REVIEW ESSAY

SEPARATION ANXIETY

DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT. By Noah Feldman. Farrar, Straus and Giroux 2005. Pp. 306. Paper. $11.90. ISBN: 0-374-53038-6.

Reviewed by Perry Dane[*]

Noah Feldman first excited the scholarly and public imagination by arguing that Muslim countries could respect democracy and individual rights while still continuing to entrench Islam in their constitutional order.[1] More recently, he has turned his considerable intelligence and analytic elegance back to the Establishment Clause[2] and the church-state problem in the United States. Feldman's book *Divided by God* is mostly a history, from about the time of the Framers to the present. But it is, by its own terms,[3] a history with a trajectory, leading to his view of the current standoff and his proposal for reframing the American dispensation of church and state.

The stand-off, as Feldman sees it, is not only between two legal positions, but two movements. On the one side are "legal secularists," who insist on a strict separation between government and religion. On the other side are "values evangelicals," who want to allow the government to engage in religious expression, at least of a general sort, and to finance the good work of religious institutions. Feldman's proposal, outlined at the end of the book, is to give a bit to both sides—

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1. *See* Noah Feldman, *After Jihad: America and the Struggle for Islamic Democracy* (Farrar, Straus & Giroux 2003). Feldman also took on a practical role in the early days of the United States occupation of Iraq as Senior Constitutional Advisor to the Coalition Provisional Authority. *See also* Noah Feldman, *What We Owe Iraq: War and the Ethics of Nation Building* (Princeton U. Press 2004).

2. "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. 1.

3. "This book sets out to address these crucial questions, turning to our history to understand the origins of today's controversies and exploring how we might chart a course for the future." (7).

to loosen current limits on non-coercive religious expression by government, while tightening limits on the government's financial aid to religion.

I have doubts about both Feldman's diagnosis and his prescription, as will become clear. The formulation of his proposal strikes me as unclear in crucial ways, and in any event unlikely to produce the peace and reconciliation that Feldman believes it will. More fundamentally, Feldman pays much too little attention to the religious undergirding of what he calls "legal secularism," as well as the secular forces and sensibilities contributing to what he calls "values evangelicalism." At the end of the day, any path out of the current debate would require a more complete integration of these complicated cross-currents than Feldman provides. In important ways, Feldman is eminently reasonable, but maybe too reasonable to appreciate fully the radical, indeed theologically radical, meaning embedded in the Establishment Clause.

Nevertheless, this is a lucid and intelligent book. It also expertly straddles the worlds of scholarship and public intellectual debate.[4] Together with Feldman's earlier work, it is a vital contribution to the ongoing consideration of the role of religion in the contemporary nation-state.

Part I of this review essay sketches some pieces of Feldman's historical account. Part II takes a more detailed look at his proposal and its doctrinal and practical implications. Part III delves more deeply into the complex interweaving of the "secular" and the "religious" in the perennial debate over the meaning of the American experiment in religious disestablishment. Part IV offers some concluding thoughts.

I.

Feldman's history is compact and episodic, and it is undoubtedly vulnerable to criticism on its details. But it is also deft and insightful. And it is wonderfully useful in several respects.

Feldman emphasizes the full arc of the church-state story in the United States. He starts with the framers, and gives them their due, but goes on to treat the experiences and controversies of ensuing generations as equally instructive to the current constitutional debate. Feldman also gives Supreme Court jurisprudence its due, but he does not imagine that

4. There are also hints of a third genre here: the rigorous nonfiction narrative perfected by such authors as Tracy Kidder and Jonathan Harr. Sometimes, indeed, the seams show; one can almost hear, at certain points, Feldman's editor asking him to add a telling anecdote here or some local color there to keep the general reader on board.

things only got interesting when the Court began its line of Establishment Clause decisions in 1947 with *Everson v. Board of Education*.[5]

Feldman is particularly good on the nineteenth century. He focuses, as have others, on the battle over schools between Catholic and Protestant partisans, especially emphasizing how the latter deployed the rhetoric of "nonsectarianism" both to justify nondenominational but decidedly Protestant religious exercises in the public schools *and* to limit state financial aid to Catholic schools. He also insightfully treats the crusade against Mormon polygamy, not only as a chapter in the history of free exercise, but as a demonstration of the subtle intertwining of secular and religious influences in the definition of significant legal institutions such as marriage.

Feldman's narrative takes on a particular elegance and symmetry, however, in his account of how the sides in today's debate fell into place. As he tells the story, the latter nineteenth century saw, along with all manner of other developments, the rise of two extreme movements—a strand of conservative Christianity that at one point sought to write Jesus directly into the Constitution and eventually gave rise to modern Fundamentalism, and an organized movement of "strong secularists" dismissive of religion and the Bible and dedicated to the victory of scientific method. The clash of strong secularism and conservative Christianity culminated, inconclusively, in the Scopes trial of 1925. Both movements, however, ended up birthing tamer, more palatable, but still insistent, offspring: "Strong secularism," paring its agenda to the specific realm of law, and stripping itself of blatant hostility to religion, gave rise to "legal secularism," which the Supreme Court adopted as constitutional orthodoxy from 1947 to at least the 1970s. Meanwhile, conservative Protestant Christianity, after a period of political quiescence, joined its one-time theological foes among conservative Catholics to give rise to a more tolerant and religiously inclusive, and more intellectually sophisticated, "values evangelicalism" that today mounts the strongest, and at least intermittently successful, challenge to that received orthodoxy of modern Establishment Clause doctrine.

For reasons that will become clearer, I do not agree with some of Feldman's genealogy of ideas. But his larger point is instructive and important: The terms of today's arguments are not the same as those that animated the Framers. And neither side can hope to find easy or complete validation in the Framers' assumptions and intent.

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5. 330 U.S. 1 (1947).

At the same time, Feldman emphasizes certain constants over time, which are also important. Most clearly, behind the smoke of the continuing debates, there has been, since the beginning, a certain rough common ground, extolling "liberty of conscience" and avoiding the extremes of both religious or anti-religious oppression, in the American view of church and state. In Feldman's telling, a basic commitment to the structural reality and legitimacy of American religious pluralism was already in place by the time of the Framers.[6] Tellingly, the point of James Madison's famous *Memorial and Remonstrance* was not to secure minority rights, or even to end Virginia's official support of a single church. Those steps had already been taken. Rather, the *Remonstrance* had to make a more "tricky," even "remarkable," argument (37) that Virginia should not set up even a nonpreferential system of aid to religious education.

Feldman convincingly demonstrates that the rough common ground of the American dispensation was so deeply embedded that even positions that now seem contrary to it were bound by its rhetoric. Thus, for example, "[a]t the time the First Amendment came into being, Americans were almost universally prepared to say that establishment of religion was a bad thing," (49) though they disagreed about what an "establishment of religion was." Most dramatically, even the New England states that still sponsored official churches, and would continue to do so into the nineteenth century, argued that their arrangements were not "establishments of religion" since they allowed opt-out rights for dissenters.[7] (49) Similarly, while we might think that nineteenth and twentieth-century supporters of school religious exercises were either hypocritical or dense to wave the banner of "nonsectarianism," "an ideology of inclusiveness that was fully prepared to exclude," (85) that they adopted the slogan at all testifies to the power of the rough American consensus. And while many of us might argue that the notion of a national "Judeo-Christian" heritage, which first gained wide

6. Feldman rightly and convincingly points out that American religious pluralism is not only a fact, but a fact built into the nation's structure. To begin with, the original thirteen States had very different religious histories, and that diversity among the States made any single national establishment "impossible." (26) More deeply, while Europeans could just assume that the "official state religion was the religion of the sovereign," American notions of popular sovereignty "profoundly disturbed the old model: How could the state establish the religion of the sovereign if the sovereign people belonged to many faiths?" (10) This original structural pluralism was in turn renewed and enriched by successive waves of religious change, such as the Second Great Awakening, and the immigration of religious minorities, such as Catholics and Jews.

7. Feldman uses this observation to rebut the view that the First Amendment, in forbidding Congress from making "any law respecting an establishment of religion," meant also to prohibit congressional interference with existing State establishments.

currency in the 1950s, is an uninformed or even imperialist effort to lump together two very different religious traditions,[8] Feldman gives the authors of the idea credit for good intentions. (167)

Today, Feldman laments the war between "legal secularists" and "values evangelicals." But he thinks that the two sides still have much in common. In particular, he repeats that both sides seek the same goal—national unity in the face of religious differences—though they urge different methods for achieving it.[9] And he credits both with a continuing commitment to "freedom of conscience and religious liberty."[10] (228) He therefore seeks to draw from his history a possible solution to their antagonism.

II.

A.

Feldman's solution is described in about fifteen pages at the end of his book, and it is on those pages that the book ultimately rests. It is not entirely obvious, however, exactly what Feldman is proposing. To be sure, the outline is crisp: he wants to "offer greater latitude for public religious discourse and religious symbolism, and at the same time insist on a stricter ban on state funding of religious institutions and activities." (237) "Such a solution," Feldman writes, "would both recognize religious values *and* respect the institutional separation of religion and government as an American value in its own right." (237) But the devilish details are less apparent.

Consider the first prong of Feldman's proposal—to offer "greater latitude for public religious discourse and religious symbolism." What, exactly, would this entail? A problem with Feldman's discussion here is

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8. *See* Arthur Cohen, *The Myth of the Judeo-Christian Tradition* (Harper & Row 1970); Jacob Neusner, *Jews and Christians: The Myth of a Common Tradition* (Wipf & Stock 2003); Martin E. Marty, *A Judeo-Christian Looks at the Judeo-Christian Tradition*, 103 Christian Century 858, 859 (Oct. 8, 1986); Ronald F. Thiemann, *Religion and Legal Discourse: An Indirect Relation, A Response to Steven D. Smith*, 81 Marq. L. Rev. 289, 293 (1998). This is not to say, of course, that there cannot be useful dialogue and common purpose between Jews and Christians. *See Christianity in Jewish Terms* (Tikva Frymer-Kensky et al. eds., Westview 2002).

9. *See e.g.* 9 ("The goal of reconciling national unity with religious diversity is the same, but the methods for doing it are deeply opposed"), 220 ("Legal secularism and values evangelicalism are both attempts to deal with the challenge of achieving national unity in the face of religious diversity.").

