel Rose Markus & Shinobu Kitayama, *The Cultural Construction of Self and Emotion: Implications for Social Behavior*, in EMOTION AND CULTURE: EMPIRICAL STUDIES OF MUTUAL INFLUENCE 89, 89-91 (Shinobu Kitayama & Hazel Rose Markus eds., 1994); Wolfgang Tönnemann, *Group Identification and Political Socialisation*, in THE SOCIOBIOLOGY OF ETHNOCENTRISM 175, 184 (Vernon Reynolds, et al., eds., 1986).

179. Johan M.G. van der Dennen, *Ethnocentrism and In-Group/Out-Group Differentiation: A Review and Interpretation of the Literature*, in THE SOCIOBIOLOGY OF ETHNOCENTRISM, *supra* note 178, at 1, 17.

180. Donald R. Songer & Susan J. Tabrizi, *The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts*, 61 J. POL. 507 (1999); Clyde Wilcox, *Fundamentalists and Politics: An Analysis of the Effects of Differing Operational Definitions*, 48 J. POL. 1041 (1986).

lower federal courts, covering 1986 to 1995, the authors concluded that in “religious freedom decisions, the single most prominent, salient, and consistent influence on judicial decisionmaking was religion—religion in terms of affiliation of the claimant, the background of the judge, and the demographics of the community.”¹⁸¹ Other studies showed that judges’ religious affiliations influenced their perceptions of not only religious-freedom cases per se but also cases involving gay rights, obscenity, the death penalty, and gender discrimination.¹⁸² In short, empirical evidence suggests that religious affiliation can be a strong source of social identification and that such social identification is likely to engender social and political division and discrimination. Majority-ingroup members will disfavor minority-outgroup members. When the government nurtures religious identification, governmental action will thus frequently encourage political divisiveness detrimental to political equality and democratic culture.

Finally, the nature of religion itself exacerbates the threat to pluralist democracy. Religion cannot be easily cabined in some hypothetical religious realm, separate from a secular realm. For some religious individuals, as well as for some religions, religious convictions are always pressing outwards, pushing into worldly affairs. Marty explains:

In the pursuits that observers call religion, people aspire to deal with the ultimate, the whole, the unum, the All. They are alert to evocations of awe and wonder. Their sense of the sacred leads most of them to build community [sic] and undertake various sorts of mission [sic]. Therefore religion, when vital, is never easily contained within a defined and disciplined sphere. Religion is never

181. Gregory C. Sisk, et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 614 (2004); see Scott C. Idleman, *The Concealment of Religious Values in Judicial Decisionmaking*, 91 VA. L. REV. 515, 521-23 (2005) (arguing that judges try to conceal that they are influenced by their religious beliefs).

182. DANIEL R. PINELLO, *GAY RIGHTS AND AMERICAN LAW* 87-91 (2003); Songer & Tabrizi, *supra* note 180, at 521.

self-contained, never unconnected. It always stands the potential of being “widened.”¹⁸³

Religion, then, will seek to insinuate itself into political debates. And certainly, in a country as religious as the United States,¹⁸⁴ a mix of religion and politics might seem inevitable. But this inevitability does not mean that the government, in general, and the courts, in particular, should encouraged or stir the religion-politics mix. Because religious convictions can impair the pluralist democratic process, pluralist democracy is persistently pitted in battle against religion (or at least against some religions). In this battle, the government and the courts should not surrender—though one should never expect religion to surrender either. To be sure, despite the tenuous status of religion within the pluralist democratic process, the free exercise of religion must be protected; government should not attempt to subdue religious practices and beliefs. Without the free exercise of religion, individual liberty would be stillborn. But partly for that very reason—because of the special constitutional protection afforded to religion—courts should acknowledge and guard against the tension between religion and pluralist democracy.¹⁸⁵

B. History

American history is replete with examples of political strife produced by religious differences. In the mid-nineteenth century, Protestant educators sought to create common (or public) schools that

183. Marty, *supra* note 162, at 26-7.

184. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, Table No. 64, at 56 (2002) (Religious Preference, Church Membership, and Attendance: 1980-2000) (reporting that church and synagogue membership generally hovers around seventy percent); KOSMIN & LACHMAN, *supra* note 1, at 9 (reporting poll showing that United States is most religious of western nations). “[T]he U.S. population remains highly religious in its beliefs and practices, and religion continues to play a prominent role in American public life.” RELIGIOUS LANDSCAPE SURVEY, *supra* note 14, at 1.

