# Book Reviews

# "MODEST EXPECTATIONS"?: CIVIC UNITY, RELIGIOUS PLURALISM, AND CONSCIENCE

**DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT.** By Noah Feldman.[1] Farrar, Straus & Giroux. 2005. Pp. 306. $25.00.

**THE RIGHT TO BE WRONG: ENDING THE CULTURE WAR OVER RELIGION IN AMERICA.** By Kevin Seamus Hasson.[2] Encounter Books. 2005. Pp. 176 + xii. $25.95.

*Richard W. Garnett*[3]

America is divided, and religion is divisive. These two claims—usually asserted with both confidence and concern—are the drone notes sounding under much of what is said and written today about law, politics, religion, and culture. Contemporary America is so polarized, James Wilson quipped recently, that "our country [is] deeply divided over whether our country is deeply divided."[4] We have all seen the maps and survey results that are said to reveal our "two Americas"[5]: Red and Blue,

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4. James Q. Wilson, *How Divided Are We?*, COMMENTARY, Feb. 2006, at 15, 15.
5. STANLEY B. GREENBERG, THE TWO AMERICAS: OUR CURRENT POLITICAL

Metro and Retro,[6] "United States of Canada" and "Jesusland."[7] We have all heard about the "culture wars"[8] pitting—in the words of one of our more clear-eyed social observers—"racist fascist knuckle-dragging NASCAR-obsessed cousin-marrying roadkill-eating tobacco-juice-dribbling gun-fondling religious fanatic rednecks" against "godless unpatriotic pierced-nose Volvo-driving France-loving left-wing communist latte-sucking tofu-chomping holistic-wacko neurotic vegan weenie perverts."[9] In "red America," we all know, "Saturday is for NASCAR and Sunday is for church. In blue America, Saturday is for the farmers' market . . . and Sunday is for *The New York Times.*"[10]

Now, many social scientists insist that these and similar diagnoses miss the mark.[11] Two commentators noted recently that it is actually "[t]he gap between the rhetoric and the reality of American cultural division"—and not the division itself—"that is perhaps the most fundamental feature of our cultural politics."[12] Yes, in America today there are bitter conflicts, cranky bloggers, hard-fought campaigns, deep-seated preferences and prejudices, and regional contrasts. But these could

DEADLOCK AND HOW TO BREAK IT (2004).

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

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

8. JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991); *see also, e.g.,* GERTRUDE HIMMELFARB, ONE NATION, TWO CULTURES: A SEARCHING EXAMINATION OF AMERICAN SOCIETY IN THE AFTERMATH OF OUR CULTURAL REVOLUTION (2001).

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

10. Jonathan Rauch, *Bipolar Disorder,* THE ATLANTIC MONTHLY, Jan./Feb. 2005, at 102, 102 ("[R]ed America is godly, moralistic, patriotic, predominantly white, masculine, less educated, and heavily rural and suburban; blue America is secular, relativistic, internationalist, feminine, college educated, and heavily urban and cosmopolitan. Reds vote for guns and capital punishment and war in Iraq, blues for abortion rights and the environment.").

11. *See, e.g.,* MORRIS P. FIORINA ET AL., CULTURE WAR? THE MYTH OF A POLARIZED AMERICA (2005); Rauch, *supra* note 10, at 102 ("American politics is polarized but the American public is not. In fact, what may be the most striking feature of the contemporary American landscape . . . is not the culture war but the culture peace."). For an interesting online collection of alternative maps that emphasize the "purple," rather than the "red" and "blue," that the 2004 presidential election revealed, see Michael Gastner et al., *Maps and Cartograms of the 2004 US Presidential Election Results,* http://www-personal.umich.edu/~mejn/election/ (last visited July 20, 2006).

12. Steven Waldman & John C. Green, *Tribal Relations,* THE ATLANTIC MONTHLY, Jan./Feb. 2006, at 136, 142. According to Waldman and Green, for example, it is more accurate to categorize Americans in "twelve tribes" than "two Americas."

reasonably be regarded not so much as skirmishes in a boiling culture war as evidence that we are human beings, living in interesting times, confronted with hard questions. Maybe the story should be that—Michael Moore and Ann Coulter notwithstanding—most Americans, in most places, are purple-ish and, in the end, agree about most things.[13]

But even if it is true that the post-*Bush v. Gore* "Red v. Blue" thesis has had its day, the "religion is divisive" meme continues both to spread through and shape our conversations.[14] "We are," as Justice Souter observed not long ago, "centuries away from the St. Bartholomew's Day massacre and the treatment of heretics in early Massachusetts, but the divisiveness of religion in current public life is"—he insisted—"inescapable."[15] Indeed, according to a prominent philosopher, Richard Dawkins, "[o]nly the willfully blind could fail to implicate the divisive force of religion in most, if not all, of the violent enmities in the world today."[16] Former Senator and Ambassador John Danforth (who is also an Episcopal priest) is not so harsh, but still warns that while, "[a]t its best, religion can be a uniting influence, . . . in practice, nothing is more divisive."[17] Some might even think that Rev. Danforth is too sanguine, that—even "at its best"—religion is necessarily exclusionary and divisive, and that religion "by its very nature . . . is incapable of producing . . . unity"[18] because "political unity . . . is actually antithetical to religion's entire reason for existing."[19]

Professor Noah Feldman concedes, and is concerned, that religion can be divisive and that America is *Divided by God.* Although, as he notes, the "overwhelming majority of Ameri-

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13. *See generally, e.g.*, ALAN WOLFE, ONE NATION, AFTER ALL: WHAT MIDDLE-CLASS AMERICANS REALLY THINK ABOUT: GOD, COUNTRY, FAMILY, RACISM, WELFARE, IMMIGRATION, HOMOSEXUALITY, WORK, THE RIGHT, THE LEFT, AND EACH OTHER (1998).

14. *See generally* Richard W. Garnett, *Religion, Division, and the First Amendment,* 94 GEO. L.J. 1666 (2006). A "meme" is a unit of cultural information transmitted from one mind to another.

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

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

17. John C. Danforth, *In the Name of Politics,* N.Y. TIMES, March 30, 2005, at A1; *see also* JOHN C. DANFORTH, FAITH AND POLITICS: HOW THE "MORAL VALUES" DEBATE DIVIDES AMERICAN AND HOW TO MOVE FORWARD TOGETHER (forthcoming 2006).

18. Steven G. Gey, *Unity of the Graveyard and the Attack on Constitutional Secularism,* 2004 B.Y.U. L. REV. 1005, 1011.

19. *Id.* at 1013; *see also* SAM HARRIS, THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON (2004).

cans . . . say they believe in God, . . . a common understanding of how faith should inform nationhood . . . no longer bring[s] Americans together" (p. 5). In fact, "no question divides Americans more fundamentally than that of the relation between religion and government" (p. 5).[20] Still, the end toward which Feldman's narrative, analysis, and prescriptions point is "reconciliation between the warring factions that define the church-state debate and . . . much else in American politics" (p. 16).

Seamus Hasson's goals, in *The Right to Be Wrong,* are similarly irenic. His argument for "robust religious freedom for all" (p. 6) is based on "human nature" (p. 7)—i.e., "on the truth about each of us" (p. xii)—and is, at the same time, sensitive to the challenge of protecting the freedom of conscience in conditions of pluralism.[21] In Hasson's view, the surest path to the reconciliation he and Feldman seek is not the marginalization or privatization of religion—a course that is both "inhuman" and "self-defeating" (p. 5)—but the embrace of "an authentic pluralism that allows all faiths into the public square" (p. 130) and that both reflects and protects our "conscience-driven, fundamental need for religious search and expression" (pp. 123–24).