10. Though Feldman does not mention it, this shared commitment was most dramatically demonstrated in the remarkable, across-the-board coalition backing the passage of the Religious Freedom Restoration Act in 1993. *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 210-211, 210 n. 9 (1994).

that it begins with a bit of a red herring. Feldman is concerned about the constitutional status of "public religious discourse." He suggests that legal secularists "are in favor of a constitutional rule under which the fact that supporters have invoked religion in support of a bill in Congress could disqualify that bill from taking effect as a law." (223) He then emphasizes that his proposal would allow into the public square "political arguments that depend on religious premises." (239) The fact, though, is that, while some political philosophers and legal academics have made an industry of debating whether religious arguments should be admissible in public political discourse,[11] actual constitutional doctrine, even at its most separationist, has consistently insisted that religious motivation does not, in itself, invalidate legislation.[12] Thus, for example, despite the religious arguments that swirl around the abortion controversy, establishment clause arguments against abortion restrictions[13] have never gained traction, even on the pro-choice side of

11. For some representative sources on both sides of these debates, *see e.g.* Bruce A. Ackerman, *Social Justice in the Liberal State* (Yale U. Press 1980); Robert Audi, *Religious Commitment and Secular Reason* (Cambridge U. Press 2000); Christopher J. Eberle, *Religious Conviction in Liberal Politics* (Cambridge U. Press 2002); Kent Greenawalt, *Religious Convictions and Political Choice* (Oxford U. Press 1987) [hereinafter Greenawalt, *Religious Convictions*]; Kent Greenawalt, *Private Consciences and Public Reasons* (Oxford U. Press 1995); Michael Perry, *Love and Power: The Role of Religion and Morality in American Politics* (Oxford U. Press 1991); Michael Perry, *Under God? Religious Faith and Liberal Democracy* (Cambridge U. Press 2003); Lucinda Peach, *Legislating Morality: Pluralism and Religious Identity in Lawmaking* (Oxford U. Press 2002); John Rawls, *Political Liberalism* (Colum. U. Press 1993); John Rawls, *The Idea of an Overlapping Consensus*, 7 Oxford J. Leg. Stud. 1 (1987); Paul J. Weithman, *Religion and the Obligations of Citizenship* (Cambridge U. Press 2002); Ronald M. Dworkin, *Liberalism*, in *Public and Private Morality* 113 (Stewart Hampshire ed., Cambridge U. Press 1978); Edward M. Gaffney, *Politics Without Brackets on Religious Convictions: Michael Perry and Bruce Ackerman on Neutrality*, 64 Tul. L. Rev. 1143, 1188-1194 (1989); Charles Larmore, *Political Liberalism*, 18 Political Theory 339 (1990); Douglas Laycock, *Freedom of Speech that is Both Religious and Political*, 29 U.C. Davis L. Rev. 793 (1996); Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 Phil. & Pub. Affairs 215 (1987); Joseph Raz, *Facing Diversity: The Case of Epistemic Abstinence*, 19 Phil. & Pub. Affairs 3 (1990); Richard Rorty, *Religion as Conversation-Stopper*, 3 Common Knowledge 1 (1994); Michael J. Sandel, *Political Liberalism*, 107 Harv. L. Rev. 1765 (1994); Jeremy Waldron, *Religious Contributions in Public Deliberation*, 30 San Diego L. Rev. 817 (1993). Significantly, many of the works just cited are more clearly directed to the political morality of responsible citizenship than to the specific constraints of the Establishment Clause.

12. *See e.g. Bd. of Educ. v. Mergens*, 496 U.S. 226, 249 (1990) (plurality); *Harris v. MacRae*, 448 U.S. 297, 319-320 (1980).

13. *See e.g.* David R. Dow, *The Establishment Clause Argument for Choice*, 20 Golden Gate U. L. Rev. 479 (1990); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1025-1027 (1984); Laurence Tribe, *The Supreme Court's 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1, 21-25 (1973). Professor Tribe famously retracted his argument, commenting in his treatise that his earlier view, among other problems, gave "too little weight to the value of allowing religious groups freely to express their convictions in the political process." Laurence Tribe, *American Constitutional Law*, vol. 2, § 15-10, at 1350 (2d ed., Foundation Press 1988) [hereinafter Tribe, *American Constitutional Law*

the debate.[14] More than that, the Court has affirmatively protected the religious voice in political debate, most dramatically in *McDaniel v. Paty*,[15] which struck down a State's efforts to limit the political participation of ministers.[16] Indeed, to put the matter simply, if Feldman is right to emphasize a difference between "legal secularism" and secularism as such (and I suspect he is right at least in part), then one of the dividing lines between the two is surely over this issue.[17]

2d ed.]. *See infra* n. 16 (discussing and citing Tribe's views). *See also* Laurence Tribe, *Abortion: The Clash of Absolutes* 116 (W.W. Norton & Co. 1990).

14. Particularly significant here is *Harris* in which the Court upheld the Hyde Amendment restricting federal funding of abortions under Medicaid. While it might not be surprising that the majority in *Harris* rejected the Establishment Clause challenge to the legislation, *Harris*, 448 U.S. at 319-320, it is notable that none of the four dissenting opinions, authored by Justices Brennan, Marshall, Blackmun, and Stevens—all strict separationists—even raised the Establishment Clause argument at all. Justice Stevens has in another context objected on Establishment Clause grounds to a statute restricting abortion. *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 566-567 (1989) (Stevens, J., concurring in part and dissenting in part). Even Stevens, however, whose views of the Religion Clauses might in any event be described as idiosyncratic, emphasized that

> I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution. This conclusion does not, and could not, rest on the fact that the statement happens to coincide with the tenets of certain religions, or on the fact that the legislators who voted to enact it may have been motivated by religious considerations. Rather, it rests on the fact that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths, serves no identifiable secular purpose. That fact alone compels a conclusion that the statute violates the Establishment Clause.

Id. (citations omitted).

15. 435 U.S. 618 (1978).

16. Significantly, it was Justice Brennan who famously observed in *McDaniel* that the

> mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association, and political participation generally.

Id. at 640 (Brennan & Marshall, J.J., concurring in judgment). The Justice then went on to quote Laurence Tribe's observation, which comes as close as one can to conventional wisdom on the matter, that

> American courts have not thought the separation of church and state to require that religion be totally oblivious to government or politics; church and religious groups in the United States have long exerted powerful political pressures on state and national legislatures, on subjects as diverse as slavery, war, gambling, drinking, prostitution, marriage, and education. To view such religious activity as suspect, or to regard its political results as automatically tainted, might be inconsistent with first amendment freedoms of religious and political expression—and might not even succeed in keeping religious controversy out of public life, given the "political ruptures caused by the alienation of segments of the religious community."

Id. at 641, n. 25 (quoting Laurence Tribe, *American Constitutional Law* § 14-12, at 866-867 (Foundation Press 1978) (nn. omitted)). Professor Tribe reiterated and expanded on these views in the second edition of his treatise. *See* Tribe, *American Constitutional Law* 2d ed., *supra* n. 13, at § 14-14.

17. *See* Edward McGlynn Gaffney, Jr., *On Ending the War on Drugs*, 31 Val. U. L. Rev. xvii,

To be sure, the so-called *Lemon* test for Establishment Clause violations looks, in part, to whether the challenged legislation has a "secular legislative purpose."[18] But, despite occasional infelicity and doctrinal static in the opinions, there is an important difference, which the Court has respected, between statutes with impermissible religious purposes, on the one hand, and legislators motivated by religious arguments, on the other.[19] Indeed, in practice, the Court has only used the "purpose prong" of the *Lemon* test to strike down legislation, such as bans on the teaching of evolution[20] or displays of the Ten Commandments[21] that would have been constitutionally suspicious in any event.[22]

More to the point than the details of current doctrine, however, it bears emphasis that one can take a strict separationist view, in most of the ways that position in the ongoing debate is conventionally understood, and still easily reject the view of some liberal political thinkers that religious folk need to censor themselves before entering the public square.[23] Indeed, for reasons I will discuss later on, one can be

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xxii-xxiii (1997):

> It is not a mistake to insist that legislation should have a valid secular purpose. But this requirement of secularity in governmental policy means that public policies must be shaped to provide for the general welfare of the nation or the local community. It is a misunderstanding of secularity to extend this requirement into an anti-religious ideology of secularism that would exclude religious voices from the conversations or debates that precede the formation of secular policies.

(nn. omitted).

18. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

19. *See Mergens*, 496 U.S. at 249 (plurality)

> Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law.

(emphasis in original). For a fine treatment, *see* Scott W. Breedlove & Victoria S. Salzmann, *The Devil Made Me Do It: The Irrelevance of Legislative Motivation Under the Establishment Clause*, 53 Baylor L. Rev. 419 (2001).

20. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

21. *McCreary Co. v. ACLU*, 545 U.S. 844 (2005).

22. Michael McConnell, *Religious Freedom at the Crossroads*, 59 U. Chi. L. Rev. 115, 145 (1992). Even the most decidedly separationist of the Justices presently sitting on the current Supreme Court have agreed that, though the purpose prong of the *Lemon* test "serves an important function," it will by itself "rarely be determinative." *McCreary Co.*, 545 U.S. at 859 ((Souter, J., joined by Stevens, O'Connor, Ginsburg & Breyer, J.J., plurality opinion) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring in judgment)). This would not be true if the inquiry into purpose had a larger mission of banning any legislation motivated by religious views.

23. *See* Mark Tushnet, *Religion in Politics*, 89 Colum. L. Rev. 1131, 1134-1135 (1989) (reviewing Greenawalt, *Religious Convictions*, *supra* n. 11). For my own short take on the role of religious arguments in legal discourse, and the relationship of that question to the American experiment in separation of religion and state, *see* Perry Dane, *Spirited Debate: A Comment on*

the strictest of separationists precisely *for the sake of* freeing religion to play a prophetic, subversive, radical, role in public debate.

Putting aside, then, Feldman's call to give "greater latitude" to "public religious discourse," which would not actually change much in existing legal doctrine (and would have not changed much in legal doctrine even during the heyday of legal secularism), we are left with the rest of the first prong of his proposal—to give "greater latitude" as well to "religious symbolism." This part of the plan probably *would* change current law. But its full scope is not entirely clear either.

Feldman would relax constraints on religious symbols and celebrations in the public realm. He rejects as unnecessary and unrealistic the essentially psychological concern embodied in Justice O'Connor's "endorsement" test for the sensibilities of religious minorities.[24] Members of religious minorities should "strengthen their own identities" instead of insisting "that the majority give up its own [symbols and ceremonies] to accommodate them." (240) Moreover, Feldman argues that sheer demographic reality will help assure that a public square more friendly to religious expression will, in fact, be a stage for pluralistic and diverse religious expression, ultimately benefiting both religious minorities and inter-religious understanding.

