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Richard W. Garnett

Notre Dame Law School, rgarnett@nd.edu

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INTRODUCTION: RELIGION, DIVISION, AND THE CONSTITUTION

Richard W. Garnett*

Thirty-five years ago, in his landmark *Lemon v. Kurtzman* opinion, Chief Justice Warren Burger declared that state actions could “excessive[ly]”—and, therefore, unconstitutional—“entangle” government and religion,¹ not only by requiring or allowing intrusive monitoring by officials of religious institutions and activities, but also through their “divisive political potential.”² He worried that government actions burdened with this “potential” pose a “threat to the normal political process”³ and “divert attention from the myriad issues and problems that confront every level of government.”⁴ And, he insisted that “political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.”⁵ Accordingly, he concluded that the parochial-school-funding programs under review in *Lemon* were unconstitutional, not only because they “foster[ed] an impermissible degree of entanglement” between government and religion,⁶ but also because they were likely to “intensif[y]” “[p]olitical fragmentation and divisiveness on religious lines.”⁷

As I have described in detail elsewhere,⁸ Chief Justice Burger’s view that the First Amendment not only authorizes, but also invites, judges to look to their observations and predictions of political division along religious lines for the enforceable

* Lilly Endowment Associate Professor of Law, University of Notre Dame. The papers that follow were presented at the January 7, 2006 meeting of the Section on Law and Religion of the American Association of Law Schools, in Washington, D.C. I served as the Program Chair for the Section in 2005, and am very grateful to the scholars who accepted my invitation to participate in the program and also to the many who attended the session and posed thoughtful, provocative questions.

Portions of this short introduction are adapted or excerpted from two other papers of mine, in which I explore many of the questions engaged by the participants in this symposium. See Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1666 (2006); Richard W. Garnett, *Civic Unity and Religious Pluralism*, CONST. COMMENT. (forthcoming) (reviewing NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* (2005) and KEVIN SEAMUS HASSON, *THE RIGHT TO BE WRONG: ENDING THE CULTURE WAR OVER RELIGION IN AMERICA* (2005)).

¹ 403 U.S. 602, 614 (1971).

² *Id.* at 622.

³ *Id.*

⁴ *Id.* at 623.

⁵ *Id.* at 622.

⁶ *Id.* at 615.

⁷ *Id.* at 623.

⁸ See Garnett, *Religion, Division, and the First Amendment*, *supra* note *.

content of the Establishment Clause has, since *Lemon*, been endorsed and employed by many scholars, judges, commentators, and citizens, in many cases and contexts. More generally, the claims that America is divided and religion is divisive are unavoidable in—indeed, they animate and shape—much of what is said and written today about law, politics, religion, and culture. We have all seen the maps and survey results that are said to reveal—or, maybe, to construct—our “Two Americas”⁹: Red and Blue, Metro and Retro,¹⁰ “United States of Canada” and “Jesusland.”¹¹ And, we have all heard, time and again, about the “culture wars”¹² pitting—in the words of one of our more clear-eyed social observers—“racist fascist knuckle-dragging NASCAR-obsessed cousin-marrying roadkill-eating tobacco-juice-dribbling gun-fondling religious fanatic rednecks” against “godless unpatriotic pierced-nose Volvo-driving France-loving left-wing communist latte-sucking tofu-chomping holistic-wacko neurotic vegan weenie perverts.”¹³ True, many social scientists have questioned the post-*Bush v. Gore* “Red v. Blue” thesis, and suggested that, in fact, our country and communities come in a wide range of purple shades.¹⁴ Still, the “religion is divisive” meme continues to spread through and to shape both litigation and public conversations.

For example, Justice David Souter observed not long ago that “[w]e are centuries away from the St. Bartholomew’s Day massacre and the treatment of heretics in early Massachusetts, but the divisiveness of religion in current public life is inescapable.”¹⁵ Indeed, according to a prominent philosopher, Richard Dawkins, “[o]nly the willfully blind could fail to implicate the divisive force of religion in most, if not all, of the

⁹ STANLEY B. GREENBERG, *THE TWO AMERICAS: OUR CURRENT POLITICAL DEADLOCK AND HOW TO BREAK IT* (2004).