185. See Abner S. Greene, *The Incommensurability of Religion*, in LAW AND RELIGION: A CRITICAL ANTHOLOGY, *supra* note 1, at 226 (arguing that religion should play a limited role in public deliberations, but that religion should be given special protection from generally applicable laws).

would instill Protestant values and attitudes in Catholic children by, for example, having the children read from the Protestant King James Bible.¹⁸⁶ Simultaneously, Protestants fought politically to prevent the extension of governmental funding to private religious [read: Catholic] schools. The anti-aid advocates managed to secure constitutional amendments in several states precluding such funding, and almost succeeded in pushing through a similar amendment (the Blaine Amendment of 1876) to the national Constitution.¹⁸⁷ During the early-twentieth century, massive immigration from Eastern and Southern Europe—often more than one-million people per year—combined with Protestant-American nativism to generate long-running political battles over the restriction of immigration.¹⁸⁸ The anti-immigration forces emphasized the ostensible racial and religious inferiority of recent immigrants.¹⁸⁹ Albert Johnson (R-Wa.), Chair of the House Committee on Immigration, complained especially about recent Jewish immigrants and called for a complete suspension of immigration, lasting for two years. Johnson relied on a report from Wilbur J. Carr, head of the United States Consular Service (in the State Department), that stated: “[Potential Jewish immigrants were] of the usual ghetto type. Most of them are . . . filthy, un-American and often dangerous in their habits.”¹⁹⁰ They were, Carr added, “[p]hysically deficient . . . [m]entally deficient . . . [e]conomically undesirable [and] [s]ocially undesirable:

186. FELDMAN, *FREE EXPRESSION*, *supra* note 29, at 39; PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 219-29 (2002); John C. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 300 (2001) (“crowds in Philadelphia rioted over whether Catholic children could be released from the classroom during Bible reading”).

187. HAMBURGER, *supra* note 186, at 296-302; Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121, 130 (2001). The House passed the Blaine Amendment in 1876, but the Senate vote fell short of the needed two-thirds majority. Jeffries & Ryan, *supra* note 186, at 301-02.

188. AUSTIN, *supra* note 138, at 470 (Table 7.4: Total Number of Immigrants Arriving Annually in the United States, 1820-1980).

189. See JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925*, at 264-99 (2d ed. 1988) (discussing the role of nativism in anti-immigration debates).

190. Congressional Committee on Immigration, *Temporary Suspension of Immigration* (1920), *reprinted in* THE JEW IN THE MODERN WORLD: A DOCUMENTARY HISTORY 405, 406 (Paul R. Mendes-Flohr & Jehuda Reinharz eds., 1980).

Eighty-five to ninety per cent lack any conception of patriotic or national spirit. And the majority of this percentage is mentally incapable of acquiring it."¹⁹¹ In the 1920s, the anti-immigrant advocates triumphed; quotas were established that almost eliminated Jewish and Catholic immigration from Eastern and Southern Europe.¹⁹²

Republican democracy, it should be emphasized, facilitated the manifestation of nativist and exclusionary attitudes throughout the nineteenth and early-twentieth centuries. Condemnations of Catholics, Jews, and other outsiders were often couched in republican democratic terminology: they lacked the civic virtue needed to understand the American commitment to the common good. Political discrimination against religious minorities could all-too-easily be legitimated in accord with republican principles. "The chief argument against the wholesale admission of unassimilable aliens," wrote the editor of *World's Work*, "is that it creates nationalistic and racial blocs which are constantly bringing pressure to bear upon law-making bodies in the interests of their particular nationalities, which do not think like Americans, but which retain indefinitely their European and Asiatic consciousness."¹⁹³ Consequently, from the perspective of many old-stock Americans, religious minorities were to be either banished from the country or inculcated with Protestant-American values (hence, the need for Bible reading and similar activities in the public schools).¹⁹⁴

The power of religion to skew American politics was never more evident than in the presidential election of 1928. The Republican candidate was the former Secretary of Commerce, Herbert Hoover. The Democratic candidate was Al Smith, an Irish-Catholic, a child of

191. *Id.* at 407.

192. *Immigration Act of 1924*, reprinted in 2 DOCUMENTS OF AMERICAN HISTORY 372 (Henry Steele Commager ed., 3d ed. 1944); E. P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965, at 175-76, 187-92 (1981); HOWARD M. SACHAR, A HISTORY OF THE JEWS IN AMERICA 323-24 (1992).

193. LYNN DUMENIL, THE MODERN TEMPER 211 (1995).

194. See Feldman, *Theory and Politics*, *supra* note 140, at 434-35, 451-53, 457-65 (detailing the relation between republican democratic concepts and the exclusion of outsiders).

an immigrant, and an opponent of Prohibition.¹⁹⁵ A four-time governor of New York, Smith reveled in his Lower East Side (Manhattan) identity: "The derby hat set at a slightly rakish angle, the flashy suits, the big cigar, the slight swagger, the striking pronunciations all bespoke New York"¹⁹⁶ Smith represented what the populist and Protestant fundamentalist leader William Jennings Bryan had called "the enemy's country."¹⁹⁷ With Smith opposing Hoover, the 1928 election encapsulated the nation's multiple interrelated divisions: "Catholics versus Protestants, wets versus drys, immigrants versus natives, and city versus country."¹⁹⁸

Smith became the first Catholic nominated by a major political party only because, by the late 1920s, immigrants and their children constituted approximately one-third of the American population. Even so, the salience of American anti-Catholicism intensified dramatically during the 1928 presidential campaign exactly because of Smith's candidacy.¹⁹⁹ A Methodist Bishop from New York State declared, "No Governor can kiss the papal ring and get within gunshot of the White House,"²⁰⁰ while an Alabama Reverend proclaimed, "I'd rather see a saloon on every corner in the South than see the foreigners elect Al Smith President!"²⁰¹ The *Christian Century*, a moderately liberal Protestant publication, encouraged its readers to resist "the seating of a representative of an alien culture, of a mediaeval Latin mentality, of an undemocratic hierarchy and of a foreign potentate in the great office of President of the United States."²⁰² Anti-Smith pamphlets sported titles

195. See ALLAN J. LICHTMAN, *PREJUDICE AND THE OLD POLITICS* 40-76 (1979) (emphasizing the importance of religion in the 1928 election); SAMUEL LUBELL, *THE FUTURE OF AMERICAN POLITICS* 48-55 (3d ed., rev., 1965) (discussing Smith and the 1928 election).