I sympathize with Feldman's critique of the Court's turn to the psychological. As with any church-state dispensation, however, questions inevitably remain about where to draw the line. Feldman's proposal, if it is not to be trivial, would have to allow more official government sponsorship of religious expression, and not just further opening up public property to unambiguously private conduct.[25] But he also insists that such public religious expression should not subject religious minorities to "coercion or discrimination" (239) and should also respect an "institutional separation" between the government and particular churches. (247) At what point, though, would a display or an

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Edward Foley's Jurisprudence and Theology, 66 Fordham L. Rev. 1213 (1998).

24. The "endorsement" test is even more vulnerable to attack from the strict separationist side of the debate. As Carl Esbeck has pointed out,

> Separationism focuses primarily on patrolling the boundary between church and state regardless of whether an individual (the reasonable, objective observer or otherwise) either resents or welcomes the government's sponsorship of religious symbols. . . . Justice O'Connor's no-endorsement test . . . weakens separationism by concentrating on the psychological reaction of an "objective observer," rather than on policing the boundary between the institutions of church and state.

Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 Notre Dame L. Rev. 581, 631-32 (1995).

25. The Court has already made clear that genuinely and clearly private religious speech deserves the same nonpreferential access to the public square as other speech. *See e.g. Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 759-763 (1995).

event be so aggressive that it would be coercive? What should the constitutional response be, for example, to a forty-three-foot cross on public property at one of the highest spots in San Diego County?[26] And how, exactly, should the government be expected to choreograph the play of particularity and pluralism in public religious expressions? At what point, that is, would Feldman's confidence in the inevitability of religious diversity run into the legitimate and entirely non-trivial imperative of religious integrity? Could a municipal Christmas display, for example, intentionally exclude non-Christian symbols on the reasonable grounds that such additions would trivialize and cheapen the "meaning of Christmas"?

Then there is the matter of official school prayer. Feldman defends the inclusion of the words "under God" in the pledge of allegiance because, so long as no coercion is involved, the atheist can "easily adhere to his own views while insisting on his citizenship." (242) Nevertheless, Feldman opposes official school prayer, arguing that the same principle of "institutional separation" that forbids religious funding also mandates that the "state itself must not compose or mandate public prayers, which then take on the shape of state-sanctioned religious exercises." (247) But this reliance on the norm of "institutional separation" seems jury-rigged at best. The Regents' Prayer struck down in *Engel v. Vitale*[27] was a classic instance of "civil religion,"[28] with no connection to any religious "institution" as that term is usually understood. Indeed, if the issue is "state sanction," how *are* prayers different from the inclusion of "under God" in the pledge of allegiance? One answer might be that prayer is "religion in act," "fundamentally and necessary religious."[29] But this is an argument, not from "*institutional* separation," but from separation *simpliciter*.

Feldman does make at least an implicit effort to bridge this gap in

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26. *See Murphy v. Bilbray*, 782 F. Supp. 1420, 1438 (S.D. Cal. 1991) (holding that the "Mount Soledad cross" violated "No Preference" clause of the California Constitution), *aff'd sub nom. Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993), *enforced by, Paulson v. City of S.D.*, 2006 U.S. Dist. LEXIS 44740 (S.D. Cal. May 3, 2006), *stay pending appeal granted sub nom., San Diegans for the Mt. Soledad Natl. War Meml. v. Paulson*, 126 S. Ct. 2856 (Kennedy, Cir. J. 2006); *see also* Pub. L. No. 109-272, 120 Stat. 770 (2006) (transferring title of "Mount Soledad Veterans Memorial," including controversial cross, to federal government, and authorizing just compensation); Randall C. Archibold, *Bush Signs Law to Save War Memorial Cross*, N.Y. Times A14 (Aug. 15, 2006).

27. "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Engel v. Vitale*, 370 U.S. 421, 422 (1962).

28. *See generally* Robert N. Bellah, *Civil Religion in America,* 96 Daedalus 21 (Winter 1967); Yehuda Mirsky, *Civil Religion and the Establishment Clause*, 95 Yale L.J. 1237 (1986).

29. *Marsh v. Chambers*, 463 U.S. 783, 810-811 (1983) (Brennan & Marshal, J.J., dissenting) (internal quotation omitted).

his argument. He writes, in the lead-up to his brief take on the prayer issue, that by virtue of the

> tradition of institutional separation[,] . . . [a]ll attempts to use government resources to institutionalize religious practices countermand the American tradition of nonestablishment, grounded historically in the belief that government has no authority over religious matters. (247)

But if (as I doubt) he really means to define "resources" so far beyond money, and to extend his focus from state aid for religious "institutions" to the state's own "institutionalization" of broadly inclusive religious practices, then the grand compromise with which he began—to "loosen up on religious talk and symbols while cracking down on institutional affiliation of church and state" or, more simply, to replace current Establishment Clause doctrine with a rule of "no coercion and no money" (238)—seems much more ambiguous, and less of a departure from current doctrine, than originally advertised.

This problem of governmental "authority over religious matters" also leads to inevitable questions about some cutting-edge issues that Feldman does not directly confront, including, say, the injection of the so-called "theory of intelligent design" into public school science curricula.[30] Is the state sanction of this sort of mingling of religious and secular discourses an example of pluralism and tolerance, which Feldman would allow, or does it cross whatever line Feldman does mean to draw?

The other prong of Feldman's grand compromise raises its own questions. Feldman believes that the most historically grounded and most durable imperative behind the Establishment Clause is to guarantee "institutional separation" between church and state, particularly as to funding. He does not share the current Court's willingness to approve vouchers for religious schools,[31] (244-245) or the political fondness for "faith-based initiatives." (247) But it is not entirely clear how far Feldman's no-aid principle would go. The Supreme Court, even at the height of its commitment to strict separation, focused its efforts on aid to religious elementary and secondary schools, which it found to be "pervasively sectarian," and had a more tolerant view of aid to the non-religious functions of religious colleges and universities.[32] Moreover, as Feldman recognizes, even the anti-aid movement of the nineteenth

30. *See Kitzmiller v. Dover Area Sch. Dist*., 400 F. Supp.2d 707 (M.D. Pa. 2005).

31. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

32. *See Roemer v. Bd. of Public Works*, 426 U.S. 736, 755-759 (1976) (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)).

century eventually reconciled itself to state support of charitable institutions other than schools. (98) The modern welfare state, building on that compromise, is hopelessly intertwined with a wide spectrum of religiously-affiliated institutions, including hospitals, adoption centers, and other charities. It is a little hard to parse Feldman's discussion here, but there are hints that he would not want to sever all such financial ties entirely; he hones in, for example, in his attack on "charitable choice," on charities "that rely on faith to accomplish their goal." (247) But this qualification might be as difficult to apply to particular cases as any of the arcane tests that are now a part of the governing Establishment Clause analysis that Feldman critiques.[33]

Finally, the "no coercion and no money" formula must surely run into difficulties when issues of religious symbolism and issues of funding overlap. In the Supreme Court's classic school prayer and Bible reading cases, Justice Douglas wrote a pair of concurring opinions that emphasized the fact that the government financed the religious exercises at issue.[34] These Douglas opinions, in the context of our actual current

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33. Consider, for example, that the mission of Catholic hospitals, according to the United States Conference of Catholic Bishops, necessarily reflects Jesus' "concern for the sick," "bears witness to the truth that, for those who are in Christ, suffering and death are the birth pangs of the new creation," and is constrained by specific religious prohibitions on practices such as abortion, contraception, and any form of fertility treatment that bypasses the sexual union of husband and wife. *See* United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services* 4, 5 (4th ed., U.S. Conf. Cath. Bishops 2001). Whether the presence of such governing principles means that Catholic hospitals "rely on faith to accomplish their goal" (247) is, at the least, an interesting and difficult question.

34. Thus, in *Engel*, Douglas wrote:

> The point for decision is whether the Government can constitutionally finance a religious exercise. Our system at the federal and state levels is presently honeycombed with such financing. Nevertheless, I think it is an unconstitutional undertaking whatever form it takes . . . . In New York the teacher who leads in prayer is on the public payroll; . . . [o]nly a bare fraction of the teacher's time is given to reciting this short 22-word prayer . . . . Yet, . . . no matter how briefly the prayer is said, . . . the person praying is a public official on the public payroll, performing a religious exercise in a governmental institution. . . . I cannot say that to authorize this prayer is to establish a religion in the strictly historic meaning of those words. A religion is not established in the usual sense merely by letting those who choose to do so say the prayer that the public school teacher leads. Yet once government finances a religious exercise it inserts a divisive influence into our communities.

370 U.S. 421, 437, 441-442 (1962) (Douglas, J., concurring) (nn. omitted). Similarly, in *Schempp*, the case striking down official Bible-reading in the public schools, Douglas wrote:

> These regimes violate the Establishment Clause in two different ways. In each case the State is conducting a religious exercise; and, as the Court holds, that cannot be done without violating the "neutrality" required of the State by the balance of power between individual, church and state that has been struck by the First Amendment. But the Establishment Clause is not limited to precluding the State itself from conducting religious exercises. It also forbids the State to employ its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by

constitutional doctrine, appear more than a little off-key, like the words of an eccentric uncle who turns every conversation around to the same old topic. But if Feldman's proposal were to become law, these opinions would become prescient, for the issue of funding would unquestionably come front and center as a litigation strategy whenever government-sanctioned religious expression were at issue. Indeed, Feldman's own discussion of school prayer, as noted, already hints at precisely this shift of focus.

B.

I do not ask these questions to quibble or to bluster. Particularly because Feldman is engaged in the forum of public intellectual debate, and not writing a technical article, it would be unfair to expect him to hone his proposal to the last detail. But larger issues lurk here.

To begin with, questions such as the ones I've raised suggest that implementing Feldman's ideas, or any other grand compromise, would not necessarily calm the church-state waters. Feldman emphasizes that his principle justification is neither logical nor historical, though he makes logical and historical arguments as well, but practical and "forward-looking, . . . to find a way toward greater national unity in the face of our religious diversity." (238) He argues that the effect of his formula would be to "tone down" "the fevered pitch of debate" and that "[v]alues evangelicalism as a militant movement should begin to lose some of its ardor as legal secularism ceases to be its equally implacable enemy." (16) One problem, though, is that any legal line, whether drawn left, right, or center, as long as it invites further questions, as this one certainly does, will be the occasion for opposing parties to continue to litigate, jockey for tactical advantages and broader change, and feel aggrieved if those efforts don't go their way.[35]

Moreover, in the context of church-state disputes specifically, two other considerations come into play. First, Feldman posits that, at root,

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> relying on its members alone. Thus, the present regimes must fall under that clause for the additional reason that public funds, though small in amount, are being used to promote a religious exercise. Through the mechanism of the State, all of the people are being required to finance a religious exercise that only some of the people want and that violates the sensibilities of others.

