JUSTICE BREYER AND THE ESTABLISHMENT CLAUSE: NOTES ON "APPEASEMENT," "LEGAL JUDGMENT," AND "DIVISIVENESS"

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Stephen G. Breyer served, conscientiously and credibly, as an Associate Justice of the Supreme Court of the United States for nearly three decades. He was known for, among many other things, his courtesy and civility, his creative hypotheticals and free-form questioning during oral arguments, his road-show debates with the late Antonin Scalia about the relevance to constitutional interpretation of foreign jurisdictions' practices and policies, and his earnest concern for the Court's role and reputation. He wrote hundreds of judicial opinions, including many in cases involving the First Amendment. And yet, during his long career and notwithstanding his wide-ranging interests, he never authored a majority opinion resolving a dispute about the meaning of that Amendment's Establishment Clause.[1]

Nevertheless, Justice Breyer's writings and record—in judicial opinions and elsewhere—regarding the no-establishment rule are distinctive in at least three ways. First, there is the fact that he did not vote uniformly with his more secularist colleagues in divided Establishment Clause cases.[2] That is, he often resisted the stricter applications of the no-establishment rule endorsed by some of his colleagues. Next, he regularly rejected the argument that such cases could or should be resolved by applying a

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[1] Justice Breyer's opinion in Van Orden v. Perry, 545 U.S. 677 (2005), concurring in the judgment, is generally seen as supplying the controlling, fifth vote in that case, although it is not a "majority opinion." And, his opinion for a unanimous Court in Shurtleff v. City of Boston, 142 S. Ct. 1583 (2022) focused on the application of the Court's viewpoint-discrimination and government-speech doctrines.

[2] The term "secular" is used in various ways, sometimes confusingly or misleadingly, in First Amendment decisions, commentary, and scholarship. Correctly understood, the term does not denote an anti-religious attitude or stance, but simply invokes a distinction between the affairs and authorities of this world and those of another. *See generally, e.g.*, Richard W. Garnett, *Religious Freedom, Church Autonomy, and Constitutionalism*, 57 Drake L. Rev. 901, 905–06 (2009) (discussing "positive secularity'). For present purposes, "secularist" characterizes those justices who understand the Establishment Clause as placing stricter limits on cooperation between governments and religious entities and on religious expression and symbols in public spaces.

particular "test" and was unmoved by the lure of any grand unified theories about the provision. His approach was consciously particularistic and case-by-case; he saw church-state controversies as highly, inevitably fact-bound, solvable only through a judicial-balancing exercise akin to the proportionality review that is practiced in some other jurisdictions. In his view, "legal judgment" in light of "the underlying purposes of the Clauses," and not the workings of "any set of formulaic tests,"[3] produces the all-things-considered optimal outcomes. And, more often than any other justice in the Court's history, he identified the Clause's primary purpose as the avoidance of "religiously based divisiveness" and insisted that law-and-religion disputes should be decided in the way most likely to promote this purpose.[4]

This emphasis on the judicial management of strife, and his view that judges charged with interpreting and applying the First Amendment are authorized to invalidate those actions of political actors that are determined or predicted to have excessive potential for conflict-creation, are Justice Breyer's signature Establishment Clause contributions. They animated his final Religion Clauses opinion, a 2022 dissent in *Carson v. Makin*.[5] This view, though, is mistaken, and these contributions are regrettable. I argued as much, 17 years ago, in an overlong and excessively annotated article that, it appears, did not convince the Justice.[6] "That concerns about 'political division along religious lines' are real and reasonable," I wrote, "does not mean that they can or should supply the enforceable content of the First Amendment's prohibition on establishments of religion."[7]

> Those who crafted our Constitution believed that both authentic freedom and effective government could and should 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 that are an unavoidable part of the political life of a diverse

[3] Van Orden v. Perry, 545 U.S. 677, 700, 702 (2005) (Breyer, J., concurring).
[4] *Id.* at 704 (Breyer, J., concurring).
[5] 596 U.S. ___ (2022), No. 20-1088 (Breyer, J., dissenting).
[6] Richard W. Garnett, *Religion, Division, and the Constitution*, 94 GEO. L. J. 1667 (2006).
[7] *Id.* at 1670.

> and free people and, perhaps, best regarded as an indication that society is functioning well.[8]

I.