196. LICHTMAN, *supra* note 195, at 10.

197. LUBELL, *supra* note 195, at 52.

198. LICHTMAN, *supra* note 195, at 25.

199. See *id.* at 73-76 (discussing variations in salience, with an emphasis on religion).

200. WILLIAM E. LEUCHTENBURG, *THE PERILS OF PROSPERITY, 1914-1932* 233 (1958).

201. *Id.* at 238.

202. *Id.* at 234.

like "Traffic in Nuns" and "Alcohol Smith."²⁰³ A Tennessee editor and historian brooded:

[Smith appeals] to the aliens, who feel that the older America, the America of the Anglo-Saxon stock, is a hateful thing which must be overturned and humiliated; to the northern negroes, who lust for social equality and racial dominance; to the Catholics who have been made to believe that they are entitled to the White House, and to the Jews who likewise are to be instilled with the feeling that this is the time for God's chosen people to chastise America yesteryear As great as have been my doubts about Hoover, he is sprung from American soil and stock.²⁰⁴

Smith himself recognized that his ties to the national populace were tenuous. He ran as an economic conservative and, like Hoover, invoked the republican democratic principles of virtue and the common good. Whereas Protestant nativists castigated Smith for his Catholicism, Smith and other Democrats realized they should not attempt to attract Catholic voters qua Catholics. Democratic supporters did not "launch a sectarian campaign on behalf of Al Smith," but rather called for religious freedom.²⁰⁵ Regardless, Smith lost the election, and decisively so, garnering only fifteen million popular and eighty-seven electoral votes to Hoover's twenty-one million popular and 444 electoral votes.²⁰⁶ Smith ran poorly in most areas with large native-born populations, including the traditionally strong Democratic South, where he lost almost all major cities, including Birmingham, Dallas, and Atlanta.²⁰⁷ Most distinctly, Smith lost votes because of his Catholicism. "Protestant opposition to Smith's religion was remarkably widespread,

203. *Id.*

204. *Id.* at 239.

205. LICHTMAN, *supra* note 195, at 76.

206. AUSTIN, *supra* note 138, at 94, 97 (Table 3.1: *National Electoral and Popular Vote Cast for President, 1789-1984*).

207. See LICHTMAN, *supra* note 195, at 40-76, 122-43 (discussing the importance of religion and the division between urban and rural residents to 1928 election); LUBELL, *supra* note 195, at 48-49 (discussing urban voting in 1928 election).

extending to all regions of the nation, to city and country, to church members and unaffiliated Protestants."²⁰⁸

Of course, another Irish-Catholic nominee successfully ran for president in 1960. John F. Kennedy's victorious campaign demonstrated two important facts. First, the transformation of the United States in the 1930s from a republican into a pluralist democracy mattered: erstwhile outsiders could participate en masse in national politics without first proving that they were sufficiently virtuous to qualify as voting citizens (and they could, therefore, help elect a Catholic).²⁰⁹ Second, even within the pluralist democratic regime, the potential for religiously-inspired political divisiveness remained strong. Early in Kennedy's campaign, many Protestant-Americans questioned whether his Catholicism rendered him an unworthy candidate.²¹⁰ Alluding to the feared allegiance of a Catholic president to the Vatican, best-selling author and Protestant minister Norman Vincent Peale wondered whether JFK was as "free as any other American to give 'his first loyalty to the United States.'"²¹¹ In response to such expressions of doubt, Kennedy was moved to make a well-publicized speech to the Greater Houston Ministerial Association on September 12, 1960, in order to address, in his words, "the so-called religious issue."²¹² Kennedy told his audience:

[B]ecause I am a Catholic, and no Catholic has ever been elected President, the real issues in this campaign have been obscured—perhaps deliberately, in some quarters less responsible than this. So it is apparently necessary for me to state once again—not what kind of church I believe in, for that should be important only to me—but what kind of Amer-

208. LICHTMAN, *supra* note 195, at 71.

209. See THOMAS J. CARTY, *A CATHOLIC IN THE WHITE HOUSE? RELIGION, POLITICS, AND JOHN F. KENNEDY'S PRESIDENTIAL CAMPAIGN* (2004) (discussing the complex role that religion played in Kennedy's campaign and election).