Abington Sch. Dist. v. Schempp, 374 U.S. 203, 229 (1963) (Douglas, J., concurring).

35. This is a completely unrigorous corollary of the famous Priest/Klein hypothesis that, regardless of whether any given set of legal rules is pro-plaintiff or pro-defendant, plaintiffs and defendants will, all other things being equal, still continue each to win about 50% of the cases that go to trial. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. Leg. Stud. 1 (1984).

both "values evangelicals" and "legal secularists" are seeking the same goal—unity in the face of religious diversity. But not all the participants in this debate seek unity; some just seek victory. Recall Feldman's argument that "values evangelicalism" is a more moderate, more tolerant and less sectarian, offshoot of a brand of Christian triumphalism, and that "legal secularism" is a moderate offshoot of dogmatic systemic secularism. I think this account is too simple, as I detail below. But it is also at least partly right. And to the extent that it is right, it is worth recalling that the links between the more moderate and more extreme manifestations of each of these movements are not merely historical. Among the forces combined in what Feldman calls "values evangelicalism" are some that, as Feldman acknowledges, are more interested in promoting specifically Christian values than in a more inclusive advocacy for religion in public life. (232) Further along that same spectrum, moreover, are adherents to truly uncompromising religious ideologies, who believe explicitly that it is "the moral obligation of Christians to recapture every institution for Jesus Christ" and to turn to the Bible directly and in literal detail as the source of American law.[36] Similarly, some "legal secularists" (and some is all it takes) remain committed to plain-old anti-religious secularism. Now, as

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36. *See generally* Michelle Goldberg, *Kingdom Coming: The Rise of Christian Nationalism* (W.W. Norton 2006); Mark Juergensmeyer, *Christian Violence in America*, 558 Annals 88 (1998). These ideologies have manifested in several overlapping religious movements, including "Christian Nationalism," "Dominion Theology" or "Christian Reconstructionism." Some observers have tried to paint a particularly stark, frightening, picture of the role of these movements in the contemporary culture wars. *See e.g.* James Rudin, *The Baptizing of America: The Religious Right's Plans for the Rest of Us* (Thunder's Mouth Press 2006). Feldman might be closer to the mark when he implies that their direct influence is more peripheral. (233) Nevertheless, as one scholar has noted, even if

> Christian Reconstructionists are but a tiny fringe of the Christian Right, . . . their arguments are increasingly incorporated in mainstream writing[.] . . . This does not mean that many Christian Right activists advocate stoning incorrigible children, but it does indicate how serious discussions are taking place among Christian Right activists of how to go about restructuring society to conform with biblical law.

Clyde Wilcox, *Onward Christian Soldiers? The Religious Right in American Politics* 128 (2d ed., Westview Press 2000). Tellingly, Feldman begins his book with a short teaser focusing on Judge Roy Moore's effort to install a monument to the Ten Commandments in the lobby of the Alabama Supreme Court building. (3-4) He does not explain, however, that for Moore himself, if not for all his supporters, the Ten Commandments monument did not just articulate a broad acknowledgment of traditional values or "Judeo-Christian" religious heritage, but a very specific, self-described Christian, political agenda. *See* Goldberg, *supra*, at 25-26, 37.

I do need to stress here, though, that, as I emphasize later in this review, *infra* Part III.E, that "conservative" religious views do not necessarily entail "values evangelicalism" in either its moderate or more radical forms. To the contrary, there is still very much present among Christian conservatives (though perhaps not the "Christian right" as a specific, brand-named, political trend) a powerful counter-theology that is considerably more skeptical, on religious grounds, of the desirability of strong links between the state and a specific religious tradition.

we know from other contexts, when a broadly-defined movement achieves some of its ends, that can either tone down its resentments and marginalize its more uncompromising elements, or it can embolden those elements to seek further gains, and in turn render those elements more credible and move the center of gravity of the entire movement in their direction.

Second, there is the distinctly modern, and flummoxing, role of identity politics here. Feldman is dead on in insisting that "values evangelicalism" and "legal secularism" are not just abstract legal positions, but situated movements. But movements and groups strive, not only to achieve certain ends, but also to increase their own cohesion and sense of purpose. In the peculiar social psychology of our times, group strength is often bound up with a sense of victimization. Thus, contemporary American evangelicals (who form a major part of "values evangelicals") have prospered in part by being able simultaneously to increase their successful engagement in the larger society, and to nurture a continuing sense of grievance.[37] The same might be said about modern secularists, particularly of the anti-religious sort. The sad upshot is that, even if the courts adopted something like Feldman's proposal, one might expect both sides in the current debate over religion and state both to continue to fight for larger victories and, at the same time, to further nurture their identity as persecuted, aggrieved, minorities.

III.

I wonder whether this country is as riven by church-state issues as Noah Feldman believes. I also tend to think that the broad heritage of Establishment Clause doctrine since *Everson*, though it could be improved, tightened, and clarified in any number of ways, is not fundamentally off base. In any event, though, I would suggest that the solution to the battle between "values evangelicals" and "legal secularists" must lie, not in splitting the baby between them, but in reframing the controversy itself. My claim is that what Feldman calls "values evangelicalism" is as much secular as it is religious, and that what Feldman calls "legal secularism" is as much religious as it is secular, and that understanding this might help us see our way forward.

37. *See* Christian Smith, *American Evangelicalism: Embattled and Thriving* (U. Chi. Press 1998).

A.

Let's begin with that term "secular." Feldman, in supporting his view that the framers were "supremely untroubled" by governmental expressions of religion (50), observes that they "were not secularists in the modern sense." (51) He observes later on that the term "secularism" entered the language only in the 1840s, (113) and developed in the United States into a movement among the intellectual elite that sought to replace religious belief with faith in science and rationalism. He writes that this form of "strong secularism failed both ideologically and politically in America," (148) and that "legal secularism" is its more modest, but still overreaching, child. Lurking in the background of Feldman's discussions of both secularism and "legal secularism," however, are broader questions about the nature of "secularism," not as a distinct movement, but as a defining element of modernity itself.

The literature on "secularism" and "secularization" is huge and well-trod. A crude overview, however, might go something like this: At one time, many historians, sociologists, and other analysts embraced a broad version of the "secularization hypothesis," the claim that religious belief and commitment in the modern Western world has progressively declined. This hypothesis, in its simplest form, is at least debatable, not only by virtue of the observably still potent, and even growing, influence of religion, but by the insight that religious commitment in the past was not as entrenched and pervasive as we sometimes assume, either in America or elsewhere. Indeed, as Feldman himself observes, church attendance in the framers' generation "was low, at least by today's standards" (51) and many of the framers themselves were skeptics or Deists.[38] Some scholars, however, have advanced more subtle forms of the secularization hypothesis, claiming, not that religion has absolutely declined in influence, but that its nature and place has changed—that it has become privatized,[39] or become more differentiated from other aspects of social life,[40] including political governance, or lost its

38. For a broader discussion, *see e.g.* Roger Finke & Rodney Stark, *The Churching of America 1776-1990* (2d ed., Rutgers U. Press 2005). Only 17% of Americans formally affiliated with a religious group in 1776; the proportion in 1980 was 62%. *Id*. at 23 fig. 1.2. *See generally The Secularization Debate* (William H. Swatos, Jr. & Daniel Olson eds., Rowman & Littlefield 2000).

39. *See* Thomas Luckmann, *The Invisible Religion* (Macmillan 1967); Robert Wuthrow, *The Restructuring of American Religion* (Princeton U. Press 1988); *see also* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. Pa. L. Rev. 149, 169-180 (1991).

40. *See* Jose Casanova, *Public Religions in the Modern World* 6-7 (U. Chi. Press 1994); Bryan Wilson, *Secularization: The Inherited Model*, in *The Sacred in a Secular Age: Toward Revision in the Scientific Study of Religion* 9, 12-15 (Phillip E. Hammond ed., U. Cal. Press 1985).

normative authority,[41] or been systematically driven out of certain specific but culturally-central institutions such as elite colleges and universities.[42] Some scholars have even argued that secularization is part of an endless, cyclic, process of religious transformation, in which new sects and revived faith inevitably rise out of the wreckage of discredited sureties.[43]

Most interestingly, some social thinkers have argued that "secularization" needs to be understood as a transformation in the very nature of society, a transformation that affects religion itself.[44] In one view, modernity, including modern religion, is marked by a turn from the normative to the "therapeutic." In another view, we are living in a time that has undergone a powerful "disenchantment," so that religion, rather than being a background assumption even for nonbelievers, becomes even for believers a matter of volition and identity, part of a search for meaning or authenticity.

Trying to draw normative conclusions from all these complex claims is a task well beyond the scope of this review. One could begin to scratch the surface, however, by asking whether the framers were, in at least some senses of the term, "secularists" whether or not they used the word. One might also ask whether the contemporary function of the Establishment Clause might be to reinforce some of the dimensions of secularization while opposing or even resisting others. More specifically, it is worth asking, in a tradition going back to de Tocqueville[45] and continuing with contemporary observers[46] whether the

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41. *See* Mark Chaves, *Secularization as Declining Religious Authority*, 72 Soc. Forces 749 (1994).

42. Two important collections of essays on these themes are *The Secularization of the Academy* (George M. Marsden & Bradley J. Longfield eds., Oxford U. Press 1992) and *The Secular Revolution: Power, Interests, and Conflict in the Secularization of American Public Life* (Christian Smith ed., U. Cal. Press 2003).

43. *See* Rodney Stark & William Sims Bainbridge, *The Future of Religion: Secularization, Revival, and Cult Formation* (U. Cal. Press 1985).

44. *See e.g.* Charles Taylor, *Modern Social Imaginaries* (Duke U. Press 2004); Philip Rieff, *Sacred Order/Social Order: My Life Among the Deathworks* (U. Va. Press 2006); Marcel Gauchet, *The Disenchantment of the World* (Oscar Burge trans., Princeton U. Press 1997).

45.