Scholars and informed commentators are aware that the narrative about the Supreme Court in which all, most, or even many cases are decided along obvious ideological or partisan lines, with justices appointed by presidents of one party lining up in lockstep against their colleagues appointed by presidents of the other, is misleading. It is, and has long been the case, that most of the Supreme Court's rulings do not fit this account; indeed, it has generally been the case, notwithstanding our deep and close polarization, that around half of the Court's decisions are unanimous or nearly so.[9] Even in the contested context of law-and-religion, unanimous determinations are not unheard of.[10]

That said, it cannot be denied that the Court's argued-and-decided cases involving the meaning and requirements of the Establishment Clause are regularly resolved by close votes that track the familiar, if not entirely precise, "liberal" and "conservative" classifications. This has been true for decades, and it was certainly the case during Justice Breyer's tenure. It is noteworthy, then, that despite his all-things-considered warranted categorization as part of the Court's "liberal" bloc, he regularly, perhaps even as often as not, joined more "conservative" colleagues in rulings rejecting Establishment Clause challenges to official acts and policies.

Justice Breyer was confirmed in the summer of 1994, replacing Justice Harry Blackmun, just a few weeks after the Court handed down a splintered 6-3 ruling in the *Kiryas Joel* case, holding that New York had violated the Establishment Clause by creating a new school district that tracked the boundaries of a village inhabited entirely by Satmar Hasidim.[11] Just one year later, during the now-usual late-June announcements of the Court term's hot-ticket rulings, Justice Breyer revealed his reservations about inflexible judicial policing of a strict form of

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[8] *Id.* (internal citations omitted).

[9] Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, CORNELL L. REV. 769, 781 (2015).

[10] *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709 (2005) (holding that the Religious Land Use and Institutionalized Persons Act is a permissible accommodation of religion that does not violate the Establishment Clause); Holt v. Hobbs, 574 U.S. 352 (2015) (holding that Arkansas violated the Religious Freedom Restoration Act by refusing to permit a Muslim prisoner to grow a short beard); Shurtleff v. City of Boston, 596 U.S. ___ (2022) (holding that Boston violated the First Amendment by refusing to permit a group to fly a Christian flag in front of City Hall).

[11] Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 690 (1994).

public secularism: In *Capitol Square*, he joined concurring opinions by Justices Sandra Day O'Connor and David Souter, rejecting the claim that it unconstitutionally "endorsed" religion for an official body to permit a private group—in this case, the Ku Klux Klan—to display a cross during the Christmas season in Columbus, Ohio's Capitol Square.[12] On the same day, he dissented with Justice Souter and two other "liberal" justices in *Rosenberger*, insisting that the Free Speech Clause did not require, because the Establishment Clause did not permit, the University of Virginia's Student Activities Fund to pay the printing expenses of a Christian newspaper.[13]

There are other examples going in each direction, and it is not necessary to catalog them all here.[14] The best-known and most-often-remarked instance and illustration of Justice Breyer's church-state intuitions is his concurring opinion in *Van Orden v. Perry*, the Texas Ten Commandments case.[15] Having joined Justice Souter and three other justices in concluding that two displays of the Ten Commandments on the walls of Kentucky courthouses lacked a "secular purpose" and so violated the Establishment Clause,[16] he then—again, on the same day—concurred with an entirely different group of four colleagues' determination that a six-feet-tall Ten Commandments monument on the grounds of the Texas State Capitol did not. As will be discussed in more detail below, Justice Breyer—"tak[ing] account of context and consequences [measured] in light of" the "basic" and "underlying purposes" of the Religion Clauses—reasoned that these purposes would, all things considered, be better served by permitting than by condemning the monument.[17]

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[12] Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 772 (1995) (O'Connor, J., concurring); *id.* at 783 (Souter, J., concurring).
[13] Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819, 863–64 (1995) (Souter, J., dissenting).
[14] *Compare, e.g.*, Good News Bible Club v. Milford Cent. Sch., 533 U.S. 98, 127 (2001) (Breyer, J., concurring in part) (arguing that the Establishment Clause does not justify or require refusing a Christian youth group's request to use school facilities for after-school meetings), *with* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (holding a Texas school district's policy permitting prayer, led and initiated by students, at football games violated the Establishment Clause).
[15] 545 U.S. 677, 698–700 (2005) (Breyer, J., concurring in the judgment) ("If the relation between government and religion is one of separation, but not of mutual hostility and suspicion, one will inevitably find difficult borderline cases. And in such cases, I see no test-related substitute for the exercise of legal judgment.").
[16] McCreary Cnty., Ky. v. Am. C.L. Union of Ky., 545 U.S. 844 (2005).
[17] *Van Orden*, 545 U.S. at 698, 700.