Feldman is a prominent and prolific young legal scholar who has written extensively about religious freedom, church-state relations, and the challenges posed by radical Islam and post-invasion Iraq.[22] Hasson is the founder and chairman of the interfaith Becket Fund for Religious Liberty and a longtime happy warrior for religious freedom in the courts of law and public opinion.[23] Both authors are experienced and engaging big-media commentators. Feldman's book was excerpted for the cover story of *The New York Times Magazine,* and Hasson's work for Muslim free-exercise claimants has led to talk-show

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20. *See* FELDMAN (p. 251) (noting that our religious diversity "has often been called a blessing and a source of strength or balance, yet it also remains . . . a fundamental challenge to the project of popular self-government").

21. *See, e.g.,* HASSON (p. 2) (posing the question, "[h]ow do you reconcile claims of absolute truth with human freedom in a pluralistic society?").

22. NOAH FELDMAN, AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY (2003); NOAH FELDMAN, WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING (2004). At least one reviewer of *Divided by God* has expressed surprise that Feldman does not draw more extensively on these works, and on the situation in and experiences of Muslim societies, in his book about "America's church-state problem." Franklin Foer, Sunday Book Review, *'Divided by God': One Nation, Under Whomever,* N.Y. TIMES, July 24, 2005, at 14.

23. I should note that I have co-authored several amicus briefs with Becket Fund lawyers and on behalf of Becket Fund clients, and have occasionally supported the organization through financial contributions.

appearances on Al-Jazeera. Certainly, the two authors have their disagreements: Hasson, for example, has argued for school-voucher programs while Feldman believes they are inconsistent with the "American tradition of institutionally separated church and state" (p. 244). Feldman does not share Hasson's sympathy for the argument that the First Amendment's establishment clause ought not to constrain state and local governments.[24]

That said, these books are, in many ways, consonant and complementary. Neither book wades far into the weeds of parsing precedents and the Court's multi-part tests, though each author flags the doctrines and cases that are implicated by his arguments. (In brief, Feldman's focus is on what the establishment clause should permit or prohibit, while Hasson is more concerned with what the free exercise clause ought to require). Each author hopes for, and holds out the promise of, a less rancorous civil society, but neither pins that hope on a public square scrubbed clean by judges of religious expression, symbols, and activity.[25] Both Hasson and Feldman build their narrative around the development of and frictions between two misguided camps ("Park Rangers" and "Pilgrims" for Hasson, "values evangelicals" and "legal secularists" for Feldman), whose mistakes might mark the way through and beyond the culture wars. And, both put the freedom of conscience at the heart of their arguments about religious liberty, state action, and the common good.[26]

## I.

*Divided by God* features a diagnosis, two camps, three principles, a proposal, and a hope. Feldman's diagnosis, in a nutshell, has two parts: First, "[w]e are, increasingly, a nation divided by God. Although we all believe in religious liberty and almost no one wants an officially established religion, we cannot agree on what the relation between religion and government should be" (p. 235).[27] Feldman's point is not simply that people's religious

24. *Compare* FELDMAN (pp. 24–27) (presenting, and critiquing, the "revisionist" view of the incorporated establishment clause), *with* HASSON (p. 144) (suggesting that we "give up on the incorporated establishment clause altogether").

25. *See, e.g.*, FELDMAN (pp. 14–15, 238–44); HASSON (pp. 4–6, 125–30).

26. *See, e.g.*, FELDMAN (pp. 26–42); HASSON (p. 146) ("Respect for others' consciences, even when we're sure they are wrong, is contagious. . . . Because of how we're made, we are each free—within broad limits—to follow what we believe to be true in the manner that our consciences say we must.").

27. *See also* FELDMAN (pp. 5, 6) ("[N]o question divides Americans more fundamentally than that of the relation between religion and government" or that "over the role that [religious] belief should play in the business of politics and government.").

belief and church attendance are, increasingly, good predictors of how they will vote.[28] He is interested not so much in how we vote, or in why we vote the way we do, but in our disagreements about the place of religious commitments and expression in civil and political life.

The second part of his diagnosis has to do with constitutional doctrine and the Supreme Court's precedents. Put simply, the Court has things backwards and is making things worse. That is, Feldman thinks that the Justices have contributed to our divisions, and turned our nation's Founding-era commitments upside down, by allowing public-funding programs that Feldman believes are divisive and burden dissenters' consciences while aggressively policing public religious expression, symbols, and displays. At the center of this book, then, is the "irony" that neither side of the God-line is getting what they really—or, at least, should—want. Those whom Feldman describes as "legal secularists" have, in recent decades, "failed to hold the line on the ban of government funding for religion, the cornerstone of early legal secularism and indeed of the American tradition of the separation of government institutions from the institutional church"; on the other side, "[v]alues evangelicals have simultaneously found themselves frustrated in the symbolic sphere about which they care most, and the loss of which inspired them to action in the first place" (p. 218). The Court permits public funding of religious schools in cases like *Zelman v. Simmons-Harris*[29] and *Mitchell v. Helms*[30] but disapproves public religious symbols in cases like *County of Allegheny v. ACLU*[31] and *McCreary County v. ACLU.*[32] In so doing, the Court pleases no one—and betrays America's basic commitments.

Much of the narrative in *Divided by God* traces the formation of and symbiotic relationship between two camps that "correspond[] to what today are the two most prominent approaches

28. *See* Amy Sullivan, *Do the Democrats Have a Prayer?*, WASH. MONTHLY, June 2003, at 30, 32 ("Today, conventional wisdom holds that the best way to predict a person's party affiliation is to ask how often they go to church. As political commentator Michael Barone has noted, 'Americans increasingly vote as they pray, or don't pray.'"). A widely noted Pew Forum study appears to confirm Barone's quip. *See* News Release, The Pew Forum on Religion and Public Life, Religion and Politics: Contention and Consensus 1 (July 24, 2003), *available at* http://pewforum.org/publications/surveys/religion-politics.pdf ("Religion is a critical factor these days in the public's thinking about contentious policy issues and political matters.").

29. 536 U.S. 639 (2002).

30. 530 U.S. 793 (2000).

31. 492 U.S. 573 (1989).

32. 125 S. Ct. 2722 (2005).

to the proper relation of religion and government" (p. 7). "Values evangelicals" are those who "insist on the direct relevance of religious values to political life" (p. 7) and believe that "[c]onvergence on true, traditional values is the key to [national] unity and strength" (p. 8). "Legal secularists," on the other hand, are "concerned that values derived from religion will divide us" and think that "government should be secular and that the laws should make it so" (p. 8). Despite their differences, though, it turns out that both camps are about the same thing, namely, "the challenge of achieving national unity in the face of religious diversity" (p. 220).[33] What's more, both camps' positions resonate with, even if both fail to capture, the approach that enjoyed widespread support at the Founding, namely, the protection of the freedom of conscience through an unyielding insistence on institutional and financial separation between government and religion, coupled with an untroubled acceptance of public religious symbolism and expression.[34] That is, our Founding "experiment" in the separation of the "spheres of organized religion and government" was about protecting conscience by insisting on clear "institutional" boundaries (p. 52); it was not about regulating "public religious symbolism" in order to prevent offense or secularize society (p. 50).

Today's "legal secularists," in Feldman's account, are the somewhat chastened successors to those "strong secularists" who appeared on the scene in the late nineteenth century, preaching "a comprehensive worldview that presented itself as an alternative to religious conceptions of the world" (p. 129). These secularists' aim was not Madison's—i.e., the protection of religion from the corrupting influence of public support—and was not even the maintenance of a respectful separation between the public sphere of government and the private sphere of faith. It was, instead, the "wither[ing] away" of religion and the triumph of "scientific reason" (p. 130). The trouble was, they overplayed their hand. Strong secularism never managed to "overcome its self-imposed burden of elitism" (p. 148). Americans were, then

33. *See also* FELDMAN (p. 8) (noting that Americans "strive to be a nation with a common identity and a common project"); *id.* (stating that for both values evangelicals and legal secularists, the "goal" is "reconciling national unity with religious diversity"); *id.* at 251 ("Out of the many strands of religious faith that have only increased in America since our founding, we have been trying to construct a single nation.").

