Divided By God: America's Church-State Problem —and What We Should Do About It

by Noah Feldman

*Reviewed by Richard W. Garnett**

The Supreme Court this past summer handed down rulings in three closely watched, eagerly anticipated, and—as it happened—not surprising cases: In *Van Orden v. Perry,* a bare five-Justice majority announced that the 44-year-old Ten Commandments monument on the grounds of the Texas State Capitol did not unconstitutionally "establish" religion. A different, but no less narrow majority concluded in *McCreary County v. ACLU* that a different, less longstanding Ten Commandments display lacked a "secular purpose" and so *did* violate the First Amendment's Establishment Clause. And in *Cutter v. Wilkinson,* a refreshingly unanimous Court declared that the federal Religious Land Use and Institutionalized Persons Act—which, among other things, requires prisons receiving federal funds to go beyond the Free Exercise Clause's requirements in accommodating inmates' religious practices—does not unconstitutionally privilege religion.

As many Court-watchers predicted, these decisions all turned on tricky line-drawing: When does a permissible recognition of the role of faith in our Nation's history become an illegal endorsement of religion? How is a "religious" monument to be distinguished from a "secular" display *about* religion? When do judges' efforts to reduce religious strife cause the very divisions they are intended to prevent? Where is the line between the accommodations of religion that the Constitution permits—even encourages—and the privileging of believers that it forbids?

The reaction to these opinions on editorial pages, over the airwaves, in coffee shops, and around the blogosphere confirmed that these and similar questions about government, religion, and public life are as intriguing, and confounding, as ever. Enter Professor Noah Feldman's latest, *Divided by God.*

Divided by God is readable, warm, and engaging; it provides a narrative, a diagnosis, and a prescription. The author's commendable hope is for "reconciliation between the warring factions that define the church-state debate and . . .much else in American politics." And, his opening premise and observation is the claim that, although "the overwhelming majority of Americans. . .say they believe in God, . . .a common understanding of how faith should inform nationhood can no longer bring Americans together. To the contrary, no question divides Americans more fundamentally than that of the relation between religion and government."

Justice Souter observed in one of the recent Ten Commandments cases—and Feldman would agree—that "the divisiveness of religion in current public life is inescapable." Still, Feldman insists that the rival "camps" in the culture wars share the same goal: "Legal secularists," in his account, see "religion as a matter of personal belief and choice largely irrelevant to government" and are "concerned that values derived from religion will divide us, not unite us." "Values evangelicals," on the other hand, "insist on the direct relevance of religious values to political life" and believe that "convergence on true, traditional values is the key to unity and strength." The two groups share, however, the hope of "reconciling national unity with religious diversity." While "[v]alues evangelicals think that the solution lies in finding and embracing traditional values which we can all share and without which we will never hold together[,]" the "[l]egal secularists think that we can maintain our national unity only if we treat religion as a personal, private matter, separate from concerns of citizenship."

Unfortunately, Feldman contends, the reconciliation both groups seek is undermined by the Court's misshapen Establishment Clause doctrine. He argues that the Framers' clear aim was to protect the liberty of conscience by forbidding taxation and public spending in support of religious institutions; the Supreme Court, however, has permitted public funding of parochial schools and religious charities. At the same time, the contemporary Court aggressively polices, and often censors, public displays and "endorsements" of religious symbols and messages, even though the founding generation "did not think the state needed to be protected from the dangers of religious influence, nor were they particularly concerned with keeping religious symbolism out of the public square."

In Feldman's view, the way to unity-in-diversity is to flip things around: We should "permit and tolerate symbolic invocation of religious values and inclusive displays of religion while rigorously protecting the financial and organizational separation of religious institutions from institutions of government." "Values evangelicals," he states, "must recognize that government funding of religion will, in the long run, generate disunity, not unity." At the same time, "legal secularists" must abandon their unfounded hostility to religious expression, arguments, and symbols in the public sphere.

Feldman is generous and fair-minded, so it might seem a bit churlish to suggest that, in the end, it is he, and not the Justices, who has things backwards. Feldman's proposed solution—"no coercion, and no money"—owes a lot to the quite contestable claim that school-voucher programs

"create[ ] conflict and division," and are more threatening to "national unity," than are government sponsored displays of religious symbols or other official, "inclusive" endorsements of religion. To shore up this claim, Feldman endorses the common but unconvincing claims that educational choice and religious schools "promot[e] difference and nonengagement," and do not "promote a common national project" but instead "generate balkanized values." In fact, though, recent research by Notre Dame's David Campbell, David Sikkink, and others indicates that there is every reason to think that the kind of religious schools that participate in choice programs are *at least* as successful at forming other-regarding, engaged, and tolerant citizens as are the public schools, whose current ability to "promote a common national project" Feldman fails to question. At the same time, and even though Feldman's critique of the "legal secularist" program is powerful, it is hard to agree with him that, given cultural realities, an increase in public displays of religious symbols is a recipe for *less* division.

In any event, it is not clear that reducing—let alone eliminating—"divisiveness" in American public life is possible or desirable, let alone the First Amendment's mandate. True, nearly thirty-five years ago, in *Lemon v. Kurtzman*, Chief Justice Warren Burger declared that state programs or policies could "excessive[ly]"—and, therefore, unconstitutionally—"entangle" government and religion, not only by requiring or allowing intrusive public monitoring of religious institutions and activities, but also through what he called their "divisive political potential." Government actions burdened with such "potential," he reasoned, pose a "threat to the normal political process" and "divert attention from the myriad issues and problems that confront every level of government." Chief Justice Burger asserted also, and more fundamentally, that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."

Certainly, this "political division" argument is enjoying something of a renaissance. Justice Breyer, for example, in his crucial concurring opinion in one of the Court's recent Ten Commandments cases, identified "avoid[ing] that divisiveness based on religion that promotes social conflict" as one of the "basic purposes of [the Religion] Clauses." He then voted to reject the First Amendment challenge to the public display at issue in part because, in his view, to sustain it "might well encourage disputes" and "thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."

In fact—as John Courtney Murray once observed—"pluralism [is] the native condition of American society" and that the unity toward which Americans have aspired—*e pluribus unum*—is a "unity of a limited order." Those who crafted our Constitution believed that both authentic freedom and effective government could be secured through checks and balances, rather than standardization, and by harnessing, rather than homogenizing, the messiness of democracy. It is both misguided and quixotic, then, to employ the First Amendment to smooth out the bumps and divisions that are an unavoidable part of the political life of a diverse and free people and perhaps also an indication that society is functioning well.

Feldman is right to observe that our religious diversity —which "has often been called a blessing and a source of strength or balance" also remains a "a fundamental challenge to the project of popular self-government." The divisions that run through our politics and communities make appealing to many a more managerial approach to politics and public life. Division and disagreement, though—about important things—is, this side of Heaven, a fact. Accordingly, we should, in Murray's words, "cherish only modest expectations with regard to the solution of the problem of religious pluralism and civic unity." Madison's warning remains as powerful as ever:

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

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