Justice Breyer's opinion and "swing" vote in *Van Orden* received, not surprisingly, both praise and criticism.[18] And again, for present purposes, there is no need to catalog every time that he rejected a more-strictly-separationist resolution proposed by his "liberal" colleagues or to establish at length that he never went further down the secularist road than those colleagues did. A reasonable question is whether the mere fact that he voted as he did amounts to, as I suggested above, a "distinctive" feature of his judicial work relating to the Establishment Clause. Two leading scholars of American law and religion, Professors Micah Schwartzman and Nelson Tebbe, have proposed a reading of that work in which Justice Breyer's (and, they suggest, Justice Elena Kagan's) defections from "liberal" colleagues' strict-separationist dissents are evaluated as instances of "appeasement."[19] "Appeasement," in their analysis, is "a sustained strategy of offering unilateral concessions for the purpose of avoiding further conflict but with the self-defeating effect of emboldening the other party to take more assertive actions."[20] They suggest that "appeasement carries particular risks in judicial decision-making": Not only can it "affect outcomes," it also "can influence constitutional legitimacy" by "lend[ing] credence" to a "conservative" majority's decision, "thereby weaken[ing] dissenting views."[21] Appeasement, they contend, "may also impact the range of constitutional interpretations that are taken seriously at a given time," by lending "plausibility" to "[a]rguments that might have been considered extreme" and by weakening the force of a "powerful" dissent that can "provide a counterweight to efforts by a majority to alter the boundaries of accepted constitutional argument."[22]

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[18] *Compare, e.g.*, Richard H. Fallon, Jr., *A Salute to Justice Breyer's Concurring Opinion in* Van Orden v. Perry, 128 HARV. L. REV. 429, 433 (2014) ("My hat comes off to Justice Breyer's *Van Orden* opinion for candidly shouldering the responsibility that goes with a conception of the judicial role in which good judging requires good judgment.), *with, e.g.*, Erwin Chemerinsky, *Why Justice Breyer Was Wrong in* Van Orden v. Perry, 14 WM. & MARY BILL RTS J. 1,3 (2005) ("Justice Breyer missed the forest for the trees[.]").

[19] Micah Schwartzman and Nelson Tebbe, *Establishment Clause Appeasement*, THE SUP. CT. REV. 271 (2020). *See also* Nelson Tebbe and Micah Schwartzman, *Re-Upping Appeasement: Religious Freedom and Judicial Politics in the 2019 Term*, ACS SUPREME COURT REVIEW (2020), available at: https://www.acslaw.org/re-upping-appeasement-religious-freedom-and-judicial-politics-in-the-2019-term/.

[20] Schwartzman and Tebbe, *Establishment Clause Appeasement, supra* note 19 at 272. The authors acknowledge the "powerful negative connotations" of the term "appeasement" and "disclaim any direct analogies to historical examples." *Id*.

[21] *Id*. at 273.

[22] *Id*.

Other prominent scholars have offered varying evaluations of their "appeasement" thesis and warning.[23]

It would be beyond the scope of this essay to evaluate thoroughly Schwartzman's and Tebbe's categorization of particular decisions as "appeasement." Certainly, there are ample bases for the view that, sometimes, justices cast votes for reasons other than, or in addition to, their best-judgment conclusions about the all-things-considered merits of competing legal arguments. Here, I briefly note only two reservations about their thesis: First, as they acknowledge, the "appeasement" characterization builds in claims about the alleged appeasers' intent: "[A]ppeasement . . . depends on an actor's intent or motivation. Appeasement cannot be undertaken entirely by mistake; instead, it requires a deliberate course of conduct."[24] In my judgment, however, they have not convincingly refuted the competing possibility to "appeasement," namely, that Justice Breyer (like, when applicable, Justice Kagan) voted as he did in religious-freedom and church-state cases "on the basis of constitutional principle and precedent, according to [his] own interpretation[]."[25]

A second, related reservation: It is a premise—one that is, for the most part, presumed—that the "conservative" Establishment Clause decisions Justice Breyer joined when he parted company with other "liberal" justices were not only wrongly decided but "assertive," "aggressive," and even "off the wall." His colleagues' rejected dissents are characterized glowingly, as "powerful," "ringing," and "principled." It could be, though—in my view, it is the case—that the decisions in question were correct and the dissenters who were left "isolate[d]" were wrong.[26] That is, in each case that Justice Breyer, unlike some "liberal" colleagues, rejected the argument that a particular practice, action, or policy violated the

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[23] Justin Driver, for example, appears to agree with Schwartzman and Tebbe that Justice Breyer's and Justice Kagan's "appeasement" has failed to "moderat[e] the Court's right-wing lurch in this area." Justin Driver, *Three Hail Marys*: *Carson, Kennedy*, *and the Fractured Détente over Religion and Education*, 136 HARV. L. REV. 208, 225 n.133 (2022). Mark Movsesian notes, however, that the practice, or phenomenon, was not in evidence in the recent Supreme Court rulings involving COVID-19-related restrictions on religious gatherings. Mark Movsesian, *Law, Religion, and the COVID-19 Crisis*, 37 J. LAW & REL. 23, n.159 (2022).