> The religious atmosphere of the country was the first thing that struck me on arrival in the United States. . . . In France I had seen the spirits of religion and of freedom almost always marching in opposite directions. In America I found them intimately linked together in joint reign over the same land. My longing to understand the reason for this phenomenon increased daily. To find this out, I questioned the faithful of all communions; I particularly sought the society of clergymen, who are the depositaries of the various creeds and have a personal interest in their survival. . . . I expressed my astonishment and revealed my doubts to each of them; I found that they all agreed with each other except about details; all thought that the main reason for the quiet sway of religion over their country was the complete separation of church and state. I have no

genius of the American experiment might be precisely in the trade-off it produces between different aspects of secularization: the conditions for a more religious society produced, not in spite of, but because of, the separation of church from state.[47]

For present purposes, though, in the light of these accounts of secularization as a complex, often paradoxical, process, it is particularly worth observing how modern, in a deep and not only chronological sense, "values evangelicalism" really is.[48] This cast of modernity is evident in the "multiculturalist pluralism" that Feldman optimistically sees in the movement. (229) But it also helps explain the tendency of values evangelicals (whether tactically or out of conviction) to make arguments grounded in the alleged parity of religious symbols, ideas, and institutions with other participants in the public square—arguments that, however successful in the short run, ultimately corrode the sense that religion is a distinctive phenomenon that plays by different rules and might well justly be subject to different rules. The symbolic and practical consequences of this move are enormous. Thus, for example, the Supreme Court's recent move to a focus on "neutrality" and equality

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> hesitation in stating that throughout my stay in America I met nobody, lay or cleric, who did not agree about that.

Alexis de Tocqueville, *Democracy in America* 271-272 (J.P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1966).

46. *See e.g.* David Martin, *Revived Dogma and New Cult,* 111 Daedalus 53, 54 (1982):

> The icy thinness of religion in the cold airs of Northwest Europe and in the vapors of Protestant England is highly significant, because it represents a fundamental difference in the Protestant world between North America and the original exporting countries. In all those countries with stable monarchies and Protestant state churches, [religious] institutional vitality is low. In North America, lacking either monarchy or state church, it is high.

(n. omitted).

47. Some scholars, including the sociologist Rodney Stark, have tried to explain this dynamic using the tools of rational-actor analysis sometimes referred to as the "new paradigm" in empirical religious studies. *See* Rodney Stark & Roger Finke, *Acts of Faith: Explaining the Human Side of Religion* (U. Cal. Press 2000). In this view, separation of church and state helps maintain a free "market" in religion, with many of the same benefits as free markets in other contexts, and also facilitates a degree of "tension" between religious communities and the broader society that is important to sustaining religious commitment and group cohesion.

48. *Cf.* James K.A. Smith, *Introducing Radical Orthodoxy: Mapping a Post-secular Theology* (Baker Academic 2004) [hereinafter Smith, *Radical Orthodoxy*]. As Smith puts it,

> In the United States, the march of the secular finds its expression in the persistent project to neutralize the public sphere, hoping to keep this pristine space unpolluted by the prejudices of concrete religious faith. The religious response to this has been the confused "Constantinian" project of the Religious Right, which has sought to colonize the public and political spheres by Christian morality (or the morality supposedly disclosed by "natural law"). . . . [T]his kind of theological response *to* secular modernity actually ends up operating on the basis *of* modernity.

Id. at 31-32 (emphasis in original).

rather than "separation" in its Religion Clause jurisprudence[49] has expanded the possibilities for private religious speech on public property[50] and funding of religious institutions,[51] but it has also seriously weakened the protections afforded by the Free Exercise Clause[52] and threatens the basis of religious institutional autonomy.[53]

The distinctively modern character of today's values evangelicalism is also apparent, as I have already discussed,[54] in the element of identity politics in the movement's crusades. This embroilment with identity politics suggests, at the very least, that contemporary efforts to weaken the separation of religion and state need to be understood, realistically but without condescension, as sometimes serving values other than simple, old-fashioned, faith.[55] Indeed, more

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49. *See generally* Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & Religion 187 (2001); Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 Ind. L.J. 1 (2000); Frederick Mark Geddicks, *The Improbability of Religion Clause Theory*, 27 Seton Hall L. Rev. 1233 (1997). For Feldman's own discussion of this move, and the opening it gave to values evangelical arguments, *see* pp. 205-206. *See also* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 Cal. L. Rev. 673 (2002).

50. *See e.g. Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Pinette*, 515 U.S. 753.

51. *See e.g. Zelman*, 536 U.S. 639; *Mitchell v. Helms*, 530 U.S. 793 (2000); *Rosenberger v. Rector & Visitors of U. of Va.*, 515 U.S. 819 (1995).

52. *See Emp. Div. v. Smith*, 494 U.S. 872 (1990). For important discussions and criticisms of the Court's reliance on a notion of formal neutrality in the free exercise context, *see e.g. Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 561-577 (1993) (Souter, J., concurring in part & concurring in the judgment); Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & Pol. 119 (2002); Daniel O. Conkle, *supra* n. 49; Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990)

53. *See* Perry Dane, "*Omalous" Autonomy*, 2004 BYU L. Rev. 1715.

54. *See supra* Part II.B.

55. As one commentator has acutely observed,

> Putting it crudely, . . . liberals [] send devout Christians two messages: "you're idiots" and "you're entitled to toleration." . . . . No wonder, [then], that issues surrounding evolution, creation science, school prayer, and the like have been so hotly contested. In the ban that keeps creation science and prayer out of the public schools, some see evenhanded liberal toleration[;] . . . Others see the ban as an official proclamation that secular humanism is better than Christianity.
>
> This context illuminates a splendid irony of our day. Conservatives like to gnash their teeth about the inanities of so-called identity politics, which they see as a creature of the rabid left: gays, lesbians, feminists, members of allegedly benighted minority groups, all battle for public recognition as dignified equals. But shouldn't we see the campaigns for creation science and the like as identity politics, too? Aren't they symbolic campaigns for social status pursued by Christians who worry that they are becoming or already have become second-class citizens in a polity presided over by smug secular humanists?

Don Herzog, *Liberalism Stumbles in Tennessee*, 96 Mich. L. Rev. 1898, 1908 (1998) (reviewing Edward J. Larson, *Summer for the Gods: The Scopes Trial and America's Continuing Debate Over Science and Religion* (Basic Books 1997)).

than that, though, they need to be understood as representing a decidedly "secular" turn in modern religion itself.

B.

Along the same lines, but in a more crudely empirical rather than meta-historical vein, consider one other piece of the puzzle: Although Feldman observes that not all "values evangelicals" are themselves necessarily religious believers, (7) he passes over the specific role played in the movement's rise by political "neoconservatives,"[56] many of whom come out of the same general, elite, religiously skeptical, cultural milieu as the evangelicals' secularist opponents.[57]

Read most charitably, this alliance might be understood as just a simple convergence of views. As Irving Kristol, considered one of the fathers of modern neoconservatism, puts it,

> The steady decline in our democratic culture, sinking to new levels of vulgarity, does unite neocons with traditional conservatives—though not with those libertarian conservatives who are conservative in economics but unmindful of the culture. The upshot is a quite unexpected alliance between neocons, who include a fair proportion of secular intellectuals, and religious traditionalists. They are united on issues concerning the quality of education, the relations of church and state, the regulation of pornography, and the like, all of which they regard as proper candidates for the government's attention.[58]

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56. This convergence on the issue of the relation of religion and the state is, of course, only a small part of a larger coalition whose effect on American politics and policy has been profound. *See e.g.* Hugh B. Urban, *America, Left Behind: Bush, the Neoconservatives, and Evangelical Christian Fiction*, 8 J. Religion & Socy. (2006), http://moses.creighton.edu/JRS/2006/2006-2.html (accessed Apr. 16, 2007).

57. It might also be worth a footnote to observe that, while Feldman rightly emphasizes the role that some Jews, concerned about their place in American society, played in the development of strict separationism as a legal strategy, (170) and the extent to which part of the "elite appeal of legal secularism was the implicit suggestion that the religious minorities most in need of protection were Jews," (183) the Jewish presence among neoconservatives represents, if nothing else, another fascinating, alternative strategy for coping with minority status and cultural angst. For one account, *see* Murray Friedman, *The Neoconservative Revolution: Jewish Intellectuals and the Shaping of Public Policy* (Cambridge U. Press 2005).

58. Irving Kristol, *The Neoconservative Persuasion*, vol. 8, issue 47, The Wkly. Stand. (Aug. 25, 2003).

The unbeliever so afraid of the disruptive implications of atheism that he becomes a pro-religious political conservative has, of course, been a stock figure since at least the dawn of modernity. For a recent study of one fascinating example, *see* Matthew Stewart, *The Courtier and the Heretic: Leibniz, Spinoza, and the Fate of God in the Modern World* (W.W. Norton & Co. 2006).

Much more admirable, to my mind at least, is the religious skeptic who understands and even celebrates religion's own disruptive, counter-cultural, implications. *See e.g.* William E.

More astringent commentators, however, argue compellingly (even discounting for a certain paranoid streak in their analyses) that what is at work is a much more cynical exploitation of religious hot buttons both to cobble together a winning political coalition and to maintain among the masses a sense of national cohesion and a commitment to state authority in the face of what the neoconservatives view as the corrosive effects of liberal modernity.[59]

In any event, the fact of this alliance carries important normative implications. For one thing, it suggests how contingent and historically specific "values evangelicalism" might be. Rather than being the voice of "religion" writ large in an existential culture war, it is a specific movement born of particular circumstances, whose historically-situated claims and grievances might not warrant Feldman's call for an urgent and long-term revision in our constitutional doctrine. In saying this, I am building on Feldman's own admirable historical consciousness, but suggesting that such consciousness might undermine, at least to some extent, his effort to articulate one grand programmatic conclusion.

More important, the alliance between elements of the "Christian right" and secular neoconservatives casts in relief a tendency in the Christian right itself (and not only its neoconservative allies) to let religion (and religious identity politics) be used as a means to other ends—to exploit religious faith in the public arena for political, and sometimes crassly political, purposes.[60] Feldman himself admits that "the transmutation of religion into values" can manifest "a tendency . . . for public religion to serve the interests of government more than those of faith." (193) But the implications of this passing comment are acute. The instrumentalization of religion, though as old as religion itself, is precisely one of the dangers against which the ideology, and theology, of strict separation was a response. In Madison's bracing words, to "employ Religion as an engine of civil policy[] . . . [is] an unhallowed

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Connolly, *Why I Am Not a Secularist* (U. Minn. Press 1999).

59. For one thorough, if polemical, account of these ideas and motivations, *see* Shadia B. Drury, *Leo Strauss and the American Right* (St. Martin's Press 1997). Whether Strauss himself would actually agree with the conclusions of his neoconservative "Straussian" followers is entirely beyond the scope of this essay. For a different view of Strauss, which reads him as a friend of liberalism, *see* Steven B. Smith, *Reading Leo Strauss: Politics, Philosophy, Judaism* (U. Chi. Press 2006).