34. *See* FELDMAN (p. 51) (noting that Americans at the Founding "did not react with horror to public symbols of religion" because "they were not secularists in the modern sense" and were not "particularly concerned with keeping religious symbolism out of the public sphere").

as now, comfortable being comfortably religious. The "legal secularists" who followed, though, did better, in part because they took their case to the courts. Legal secularism succeeded, while strong secularism had failed, because its proponents "went to great lengths to insist that [they] had nothing against religion, so long as religion remained disconnected from government.... Religious diversity could be reconciled with national unity by keeping the state secular" (p. 182). And so, starting with Justice Black's opinion in *Everson*—an opinion that, as Feldman recognizes, constitutionalized a tendentious and inaccurate historical account[35]—and continuing for the next several decades, the Justices played the role not of secularist opponents of religion, but as gimlet-eyed monitors of a "sharp line between religion and government" (p. 170) and, therefore, as protectors of religious minorities and conscience.

Notwithstanding its successes, though—and perhaps because of them—"legal secularism . . . generate[d] a dissenting response" (p. 185). If strong secularism was chastened and made more effective by evolving into legal secularism, the "fundamentalists" of the early twentieth century did the same thing, evolving over time into what Feldman calls "values evangelicals." As Feldman describes—and Spencer Tracy notwithstanding[36]—"fundamentalism" was not a backwater reaction to evolution in schools, but a theological counter-movement, a "response to liberal developments in Christian theology" (p. 138).[37] Although

35. *See* FELDMAN (pp. 174–75); *see also* John Courtney Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23, 33 (1949) ("The First Amendment has been stood on its head. And in that position it cannot but gurgle juridical nonsense."). *See generally, e.g.*, PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002).

36. Spencer Tracy starred in the 1960 film, *Inherit the Wind*, playing a character based on Clarence Darrow. As Feldman notes, the film helped to make orthodox an understanding of the "Scopes Monkey Trial" that "misses much of what the trial meant for the relationship between religion and government in the United States." FELDMAN (p. 145). Feldman's own account, which draws on Edward J. Larson's excellent study, SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION (1997), is both richer and more sensitive than the cartoonish account that most of us have absorbed. Feldman reminds us, for example, that the trial was not the humiliating defeat for traditional religion depicted in film but was instead a rejection of a crude, eugenicist version of Darwinism and the "last gasp of strong secularism in America." FELDMAN (p. 141). It is worth noting that, throughout the book, Feldman is consistently and refreshingly fair both to contemporary evangelicalism and its roots in fundamentalism. *See, e.g., id.* at 233 ("[V]alues evangelicals . . . are out not to subvert the Constitution in favor of religion but rather to defend the Constitution in what they consider its truest form.").

37. Feldman observes that the concerns that animated A.C. Dixon's early twentieth century series of volumes, THE FUNDAMENTALS: A TESTIMONY TO THE TRUTH (R.A. Torrey & A. C. Dixon eds., 2003) (1917), were "Christian modernism" and "liberalism," not science. FELDMAN (p. 137). For an excellent study, see GEORGE M. MARSDEN,

fundamentalism is widely thought to have been defeated by Darrow, in fact it did not recede from the national scene until it helped kill off "strong secularism" and lay the groundwork for legal secularism's current rival.

In the late 1960s and early 1970s, "the sexual revolution and the rise of the counterculture helped fuel an oppositional revival of evangelical faith and fundamentalist belief" (p. 190). This "new national religious movement," Feldman writes, would soon "change the face of American religion and politics alike" (pp. 187–88). His emphasis, though, is not only on the values evangelicals' reaction to legal secularism, but on the two camps' shared concern for unity through common values. Where legal secularists might worry about the "divisive" potential of religion, though, the values evangelicals emphasized the unifying and positive effect of religiously grounded values, symbols, and expression. Accordingly, they managed to forge an alliance between traditional Protestants and Catholics, an alliance that "fundamentally transformed the public conversation about religion and government in America" and that helped to "develop a public philosophy that expressly acknowledged the importance of religious faith in shaping common values" (pp. 197–98). Also, values evangelicals managed to take back some of the constitutional ground occupied in previous decades by the legal secularists, thanks in part to Professor—now Judge—Michael McConnell, the "Thurgood Marshall of values evangelicals" (p. 207).[38]

Feldman's story of the rise of and stalemate between values evangelicals and legal secularists is also the story of the working-out in American history of three thematic principles: the freedom of conscience, nonsectarianism, and unity. The book's opening, longest chapter makes the case, drawing on Feldman's

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FUNDAMENTALISM AND AMERICAN CULTURE: THE SHAPING OF TWENTIETH-CENTURY EVANGELICALISM, 1870-1925 (2d ed. 2006). *See also* GEORGE M. MARSDEN, UNDERSTANDING FUNDAMENTALISM AND EVANGELICALISM (1991).

38. In cases like *Rosenberger v. Rectors & Visitors of the University of Virginia*, Feldman contends, McConnell and other values evangelicals were successful in casting religious believers as vulnerable minorities, victims of discrimination by state actors who mistook the naked public square for government neutrality. *See* 515 U.S. 819 (1995). Thus, the "Establishment Clause [was turned] on its head," and the Court in the 1980s and 1990s embraced "a position almost squarely the opposite of the original intent of the Establishment Clause." FELDMAN (p. 209). At the same time, Justice O'Connor's "endorsement test" served to curtail many outcomes that, Feldman believes, values evangelicals cared about—public prayers, religious instruction in schools, public symbols, etc. And so, "a new generation of constitutional lawyers and advocates has increasingly come to accept both the expansion of government funding of religious institutions and restrictions on public religion as normal and constitutionally appropriate." *Id.* at 212.

earlier work,[39] that the "principled reason"[40] behind both of the First Amendment's religion clauses "was to protect the liberty of conscience of religious dissenters—and everybody involved in the process understood that fact" (p. 20).[41] Americans at the Founding, Feldman contends, agreed broadly and firmly with James Madison's argument "that coercing individuals in matters of conscience is fundamentally wrong because religious faith can be meaningful only when it follows from the individual's own belief and judgment" (p. 36). They also believed that the freedom of conscience is threatened not only by coerced professions of faith but also by public funding for religion.

If the foundational principle for the religion clauses was freedom of conscience, it was America's "religious diversity"—already a reality, even in our early history—that "drove [the] push for a constitutional amendment on religious liberty" (p. 43). Similarly, it was the nation's "drastically increased religious diversity" (p. 60) in the early nineteenth century that not only stoked the fires of nativism and anti-Catholicism,[42] but also provided the occasion for Feldman's second theme: "nonsectarianism" (p. 61). Feldman acknowledges, of course, that nonsectarianism—i.e., "the claim that there [are] moral principles shared in common by all Christian sects, independent of their particular theological beliefs" (p. 61)—was long and often employed as a vehicle for anti-Catholic ideology during the school-wars.[43] The

39. *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002) [hereinafter Feldman, *Intellectual Origins*]; Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002).

40. *Cf.* STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995).

41. *See also, e.g.*, FELDMAN (p. 27) ("Americans in the decades leading up to the First Amendment broadly agreed that government—whether state or federal—had no authority to coerce individuals in matters of religious conscience."); *id.* at 26 (stating that the liberty of conscience was the common, "clearly articulated principled rationale for free exercise *and* nonestablishment"); *id.* at 48 (noting that, although the Amendment itself did not, in the end, refer to "conscience," "it is certain that everyone understood that the liberty of conscience was the principled reason to prohibit establishment and guarantee free exercise").

42. *Cf., e.g.*, Richard W. Garnett, Book Review, *American Conversations With(in) Catholicism*, 102 MICH. L. REV. 1191, 1199 (2004) [hereinafter *American Conversations*] ("From the Puritans to the Framers and beyond, anti-'popery' was thick in the cultural air breathed by the early Americans, who were raised on tales of Armadas and Inquisitions, Puritan heroism and Bloody Mary, Jesuit schemes and Gunpowder Plots, lecherous confessors and baby-killing nuns."); John T. McGreevy, A History of the Culture's Bias, Remarks at Anti-Catholicism Conference: The Last Acceptable Prejudice? (May 24, 2002) ("In a certain sense, . . . anti-Catholicism is integral to the formation of the United States.").