[24] Schwartzman and Tebbe, *Establishment Clause Appeasement, supra* note 19.

[25] *Id*.

[26] As then-Justice William Rehnquist once observed, "comments in a dissenting opinion are just that: comments in a dissenting opinion." Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 177 n.10 (1980).

Establishment Clause (or, for that matter, accepted the argument that it would violated the Free Exercise Clause), he was not engaging in a "risky," error-enabling strategy or undermining supposedly "powerful" dissents; he was, instead, correctly answering the question presented. This is true even if, in some of these cases, doing so involved re-fashioning, clarifying, limiting, or even abandoning some "preexisting" but misguided "doctrine[s]."[27] And so, in *American Legion v. American Humanist Association*, the "Bladensburg Peace Cross" case, the Court was correct to conclude that the public maintenance of a century-old, war-memorial cross did not violate the prohibition on religious establishments.[28] And, Justice Breyer was not engaging in futile or feckless "appeasement" when he agreed with that conclusion, noting—among other things—that "ordering [the cross's] removal or alteration at this late date would signal 'a hostility toward religion that has no place in our Establishment Clause traditions.'"[29] Similarly, in the *Our Lady of Guadalupe*, the Court correctly concluded, in accord with the so-called "ministerial exception,"[30] that the Religion Clauses do not permit secular political authorities to second-guess the decision of Roman Catholic parochial schools that particular persons should not be teachers.[31] Justice Breyer agreed with Justice Samuel Alito that "[t]he First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine'" and that "[j]udicial review of the way in which religious schools discharge [their] responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate."[32] That he did so does not seem particularly "myster[ious]."[33]

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For a few decades, the Supreme Court's doctrines and holdings relating to the First Amendment's Establishment Clause often, but not always, reflected an ahistorical, impractical, and morally unsound understanding of church-state

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[27] Schwartzman and Tebbe, *Establishment Clause Appeasement*, *supra* note 19, at 276.
[28] 588 U.S. ___ (2019) No. 17-1717.
[29] *Id.* at 2091.
[30] Richard W. Garnett & John M. Robinson, Hosanna-Tabor, *Religious Freedom, and the Constitutional Structure*, 2012 CATO SUP. CT. REV. 307, 330 ("[T]he ministerial exception is neither strictly 'ministerial' nor an 'exception.'").
[31] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. 2049, 2060 (2020).
[32] *Id.* at 2055.
[33] Schwartzman and Tebbe, *Re-Upping Appeasement*, *supra* note 19 at 135 & n.97.

separation.[34] This understanding continues to be taken for granted by many, particularly in the American legal academy. More recently, though, in a variety of cases and contexts, the justices have been gradually correcting the Court's earlier mistakes.[35] This development is, for better or worse, regularly characterized as the work of the Court's "conservative" justices; it is seen by some scholars as a "collapse" rather than a correction.[36] The latter interpretation is the better one, though, and it is part of Justice Breyer's legacy that he—with some reservations and disagreements—understood that the First Amendment neither authorizes nor requires aggressive judicial revision of longstanding practices or the unyielding imposition and enforcement of an abstract public secularism.

II.

Justice Breyer was, and continues to be, in scholarship and in popular commentary, regularly described as "pragmatic."[37] To be sure, the term means different things in different contexts to different people. Still, it likely connotes some impatience and skepticism with respect to claims that judges can and should resolve legal controversies via the consequence-indifferent invocation and application of a particular legal rule or test. Without pronouncing on the Justice's work in other areas or his thoughts about other matters, one can confidently report that a distinctive feature of his approach to Establishment Clause controversies was his aversion to the constraints and to what he regarded as the false promise of impersonality and regularity of "tests." As he put it, in one of his last signed opinions, "a 'rigid, bright-line' approach to the Religion Clauses . . . will too often work against the Clauses' underlying purposes."[38] Here, the Justice echoed one of our most eminent First Amendment scholars, Prof. Kent Greenawalt,

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[34] *See generally, e.g.*, JOHN WITTE, JR., JOEL A. NICHOLS, AND RICHARD W. GARNETT, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT (5th ed. 2022).