60. For a recent journalistic account, *see* Ray Suarez, *The Holy Vote: The Politics of Faith in America* (Rayo 2006).

The careful reader might wonder how I can emphasize the subordination of the religious to the political here after having, only a few pages ago, noted the influence among values evangelicals of movements that seek explicitly to subordinate the state to their very specific religious agenda. The simple answer is that political and ideological trends are often complex, multi-faceted, and paradoxical.

perversion of the means of salvation."[61] And to the extent that the values evangelical battle for prayer, crosses, and crèches becomes a political means rather than a religious end, it needs to be viewed with profound suspicion, not only by secularists, but by religious folk as well.[62]

C.

I have argued that Feldman does not adequately appreciate the secular dimensions, at various levels, of values evangelicalism. But the reference I just made to the "theology" of strict separation also points to what might be the single most serious gap in Feldman's analysis: his underestimation, both normatively and descriptively, of the religious and theological dimension in what he calls legal secularism and others would call strict separationism.[63] This gap is crucial for at least three reasons: First, a more complete account of the theological foundations of separationism might help explain and buttress its justificatory structure. Second, such an account would bring into better focus the stakes in the controversy. Third, in ways well beyond the scope of this essay, it might, in at least some contexts, suggest a different practical and doctrinal analysis than a form of separationism grounded solely in secular liberal notions of the place of religion in the modern state.[64]

Feldman acknowledges, as anyone writing after the appearance of Mark DeWolfe Howe's classic *The Garden and the Wilderness* must, that the framers were influenced both by Enlightenment arguments for religious liberty and toleration, and by dissident religious arguments, most often conveniently identified with Roger Williams, regarding the primacy of conscience and the need to protect the "garden" of religion from threats by the state. (24-25) Crucially though, Feldman assumes

61. *See* James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* James Madison: *Writings* 29, 32 (Jack N. Rakove ed., Lib. Am. 1999).

62. Some Christian conservatives have, of course, themselves come to this conclusion. *See infra* Part III.E.

63. Emphasizing the religious dimension of the separationist impulse is, of course, by now a commonplace. *See e.g*. Elwyn A. Smith, *Religious Liberty in the United States: The Development of Church-State Thought Since the Revolutionary Era* 15-26 (Augsburg Fortress Publishers 1972); Edward J. Eberle, *Roger Williams' Gift: Religious Freedom in America*, 4 Roger Williams U. L. Rev. 425, 427 (1999). For a good account of the particularly complex brew of traditions that helped frame the original church-state debate, *see* John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 Notre Dame L. Rev. 371, 377 (1996).

64. The differences I have in mind, though, would still fit comfortably within the outer bounds of what I earlier called "the broad heritage of Establishment Clause doctrine since *Everson*." *See supra* Part III.

that this religious line of argument was more accommodationist, less extreme, than the "protosecular" views of Thomas Jefferson and his ilk.[65] He thus assumes that the focus of many of the framers "on protecting religion from government, [and] not the other way around" (40) weighs against a strict separationist reading of the Establishment Clause, and ultimately supports his own compromise position.

This account, however, is at least doubtful. Williams himself was as radical and uncompromising (if also complex and unsystematic) thinker as they come.[66] His conception of state power was particularly narrow and circumscribed. He also believed, contrary to religious instrumentalists of all stripes, that human beings possessed a faculty of moral and political conscience that equipped them to live in peace and basic justice without the aid or prop of any particular religious ritual or belief. And he believed in a religious conscience that could only be genuine if it were absolutely free.

Williams himself lived well before the framing of the Bill of Rights, and is arguably more of an icon than a founder of our church-state tradition. Perhaps more to the point are the views of James Madison, who most directly shaped the Establishment Clause, and who is generally considered to represent, in his own person, a confluence of sorts between the two strains of thought that Howe identified. Any fair reading of Madison's *Memorial and Remonstrance*, it seems to me, makes clear that his most pungent and effective, and uncompromising, arguments were drawn from the religious side of the equation.[67]

There is also an important analytical point to be made here, quite separate from the parsing of historical texts and the tracing of historical influences. As noted, Feldman argues that the framers, on the basis of both religious and non-religious arguments, were most concerned, not with governmental religious expression, but by the state's institutional support of religion, particularly through funding. He then takes this as the template for his own proposed church-state dispensation. But why would Madison and others object to *nonpreferential* aid to religious institutions? The answer is multi-faceted and in Feldman's own words "tricky" and "remarkable." (37) But Feldman rightly gives pride of

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65. Feldman particularly relies here on several "revisionist" accounts, including that of Philip Hamburger, though he disagrees with the revisionists on several other important points. (24-26).

66. For an important study that emphasizes this point, *see* Timothy L. Hall, *Separating Church and State: Roger Williams and Religious Liberty* (U. Ill. Press 1998). Another helpful treatment of Williams and his theological and political views in the context of the religious conversation of his times is James Calvin Davis, *The Moral Theology of Roger Williams: Christian Conviction and Public Ethics* (Westminster John Knox Press 2004).

67. *See* Dane, *Spirited Debate*, *supra* n. 23, at 1223-1224, 1224 n. 38.

place to the argument that forcing one set of citizens to fund the religion of another, even on the basis of equality, represents a "coercion of conscience." (50) The problem, though, is that this conception of "coercion" through taxation and spending is, by conventional standards, entirely idiosyncratic and unworkable. It is not one that the law is willing to respect in any other context, as witnessed by the treatment of pacifists or anti-war activists who try to avoid paying their share of the defense budget.[68] If we treat the taxing of one person to pay for the needs of others as unjustifiable "coercion of conscience" *only* in the church-state context, it is precisely because of assumptions that are deeply theological, bracingly radical, and sufficiently tied up in a broader separationist ideology to render at least plausible the extension of that same separationist ideology to "symbolic" state involvement with religion as well.

D.

Feldman's incomplete account of the era of the framers is only one piece, however, of his insufficient acknowledgment of the religious impulse to strict separation. The other, more consequential, piece is his assumption, captured in the very label "legal secularist," that, in the *current* church-state debate, the strict separationist position is wholly the product of a secularist mindset that, in its origins, was hostile to religion, and even in its tamer version, thinks of public manifestations of religion as a dangerous threat to national unity and liberal polity. In fact, modern strict separationism, much like the anti-Establishmentarianism of the framers, is grounded in both "liberal" and religious intuitions, and has both atheist and devout supporters. It seeks to protect church from state as well as state from church. It draws from both sources, and in particular from their points of contact, though it also shows some of the seams of what is at times an uneasy alliance.

A small but telling token of Feldman's blind spot appears in his account of *Everson*, the 1947 funding case that, as I noted earlier, began the modern era of Establishment Clause jurisprudence. Feldman writes: "The *Everson* opinion was written by Justice Hugo Black, the sole

68. *See e.g. U.S. v. Quilty*, 541 F.2d 172 (7th Cir. 1976); *Greenberg v. Commr.*, 73 Tax 806 (1980). Even in a more specific Free Exercise context, the courts have consistently rejected, for better or worse, the claim that persons could avoid paying otherwise-applicable taxes on the basis of a religious objection. *See U.S. v. Lee*, 455 U.S. 252 (1982); *see also McKee v. Co. Ramsey*, 316 N.W.2d 555, 556 (Minn. 1982) (per curiam) (rejecting argument that state and local governments violated taxpayers' freedom of religion, as well as the Establishment Clause, by "compelling them to pay property taxes, a small portion of which tax money is used to fund sterilization, contraception and state-authorized abortion.").

Southern Baptist on the Court and . . . not the most likely man to become the judicial godfather of legal secularism." (173) But to the contrary, Justice Black's religious background, understood in the light of the Baptist heritage of Roger Williams, made him the perfect godfather of strict separation, as Black himself well understood.

As it happened, by the time Justice Black reached the Supreme Court, he was no longer formally or conventionally religious.[69] But he remained immersed in the religious texts and ethics of his youth. And he especially internalized the specifically theological, historically Baptist, conviction that official sponsorship violated the essence of true religious faith. Thus, in orally delivering his later opinion in *Engel v. Vitale*, which struck down official prayer in the public schools, Black zoomed in on his claim that religion "is too personal, too sacred, too holy to permit its 'unhallowed perversion' by a civil magistrate."[70] His "'voice trembled with emotion,' wrote one observer, 'as he paused over "too personal, too sacred, too holy."' . . . And he added extemporaneously, 'The prayer of each man from his soul must be his and his alone.'"[71] Several days later, in explaining his opinion to a relative, Justice Black cited for support, not the writings of Jefferson or Locke, but "the sixth chapter of *Matthew* 1 through 19, . . . particularly verses 5 through 8."[72] This was clearly an attitude and an argument that traced back, not to anti-religious skepticism or disdain, but to a precise, uncompromising, theological vision.

Putting to one side Justice Black's biography, a reading of classic separationist cases such as *Engel* and *Schempp* reveals a conviction that to take religion seriously requires strict suspicion of its casual co-optation by the state. As Justice Black wrote in *Engel*, the "first and most immediate purpose" of the Establishment Clause "rested on the

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69. He famously told his son, "I cannot believe. But I can't not believe either." Hugo Black, Jr., *My Father: A Remembrance* 172 (Random House 1975). Justice Black rarely attended church in Washington. *Id.* When he did, it was a Unitarian church. Roger K. Newman, *Hugo Black: A Biography* 521 (Pantheon Books 1994).

70. *Id.* at 522-523. *See Engel*, 370 U.S. at 432.

71. Newman, *supra* n. 69, at 523.

72. *Id.* at 524. The text that Black had in mind is part of the Sermon on the Mount:

> And when thou prayest, thou shalt not be as the hypocrites are: for they love to pray standing in the synagogues and in the corners of the streets, that they may be seen of men. Verily I say unto you, They have their reward. But thou, when thou prayest, enter into thy closet, and when thou hast shut thy door, pray to thy Father which is in secret; and thy Father which seeth in secret shall reward thee openly. But when ye pray, use not vain repetitions, as the heathen do: for they think that they shall be heard for their much speaking. Be not ye therefore like unto them: for your Father knoweth what things ye have need of, before ye ask him.

