successfully combines the richness of individual case studies with the need to generalize from broad comparisons. In demonstrating the potential of the comparative case study approach, the authors challenge future researchers to discover the peculiar "institutional identities" of state supreme courts across the nation.

SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION. By Robert L. Cord.[1] Baker Book House. 1988. Originally published: Lambeth Press, 1982. Pp. 302. $19.95.

CHRISTIANITY AND THE STATE. By Rousas John Rushdoony. Ross House Books. 1986. Pp. 192.

Steven D. Smith[2]

If book reviews carried subtitles, this one could be called "The Mechanic and the Manichee." Those terms suggest the character, and the shortcomings, of Professor Robert Cord's and Dr. Rousas Rushdoony's respective efforts to examine the issues of religious freedom from a historical perspective. Each book has its merits. Professor Cord pulls together a mass of (sometimes) helpful historical data to deflate some mischievous historical myths. Dr. Rushdoony offers unorthodox (and therefore potentially valuable) insights and perspectives. The critical comments that follow should not be understood as disparaging these achievements. For different reasons, however, neither book establishes a genuine conversation with the past. Hence, neither book finds a historical antidote for the current doctrinal and theoretical malaise.

I

A book may be unpersuasive without being unimportant. And in fact, Cord's is an important book that imparts an important truth. The book is important because it has become a cornerstone of sorts for the "nonpreferentialist" school of establishment clause jurisprudence—a school that claims among its adherents the current Chief Justice.[3] The important truth that emerges from Cord's

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3. The Rehnquist dissent in Wallace v. Jaffree, 472 U.S. 38, 106 (1985), adopts Cord's position that the establishment clause was intended to prevent establishment of a national church but was *not* intended to prevent public aid to religion so long as such aid is nonprefer-

analysis is that the "framers" (whoever they were; Cord pays little attention to this or other jurisprudential questions posed by critics of originalism) almost certainly did not intend to exclude religion from the public sphere, or to establish a purely secular government.

Cord is not the first scholar to debunk the "secular government" thesis, however, and he is far from being the most persuasive. The book's problems are rooted, I think, in the way Cord frames his analysis. He sets up his discussion as a sort of debate between himself and the modern proponents of the secularist construction, including Leo Pfeffer, Justice Rutledge, and Justice Black. This debate format produces a numbing redundancy in the presentation of the evidence. Cord takes on the secularists one-by-one; and he keeps trotting out the same facts over and over again—congressional chaplains, Thanksgiving proclamations, treaties that subsidized proselytizing and preaching among the Indians—to show that Pfeffer was mistaken, that Justice Rutledge was mistaken, that Justice Black was mistaken, that the later Justice Douglas was mistaken.

Cord's debating posture also leads to the kind of bickering that one expects in, say, presidential campaigns, but that is unedifying in scholarly analysis. For example, he revels in quoting the more unguarded or unqualified statements of opponents like Pfeffer, and then observing that "[t]he Pfeffer thesis . . . is an absolute one that is logically disproven by the mere showing of one exception." One may concede the point: If Cord had a private wager going with Pfeffer about whether the framers wanted "absolute separation," Cord would win the bet. But the Supreme Court has not adopted—nor is it likely to adopt—any requirement of "absolute separation." By turning the question into a private quarrel, Cord makes his analysis less illuminating on the live public issues.

More important, by joining issue with Pfeffer and Rutledge, Cord allows his opponents to dictate both the methodology and the terms of the debate—with unfortunate consequences. Pfeffer-Rutledge historiography is not noteworthy for its sensitivity to historical climate of opinion, to the nuances and ambiguities and individual differences in the thinking of the framers, or to "the unnoted change in the meaning of familiar words and the consequent transformation of controlling concepts"[4] that divides the twentieth century from the eighteenth. As Cord shows, Pfeffer and Rutledge

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ential or nondiscriminatory among different religions. And Rehnquist's supporting argument amounts to a succinct presentation of the evidence discussed in Cord's book.

4. Howe, *The Garden and the Wilderness: Religion and Government* in *American Constitutional History* 154 (1965).

used history selectively and mechanically to advance their own position on church-state relations; their history is consequently unilluminating about what the eighteenth century Americans who adopted the establishment clause actually believed that they had decided.

Unfortunately, though Cord's historical conclusions are different, his historiography is disappointingly similar to that of his opponents. Like Pfeffer and Rutledge, Cord focuses largely upon the beliefs of Madison and Jefferson. He makes little effort to explore the complex ways in which these men were shaped by, and responded to, philosophical and cultural influences. Cord has little patience for incongruity or uncertainty in his subjects. For instance, Madison's own doubts, acknowledged later in life, about the permissibility of legislative chaplains and Thanksgiving proclamations, are brushed aside with the pious assertion that if he had truly felt doubts he would never have supported such measures. Cord concedes that Madison may have changed his mind after leaving office—Madison's own words compel at least this minimal concession—but he cannot conceive of a Madison who while in office was either ambivalent about the meaning of religious freedom or capable of acting from political expediency. As in a bad novel, Cord's characters lack human complexity.