[35] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002); *see generally, e.g.*, Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 TEX. REV. LAW & POL. 301 (1999-2000).

[36] Micah Schwartzman & Nelson Tebbe, *Religious Antiliberalism and the First Amendment*, 104 MINN. L. REV. 1341, 1381 (2020).

[37] *See, e.g.*, Marc O. DeGirolami & Kevin C. Walsh, *Judge Posner, Judge Wilkinson, and Judicial Critique of Constitutional Theory*, 90 NOTRE DAME L. REV. 633, 667 (2014). *See also* Jeffrey Toobin, *Without a Paddle: Can Stephen Breyer Save the Obama Agenda in the Supreme Court?*, *New Yorker*, Sept. 27, 2010, at 38 ("I belong to a tradition of judges who approach the law with prudence and pragmatism.") (emphasis added) (quoting Justice Breyer in a personal interview) (internal quotation marks omitted).

[38] Carson v. Makin, 142 S. Ct. 1987, 2005 (2022) (Breyer, J., dissenting).

who concluded in his two-volume study *Religion and the Constitution* that "the [Religion Clauses] reflect such complex, often conflicting, values, that no tests can do them justice."[39]

The Justice probably staked out his anti-test position most memorably in *Van Orden*, the Texas Ten Commandments case, which has already been mentioned. He opened his controlling concurring opinion with Justice Arthur Goldberg's statement that there is "no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible."[40] "[N]o single mechanical formula," he insisted, "can accurately draw the constitutional line in every case" or "readily explain" the outcomes in a broad array of Establishment Clause decisions.[41] In *Marsh v. Chambers*, Justice Breyer reminded us, Justice William Brennan had reported confidently, albeit in dissent, that "if any group of law students were asked to apply [the *Lemon* test] to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional;" and yet, the practice was upheld.[42] Justice Breyer went on:

> If the relation between government and religion is one of separation, but not of mutual hostility and suspicion, one will inevitably find difficult borderline cases. And in such cases, I see no test-related substitute for the exercise of legal judgment. That judgment is not a personal judgment. Rather, as in all constitutional cases, it must reflect and remain faithful to the underlying purposes of the Clauses, and it must take account of context and consequences measured in light of those purposes. While the Court's prior tests provide useful guideposts—and might well lead to the same result the Court reaches today—no exact formula can dictate a resolution to such fact-intensive cases.[43]

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[39] KENT GREENAWALT, RELIGION AND THE CONSTITUTION, VOL. 2: ESTABLISHMENT AND FAIRNESS 50 (2009).
[40] Van Orden v. Perry, 545 U.S. 677, 698 (Breyer, J., concurring) (internal quotation marks and citation omitted).
[41] *Id.* at 699.
[42] Marsh v. Chambers, 463 U.S. 783, 800–01 (Brennan, J., dissenting).
[43] *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring) (internal quotation marks and citations omitted).

The Justice provided similar sketches of his approach in other law-and-religion cases.[44]

To be sure, the doubts expressed over the years by Justice Breyer about Establishment Clause "tests" are not harbored only by him and are not limited to "liberals" on the Court or among scholars.[45] It could even be said that the current "conservative" majority has come around to his view. In 2022's much-remarked Praying Football Coach case, *Kennedy v. Bremerton School District*, Justice Gorsuch, writing for a Court majority, observed that "in *Lemon* this Court attempted a 'grand unified theory' for assessing Establishment Clause claims" but then reported (no doubt to the surprise of many state-court and lower-federal-court judges) that this "ahistorical approach to the Establishment Clause became so 'apparent' that this Court long ago abandoned *Lemon* and its endorsement test offshoot."[46] "In place of" these tests, he continued, "the Establishment Clause must be interpreted by reference to historical practices and understandings" and in a way that "accords with history and faithfully reflects the understanding of the Founding Fathers."[47] A few years earlier, in *American Legion*, Justice Alito wrote—and Justice Breyer joined—a consonant opinion, in which he noted that, in Establishment Clause cases, "we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance."[48] Justice Brett Kavanaugh, in that same case, elaborated on this approach and observed that "[i]f *Lemon* guided this Court's understanding of the Establishment Clause, then many of the Court's Establishment Clause cases over the last 48 years would have been decided differently."[49] After canvassing an array of case-clusters involving the no-establishment rule, he concluded that "each category of Establishment Clause cases has its own principles based on history, tradition, and precedent."[50]

To be sure, the claim here is not that Justice Breyer agreed entirely with Justices Gorsuch, Kavanaugh, and Alito about the meaning, implications, applications, and judicial enforcement of