Matt 6:5-8 (all Biblical citations are taken from the King James Version).

belief that a union of government and religion tends to destroy government and to degrade religion."[73] And as Justice Clark wrote in *Schempp*,

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard.[74]

Similarly, Justice Brennan's famous concurring opinion in *Schempp* insisted that

> It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government. It has rightly been said of the history of the Establishment Clause that "our tradition of civil liberty rests not only on the secularism of a Thomas Jefferson but also on the fervent sectarianism . . . of a Roger Williams."[75]

And when the strict separationist tradition suffered some erosion in the 1980s and 1990s, the responses that were most theologically attuned, and most likely to take religion seriously on its own terms and not as a mere ornament, could usually be found in the dissenting opinions of holdouts such as Justice Brennan and Justice Blackmun.[76]

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73. *Engel*, 370 U.S. at 431.

74. *Schempp*, 374 U.S. at 226.

75. *Id.* at 259-260 (quoting Paul Abraham Freund, *The Supreme Court of the United States* 84 (World Publishing Co. 1961) (n. omitted)).

76. *See e.g. Co. of Alleghany v. Am. Civ. Liberties Union*, 492 U.S. 573, 645 (1989) (Brennan, J., dissenting):

> The uncritical acceptance of a message of religious pluralism also ignores the extent to which even that message may offend. Many religious faiths are hostile to each other, and indeed, refuse even to participate in ecumenical services designed to demonstrate the very pluralism Justices Blackmun and O'Connor extol. To lump the ritual objects and holidays of religions together without regard to their attitudes toward such inclusiveness, or to decide which religions should be excluded because of the possibility of offense, is not a benign or beneficent celebration of pluralism: it is instead an interference in religious matters precluded by the Establishment Clause.;

Lynch v. Donnelly, 465 U.S. 668, 711-712 (1984) (Brennan, J., dissenting):

> The essence of the creche's symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma—that God sent His Son into the world to be a Messiah. Contrary to the Court's suggestion, the creche is far from a mere representation of a "particular historic religious event." It is, instead, best understood as a mystical re-creation of an event that lies at the heart of Christian faith. To suggest, as the Court does, that such a symbol is merely "traditional" and therefore no different from

E.

If I am right about the importance of the religious arguments for strict separation, though, that leaves an important puzzle. Why has this separationist theology apparently lost much of its salience? Why are objections to state sponsorship of religion, whether symbolic or financial, widely perceived, and not just by Feldman, as necessarily serving secularist ends?[77]

Part of the reason might lie in theological and social developments in American religious thought.[78] But a believer need not share Roger Williams's specific sectarian framework, and certainly not some of his singular views about the nature of the church or the details of salvation,

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> Santa's house or reindeer is not only offensive to those for whom the creche has profound significance, but insulting to those who insist for religious or personal reasons that the story of Christ is in no sense a part of "history" nor an unavoidable element of our national "heritage."

(nn. &d internal citations omitted); *id.* at 726 (Blackmun & Stevens, J.J., dissenting)

> Not only does the Court's resolution of this controversy make light of our precedents, but also, ironically, the majority does an injustice to the creche and the message it manifests. While certain persons, including the Mayor of Pawtucket, undertook a crusade to "keep Christ in Christmas," the Court today has declared that presence virtually irrelevant. The majority urges that the display, "with or without a creche," "recalls the religious nature of the Holiday," and "engenders a friendly community spirit of goodwill in keeping with the season." . . . . The creche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part. The city has its victory—but it is a Pyrrhic one indeed.

(nn. & internal citations omitted); *Marsh v. Chambers*, 463 U.S. 783, 804, 810 (1983) (Brennan & Marshall, J.J., dissenting) (one purpose of the constitutional principles of religious separation and neutrality "is to prevent the trivialization and degradation of religion by too close an attachment to the organs of government."

> We have [] recognized that government cannot, without adopting a decidedly anti-religious point of view, be forbidden to recognize the religious beliefs and practices of the American people as an aspect of our history and culture. . . . [C]ertainly, the text of Abraham Lincoln's Second Inaugural Address which is inscribed on a wall of the Lincoln Memorial need not be purged of its profound theological content. The practice of offering invocations at legislative sessions cannot, however, simply be dismissed as "a tolerable acknowledgment of beliefs widely held among the people of this country." "Prayer is religion in act." "Praying means to take hold of a word, the end, so to speak, of a line that leads to God." . . . [Members] of the clergy who offer invocations at legislative sessions are not museum pieces put on display once a day for the edification of the legislature. Rather, they are engaged by the legislature to lead it—as a body—in an act of religious worship. If upholding the practice requires denial of this fact, I suspect that many supporters of legislative prayer would feel that they had been handed a pyrrhic victory.

(nn. & internal citations omitted)); I should disclose here that I was Justice Brennan's clerk during the October 1982 term and worked on *Marsh v. Chambers*.

77. *Cf.* Hall, *supra* n. 66, at 164 (observing that the "curious alliance between Separatist pietism and enlightenment that wrested religious liberty from the grasp of religious establishment has deteriorated with age").

78. *See id.*

to find compelling his more general observations about church-state relations and the complexities of conscience. Moreover, Williams's church-state theology has the rare merit of being, at least in part, empirically verifiable: As noted earlier, rigorous church-state separation does indeed seem to contribute to a stronger, more vital, more committed, religious society.[79]

My own sense is that the religious half of the separationist equation is, in modern America, not so much outmoded as outshouted. Even looking solely at conservative evangelical Christians, the picture is complicated. As Feldman notes, religious evangelicals were politically quiescent for much of the twentieth century, for reasons that, though culturally complex, were at least to some extent rigorously theological. Moreover, even as that quietism and separatism has fallen out of favor, many of the genuine intellectual leaders of American evangelicalism have been much more subtle and ambivalent about church-state relations than the agitations of some evangelical television ministers might suggest.[80] Significantly, their caution is grounded in a specific skepticism about the possibility of cultivating moral and religious righteousness among still-unregenerate human beings. Moreover, important sociological studies of "conservative" Christians suggest a population that is less politically aggressive, and less interested in injecting religion into public life, than the common stereotype would suggest.[81] And even if many of these conservative Christians do indeed wish that the United States were a more "Christian nation," what they specifically mean by a "Christian nation" is often, perhaps ironically, a tolerant, pluralistic, even liberal nation.[82] It should therefore not come

79. *See supra* nn. 45-47 (discussing work of Tocqueville, Martin & Stark).

80. For a useful account of these and other issues, *see* J. Budziszewski, *Evangelicals in the Public Square: Four Formative Voices on Political Thought and Action* (Baker Academic 2006).

81. *See generally* Christian Smith, *Christian America? What Evangelicals Really Want* (U. Cal. Press 2000) [hereinafter Smith, *Christian America*]. A recent study of "mega-churches," most of them evangelical or Pentecostal, released by Hartford Seminary's Hartford Institute for Religion Research and the Cooperative Congregations Study Partnership, emphasizes that, while their members would generally label themselves as politically "conservative," neither they nor the churches themselves are particularly active in politics. *See* Scott Thumma, Dave Travis & Warren Bird, *Megachurches Today 2005: Summary of Research Findings* 7, http://hirr.hartsem.edu/megachurch/megastoday2005summaryreport.pdf (accessed Apr. 16, 2007).

82. One of the most eye-opening results in Christian Smith's study of evangelical Christian attitudes is that, while "many" of the evangelicals interviewed did hope that America could again be the "Christian nation" they believe it once was, when one

> refrains from projecting Christian Right discourse onto the speech of ordinary evangelicals, one notices a tremendous variety of meanings attached to the phrase "Christian America," many of which have little if anything to do with organizing a Christian control of American culture and society. . . .
>
> The meaning that evangelicals most frequently gave to the idea that America was

as a surprise that some conservative Christian leaders have, in very public ways, in both their actions[83] and their writings,[84] actively disassociated themselves from the Christian right as a political movement.

The most interesting part of the story, though, might be found in a set of cutting-edge, increasingly influential, movements in Christian thought. These overlapping trends have many names and colorations, including "postliberal," "postconservative," "postmodern," "radical orthodoxy," "generous orthodoxy," "paleo-orthodoxy," "narrative theology," and the "emerging church movement."[85] I cannot even begin

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> once a Christian nation was that it was *founded by people who sought religious liberty and worked to establish religious freedom. . . .*
>
> A . . . striking implication of this definition is the importance it places on religious pluralism and toleration. . . . Perhaps ironically, this meaning of "Christian America" functions more to bolster liberal toleration than religious dominion.

Smith, *Christian America*, *supra* n. 82, at 25-27 (emphasis in original, n. omitted). Smith's finding is, of course, consistent with Feldman's astute observation that values evangelicals share with legal secularists a commitment to "freedom of conscience and religious liberty." (228) But it hammers home both the depth of that commitment and the degree to which it helps define, and does not merely frame, at least some evangelicals' religious vision for the nation.

83. *See e.g.* Laurie Goldstein, *Disowning Conservative Politics is Costly for an Evangelical Pastor*, N.Y. Times (July 30, 2006).

84. *See e.g.* Randall Balmer, *Thy Kingdom Come: How the Religious Right Distorts the Faith and Threatens America: An Evangelical's Lament* (Basic Books 2006); Gregory A. Boyd, *The Myth of a Christian Nation: How the Quest for Political Power Is Destroying the Church* (Zondervan 2005). For more general evangelical critiques of the religious right, *see e.g.* Jim Wallis, *God's Politics: Why the Right Gets It Wrong and the Left Doesn't Get It* (Harper Collins 2005).