210. See *id.* at 53-54; KOSMIN & LACHMAN, *supra* note 1, at 169.

211. CARTY, *supra* note 209, at 56.

212. Senator John F. Kennedy, Address to the Greater Houston Ministerial Association (Sept. 12, 1960), available at <http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/JFK+Pre-Pres/Address+of+Senator+John+F.+Kennedy+to+the+Greater+Houston+Ministerial+Association.htm>.

ica I believe in. I believe in an America where the separation of church and state is absolute—where no Catholic prelate would tell the President (should he be Catholic) how to act, and no Protestant minister would tell his parishioners for whom to vote—where no church or church school is granted any public funds or political preference—and where no man is denied public office merely because his religion differs from the President who might appoint him or the people who might elect him.²¹³

After further elaborating his concept of the separation of church and state, Kennedy reiterated that he spoke only for himself. “[F]or contrary to common newspaper usage, I am not the Catholic candidate for President. I am the Democratic Party’s candidate for President who happens also to be a Catholic. I do not speak for my church on public matters—and the church does not speak for me.”²¹⁴ While the effects of Kennedy’s speech are difficult to gauge, he unquestionably lost votes because of his religion even as he won the election, polling only 118,574 more popular votes than Richard Nixon.²¹⁵

III. PROSCRIBED GOVERNMENTAL ACTIONS

Given that pluralist democratic theory and American history justify judicial efforts to diminish religiously-inspired political divisiveness, one must ask the following question: what governmental actions should courts proscribe pursuant to the *Lemon* entanglement

213. *Id.*

214. *Id.*

215. AUSTIN, *supra* note 138, at 98 (Table 3.1: National Electoral and Popular Vote Cast for President, 1789-1984). Kennedy garnered 303 electoral votes compared with Nixon’s 219. *Id.* at 98. Even after Kennedy’s speech, “most Protestant publications would not support him,” KOSMIN & LACHMAN, *supra* note 1, at 170, though *The Christian Century*, a moderately liberal interdenominational Protestant periodical, “changed from opposition to neutrality.” *Id.* “Nonetheless, polls showed that Kennedy gained votes from moderate Protestants.” *Id.*; see also Philip E. Converse et al., *Stability and Change in 1960: A Reinstating Election*, 55 AM. POL. SCI. REV. 269, 270-71 (1961) (discussing importance of religion in the election of Kennedy).

prong (or some similar doctrinal protection against religiously-inspired political divisiveness, such as the endorsement test)? This Part of the Article focuses on two types of governmental actions: funding of religious activities or institutions, such as religious schools; and sponsoring or displaying of religious symbols, such as crèches. After articulating the entanglements prong in *Lemon*, the justices never developed it to its full potential. While they repeatedly considered political divisiveness in the context of governmental funding cases, they never explored its ramifications in the context of governmental displays of religious symbols. Consequently, I will discuss the former type of case but concentrate on the latter.

A. Governmental Funding of Religion

When the government funds religious practices or institutions, the government introduces an issue that could readily lead to religiously-inspired political divisions. As the justices have explained in numerous cases, including *Lemon*, *Meek*, and *Aguilar*, the provision of governmental funding is rarely a one-time affair.²¹⁶ Rather, once the government initiates a funding program—let's say, funding remedial instruction in all elementary and secondary schools, whether public or private (including religious schools)—then individuals and interest groups are likely to assail the legislature (or other appropriate governmental body) with requests for funding (or more funding) on an annual basis. When such funding might or might not be provided to certain religious schools, then the respective religious officials will be motivated to lobby the legislature not only to provide funding in accordance with certain favorable criteria but to increase the amount of funding. Because such funding programs are likely to encourage religious communities to act as political interest groups, often opposing other relig-

216. *Aguilar v. Felton*, 473 U.S. 402, 414 (1985), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997); *Aguilar*, 473 U.S. at 416-18 (Powell, J., concurring); *Meek v. Pittenger*, 421 U.S. 349, 372 (1975), *overruled by* *Mitchell v. Helms*, 530 U.S. 793 (2000); *Lemon v. Kurtzman*, 403 U.S. 602, 622-23 (1971); *see* Comm. for Pub. Educ. & Religious Liberty v. *Nyquist*, 413 U.S. 756, 794 (1973) (dictum on political divisiveness).

iously-inspired interest groups, the courts should proscribe this type of governmental action pursuant to the entanglements prong.

Justice Breyer's dissent in *Zelman*, joined by Stevens and Souter, persuasively explained the need for such a judicial proscription. The majority upheld a school voucher program that allowed parents to use public money to help pay for religious-school education, but Breyer reasoned that such a program would engender religiously-inspired political divisiveness. Breyer recognized that immigration had produced not only momentous demographic but also concomitant social changes.

When [deciding *Lemon* and *Nyquist*], the Court did not deny that an earlier American society might have found a less clear-cut church/state separation compatible with social tranquility. Indeed, historians point out that during the early years of the Republic, American schools—including the first public schools—were Protestant in character. Their students recited Protestant prayers, read the King James version of the Bible, and learned Protestant religious ideals. Those practices may have wrongly discriminated against members of minority religions, but given the small number of such individuals, the teaching of Protestant religions in schools did not threaten serious social conflict. The twentieth century Court was fully aware, however, that immigration and growth had changed American society dramatically since its early years. By 1850, 1.6 million Catholics lived in America, and by 1900 that number rose to twelve million. There were similar percentage increases in the Jewish population.²¹⁷

If anything, Breyer continued, the nation has grown even more religiously diverse. Today, the United States “boasts more than fifty-five different religious groups and subgroups with a significant number of members. Major religions include, among others, Protestants, Catholics, Jews, Muslims, Buddhists, Hindus, and Sikhs. And several of these major religions contain different subsidiary sects with different religious beliefs.”²¹⁸ Given this social and religious reality, Breyer explained that the Court had to choose between two different interpreta-

217. *Zelman v. Simmons-Harris*, 536 U.S. 639, 719-20 (2002) (Breyer, J., dissenting) (citation omitted).