¹⁰ JOHN SPERLING ET AL., *THE GREAT DIVIDE: RETRO VS. METRO AMERICA* (2004).

¹¹ See *One Nation, Divisible*, ATLANTIC MONTHLY, Jan.–Feb. 2005, at 100 (describing “a new map” that “began making its way around the Internet” after the November 2004 elections, depicting the “United States of Canada” and “Jesusland,” and suggesting “a geopolitical re-sorting of North America into two more culturally cohesive and geographically sensible nations”).

¹² JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

¹³ Dave Barry, *Can’t We All Just Get Along?*, MIAMI HERALD, Dec. 12, 2004, at 1M.

¹⁴ See, e.g., MORRIS P. FIORINA ET AL., *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* (2005); David Campbell, *A House Divided? What Social Science Has to Say About the Culture War*, 15 WM. & MARY BILL RTS. J. 59, 60 (2006) (“While there is admittedly some debate over the degree to which Americans are polarized, the fairest reading of the evidence suggests that, across the issue spectrum, Americans are not as far apart as the pundits would have you believe.” (citation omitted)); Jonathan Rauch, *Bipolar Disorder*, ATLANTIC MONTHLY, Jan.–Feb. 2005, at 102 (“American politics is polarized but the American public is not. In fact, what may be the most striking feature of the contemporary American landscape . . . is not the culture war but the culture peace.”). For an interesting online collection of alternative maps that emphasize the “purple,” rather than the “red” and “blue,” that the 2004 presidential election revealed, see Michael Gastner et al., *Maps and Cartograms of the 2004 US Presidential Election Results*, <http://www-personal.umich.edu/~mejn/election/> (last visited Aug. 24, 2006).

¹⁵ *McCreary County v. ACLU*, 125 S. Ct. 2722, 2745 (2005).

violent enmities in the world today.”¹⁶ Former Senator and Ambassador John Danforth (who is also an Episcopal priest), is not quite so harsh, but still warns that while, “[a]t its best, religion can be a uniting influence, . . . in practice, nothing is more divisive.”¹⁷

In addition, prominent jurists and scholars continue to urge that the asserted tendency of a particular policy to cause, or to reflect, religion-related divisiveness may and should be taken into account by judges asked to evaluate its constitutional validity. Indeed, the argument that what Chief Justice Burger called “political division along religious lines”¹⁸ is constitutionally significant, as well as politically, culturally, or aesthetically troubling, appears to be enjoying something of a comeback after a time on the doctrinal back burner.¹⁹ Justice Breyer, for example, in his crucial concurring opinion in one of the recent Ten Commandments cases, identified “avoid[ing] that divisiveness based upon religion that promotes social conflict” as one of the “basic purposes of [the Religion] Clauses.”²⁰ He then voted to reject the First Amendment challenge to the public display at issue in part because, in his view, to sustain it “might well encourage disputes” and “thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.”²¹ Similarly, in his succinct, widely noted book, *Active Liberty*, Justice Breyer re-affirmed that “the need to avoid a ‘divisiveness based upon religion that promotes social conflict’” does and should provide a “critical value” that ought to direct the exercise of judicial review.²² Professor Noah Feldman’s recent study, *Divided By God*, sounds a similar note. The political divisions associated with religion and religious activism pose, he warns, “a fundamental challenge to the project of popular self-government.”²³ It is in part because, he thinks,

¹⁶ RICHARD DAWKINS, *A DEVIL’S CHAPLAIN: REFLECTION ON HOPE, LIES, SCIENCE AND LOVE* 161 (2003).

¹⁷ John C. Danforth, Op-Ed, *In the Name of Politics*, N.Y. TIMES, March 30, 2005, at A17; see also JOHN C. DANFORTH, *FAITH AND POLITICS: HOW THE “MORAL VALUES” DEBATE DIVIDES AMERICA AND HOW TO MOVE FORWARD TOGETHER* (2006).