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[44] *See, e.g.*, Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2291 (2020) (Breyer, J., dissenting); Town of Greece v. Galloway, 572 U.S. 565, 616 (2014) (Breyer, J., dissenting).
[45] *See* Steven D. Smith, *Unprincipled Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 497 (1996).
[46] 142 S. Ct. 2407, 2427 (2022).
[47] *Id.* at 2428.
[48] 139 S. Ct. at 2087.
[49] *Id.* at 2092 (Kavanaugh, J., concurring).
[50] *Id.* at 2093 (Kavanaugh, J., concurring).

the Establishment Clause. It is, instead, that several of the "tests" which the Court announced in the 1970s and 1980s, and which were dutifully applied, over and again, by courts across the country, regularly produced outcomes that were not consistent with any plausible understanding of the First Amendment. And yet, these results had to be anticipated by public officials at every level and in every aspect of government and were, in any event, usually revealed only after costly and unpredictable litigation. Every constitutional lawyer is, of course, familiar with the fact that judicial doctrines are artifacts—are tools—and so can and should be evaluated with an eye toward how well they perform the tasks they are made to do. As Justice Breyer and most of his colleagues appreciated, the supposedly canonical tests which the Court held out to the political community, but then haphazardly applied in its own cases, consistently fell short in this evaluation.[51] A serviceable judicial doctrine, Justice Breyer believed, must "distinguish between real threat and mere shadow."[52]

This is not to say that it was or is sufficient for Justice Breyer to invoke "legal judgment," to "take account of context and consequences," to acknowledge cases as "fact-intensive," or to lift up fidelity to the Establishment Clause's "underlying purposes."[53] An appropriate respect for our Constitution's structural features, which include an entrenched-in-text separation of powers and a meaningfully cabined judicial role in policymaking, should probably prompt the embrace of an even more modest, restrained, predictable, tradition-bound approach than his. As I have discussed in more detail elsewhere,[54] the skepticism that Justice Breyer directs at the idea of a "single mechanical formula" for deciding cases arising under the Establishment Clause should give us some pause: What, exactly, and with what justification are judges deciding Establishment Clause cases doing when they invalidate or approve the actions

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[51] The scholarly literature on the defects of the *Lemon* test and its endorsement-test "offshoot" is vast. *See, e.g.*, Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RSRV. L. REV. 795 (1993); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions*: *Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987); *see also* Richard W. Garnett, *The End of a Walking Dead Doctrine?*, SCOTUSblog (Dec. 11, 2018), available at: https://www.scotusblog.com/2018/12/symposium-the-end-of-a-walking-dead-doctrine/.

[52] Van Orden v. Perry, 545 U.S. 677, 704 (Breyer, J., concurring) (internal quotation marks and citation omitted).

[53] *Id.* at 700 (Breyer, J., concurring).

[54] *See generally* Richard W. Garnett, *Judicial Enforcement of the Establishment Clause*, 25 CONST. COMMENT. 273 (2008).

of governments and officials in the name of—as Prof. Greenawalt put it above—"complex, often conflicting valuesz"?[55] Even if one thinks "the rule of law" is not only a "law of rules,"[56] is it troubling to think that resolving disputes about matters so important and basic as the place of religion in public life and the connections and boundaries between religious and political authorities depends on judges' imperfect and incomplete interest-balancing, context-assessing, and consequences-predicting? If Establishment Clause disputes necessarily present questions of degree, invariably involve trade-offs, and inescapably require identifying and translating provisions' (asserted) purposes, then why would one believe that these disputes are best, or even better, resolved by judges through litigation than by citizens, officials, and legislators through politics? Might we decide that, given the difficulty of constructing judicially manageable standards for navigating all of the variables and variations in play, the best course is to ask whether the state action in question closely resembles any of the features of the religious establishments with which those who ratified the First Amendment were familiar?[57] In the United States today, of course, the answer will almost always be "no." Courts should give up the search for the line between dusk and twilight and settle for constructing and enforcing only those clear and straightforwardly administrable rules that are essential to vindicating the Establishment Clause's core guarantees and prohibitions.[58]

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Justice Breyer retired from the Supreme Court at a time when the Court's Religion Clauses doctrines are contested, challenged, and changing. In *Kennedy*, the justices discarded—or, at least, owned up to having discarded—the *Lemon* test;[59] in *Carson*, they held that forms of cooperation between public authorities and religious schools that were once (mistakenly) thought to be constitutionally forbidden were, in fact,