43. *See, e.g.*, CHARLES LESLIE GLENN, JR., THE MYTH OF THE COMMON SCHOOL

"ideology of nonsectarianism" made it possible for those who professed allegiance to the freedom of conscience, and who also—or, they might have said, therefore[44]—stridently opposed any public funds for Catholic schools, to nonetheless advocate religious education in common schools, in order to provide the "shared morality" without which "collective political life would be impossible" (p. 81). Nonsectarianism, to be clear, was not secularism any more than was the Founders' approach to church-state separation. It was offered and embraced, in Feldman's account, as a way to forge national unity, in conditions of religious diversity, in a way that was thought to respect Americans' fundamental commitment to the liberty of conscience.

Feldman several times turns to Justice Frankfurter as a voice for the third thematic principle that runs through *Divided by God*—unity. In *Minersville School District v. Gobitis*, for example, Frankfurter emphasized the importance of the flag as a symbol of, and vehicle for, "national unity, transcending all internal differences."[45] Our public schools, he insisted in *McCollum v. Board of Eduction,* do and should serve as "educational engines of national unity" (p. 177), and so "[i]n no activity of the state is it more vital to keep out divisive forces than in [the] schools."[46] If our religious diversity had pushed Americans at the Founding to call for a constitutional amendment protecting the freedom of conscience, an appreciation for the importance of national unity and common culture gave rise to a worry about the consequences of elevating conscience, difference, and identity. Again, the idea of unity-through-shared-values was and remains as appealing for values evangelicals as for legal secularists. Like the Protestant partisans in the nineteenth century school-wars, today's values evangelicals, Feldman writes, "main-

(1988); HAMBURGER, *supra* note 35; LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925 (1987); JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM: A HISTORY (2003); *see also* Richard W. Garnett, *The Theology of the Blaine Amendments,* 2 FIRST AMD. L. REV. 45 (2003); *American Conversations, supra* note 42.

44. As Feldman notes, in his discussion of the proposed Blaine Amendment, part of the case for the Amendment and similar measures was that "Catholicism and democracy were incompatible," precisely because "Catholic education [was] necessarily incompatible with liberty of conscience, and hence with republicanism." FELDMAN (p. 84).

45. 310 U.S. 586, 596 (1940), *overruled by* West Virginia St. Bd. of Ed. v. Barnette, 319 U.S. 624 (1943).

46. McCollum v. Board of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J. concurring).

tain that national unity requires Americans to reach some basic substantive agreement on the values we share" (p. 227).

As was noted earlier, Feldman's diagnosis is that we have things backwards at present, and this is why we are "divided by God." The increasingly long line of cases permitting funding of religious schools and charities—so long as funds are disbursed even-handedly, in accord with neutral criteria—cannot be squared with a robust understanding of freedom of conscience. Those that invalidate or too-closely scrutinize public religious displays are equally ahistorical and inconsistent with the unifying aims and effects of the nonsectarian tradition. Values evangelicals and legal secularists alike seek "national unity in the face of religious diversity" (p. 220), but "neither [side] successfully reconciles religious diversity with national unity" (p. 14). And so, Feldman's proposal: "[W]e 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" (p. 9). In a nutshell, "no coercion and no money" (p. 237). This proposal, Feldman explains, asks both legal secularists and values evangelicals to give something up, in order to better achieve what it is that they both *really* want. Values evangelicals need to give up their calls for equal-treatment and neutrality in the funding context and to instead agree that a proper respect for freedom of conscience requires strict adherence to a no-funding rule.[47] Legal secularists, for their part, need to recognize and accept the fact that religious values and arguments have always been a part of our civic conversations and so abandon their campaign against public religious symbols and acknowledgments.[48]

And, finally, the hope: Our goal is, and has long been, "to protect religious liberty without sacrificing the aspiration of living together as a single nation" (p. 249). True, there are "tensions that must inevitably exist when citizens with different beliefs must cooperate in the project of collective self-government"

47. FELDMAN (p. 15) ("Values evangelicals may not like it, but they must recognize that government funding of religion will, in the long run, generate disunity, not unity.").

48. FELDMAN (p. 9) ("I suggest that 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."); *see also id.* at 251 ("Secularists must accept the fact that religious values form an important source of political beliefs and identities for the majority of Americans, while evangelicals need to acknowledge that separating the institutions of government from those of religion is essential for avoiding outright political-religious conflict.").

(pp. 250–51). The way to reconciliation, through the current ironies and contradictions, is "to build on the common ground we already have, ground well trodden by our constitutional traditions" (p. 251).

II.

Seamus Hasson, like Feldman, provides a diagnosis of our culture wars over religion and a taxonomy of two feuding, mistaken, camps: the "Pilgrims," whose response to pluralism is "to use the state to coerce the religious consciences of those with whom they disagree" (p. 2), and the "Park Rangers," who insist "that only a society that owns no truth at all can be safe for freedom" and for whom "the price of freedom for everyone is that no one can be allowed to publicly claim that anything transcendent is absolutely true" (p. 3).[49] The Park Rangers, by the way, take their name from officials in San Francisco who tolerated a "stray parking barrier"—a "small, bullet-shaped lump of granite"—in Golden Gate Park's Japanese Tea Garden until a group of "new agers" decided it looked like a Shiva Lingam and started worshipping it, at which point "[t]he bureaucrats roused themselves and announced that it was their duty to prevent worship on (not to mention of) public property" (p. 3).

*The Right to Be Wrong* is not a history of church-state relations in America, nor does it purport to provide a close, sustained analysis of the Supreme Court's caselaw. It is an argument about an idea—the freedom of conscience—where it comes from, what it means, and what an appropriate respect for it requires. That said, along the way Hasson writes about Madison, Jefferson, the *Memorial and Remonstrance*, and the Virginia Bill for Establishing Religious Freedom (pp. 71–93); about nineteenth century anti-Catholicism, the persecution of Mormons, and General Grant's anti-Semitic General Order No. 11 (pp. 101–11); and about the disarray in the Court's establishment clause cases and its retreat from a free exercise clause that protects "a full throated natural right to religious liberty" (pp. 131–44, quote at p. 144).

49. *See* HASSON (p. xi) ("[The Pilgrims] thought only the truth was permissible in public and so they restricted other people's freedom. . . . For the Park Rangers, freedom requires driving away other people's truths, no matter how harmless."). Particularly during the Holidays, Hasson observes, "[i]t seems that no office of government, no matter how obscure, can conduct its affairs in peace without fear of a fight erupting between those who say that only their true religion belongs in public and those who say that no religions do." *Id.*

Hasson's reflections on the basis, content, and implications of the freedom of conscience are fleshed out and enlivened by the examples of a wide range of American heroes (and some villains) of conscience. For example, his insistence that we are "social creatures" who "don't believe in private because we don't live in private" (p. 12) is supported by the story of John Lyford, an Anglican minister who was banished by Plymouth's Puritan Governor Bradford for "'set[ting] up a public meeting apart on the Lord's Day'" (p. 12). The mistake of thinking "that religious divisiveness is minimized by repressing proselytism" (p. 35) is illustrated by Governor Winthrop's battles with Roger Williams and Anne Hutchinson. The execution of Mary Dyer, "'a very proper and comely young woman'" (p. 41) who was hanged as a Quaker on Boston Common in 1660, and the imprisonment by Chinese officials of a six-year-old boy, whom Tibetan Buddhists believe to be the reincarnated Panchen Lama, underscore Hasson's claim that "there are moral limits on the government's power, limits that follow from who we are" (p. 43). And, young Zach Hood's disappointment at not being permitted by his teacher to read a story about Jacob and Esau from his favorite book, *The Beginner's Bible,* drives home the points that both our humanity and our religious freedom are "bigger than just our minds and hearts" (p. 126) and that, accordingly, "an authentic pluralism that allows all faiths into the public square" is most consistent with the truth about "who we are" (p. 130).