¹⁸ *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971).

¹⁹ See *Mitchell v. Helms*, 530 U.S. 793, 825 (2000) (plurality opinion) (“The dissent resurrects the concern for political divisiveness that once occupied the Court but that post-*Aguilar* cases have rightly disregarded.”). But see *id.* at 872 n.2 (Souter, J., dissenting) (“The Court may well have moved away from considering the political divisiveness threatened by particular instances of aid as a practical criterion for applying the Establishment Clause case by case, but we have never questioned its importance as a motivating concern behind the Establishment Clause, nor could we change history to find that sectarian conflict did not influence the Framers who wrote it.”).

²⁰ *Van Orden v. Perry*, 125 S. Ct. 2854, 2868 (Breyer, J., concurring).

²¹ *Id.* at 2871. Justice Stevens went even farther, referring to “Government’s obligation to avoid divisiveness and exclusion in the religious sphere.” *Id.* at 2875 (Stevens, J., dissenting).

²² STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 122, 124 (2005) (quoting *Van Orden*, 125 S. Ct. at 2868 (Breyer, J., concurring)).

²³ NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 251 (2005).

school-choice programs “create[] conflict and division” and “generate balkanized values” that such programs violate the Establishment Clause, properly understood.²⁴

I believe that judicial efforts to impose tranquility and cohesion—or, at least, to exclude certain forms of dissent—actually exacerbate the conflicts, and sharpen the cleavages, that a divisiveness-focused inquiry purports to police.²⁵ In any event, it is not clear that reducing or eliminating “divisiveness” in American public life is possible or desirable, let alone the First Amendment’s judicially enforceable mandate. Observations and predictions, by judges or anyone else, of “political divisiveness along religious lines” should play no role in the interpretation and application of the Religion Clauses. Stated simply, while “political divisiveness along religious lines” might be undesirable and unattractive, and might signal problems in the political life of a community, and might attend violations of the Establishment Clause, it nonetheless should play no role in the evaluation by judges of Religion Clauses-based challenges to state action, because what it signals—i.e., disagreement, pluralism, and the exercise of religious freedom—is, in the end, constitutionally protected. Madison’s warning remains as powerful as ever:

Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.²⁶

* * *

The distinguished contributors to this symposium examine and unpack the many empirical, doctrinal, and normative presuppositions and assumptions implied by its title, “Religion, Division, and the Constitution.”²⁷ For example: what, exactly, is “divisiveness based upon religion,” the avoidance of which is, according to Justice

²⁴ *Id.* at 244–45. *But see, e.g.*, Richard W. Garnett, *Regulatory Strings and Religious Freedom: Requiring Private Schools to Promote Public Values*, in *EDUCATING CITIZENS: INTERNATIONAL PERSPECTIVES ON CIVIC VALUES AND SCHOOL CHOICE* (Patrick J. Wolf & Stephen Macedo eds., 2004); Richard W. Garnett, *The Right Questions About School Choice: Education, Religious Freedom, and the Common Good*, 23 *CARDOZO L. REV.* 1281 (2002).

²⁵ *See, e.g.*, Steven D. Smith, *Believing Persons, Personal Believings: The Neglected Center of the First Amendment*, 2002 *U. ILL. L. REV.* 1233, 1248 (“[I]t is not clear that any particular constitutional provision on this subject is well calculated to eliminate contention: *excluding* religion from some area of the public domain can be as controversial as *including* it.”). *See generally* Garnett, *Religion, Division, and the First Amendment*, *supra* note *.

²⁶ THE FEDERALIST NO. 10, at 123 (James Madison) (Isaac Kramnick ed., 1987).

²⁷ *See* Frederick Mark Gedicks, *Religions, Fragmentation, and Doctrinal Limits*, 15 *WM. & MARY BILL RTS. J.* 25, 25 (2006) (“The title of this symposium . . . suggests certain presuppositions. . . . The title also implies some less obvious assumptions.”).