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[55] Greenawalt, *supra* note 39, at 50.
[56] *Cf.,* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).
[57] *See generally* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003).
[58] There is a rich literature suggesting a distinction, and a gap, between the Constitution's meaning and judicially crafted implementing doctrines. *See, e.g.*, Mitchell Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).
[59] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022) ("[T]his Court long ago abandoned *Lemon* and its endorsement test offshoot.").

constitutionally required.[60] Although Justice Breyer made clear that he does not entirely endorse recent developments' apparent trajectory, it could well be that, by voicing regularly his reservations about the lack of fit between the legal tests lawyers and courts invoke and apply, and communities' values, practices, and traditions, he played a consequential role in dislodging unfounded presumptions and misguided precedents.

III.

It was noted above that Justice Breyer's Establishment Clause methodology involves claims about, and an effort to be "faithful" to, the Clause's "underlying purposes."[61] There is, of course, no end to arguments about what these purposes were, and those arguments will not be reviewed or adjudicated here. Again, though: the goal of Justice Breyer's non-test-bound, context-and-consequence-sensitive, fact-intensive inquiry is not to discover whether or not a challenged official action shares the features of a late-18th-century religious establishment but, instead, whether—all things considered—it would be more consistent with his understanding of the Establishment Clause's "purposes" to uphold or to disapprove that action.

A hallmark of—indeed, the interpretive key to—Justice Breyer's no-establishment opinions is his view that a "basic purpose" of the Establishment Clause is to "avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike."[62] In *Van Orden*, he concurred in the judgment that the Texas Ten Commandments monument could remain because, all things considered, "as a practical matter of *degree* this display is unlikely to prove divisive" and, he believed, a contrary ruling could "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."[63] In the Court's more recent religious-display case, *American Legion*, he rejected an

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[60] Carson v. Makin, 142 S. Ct. 1987, 2002 (2022) (narrowing *Locke* as holding merely that a state is not required to fund religious vocational degrees en route to holding, in the present case, that "Maine's 'nonsectarian' requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment").

[61] *Van Orden v. Perry*, 545 U.S. 677, 700 (Breyer, J., concurring).

[62] *Id.* at 698 (Breyer, J., concurring); *see also* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2090–91 (Breyer, J., concurring) ("The Court must . . . consider each case in light of the basic purposes that the Religion Clauses were meant to serve: assuring religious liberty and tolerance for all, avoiding religiously based social conflict, and maintaining that separation of church and state that allows each to flourish in its 'separate spher[e].'") (internal citation omitted).

[63] *Van Orden,* 545 U.S. at 704 (Breyer, J., concurring).

Establishment Clause challenge to a large war-memorial cross because, among other things, it had "stood on the same land for 94 years, generating no controversy in the community until this lawsuit was filed."[64] He dissented in *Town of Greece* from the Court's ruling permitting the legislative-prayer practices of a New York town board because, in his view, the town's "prayer practice . . . by doing too little to reflect the religious diversity of its citizens, did too much, even if unintentionally, to promote the 'political division along religious lines' that 'was one of the principal evils against which the First Amendment was intended to protect.'"[65] And in his final Religion Clauses opinion, he dissented from the Court's ruling in *Carson v. Makin*, invalidating a state rule that discriminatorily denied funding to parents who selected a religious school for their child, citing the funding's "potential for religious strife" and "social conflict."[66]

Scholars, including me,[67] have noted and assessed the role that concerns and predictions about strife, division, and conflict play in Justice Breyer's First Amendment opinions.[68] I continue to resist the argument that observations or predictions of political division along religious lines should supply the enforceable content or inform the interpretation of the First Amendment's Establishment Clause. The argument's roots, genealogy, and evolution have been set out in great detail elsewhere. The story is complicated and interesting. A short version, though, is that a little more than fifty years ago, in *Lemon v. Kurtzman*, Chief Justice Warren Burger declared that state programs or policies could excessively—and, therefore, unconstitutionally—"entangle" government and religion, not only by requiring or

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[64] 139 S. Ct. 2067, 2091 (Breyer, J., concurring).

[65] 572 U.S. 565, 614–15 (Breyer, J., dissenting) (quoting Lemon v. Kurtzman, 403 U.S. 602, 622 (1971)).

[66] *Carson*, 142 S. Ct. at 2010 (Breyer, J., dissenting). Justice Breyer sounded this same theme in several other cases involving financial assistance to children attending religious schools. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2281 (2020) (Breyer, J., dissenting) ("The majority's approach and its conclusion in this case . . . risk the kind of entanglement and conflict that the Religion Clauses are intended to prevent."); Zelman v. Simmons-Harris, 536 U.S. 639, 717 (Breyer, J., dissenting) ("I write separately, however, to emphasize the risk that publicly financed voucher programs pose in terms of religiously based social conflict.").