218. *Id.* at 723 (Breyer, J., dissenting) (citation omitted). See also RELIGIOUS LANDSCAPE SURVEY, *supra* note 14, at 8 (predicting that the United States will continue to become more religiously diverse).

tions of the establishment clause. On the one hand, the Court might use an “‘equal opportunity’ approach,”²¹⁹ giving each religion an equal chance, for example, “to secure state funding or to pray in the public schools.”²²⁰ On the other hand, the Court might draw “fairly clear lines of separation between church and state.”²²¹ The problem was that, in practice, the “‘equal opportunity’ approach was not workable.”²²² When so many diverse religions are battling for access to funding or to inject their views into the public schools, some religions will inevitably be favored. Equal opportunity, much less “equal treatment,”²²³ could only be hypothetical, not actual. Just as important, the equal opportunity approach would encourage the sundry religious groups to pursue their own respective interests as strongly as possible in the political realm. The equal opportunity approach, that is, would nurture religiously-inspired political divisiveness. The only workable method to achieve equality among religions was separation: removing the government from religious schools, and removing religions from the public schools.²²⁴

Finally, Breyer explained why the Cleveland, Ohio voucher program challenged in *Zelman* was not truly equal and would likely generate religiously-inspired political battles. Recall, Rehnquist’s majority opinion emphasized that parents retained “private choice” to decide where they would spend their vouchers.²²⁵ Partly for that reason, Rehnquist maintained that the governmental program was neutral; all religious schools were afforded an equal opportunity to benefit from the vouchers. Breyer responded that: the government will necessarily articulate criteria for participating in any voucher program. “Consider the voucher program here at issue.”²²⁶ “That program insists that the religious school accept students of all religions. Does that criterion treat fairly groups whose religion forbids them to do so?”²²⁷ Even fur-

219. 536 U.S. at 721 (Breyer, J., dissenting).

220. *Id.* at 722-23.

221. *Id.* at 723.

222. *Id.* at 722.

223. *Id.*

224. *Id.*

225. *Id.* at 650 (majority opinion).

226. *Id.* at 724 (Breyer, J., dissenting).

227. *Id.*

ther, the Cleveland program required that any participating school not “advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion.”²²⁸ The existence of such limits on the voucher program, however reasonable, will necessarily encourage sundry religious groups to lobby for criteria favorable to themselves. Political conflicts could readily take shape around religious differences, as not all religious schools were being treated equally. “How will the public react to government funding for schools that take controversial religious positions on topics that are of current popular interest—say, the conflict in the Middle East or the war on terrorism?”²²⁹ In addition, Breyer emphasized that government officials would need to determine whether particular schools satisfied the statutory criteria. For instance, a government official would need to decide whether a school teaches hatred of other religions. Does a Catholic school teach hatred of Judaism if it, following the Vatican, instructs students “to pray that God ‘enlighten’ the hearts of Jews ‘so that they recognize Jesus Christ, Savior of all mankind?’”²³⁰ Do we really want a government official to resolve this question? Such an intrusion of the government into religious affairs would, Breyer reasoned, engender resentment and divisiveness.²³¹ In sum, if even a private-choice school voucher program like the one in Cleveland would likely generate religiously-inspired political divisiveness, as Breyer convincingly argues, then the Court should remain wary of any government program funding religious institutions or practices.

B. Governmental Displays of Religious Symbols

The entanglements-prong prohibition against governmental actions that engender religiously-inspired political divisiveness should

228. *Id.* (quoting OHIO REV. CODE ANN. § 3313.976(A)(6)).

229. *Id.*

230. James Carroll, Op-Ed *Reviving an Old Insult to the Jews*, BOSTON GLOBE, Feb. 18, 2008, http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2008/02/18/reviving_an_old_insult_to_the_jews/ (last accessed February 26, 2008). Retreating from the reforms of the Second Vatican Council, the Vatican had at first recommended that Catholics pray “that God ‘lift the veil’ from “Jewish blindness.”
Id.

231. 536 U.S. at 724-25 (Breyer, J., dissenting).

preclude the government from sponsoring or displaying religious symbols such as crèches. Of course, governmental displays of religious symbols sometimes entail the spending of governmental funds, and such an expenditure might produce unconstitutional political divisiveness (as discussed in the previous section). Yet, religious symbolism cases usually differ from the ordinary religious funding case. Often, in a religious symbolism case, the expenditure of governmental money is minimal. Furthermore, the governmental display of a religious symbol is not likely to produce annual (or repetitive) legislative battles over the amount of and the criteria for funding.

Even so, regardless of funding, the governmental display of a religious symbol is likely to generate political divisiveness that should be deemed unconstitutional. To be clear, the Court has never interpreted the entanglements prong in this manner, but such judicial protection follows from the arguments justifying the diminishment of political divisiveness. While some justices have deprecated the entanglements inquiry, including the political-divisiveness component, as "mystifying,"²³² a public display of a religious symbol usually has at least one readily decipherable political meaning. Publicly displayed religious symbols connote priority. The message is one of division and inequality: the community and the government favor one particular religion over others.