Breyer, a “basic purpose” of the Religion Clauses?²⁸ What, exactly, is or should be the relevance of such conflict to the wisdom, morality, or constitutionality of laws and state actions? How plausible, and how normatively attractive, is Chief Justice Burger’s political-divisiveness argument, and how well does this argument cohere with the relevant text, history, traditions, and values? What does the resurfacing of this argument reveal, and what does it portend about the state and direction of First Amendment theory and doctrine?

Professor Gedicks, in his paper, takes a scalpel to the thesis that “Religion Clause doctrine should mediate the political, social, and cultural divisions caused by religion,”²⁹ suggesting that this thesis misses key facts about “religion”—in particular, the “penetrat[ion]” of “even conservative religion” by “postmodern sensibilities”—in contemporary America.³⁰ Professor Campbell brings a political scientist’s tools and perspective to the claim that America is badly polarized, and explores what he sees as a shift from denominational divisions to a “devotional divide,” i.e., between religiously-informed moral traditionalists and more secular political progressives.³¹ Professor Horwitz studies closely and carefully the debate, which rekindled during the nomination and confirmation of Chief Justice Roberts and Justice Alito, about the constraints, if any, imposed by the Constitution’s Religious Test Clause on the consideration by Senators and others of a judicial nominee’s religious faith and background.³² He notes that because “treating religion with *genuine* respect means subjecting it to criticism as well as praise,” we should not expect divisiveness to disappear as our public conversations become—as he thinks they should—richer and more honest.³³ Professor Feldman’s paper looks at judges’ decision-making, rather than their nomination and confirmation, and contends that legal scholars should pay more attention to the connection between judges’ religious affiliations and their rulings.³⁴ In something of a response, though, Professor Solum argues that religious division is better regarded not as a problem to be cured by willful judging but as a component of pluralism, which itself “can and should work as a force for constitutional consensus.”³⁵ In his view, judges best contribute to the stability of the constitutional order

²⁸ *Van Orden v. Perry*, 125 S. Ct. 2854, 2868 (2005) (Breyer, J., concurring).

²⁹ Gedicks, *supra* note 27, at 25.

³⁰ *See generally id.*

³¹ Campbell, *supra* note 14.

³² *See generally* Paul Horwitz, *Religious Tests in the Mirror: The Constitutional Law and Constitutional Etiquette of Religion in Judicial Nominations*, 15 WM. & MARY BILL RTS. J. 75 (2006).

³³ *See id.* at 79–95.

³⁴ Stephen M. Feldman, *Empiricism, Religion, and Judicial Decision-Making*, 15 WM. & MARY BILL RTS. J. 43 (2006).

³⁵ Lawrence B. Solum, *Pluralism and Public Legal Reason*, 15 WM. & MARY BILL RTS. J. 7, 7 (2006).

not by policing the arena of debate and policy for excessive divisiveness, but by submitting to the discipline of legal formalism.

* * *

The American Jesuit, John Courtney Murray, once observed that “pluralism [is] the native condition of American society” and that the unity toward which Americans have long aspired is and must be a “unity of a limited order.”³⁶ This observation strikes me as correct. Those who crafted our Constitution believed that both authentic freedom and effective government could be secured through checks and balances, rather than standardization, and by harnessing, rather than homogenizing, the messiness of democracy. It is both misguided and quixotic, then, to employ the First Amendment to smooth out the bumps and divisions—religious and otherwise—that are an unavoidable part of the political life of a diverse and free people,³⁷ and perhaps also an indication that society is functioning well.³⁸

³⁶ JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 27 (1960).

³⁷ See, e.g., Andrew Sullivan, *TRB From Washington: Federal Express*, *NEW REPUBLIC*, Dec. 13, 2004, at 6 (“[C]ultural polarization is emphatically not a problem. It’s a sign of political health, a bellwether of a society that has not given up on debating first-principle issues of human morality.”).

³⁸ See, e.g., CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 213 (2003) (“Well-functioning societies [should] take steps to discourage conformity and to promote dissent.”).