Hasson, like Feldman, writes in response to a fundamental problem—one that neither the legal secularists nor the values evangelicals, neither the Pilgrims nor the Park Rangers, manage to get right: "How do you reconcile claims of absolute truth with human freedom in a pluralistic society" (p. 2)? And for Hasson, as for Feldman, the solution to this problem is to embrace, not to domesticate or trample, the freedom of conscience, properly understood.

What are we talking about, then? What is "conscience" and what does it have to do with the freedom of religion? Hasson says:

> Conscience is the interior, quintessentially human voice that speaks to us of goodness and duty, the voice we must obey if we are to keep our integrity. It counsels doing good and avoiding evil, and serves as a referee to rule on which is which. What is more, conscience requires action, not just con-

viction. It demands that we live according to the truth as we know it (p. 14).[50]

So, an appropriate respect for the freedom of conscience—a respect without which, Hasson insists, no way through the "culture war" is possible—requires more than mere tolerance, more than freedom of belief, more than permission for private devotion. Freedom of conscience is, in a sense, the reason *for* pluralism, and also the appropriate and just response *to* pluralism.[51]

Hasson's arguments about conscience, and about its content and implications, are rooted in *anthropological* claims about who and what we human beings are.[52] We are, for starters, "intelligent beings; we want to *know*" (p. 118). "[W]e consider the search for truth an adventure, not a chore" (p. 119). In addition, "[w]e humans are social creatures," and "[w]e don't believe in private because we don't live in private" (p. 12). What's more, a "thirst for transcendence is deeply rooted in our humanity. It's natural for us to seek truth, goodness and beauty. And it's just as natural for us to want to express what we believe we've found" (p. 27). We are, in the end, "a community of conscientious truth-seekers and good-lovers.... To be human is to long for a truth desired, maybe even half-remembered, but not fully grasped" (pp. 122-23). From all of these "is" claims flow Hasson's central "ought": "[W]hen something quintessentially human requires freedom in order to be authentic, it's wrong to rob it of its authenticity by robbing it of its freedom" (p. 124).

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50. "[Conscience is] not infallible but it is in charge—and it demands action, not just belief." HASSON (p. 15). Elsewhere, Hasson writes:

> Conscience is what lives at the crossroads where the questing, restless human intellect meets the free and hungry human will. We experience it as something of a mystery: it's clearly part of us, yet seems curiously distinct; its judgments are our own judgments and yet we find that we must obey them.... It's the interior voice that requires the best of us, insisting that we seek what's true and choose what's good in the concrete circumstances of life.

P. 121.

51. *Cf.* HASSON (p. 15) ("Religious diversity is thus a fact of life. It is neither good nor bad in itself. It can't be outlawed and needn't be glorified. It simply is. The question isn't how to maximize diversity, nor how to minimize it. The question is how to live authentically in the midst of it, while allowing others to do the same.").

52. HASSON (p. 117) ("[Religious liberty] must follow, in other words, from a universal human *truth.* (Cue scary music.) Yet the truth is nothing to fear; it's no threat to freedom.... Human rights are all the more broadly secured when they're grounded in this sort of *human* truth claim."); *see also* Richard W. Garnett, *Christian Witness, Moral Anthropology, and the Death Penalty,* 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 542 (2003) ("[M]oral problems... are *anthropological* problems, because moral arguments are built, for the most part, on *anthropological* presuppositions. In other words,... our attempts at moral judgment tend to reflect our 'foundational assumptions about what it means to be human.'" (citation omitted)).

It is a truth about human beings, then, that, because we are human beings, we search for transcendence and express both the search and its fruits in public. The freedom of conscience is grounded in, and takes its shape from, truth about human nature. It includes a right to embrace fully, and to live out, and to talk to others about, the truth as one sees it. These rights "are moral limits on the government's power, limits that follow from who we are" (p. 43). And precisely because it is, in a real sense, *inhuman* to insist on privatized religion and on a naked public square—"to leave the cave walls bare" (p. 127)—doing so will not reduce "divisiveness" or bring about social unity. Proselytism in public is as natural to human beings as the search for meaning that the freedom of conscience protects.[53]

The facts about us provide good reasons not just to protect and welcome private religious expression and activity in the public square of civil society, but also for government to recognize and acknowledge the importance of religious faith—or, more precisely, *faiths*—to our human nature and to our lives together. This is not a matter about which government can or should be "neutral."[54] The solution that is most true to who we are, and at the same time respects the freedom of conscience, is not that of the Puritans (i.e., recognition by government of one faith) or the Park Rangers (i.e., government silence), but "is an authentic pluralism that allows all faiths into the public square" (p. 130). This, at the end of the day, "is the solution to the culture war"—to respect others' consciences, "[n]ot because it's nice," but

> because it conveys an important idea: . . . Because of how we're made, we are each free . . . to follow what we believe to be true in the manner that our consciences say we must. That is, we are free to celebrate our beliefs in public and try respectfully to persuade others of them. We are free, ultimately, to organize our entire lives around them" (p. 146).

53. HASSON (p. 35) (describing "Winthrop's Folly" as "the notion that religious divisiveness is minimized by repressing proselytism in public" and stating that "[t]he lesson that Winthrop should have learned" is "that dissent, and therefore proselytism and conversion, are functions of conscience").

54. HASSON (p. 128) ("It's impossible for the government to be silent on religion in culture because its silence itself speaks volumes. If the government were uninvolved in our culture generally, there would be no problem with it being uninvolved in our religious expression. But it's not uninvolved at all."); *id.* at 128–29 (contending that to say nothing "is implicitly saying something profound—that religion is at best an unimportant, and at worse a shameful, aspect of our lives").

III.

It seems fair to evaluate Feldman's proposal —i.e., no public funding of religious institutions but toleration of religious expression in public life—with reference to its predicted and hoped-for result, namely, an end to our God-related political divisions. It is not clear, though, that we really *are* "divided by God"—at least, not in the way that Feldman says we are. His opening diagnosis, remember, is that "no question divides Americans more fundamentally than that of the relation between religion and government" (p. 5). One might just as well say, though, that for all of our disagreements about various hot-button issues, and notwithstanding the loud voices of those on either end of the "religion in public life" debate, there is actually widespread agreement, or at least a fairly comfortable majority view, about religion's place in politics. That is, most people in America probably think, as Feldman does, that the institutions of religion and government should be separate, but also that religious faith remains an important part of both individual and social life, one that—consistent with the reality of pluralism and a commitment to the rights of minorities—does and should play a role in shaping our culture and institutions.

Let's assume, though, that we *are* "divided by God," in the way that Feldman says we are. Is his proposal likely to reduce or forestall the divisions he regrets?[55] If, with the prodding of the Supreme Court, values evangelicals were to give up on school vouchers and charitable choice, and legal secularists were to accept Ten Commandments monuments and public Christmas displays, would we be rewarded with national unity and political peace? Because Feldman's tone is so generous and fair-minded, it seems a bit churlish to wonder whether, in the end, he has it exactly backwards. It is not obvious that Americans are any more divided over school vouchers and charitable choice than they are over government acknowledgments of religion and public displays of religious symbols. True, school-choice proposals are bitterly contested in the political arena, but the strife associated with voucher plans has as much to do with the interests of the teachers' unions as with the role of religion in public life.

55. *See* Foer, *supra* note 22, at 14 (suggesting that Feldman's "sunny temperament" has "led him to overestimate the ease of negotiating a secularist-evangelical truce"); Michelle Goldberg, *One Nation, Divisible,* SALON.COM, July 23, 2005, http://dir.salon.com/story/books/review/2005/07/23/feldman/index.html ("Feldman is very wrong about the America that the Christian right is seeking, and about the aims of the group he calls legal secularists.").