The *Lynch* case, upholding a Pawtucket municipal display of a crèche,²³³ underscored how a publicly displayed religious symbol can establish religious and political priority. As argued in an amicus curiae brief filed jointly by the American Jewish Committee and the National Council of the Churches of Christ, religious displays are likely to demarcate certain citizens as social and political insiders and others as outsiders in accordance with their religious orientations.²³⁴ After the American Civil Liberties Union initiated the legal challenge, the Paw-

232. *Lemon v. Kurtzman* 403 U.S. 602, 666 (1971) (White, J., concurring and dissenting). See also *Roemer v. Bd. of Public Works*, 427 U.S. 736, 769 (1976) (White J., concurring in judgment) (quoting *Lemon*, 403 U.S. at 666).

233. *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984).

234. Brief for the American Jewish Committee & the National Council of the Churches of Christ in the U.S.A. as Amici Curiae Supporting Respondents at 4-7, *Lynch v. Donnelly*, 465 U.S. 668 (1984) (No. 82-1256).

tucket mayor alluded to such a division of citizens into insiders and outsiders. He emphasized that the crèche was a crucial element of the extensive Christmas display—which also included, among other things, a Christmas tree, a Santa Claus house, and a “Seasons Greetings” sign²³⁵—exactly because of the crèche’s religious message. The mayor condemned the lawsuit as “a petty attack aimed at taking Christ out of Christmas.”²³⁶ As reported in a Providence, Rhode Island newspaper, a Baptist reverend more explicitly explained that the message of the crèche was one of religious and political priority:

[W]hen anybody attacks Christianity and nibbles away, eventually the whole structure of American society is threatened. This is a Christian country. We invite all men to take residence here. But one condition of that residency is that they respect our traditions. These are a part of America and we feel that whoever comes in has an obligation to respect them, to become familiar with them, and to abide by them.²³⁷

Public support for maintaining the crèche display was powerful and unmistakable. Ninety percent of the messages to the ACLU and the city endorsed the crèche.²³⁸ After the district court trial, the judge reviewed approximately seventy letters sent to the mayor and local newspapers and concluded as follows:

Overall the tenor of the correspondence is that the lawsuit represents an attack on the presence of religion as part of the community’s life, an attempt to deny the majority the ability to express publicly its beliefs in a desired and traditionally accepted way. In the Mayor’s words, “The people absolutely resent somebody trying to impose another kind of religion on them I think the denigra-

235. 465 U.S. at 671.

236. WAYNE R. SWANSON, *THE CHRIST CHILD GOES TO COURT* 19-20 (1990) (quoting Mayor Dennis M. Lynch).

237. *Id.* at 22 (citing Barbara Carton, *Nativity Scene Participants Speak Out*, *PROVIDENCE JOURNAL*, Dec. 6, 1981, Section A).

238. *Id.* at 20.

tion, trying to eliminate these kinds of things, is a step towards establishing another religion, non-religion that it may be."²³⁹

Meanwhile, a clinical psychologist testified at trial: [F]or the child who belongs to a non-Christian family, seeing a Nativity scene as part of a City-sponsored Christmas display will raise "profound questions for that child insofar as whether or not he is okay or more importantly and as part of that whether his parents are okay." The child will question, because of the setting in which the Nativity scene occurs, his identification with the American culture.²⁴⁰

After the Supreme Court issued its decision in *Lynch*, the Jewish Dean of the New York University School of Law admitted in the *New York Times*, "When I see a government-supported crèche, I suddenly feel as if I have become a stranger in my own home, to be tolerated only as long as I accept the dominant religious values."²⁴¹ He added that "[w]hen government, at any level, lends its support to a Christian religious observance, Jews and other non-Christians are automatically excluded."²⁴²

In other words, the public display of a religious symbol, the crèche, engendered social divisions based largely on religious differences, and such divisions were manifested in widespread continuing public support for the display. Of course, the Burger majority opinion disregarded such religiously-inspired political divisiveness.²⁴³ But frequently, as in this case, symbols make a difference. In fact, as the lawsuit and the resultant backlash in *Lynch* demonstrated, not only might public displays of religious symbols create religiously-inspired political divisiveness, but also the legal and political battles that ensue

239. *Donnelly v. Lynch*, 525 F. Supp. 1150, 1162 (D.R.I. 1981), *aff'd* 691 F.2d 1029 (1st Cir. 1982), *rev'd* 465 U.S. 668 (1984).

240. Brief of the Respondents at 46-47, *Lynch v. Donnelly*, 465 U.S. 668 (1984) (No. 82-1256).

241. Norman Redlich, *Nativity Ruling Insults Jews*, N.Y. TIMES, Mar. 26, 1984, at A19.

242. *Id.*

243. *Lynch*, 465 U.S. at 684-85.

because of such displays might generate additional (and more fervent) divisiveness. By ignoring divisiveness and its potential damage to the pluralist democratic process, the Court cultivates exclusionary practices reminiscent of republican democracy. The Court fosters a return to the “good ol’ days” when, in practice, white Protestant values were deemed virtuous and white Protestant goals were enshrined as the common good. Protestant Bible reading and prayers in the public schools? Why not?