85. Some representative writings, in addition to the sources arbitrarily cited elsewhere in this section, include *Radical Orthodoxy: A New Theology* (John Milbank, Catherine Pickstock & Graham Ward eds., Routledge 1999); *The Nature of Confession: Evangelicals & Postliberals in Conversation* (George A. Lindbeck, Dennis L. Okholm & Timothy R. Phillips eds., InterVarsity Press 1996); *Why Narrative? Readings in Narrative Theology* (Stanley Hauerwas & L. Gregory Jones eds., W.B. Eerdmans 1989); Eddie Gibbs & Ryan K. Bolger, *Emerging Churches: Creating Christian Community in Postmodern Cultures* (Baker Academic 2005); Douglas Harink, *Paul Among the Postliberals* (Brazos 2003); Stanley Hauerwas, *A Better Hope: Resources for a Church Confronting Capitalism, Democracy and Postmodernity* (Brazos 2000); Stanley Hauerwas, *A Community of Character* (U. Notre Dame Press 1981); Stanley Hauerwas, *After Christendom? How the Church Is to Behave If Freedom, Justice, and a Christian Nation Are Bad Ideas* (Abingdon Press 1991); Stanley Hauerwas, *Christian Existence Today: Essays on Church, World, and Living in Between* (Brazos Press 1988); Stanley Hauerwas, *Dispatches from the Front: Theological Engagements with the Secular* (Duke U. Press 1994); Stanley Hauerwas, *In Good Company: The Church as Polis* (U. Notre Dame Press 1995); Stanley Hauerwas, *Unleashing the Scripture: Freeing the Bible from Captivity to America* (Abingdon Press 1993); George A. Lindbeck, *The Church in a Postliberal Ag*e (James J. Buckley ed., W.B. Eerdmans 2006); George A. Lindbeck, *The Nature of Doctrine: Religion and Theology in a Postliberal Age* (Westminster 1984); Brian D. McLaren, *A Generous Orthodoxy: Why I Am a Missional, Evangelical, Post/Protestant, Liberal/Conservative, Mystical/Poetic, Biblical, Charismatic/Contemplative, Fundamentalist/Calvinist, Anabaptist/Anglican, Methodist, Catholic, Green, Incarnational, Depressed-yet-Hopeful, Emergent, Unfinished CHRISTIAN* (Zondervan 2006); Nancey Murphy, *Anglo-American Postmodernity: Philosophical Perspective on Science, Religion, and Ethics*

to do justice here to these ideas and movements, or to the real differences among them. Some have relatively little to say about church-state issues. But a crude distillation might look something like this: Many of these theological trends are profoundly critical of liberal political and social theory, and even of the entire project of modernity. Indeed, in certain respects their critique is much more radical and all-embracing than that of more traditional evangelicals. At the same time, they tend to reject the Christian right agenda. At the very least, they find much of that agenda to be trivial and distracting. More to the point, they find the Christian right attitude to government to constitute an attempt to revive a discredited "Constantinian" world that is neither possible nor desirable. Some of the thinkers I have in mind actually revel in the passing of what they refer to as "Christendom," the official or unofficial association of the Church with state power and state prestige.[86] The end of Christendom, in their view, liberates the Church to cultivate its own committed communities and, just as important, frees it to speak with a critical, prophetic voice in the larger public square.[87] Rather than

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(Westview Press 1997); Nancey Murphy, *Beyond Liberalism and Fundamentalism: How Modern and Postmodern Philosophy Set the Theological Agenda* (Trinity Press Intl. 1996); Dennis Nineham, *The Use and Abuse of the Bible: A Study of the Bible in an Age of Rapid Cultural Change* (Macmillan 1976); C.C. Pecknold, *Transforming Postliberal Theology* (T. & T. Clark Publishers 2005); Carl A. Raschke, *The Next Reformation: Why Evangelicals Must Embrace Postmodernity* (Baker Academic 2004); John Howard Yoder, *The Politics of Jesus* (2d ed., W.B. Eerdmans 1994).

86.

> The demise of the Constantinian world view, the gradual decline of the notion that the church needs some sort of surrounding "Christian" culture to prop it up and mold its young, is not a death to lament. It is an opportunity to celebrate. The decline of the Constantinian synthesis between the Church and the world means that we American Christians are at last free to be faithful in a way that makes being a Christian today an exciting adventure. . . .
>
> The reason we Christians must forever be letting go of our Constantinian assertions is that we are forever forgetting how decisive, how eschatological, is the event of Christ. . . .
>
> We argue that the political task of the Christians is to be the church rather than to transform the world. . . .
>
> Political theologies, whether of the left or of the right, want to maintain Christendom, wherein the church justifies itself as a helpful, if sometimes complaining, prop for the state.

Stanley Hauerwas & William H. Willimon, *Resident Aliens: Life in the Christian Colony* 18, 29, 38 (Abingdon Press 1989).

87.

> The younger evangelicals [are] keenly aware that they live in a post-Constantinian world, a world where the church and state are separate. This knowledge has led them to reject the religious political solutions to our culture wars offered by both the right and the left. The efforts of both the right and the left to lobby moral legislation was and continues to be a colossal failure. . . .
>
> The goal of being the soul of the world is to be "salt" and "light"—a transforming

feeling aggrieved by their perceived marginalization, they argue that, only at the margins can Christians find their own true identity as a pilgrim people.

To the extent that the thinkers I have in mind speak to, and support, something like what Feldman calls legal secularism and others would call strict separationism, they tend not to do so on standard liberal or secularist grounds. Some of their arguments might look like those of Roger Williams or James Madison. More bracingly, though, they tend to call on distinct post-modern insights (of a constructive rather than deconstructive sort) into the nature of religion, belief, and culture.[88] They argue that genuine religion is, simply put, too demanding to be "established." Truly to "establish" Christianity, or even come close, might, for example, mean giving up the military, or redistributing all wealth. The historic mistake of "Christendom" for a thousand or more years was to try to fudge these issues, and that is one reason they want no more to do with it. Moreover, they believe that Christian life, and the specific values that go along with it, can only be lived in genuine, face-to-face, community. Tokens of Christian symbolism in the public arena must remain superficial and ultimately meaningless because they are detached from the lived life of the pilgrim people. Finally, a non-foundationalist (though also not relativistic or skeptical) epistemology suggests that religious conviction is situated.[89] Truth can only be discerned from within a tradition, or a specific set of texts, or a particular community.[90]

> presence. How is that accomplished? The common answer among the younger evangelicals is to return to a theology of the church as the "embodied presence" of Jesus Christ.

Robert E. Webber, *The Younger Evangelicals: Facing the Challenge of the New World* 230 (Baker Books 2002).

88. For a general survey of postmodern theology, in a principally Christian context, *see The Cambridge Companion to Postmodern Theology* (Kevin J. Vanhoozer ed., Cambridge U. Press 2003). For an introduction to Jewish postmodern thought, *see Interpreting Judaism in a Postmodern Age* (Steven Kepnes ed., N.Y. U. Press 1996).

For my own efforts, in the context of a jurisprudence of Jewish law, to try for a bit of constructive postmodernism, *see* Perry Dane, *The Yoke of Heaven, The Question of Sinai, and the Life of Law*, 44 U. Toronto L.J. 353 (1994); Perry Dane, *The Oral Law and the Jurisprudence of a Text-less Text*, vol. 2, issue 2 S'vara: J. Phil., L., & Judaism 11 (1991).

89. For one discussion of the debate between "revisionist" or "public" theology, on the one hand, and "postliberal" or postmodern theology, on the other, *see* William C. Placher, *Unapologetic Theology: A Christian Voice in a Pluralistic Conversation* 154-174 (Westminster/John Knox Press 1989).

90.

> Not only is there no common deontological code for humanity, but there is also no universal human virtue. Rather, in a situation of postlapsarian pluralism, there are only concrete, determinate, story-constituted communities that narrate a particular telos and for the habits (i.e., virtues) necessary for pursuing that telos. According to the Christian

The views I have just described are only one piece of the American religious landscape. And in going through this exercise, my aim has not been to describe fully, and certainly not defend, a new theology of church and state. But I have sought to make the modest, yet crucial, point that the culture wars, such as they are, are complex and multi-faceted, and that, at the end of the day, labels such as values evangelicals and legal secularists risk papering over those complexities and obscuring the possibility of new, richer, answers to very old debates.

IV.

Earlier in this essay, I emphasized Noah Feldman's important observation that, from the time of the framers, the controversies in America over church and state have played against a rough consensus about the minimum content and outer bounds of possible solutions. A vital question, though, is whether the proper meaning of the Establishment Clause should be understood as residing comfortably smack in the middle of that broad common ground, or at one edge of it, a sharp and even discomforting goad to constructing and maintaining the distinctive and difficult American experiment in taking religion very, very, seriously.

When the leaders of Connecticut and Massachusetts argued that their established churches did not really represent an "establishment of religion," their position was actually quite reasonable. In many contexts, we treat opt-out rights as quite sufficient to preserving human liberty. When many Virginians fought for the system of nonpreferential aid that James Madison opposed in his Memorial and Remonstrance, they were also being reasonable. Indeed, much of the Western world takes for granted that liberal societies can and should give nonpreferential aid to religious schools and other institutions. When nineteenth-century Protestants defended "nondenominational" religious exercises, and when twentieth-century politicians lauded the country's "Judeo-Christian" heritage, they were being eminently reasonable. Religion and a specific religious history, after all, *are* a part of our national culture and collective consciousness. Finally, Feldman's proposal, at the heart of this fine book, is also in many respects eminently reasonable.

> narrative, there is only one authentic telos: "You have made us for yourself, and our hearts are restless until they rest in You." Therefore, the only authentic ethic is that informed by God's revelation in Christ, and the only authentic practice is that nourished by the community of the Spirit.

James K.A. Smith, *Radical Orthodoxy*, *supra* n. 48, at 242-243.

But the Establishment Clause might not be a reasonable text, or establish a reasonable rule. To the contrary, it might be a radical text, embodying a set of radical political and religious assumptions, enforcing some radical constraints on the government in the United States, and capable of being reinforced and refreshed by radical political and religious ideas arguments in our own day.

In the end, if there is to be a meeting of minds on church-state issues, it will likely not come through a grand compromise, whether Feldman's or anyone else's. Rather, it will, I think, require some embrace of the radical potential of the American experiment. Anti-religious secularists must realize, as many already do, that religion, after all, is here to stay,[91] that one paradoxical purpose of the strict separation they support is to guarantee a secular government for the sake of nurturing a religious society, and that their own conceptions of reason and mutual respect must be willing to encompass the legitimacy of religious reason. Religious believers, meanwhile, will have to appreciate, as many already do, that a state at the service of religion very quickly turns into religion at the service of the state, and that, whatever their precise theology, they can find some strength, not in the state's willingness to validate their sense of identity, but in their own willingness to take seriously their identity as proud pilgrims and humble prophets.

The sort of rapprochement I have in mind would, to be sure, not be a straightforward exchange in which each side secures one part of its wish list in return for giving up the other part. Indeed, doctrinally speaking, it is decidedly asymmetrical, more or less embracing a rule of strict separation, and in that sense asking legal secularists to give up very little in return for values evangelicals giving up a lot. At a deeper level, though, the point would not be to cut a deal, but to reframe the calculus of values, asking both sides to think more clearly about the nature of modernity, the place of the state, the snares of identity, and the essence of faith. Understood along these dimensions, the understanding I have in mind might even be said to be asymmetrical the other way, asking secularists to give up many of their most cherished assumptions about the human condition and the direction of history, while only asking the religiously committed to rediscover principles and traditions that were part of their religious heritage and world-view all along. But the real point would surely be that both sides might see their gains and

91. *Cf.* Alister McGrath, *The Twilight of Atheism: The Rise and Fall of Disbelief in the Modern World* (Doubleday 2004).

losses in a new way, with some humility, and a genuine appreciation of the irony of it all.