What's more, Professor Berg seems to be on solid ground when he suggests that herding those who cannot afford to exit into fairly homogenous government schools generates far more searing and contentious disputes (Christmas carols, intelligent design, sex education, etc.) than would a reasonable school-choice program.[56]

With respect to school vouchers, though, Feldman seems to have a different kind of "divisiveness" in mind. His concern is less with the tone or content of the public debate over school choice than with what he asserts to be the likely content or results of religious-school education. "Even when filtered through vouchers distributed by the government and directed by individual choice," Feldman contends, "state financial aid for religious institutions like schools or charities does not encourage common values; it creates conflict and division" (pp. 244–45). Religious schools, he fears, will not—if left unregulated, anyway—promote "*common* values[.] It is at least as likely that balkanized schools will generate balkanized values as that they will promote a common national project" (p. 245). School-voucher plans, he warns, "promot[e] difference and nonengagement" (pp. 245–46).

Certainly, claims like these have long been a part of our education-reform and church-state debates. Public schools, it is often argued, are charged with the mission of creating tolerant, engaged, informed, and other-regarding citizens, and we need to worry that religious schools will transmit an unhealthy sectarian narrowness and fail to foster the required degree of public engagement. Indeed, arguments like these are entirely consonant with the views expressed for several decades by legal secularist Justices.[57] But as I have argued elsewhere,[58] one can easily concede the importance to the political community of the formation, development, and training of capable and decent persons while

56. Thomas C. Berg, *How Wide the Divide?*, CHRISTIANITY TODAY, Sept. 12, 2005, http://www.christianitytoday.com/books/features/bookwk/050912.html.

57. *See, e.g.*, FELDMAN (pp. 170–78) (discussing, among other things, the opinions of Justices Frankfurter and Black in the *Everson* and *McCollum* cases); *see also, e.g.*, School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 241–42 (1963) (Brennan, J. concurring) ("[T]he public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions.").

58. *See* Richard W. Garnett, *Regulatory Strings and Religious Freedom: Requiring Private Schools to Promote Public Values*, *in* EDUCATING CITIZENS: INTERNATIONAL PERSPECTIVES ON CIVIC VALUES AND SCHOOL CHOICE 324 (Patrick J. Wolf et al. eds., 2004); Richard W. Garnett, *The Right Questions about School Choice: Education, Religious Freedom, and the Common Good*, 23 CARDOZO L. REV. 1281 (2002).

still recognizing that most private and religious schools do, in fact, educate such persons. In fact, leading researchers have concluded that "[p]rivate schooling . . . is anything but privatizing."[59] Indeed, there are good reasons 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.[60] All things considered, Charles Glenn is probably right to object that "[t]he idea that schools that undermine societal norms would flourish unchecked under a well-designed school voucher program is a sort of ghost story to frighten the gullible."[61]

Now, one might suspect that constitutional invalidation of school-voucher programs, on the ground that they promote social conflict, would itself promote serious political strife. Indeed, as Professors Nowak and Rotunda have noted, it could be that judicial efforts to impose tranquility and cohesion actually exacerbate the conflicts, and sharpen the cleavages, that a divisiveness-focused inquiry purports to police.[62] 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 judicially enforceable mandate.[63] 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."[64] Government actions burdened with such "potential," he rea-

59. Christian Smith & David Sikkink, *Is Private School Privatizing?*, FIRST THINGS, Apr. 1999, at 16, 16.

60. *See, e.g.*, JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 183 (1999); David E. Campbell, *The Civic Side of School Reform: How Do School Vouchers Affect Civic Education?* (Univ. of Notre Dame, Program in Am. Democracy, Working Paper No. 4, May 2002).

61. Charles L. Glenn, *School Choice as a Question of Design*, *in* EDUCATING CITIZENS, *supra* note 58, at 339, 343.

62. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 17.4, at 1194 (4th ed. 1991); *see also* Steven D. Smith, *Believing Persons, Personal Believings: The Neglected Center of the First Amendment*, 2002 U. ILL. L. REV. 1233, 1248 [hereinafter Smith, *Believing Persons*] ("[I]t is not clear that any particular constitutional provision on this subject is well calculated to eliminate contention: excluding religion from some area of the public domain can be as controversial as including it.").

63. *See generally* Garnett, *Religion, Division, and the First Amendment*, *supra* note 14.

64. 403 U.S. 602, 622 (1971).

soned, pose a "threat to the normal political process"[65] and "divert attention from the myriad issues and problems that confront every level of government."[66] 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."[67]

*Divided by God* confirms that this "political division" argument—that is, the claim that sharp divisions in our political community are not just the perhaps regrettable result of normal politics and disagreements, but also the justification for invalidation by courts of the offending policies—is enjoying something of a renaissance. Like Justice Breyer, Feldman appears to endorse the view that the Constitution authorizes those charged with its interpretation to protect our "normal political process" from a particular kind of strife and to purge a particular kind of disagreement from politics and public conversations about how best to achieve the common good. As Justice Breyer put it in his recently published Tanner Lectures, "the need to avoid a 'divisiveness based upon religion that promotes social conflict'"[68] provides a "critical value" that ought to direct the exercise of judicial review.[69] As I have argued elsewhere, though, the temptation that today's well-publicized and cable- and Internet-enhanced disagreements present to embrace a managerial, supervisory judicial stance toward religion in public life, and toward public discourse generally, should be resisted.[70] Observations and predictions, by judges or anyone else, of "political divisiveness along religious lines" should not play a prominent role in the interpretation and application of the religion clauses.

Of course, Feldman could respond to all this by saying that public funding of religious institutions—whether it is divisive or not—is unconstitutional because it burdens the freedom of conscience and so conflicts with the "principled reason" behind the religion clauses (p. 20). As Feldman demonstrates, the freedom of conscience was at the heart of Americans' thinking at the Founding about religious liberty and church-state relations. As

65. *Id.* at 622.

66. *Id.* at 623.

67. *Id.* at 622.

68. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 122 (2005) (quoting Van Orden v. Perry, 125 S. Ct. 2854, 2868 (2005) (Breyer, J. concurring)).

69. *Id.* at 122, 124.

70. *See generally* Garnett, *Religion, Division, and the First Amendment*, *supra* note 14.

John Witte has written, "[l]iberty of conscience was the general solvent used in the early American experiment in religious liberty. It was almost universally embraced in the young republic—even by the most rigid of establishmentarians."[71] What's more, it was widely believed—contrary to Locke, who, as Feldman reports, "did not understand payment of taxes to support the established church as a violation of the[] liberty of conscience" (p. 32)—that "[c]ompelled taxes to support religion . . . *always* violate religious liberty, even when the taxpayer does not directly object" (p. 37). It is fair to ask, though—were those who believed this right?

Why should we think, even if James Madison thought, that the freedom of conscience is unjustly burdened by the use of public funds raised through taxes to pay the tuition of eligible students attending religiously affiliated schools?[72] Such a situation does not present, really, an "establishment" of religion like those with which the people who ratified the First Amendment, and debated religious liberty in the late eighteenth century, were familiar.[73] True, Jefferson's proclamation "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical"[74] packs a lot of rhetorical weight, but it is not clearly reflected in politics, law, and government today. Every taxpayer furnishes money for the "propagation of opinions which he disbelieves"; indeed, every taxpayer pays for all kinds of government actions to which he has serious objections in conscience. (Although Feldman does not spend time on the question of free-exercise exemptions, it seems that religious believers' freedom of conscience is burdened more seriously by, say, housing-nondiscrimination requirements and contraception-coverage mandates than by "charitable choice" policies.) As Steve Smith has observed, and

71. JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 39 (2000).

72. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 711–16 (2002) (Souter, J. dissenting) (concluding that Cleveland's school voucher program is unconstitutional because it burdens the consciences of those who object to spending public money in ways that, in effect, support religious instruction).