Why not? Because the public performance of religious rituals, the public recitation of religious tenets, and the public display of religious symbols contravene the political equality that undergirds pluralist democracy. The dissenters in *Van Orden v. Perry*,²⁴⁴ which upheld the Ten Commandments display etched on a monument in the Texas state capitol monument park,²⁴⁵ emphasized how that religious display struck at the heart of political equality. Souter’s dissenting opinion, joined by Justices Stevens and Ruth Bader Ginsburg, underscored “the simple realities that the Ten Commandments constitute a religious statement, that their message is inherently religious, and that the purpose of singling them out in a display is clearly the same.”²⁴⁶ Rehnquist admitted as much in his plurality opinion: “Of course, the Ten Commandments are religious—they were so viewed at their inception and so remain. The monument, therefore, has religious significance.”²⁴⁷ Stevens’s dissent, joined by Ginsburg, explained that the Ten Commandments display was not only religious but sectarian on two accounts.²⁴⁸ First, the display favored Christianity and Judaism because the Ten Commandments is “‘a sacred text’” for those religions (and Islam) but not others.²⁴⁹ The Ten Commandments pre-

244. 545 U.S. 677 (2005).

245. *Id.* at 681.

246. *Id.* at 738 (Souter, J., dissenting).

247. *Id.* at 690 (Rehnquist, C.J., plurality opinion); *see id.* at 692 (Thomas, J., concurring) (applauding Rehnquist’s recognition of the monument’s “religious significance”).

248. “The message transmitted by Texas’ chosen display is quite plain: This State endorses the divine code of the ‘Judeo-Christian’ God.” *Id.* at 707 (Stevens, J., dissenting).

249. *Id.* at 716 (Stevens, J., dissenting) (quoting *Stone v. Graham*, 449 U.S. 39, 41 (1980)). As Scalia has pointed out elsewhere, Islam also accepts the divinity of

scribe “a compelled code of conduct from one God, namely, a Judeo-Christian God, that is rejected by prominent polytheistic sects, such as Hinduism, as well as nontheistic religions, such as Buddhism.”²⁵⁰ Second, within the religions that accept the Ten Commandments, “different religions and even different denominations within a particular faith”²⁵¹ subscribe to “distinctive versions” of it.²⁵² The state of Texas necessarily chose to prioritize one particular version of the Decalogue by displaying it on a monument. In fact, one purpose of the monument display was proselytization, to guide youth by inspiring “renewed respect for the law of God.”²⁵³ Finally, Stevens concluded by emphasizing that the governmental display of the Ten Commandments would undermine political equality by promoting religiously-inspired political divisiveness.

Recognizing the diversity of religious and secular beliefs held by Texans and by all Americans, it seems beyond peradventure that allowing the seat of government to serve as a stage for the propagation of an unmistakably Judeo-Christian message of piety would have the tendency to make nonmonotheists and nonbelievers “feel like [outsiders] in matters of faith, and [strangers] in the political community.” “[D]isplays of this kind inevitably have a greater tendency to emphasize sincere and deeply felt differences among individuals than to achieve an ecumenical goal.”²⁵⁴

In *McCreary*, invalidating displays of the Ten Commandments in county courthouses,²⁵⁵ Scalia’s dissent candidly admitted that such a public display acknowledges a governmental preference for certain religions (monotheistic ones) over other religions (polythe-

the Ten Commandments. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting).

250. 545 U.S. at 719 (Stevens, J., dissenting).

251. *Id.* at 717.

252. *Id.*

253. *Id.* at 715

254. *Id.* at 720-21 (quoting *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 799 (1995)); *Allegheny County v. ACLU*, 492 U.S. 573, 651 (1989) (Stevens, J., concurring in part and dissenting in part). In his *Van Orden* concurrence, Breyer mentioned the importance of avoiding religiously-inspired political divisiveness. 545 U.S. at 698, 704 (Breyer, J., concurring in the judgment).

255. 545 U.S. 844 (2005).

istic ones).²⁵⁶ From Scalia's viewpoint, however, the Constitution allows the government to grant its imprimatur to certain religions.²⁵⁷ Equality be damned!

IV. CONCLUSION

Richard W. Garnett and Noah Feldman both argue that, at least when it comes to adjudication, Americans should accept religiously-inspired political divisiveness. They fret that the judicial enforcement of political equality pursuant to the establishment clause—the judicial proscription of governmental actions that would engender religiously-inspired political divisiveness—would lead to unacceptable consequences.²⁵⁸ Establishment-clause doctrine would become skewed and produce outlandish case results. Concerns about political divisiveness might be “real and reasonable,”²⁵⁹ Garnett admits, but that “does not mean that they can or should supply the enforceable content of the First Amendment's prohibition on establishments of religion.”²⁶⁰ Basically, Garnett and Feldman suggest that religious minorities should develop tougher skins and stop being so sensitive. Does it really hurt to gaze at a governmental display of a crèche?²⁶¹

Well, yes, it does, as this Article has shown. The political theory of pluralist democracy, the social science research documenting the power of religious identity, and the history of religious discrimination in the United States demonstrate that the importation of religious divisions into the political realm can thwart the pluralist democratic process. Without political equality, pluralist democracy does not exist. To be sure, republican democracy differed: an ostensible lack of civic virtue supposedly justified imposing inequality. But pluralist democracy demands that each and every citizen be af-

256. *Id.* at 892-94 (Scalia, J., dissenting).