[67] Garnett, *supra* note 6.

[68] *See, e.g.*, Stephanie H. Barclay, *Untangling Entanglement*, 97 WASH. U. L. REV. 1701 (2020); William P. Marshall, *The Constitutionality of School Prayer: Or, Why* Engel v. Vitale *Might Have Had it Right All Along*, 46 CAP. U. L. REV. 339 (2018); Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972 (2010); Chemerinsky, *supra* note 18*;* Ira C. Lupu and Robert W. Tuttle, Zelman*'s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917 (2003).

allowing intrusive public monitoring of religious institutions and activities but also through what he called their "divisive political potential."[69] Government actions burdened with such "potential," he reasoned, pose a "threat to the normal political process" and "divert attention from the myriad issues and problems that confront every level of government."[70] Chief Justice Burger asserted also, and more fundamentally—anticipating and, one assumes, influencing Justice Breyer—that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[71] From this Hobbesian premise[72] about the intent animating the First Amendment, he proceeded through the case on the assumption that the Constitution authorizes courts to protect our "normal political process" from a particular kind of strife and to purge a particular kind of disagreement from politics and public conversations about how best to achieve the common good.[73]

This political-divisiveness argument went away for the most part, but Justice Breyer brought it back, at least to the conversation if not to the role of doing outcome-determinative work. In addition to the opinions already cited, the Justice affirmed, in his 2005 book *Active Liberty*, that the "need to avoid a divisiveness based upon religion that promotes social conflict" does and should provide a "critical value" that ought to shape and direct the exercise of judicial review, including in Religion Clauses cases.[74] It seems more likely, though, 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.[75] 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

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[69] 403 U.S. 602, 622 (1971).
[70] *Id.* at 622–23.
[71] *Id.* at 622.
[72] *See, e.g.*, Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1249 (2000) ("The great end of government, for Hobbes, is to prevent civil disorder.") (discussing and citing THOMAS HOBBES, LEVIATHAN, pt. III, chs. 42, 43 (1651) (C.B. Macpherson ed., 1968)).
[73] *Lemon*, 403 U.S. at 622.
[74] STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 122, 124 (2005) (internal quotation marks and citation omitted).
[75] *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." (emphasis added)).

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. While "political divisiveness along religious lines" might be undesirable and unattractive, 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.

To be clear, what Justice Breyer identified in, for example, his *Carson* dissent as a desirable state of affairs and a worthy goal seems both desirable and worthy: "to allow for an American society with practitioners of over 100 different religions, and those who do not practice religion at all, to live together without serious risk of religion-based social divisions."[76] The existence of a constitutionally entrenched rule against an "establishment of religion," correctly understood, probably makes that desirable state more likely to come about and persist. At least in a constitutional democracy, though, the appeal of that state does not give judges the competence, or the authorization, to select for cancellation particular measures, which have been duly put in place or enacted by actors who are politically accountable to the diverse "American society," because their subject matter, or the motivations thought to be behind them, or the effects that could possibly result from them, is thought to be too "divisive." As the late Chief Justice William Rehnquist asked, responding to Justice Breyer's deployment of the political-divisiveness argument, it is not "clear where Justice Breyer would locate [the] presumed authority to deprive [citizens] of a program that they have chosen but that we subjectively find 'divisive.'"[77] In the end, 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

[76] Carson v. Makin, 142 S. Ct. 1987, 2005 (2022) (Breyer, J., dissenting).
[77] Zelman v. Simmons-Harris, 536 U.S. 639, 662 n.7 (2002).

> essential to animal life, because it imparts to fire its destructive agency.[78]

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Justice Breyer believed that the Court's Establishment Clause decisions and doctrines should align reasonably with the practices and expectations of the relevant communities. He had reservations about the utility and reliability of Establishment Clause "tests" that incorporated and relied on categories, forms, and abstractions. And, he was optimistic about the capacity of courts and judges, employing all-things-considered "legal judgment," to prevent or at least smooth over "division" and "divisiveness," along religious lines and over religious matters, in the political community. With respect to this optimism, he erred in concluding that his own irenic preferences authorize unelected federal judges to invalidate on First Amendment grounds politically accountable actors' and democratic majorities' decisions merely because those decisions, in his view, were, had been, or might be "divisive." Still, as has been observed elsewhere, "two out of three ain't bad."

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