73. *See Van Orden*, 125 S. Ct. at 2865 (Thomas, J. concurring) (discussing the original understanding of religious establishments); Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J. dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.").

74. Thomas Jefferson, *Bill for Establishing Religious Freedom*, *in* GREAT QUOTATIONS ON RELIGIOUS FREEDOM 217 app. 3 (Albert J. Menendez & Edd Doerr eds., 2002).

as Feldman has recognized in other writing,[75] good explanations simply have not yet been provided "for why the burden on conscience applies when a taxpayer objects . . . to expenditures that may benefit religion but not when a taxpayer objects on religious or conscientious grounds to expenditures that run contrary to the taxpayer's beliefs."[76]

* * * * *

Hasson provides a concise and powerful argument about the tight connections between human nature, freedom of conscience, and religious liberty. His reminder that most of the really interesting and important questions and problems are, in the end, questions and problems of moral anthropology, is welcome. Our religion clauses case law, and our thinking about religious freedom and church-state relations, would be improved if others followed Hasson in focusing on who we are, on who live under governments constrained by the First Amendment, and on why and how it matters.[77]

Hasson takes care to insist that his is not a *religious* argument for religious liberty and freedom of conscience. *The Right to Be Wrong* is "about religious liberty but," he insists, "it is not a religious book. In fact, it can't be. A religious argument for religious liberty in America would convince, at most, those Americans who believed in that religion" (p. xii). The challenge, as he sees it, is "to guarantee a robust religious freedom for all . . . and base it on something that's undeniable to both Pilgrims and Park Rangers" (p. 6). He states that Roger Williams was "on to something very big" when he insisted that people "require freedom to obey their consciences even when they're mistaken," but "he got the proof wrong" (p. 33). That is, he erred by basing his argument on *religious* claims, on claims about who God is, instead of who *we* are. James Madison, however, in his *Memorial and Remonstrance,* grounded religious liberty "on something that could itself be neither revoked nor restricted: human reason and conscience" (p. 75). His argument "was based not on theology but on human nature, albeit a human nature that was presumed to seek God—indeed, to be duty-bound to do so" (p. 75). Hasson's own claim, he suggests, improves on Madison. He proposes that religious liberty is a human right that follows from a "universal

75. Feldman, *Intellectual Origins*, *supra* note 39, at 426.

76. Steven D. Smith, *What Does Religion Have to do with Freedom of Conscience?*, 76 U. COLO. L. REV. 911, 913–14 n.13 (2005).

77. *See generally, e.g.*, Smith, *Believing Persons*, *supra* note 62.

human *truth*," from "specific traits that are typically human always and everywhere" (p. 117). This "truth" is that "we have a conscience-driven, fundamental need for religious search and expression. It is quintessentially human. And when something quintessentially human requires freedom in order to be authentic, it's wrong to rob it of its authenticity by robbing it of its freedom" (pp. 123–24).

But isn't this argument, in the end, as "religious" as Williams's or Madison's? True, it does not appeal directly or explicitly to revelation. But it is not hard to imagine a skeptic responding to Hasson, "look, I observe the same needs, the same desire for transcendence, in human beings that you do. I'm not sure where these needs and this desire come from, though. In any event, these needs and desires appear to prompt a fair number of people to act in foolish, even dangerous ways. I'm not sure what you mean by 'quintessentially' and 'authentic' but nothing you have said requires me to agree that the observable tendency of many people to engage in 'religious search and expression' should trump other policy concerns and goals or require the public to endure more than minimal inefficiency and inconvenience." By insisting that his is a "just the facts" argument, Hasson might deprive his very eloquent arguments of the ability to secure more than the toleration for religious dissent or religiously motivated behavior that, he insists, is not enough.

Perhaps Hasson's argument, on examination, has to be regarded—despite his protests to the contrary—as "religious" because, in the end, only religious arguments can yield the universal-human-rights conclusions he endorses? Whether or not the Framers "got the proof wrong," the fact is that "[t]he principal historical justification for our constitutional commitment to religious freedom was a religious rationale," one that "relied upon religious premises and worked within a religious world view."[78] And perhaps, as Steve Smith has argued, the "religious justification [remains] the most satisfying, and perhaps the only adequate justification for a special constitutional commitment to religious liberty."[79] Maybe, as Michael Perry contends, strong human-rights claims, of the kind that Hasson thinks are required to adequately protect religious liberty and conscience, require a

78. Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 149 (1991); *see also, e.g.*, Gregory C. Sisk, *Stating the Obvious: Protecting Religion for Religion's Sake*, 47 DRAKE L. REV. 45 (1998).
79. *Id.* at 149.

religious—even if not an explicitly denominational or sectarian—ground.[80]

As was noted earlier, neither Hasson nor Feldman spends much time fleshing out the details of how arguments about conscience, national unity, and human nature translate into usable judicial doctrines. This is, of course, one of the reasons why both books are such pleasant and engaging reads. Still, *The Right to Be Wrong*, in particular, might have benefited from more sustained attention to the working out of its anthropological arguments' legal implications. We know, for example, that Hasson believes the First Amendment is living through something of a "midlife crisis" (p. 132) and that "the incorporated establishment clause has completely eluded principled interpretation" (p. 139). So, he suggests, we should dis-incorporate the establishment clause, but not the free exercise clause. The establishment clause, he says, "is incapable of answering our questions, so we should stop asking it any" (p. 144). The free exercise clause, though, "is perfectly functional, if judicially repressed. . . . As incorporated, it could codify the full-throated natural right to religious liberty while making moot the conundrum of the incorporated establishment clause. . . . [T]he right to free exercise itself precludes establishment" (p. 144).

This is a huge claim, one that—even in a short book whose subject is not constitutional doctrine—deserves more discussion. Is the idea that courts should keep doing what they are doing, in terms of evaluating and invalidating what are now alleged to be unconstitutional "establishments" of religion, but simply change their terminology? If so, which of the Court's establishment cases or doctrines would change, or apply differently, once transposed into a free-exercise key? Certainly, one of the things that is and has long been thought to be wrong with establishments of religion is that they involve or result in constraints on the religious liberty of persons and communities. It seems, though, that—like Feldman—Hasson believes that many of the state actions that are now regarded as or alleged to be "establishments" do not, in fact, burden conscience or violate free exercise. Why not?

Similarly, with respect to free exercise itself, it is not clear what Hasson thinks an understanding of and appreciation for the

80. *See* MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES (1998); Michael J. Perry, *The Morality of Human Rights: A Nonreligious Ground?*, 54 EMORY L.J. 97 (2005).

truth about human beings requires of courts considering claims under the free exercise clause. Hasson is charitable toward those judges who get "the constitutional equivalent of vertigo" (p. 142) in free-exercise cases and is sympathetic to the contention that it is hard to "apply [the Clause] across the board in defense of all faiths against every bureaucrat high and low" (pp. 142–43). He concedes that "[r]eligious liberty is not absolute" and that the "hard[] part of the question is at what point do we draw the line?" (p. 16). He proposes, though, that "the point where the government should step in is the point where the government *must* step in to protect its citizens, the point where an allegedly religious practice begins to disrupt public health, safety and morals" (p. 16). This is, of course, a familiar and widely held view, one that is basically consistent with the "strict scrutiny" standard employed in the Religious Freedom Restoration Act, or the Religious Land Use and Institutionalized Persons Act.

Putting aside the question whether the free exercise clause should require governments to exempt religiously motivated conduct from the scope of generally applicable laws, except in cases where such application is narrowly tailored to serve a compelling state interest,[81] Hasson could have said more about the problem of reconciling his strong claims about human rights—that the language of rights means that some things, unlike "[m]ost matters of government," are not "subject to the rough-and-tumble of ordinary politics" (p. 75)—with the inescapable reality that not all exemptions claims can, or should, be sustained. Whether the compromises are struck by judges, in the application of the relevant standard, or by politically accountable legislators, the fact remains that even human-rights claims to religious freedom are not, in practice, "immun[e] from ... compromise" (p. 75). Even one who is entirely on board with Hasson's "who we are" arguments for conscience has to engage the "who decides?" question, and Hasson could have said more about the considerations that should shape the answer.