257. *Id.* at 893 (“With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.”).

258. See Feldman, *From Liberty*, *supra* note 21, at 718-30.

259. Garnett, *supra* note 27, at 1670.

260. *Id.*

261. FELDMAN, *DIVIDED*, *supra* note 19, at 240.

forded a full and fair opportunity to participate, to assert his or her interests and values in the democratic arena. Citizens, then, must be willing to negotiate and compromise with other citizens, who are equally entitled to assert their interests and values. But religiously-inspired political positions sometimes cannot be compromised; they are absolutes. Moreover, when political stances form around religious orientations, religious outsiders inevitably lose merely because they are minorities. Throughout American history, dominant religious groups have translated their values into political goals and imposed them on minorities when given the opportunity to do so. Religiously-inspired political divisiveness produces political inequality.²⁶²

Consequently, the Court should interpret the Establishment Clause to promote political equality and to protect religious minorities from the ravages wrought by religiously-inspired political divisiveness. But, to return to the 2008 presidential campaign, discussed at the outset of this Article, would the political divisiveness component of the entanglements prong prevent Mike Huckabee from reminding

262. Noah Feldman argues that the original purpose of the Establishment Clause was to protect liberty of conscience. From a practical standpoint, the Establishment Clause thus precluded the government from providing financial support for religion. See FELDMAN, *DIVIDED*, *supra* note 19, at 19-56; Feldman, *From Liberty*, *supra* note 21, at 679-84. While I agree with much of Feldman's historical narrative, he nonetheless makes several crucial errors. First, at the time of the framing, liberty of conscience was more central to free exercise than to disestablishment. Disestablishment arose primarily from a political reality: no single religious denomination or sect wielded sufficient power to demand governmental support. There were so many competing religions that disestablishment seemed to be a reasonable stalemate (and this fact led to the gradual disestablishment of state churches, as well). See FELDMAN, *PLEASE DON'T*, *supra* note 2, at 139-41, 148-62. Second, Noah Feldman whitewashes liberty of conscience. To the framing generation, liberty of conscience (and free exercise) did not connote a freedom to pursue any religious path whatsoever. Rather, liberty of conscience was a Protestant doctrine that denoted a freedom to follow the truth of Christ. *Id.* at 55-56, 65-66, 147-48, 155-56, 164-69. Thus, Noah Feldman twists the history of the framing period so that it better fits the religiously diverse nation that the United States has become. Third, while Noah Feldman surreptitiously skews the history of the framing period, he disregards the historical transition from republican to pluralist democracy. See FELDMAN, *FREE EXPRESSION*, *supra* note 29. Hence, in turn, he disregards the implications that the transition to pluralist democracy has for judicial interpretations of the establishment clause.

voters that he is the Christian candidate and that Mitt Romney is Mormon? Would it prevent a large percentage of Americans from refusing to vote for a Mormon presidential candidate? Certainly not. Supreme Court doctrine does not control American social attitudes and relations. When Barack Obama won the Democratic nomination, we predictably heard more rumors suggesting that he is truly Muslim and attended a radical Islamic school as a child.²⁶³ The Court and its establishment-clause proclamations were beside the point, especially when polls showed that between forty-five and fifty-four percent of Americans either would not vote for a Muslim presidential candidate or would be less likely to do so (but apparently enough Americans voted for Obama to elect him president).²⁶⁴

Even so, the Court can and should preclude the government from encouraging such divisiveness, and the political-divisiveness component of the entanglements prong provides a mechanism for doing so. Would entanglements cases sometimes lead to doctrinal difficulties, as Garnett and Noah Feldman worry? My recommended applications of the political-divisiveness proscription—prohibiting most governmental funding of religious activities and institutions and most governmental displays of religious symbols—would be relatively straightforward. But wouldn't some cases be problematic, leading some justices to parse the factual minutiae? Would a governmentally displayed Christmas tree, for instance, be a prohibited religious symbol?

Undoubtedly, some political-divisiveness issues would lead to hard cases, but vexing cases are the norm in constitutional law. We should agonize less about the niceties of doctrine and the lucidity of case outcomes and despair more about the ramifications of relig-

263. Nicholas D. Kristof, *The Push to 'Otherize' Obama*, New York Times, Sept. 21, 2008 <http://www.nytimes.com/2008/09/21/opinion/21kristof.html> (last visited Sept. 21, 2008); see generally Perry Bacon, Jr., *Foes Use Obama's Muslim Ties to Fuel Rumors About Him*, WASH. POST., Nov. 29, 2007 available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/28/AR2007112802757.html>; *CNN Debunks False Report About Obama*, CNN.com, Jan. 23, 2007 <http://www.cnn.com/2007/POLITICS/01/22/obama.madrassa/>; Jack Wheeler, *The Audacity of Apostasy: Barack Obama's Muslim Links*, BrookesNews.com, Jan. 8, 2007 <http://www.brookesnews.com/070801obama.html>.

264. Berkes, *supra* note 5.

iously-inspired political divisiveness in the pluralist democratic process.