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Feldman's view, again, is that the founding generation's solution—which we would do well to emulate—to the problem of protecting conscience in conditions of pluralism was to "permit and tolerate symbolic invocation of religious values and inclusive

81. *Cf.* Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991); Philip Hamburger, *Religious Freedom in Philadelphia*, 54 EMORY L. J. 1603 (2005).

displays of religion while rigorously protecting the financial and organizational separation of religious institutions from institutions of government" (p. 9). That is, it is the *institutions* of religion and government—and not, say, "faith" and "politics," or "religion" and "public life"—that should be separate.[82] This is not because religion is something unworthy or dangerous, from which government needs to be insulated or protected,[83] but because institutional establishments burden religious freedom and our "government institutions [have] no authority to pronounce on matters of religion" (p. 53).[84]

It has already been suggested that school-voucher and "charitable choice" programs need not be regarded as inconsistent with the "institutional" separation of church and state or as burdening the freedom of conscience of those who oppose, for whatever reason, such programs. That said, given Feldman's emphasis on *institutional* separation, it is worth noting and somewhat surprising that he has relatively little to say about religious institutions, their role, and their freedoms.[85]

Like Feldman, Hasson puts the individual's conscience, and his or her assertedly built-in drive to search for and cling to the transcendent, at the heart of his arguments about religious freedom and rights-based limits on government action. He says little, though, about the place of religious associations, institutions, and communities in the religious-freedom landscape. The free-exercise arena, in his book, seems to be one where the fights are about the right of individuals to rights-based exemptions from generally applicable laws and to equal treatment by government in the marketplace of ideas and expression.

82. *See also, e.g.*, FELDMAN (p. 52) ("The constitutional guarantee of nonestablishment sought to protect conscience from coercion by guaranteeing a division between the institutional spheres of organized religion and government."); *id.* ("[T]he Constitution separated the church, in its institutional sense, from the state."); *id.* ("'Establishment' stood for the institutional merger of church and state; nonestablishment was a distinctively American experiment in the separation of the two most important institutions in society."); *id.* at 218 (noting the "American tradition of the separation of government institutions from the institutional church"); *id.* at 244 (citing "American traditions of institutionally separated church and state"); *id.* at 248 ("[O]ur constitutional tradition . . . has always made institutional separation the touchstone of nonestablishment[.]").

83. FELDMAN (p. 51) ("[The Framers] did not think that the state needed to be protected from the dangers of religious influence.").

84. FELDMAN (p. 247) (noting the Framers' view that "government has no authority over religious matters").

85. After flagging the alleged danger "that balkanized schools will generate balkanized values," Feldman notes that "[p]rivate schools unsupported by vouchers can in any case teach whatever they want about citizenship and loyalty." FELDMAN (p. 245).

Today, some of the most interesting and pressing church-state tangles involve religious institutions, or "churches," and their internal autonomy and governance. There are, of course, various constitutional doctrines and lines of cases that, in effect, guard churches' ability and right to control their internal structure and operations, to propose their own messages, to administer their own sacraments, and to conduct their own liturgies. The rule that secular courts may not, in the course of resolving disputes between litigants or answering legal questions, interpret, apply, or enforce religious doctrines is one such rule;[86] another is the Court's holding that governments may, consistent with the Constitution's no-establishment rule, accommodate the free exercise of religion by exempting churches' employment decisions from the application of anti-discrimination laws.[87] It is well established, in other words, that the religious freedom protected by the First Amendment includes recognition and respect for "church autonomy."[88] And, the front-line of what Feldman calls "institutional separation" (p. 248) is not so much the danger of establishment-by-vouchers, but the increasingly aggressive stance that some officials, legislators, and scholars are taking in cases and contexts that implicate church autonomy.[89]

The religious-freedom claim is, but is more than, an affirmation of the freedom of religious conscience, understood as immunity from external coercion. It is also a claim about what John Courtney Murray called the "ontological structure of society."[90]

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86. *See generally, e.g.*, Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969) (noting that government interpretation of religious doctrine and judicial intervention in religious disputes are undesirable because when "civil courts undertake to resolve [doctrinal] controversies . . . the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern"); Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645, 1652-59 (2004).

87. *See* Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 334 (1987) ("This Court has long recognized that the government may . . . accommodate religious practices and that it may do so without violating the Establishment Clause.") (quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144–45 (1987)).

88. *See generally, e.g.*, Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1373 (1981) ("Quite apart from whether a regulation requires a church or an individual believer to violate religious doctrine or felt moral duty, churches have a constitutionally protected interest in managing their own institutions free of government interference.").

89. *See generally* Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOCIAL THOUGHT 59 (2006).

90. JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 199 (1960).

That is, religious freedom has, as one scholar has put it, a "public as well as personal meaning."

> Only a state with limited and defined powers could acknowledge that there was a sanctum sanctorum in every conscience where state power ought not tread.... Only a state with no pretensions to omnicompetence could acknowledge its incompetence in matters theological. Only a state which understood that it existed to serve society could acknowledge the priority and integrity of the free associations of civil society, including religious associations.[91]

This view has been elaborated by, among others, the Second Vatican Council, in *Dignitatis Humanae,* the Council's 1965 Declaration on Religious Liberty.[92] (The Declaration, clearly, has shaped Kevin Hasson's thinking and arguments.) The Declaration's proposal is not only that religious freedom includes both immunity from coercion in matters of "private" belief and a right to express that belief in community through worship and otherwise.[93] It is not only that religious faith and experience have a communal dimension. It is also that religious freedom requires and deserves a social structure, one in which the state has constitutionally limited and defined powers and, in a way, competes with other associations and institutions.

## CONCLUSION

*Divided by God* and *The Right to Be Wrong* are engaging and rewarding books. Each has its strengths; each is, in some places, provocative and, in others, inspiring. Each is animated by a spirit of charity and by a worthy desire to find common ground, to engage fellow citizens on that ground, and to point the way toward a state of affairs and law that is conducive to civil peace and consistent with mutual respect. Still, there might be something to the message offered a year or so ago by the satirist P.J. O'Rourke, who quipped that "[t]he secret to America's greatness is diversity. But America can't be diverse without divisions. And we are a divided nation.... Maybe the real secret to

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91. George Weigel, Senior Fellow, Ethics & Pub. Policy Center, Centre for Indep. Studies, Acton Lecture: The Moral Foundations of Freedom (Oct. 23, 2000), *available at* http://www.cis.org.au/Events/acton/acton00.htm.

92. Vatican Council II, Declaration on Religious Freedom, *Dignitatis Humanae* (Dec. 7, 1965), *available at* http://www.ewtn.com/library/councils/v2relfre.htm.

93. *See, e.g., id.* at no. 4 ("Religious communities are a requirement of the social nature both of man and of religion itself.").

America's greatness is that we hate one another."[94] That's certainly one way to put it. It is true, as Feldman writes, that our diversity has long and "often been called a blessing and a source of strength or balance," and is at the same time "a fundamental challenge to the project of popular self-government" (p. 251). And Feldman and Hasson are right to remind readers that our response to this challenge need not include a demand that religious expression, symbols, and activities be confined, *laicite*-style, to the private sphere or the margins of our common life. The end-game, though, should not be unity, but respect. As John Courtney Murray suggested several decades ago, given the reality and permanence of pluralism, we should "cherish only modest expectations with regard to the solution of the problem of religious pluralism and civic unity."[95]

94. P.J. O'Rourke, *Continental Divides: The Crescent of Crime, the Spousal Spine, the Divorce Coasts, the Righteous Region, and Other Sources of National Greatness*, THE ATLANTIC MONTHLY, Jan./Feb. 2005, at 128, 128.

95. MURRAY, *supra* note 90, at 23.