By refusing to take the framers on their own terms, this unsubtle approach to history virtually ensures historical misunderstanding and, consequently, a distorted view of the establishment clause's original meaning. It foists upon the framers an equation that they would not have accepted. Beginning with *Everson v. Board of Education*, the central question that modern lawyers have chosen to address is whether the establishment clause prohibited government from advancing religion. That question has commonly been conflated with another question: Did the establishment clause require "separation of church and state"? "Separation," in short, has been treated as synonymous with "no advancement." When the questions are framed in this way, the answers are virtually foreordained: The establishment clause plainly required "separation," and therefore the clause prohibits government from advancing or supporting—or, more recently, endorsing—religion.

A few scholars, like Cord, have pointed out that this "no advancement" construction is hard to square with the evidence showing that both state and national governments during the early constitutional period consciously advanced and endorsed religion in various ways. Thus, Cord's history accepts the modern questions and tries to provide different answers. But even if the evidence

seems to support Cord's answers, the debate as currently framed makes his position embarrassing. Does Cord really want to repudiate the idea of separation of church and state—a principle that virtually all Americans, at least since Jefferson, have regarded as axiomatic? And if the establishment clause did not forbid aid to religion, then what exactly *did* it do?

Cord has responses to these objections, but his responses do not allay the embarrassment. It turns out that Cord is not opposed to "separation of church and state"—only to "absolute separation" (whatever that means). And although the establishment clause did not forbid government to aid or advance religion, the clause was not a meaningless gesture; its purpose was to prohibit preferential treatment of any of the various religions. But this construction immediately runs into historical difficulties of its own: Indian treaties which specifically subsidized the Catholic Church or the United Brethren, for example, or the appointment of congressional chaplains (who presumably did not represent *all* Christian denominations). Cord tries to explain away these apparent discrepancies, but without much success. For example, Madison's support for legislation requiring Sabbath observance was ostensibly "nonpreferential" because in his day all Virginians (well, almost all Virginians)[5] were Christians anyway. But Madison's contemporaneous opposition to the Virginia Assessments Bill, under which any Christian denomination would have been eligible for public assistance, is explained with the observation that the bill would have favored Christianity, thereby discriminating against non-Christian religions. Something seems amiss here. Similar discrepancies pervade Cord's analysis of specific issues, past and present; Cord hands out judgments of "preferential" or "nonpreferential" in a fashion that reminds one of . . . well, the way the Supreme Court finds (or fails to find) "secular purposes" or "excessive entanglement."[6]

These unhappy consequences follow from Cord's acceptance of the debate as framed by Pfeffer, Rutledge, and other proponents of secular government. The modern habit has been to regard "separation," "secularism," and "no aid" as interchangeable concepts. The framers' generation recognized no such equation. So long as the modern habit is indulged, there is virtually no possibility of a comprehending conversation with those who adopted the establishment clause.

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5. There was a small community of Jews living in Richmond in the colonial period. 1 S. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 573 (1972).

6. For a persuasive historical criticism of the "no preference" analysis of history, see Laycock, *"Nonpreferential" Aid to Religion: A False Claim about Original Intent*, 27 WM. & MARY L. REV. 875 (1986).

A more sensitive historical analysis might have suggested a way out of this difficulty. Consider the pivotal premise in Madison's famous *Memorial and Remonstrance*, written in opposition to the Assessments Bill: "Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe . . . ." Hence, "[i]t is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him." For Madison, it seems, religious liberty was grounded in *religious* premises; and explicitly religious rationales could be publicly invoked to support separation of church and state (but not, manifestly, a secular public sphere sanitized of religious values and influences). Reflection upon Madison's argument might go a long way toward dissolving the equation of "separation" and "secularism" that has pervaded modern discussions of the establishment clause.[7]

Instead, Cord peremptorily dismisses most of the Memorial as not "germane." His explanation is that "most of Madison's 'ideological' arguments in the 'Memorial' seem more derivative of the call to revolution rather than the proper yardstick against which to measure an appropriate separation between Church and State in *a real society* where both institutions must coexist." I confess that this argument baffles me. Madison wrote his Memorial some two years after the end of the Revolutionary War, and he wrote it not as an exercise in academic theory but in an effort (successful, as it turned out) to dissuade real legislators from enacting a real bill. How much more "real" can you get?

The reality, it seems, is that Cord cannot learn from the Memorial for the same reason that the secularists he opposes cannot. Much in the manner of a lawyer examining a hostile witness, both camps have insisted that Madison speak to *their* questions in *their* terms, and have refused to hear what Madison was actually trying to say. With Cord's casual dismissal of the Memorial, the opportunity for genuinely helpful historical insight is lost. Thus, while exposing defects in the Pfeffer-Rutledge position, Cord ultimately succumbs to the same modernist errors that infect his opponents.

II

For Rousas Rushdoony, by contrast, "modernist" assumptions are hardly a problem. On the contrary, Rushdoony offers a roving indictment of modern notions about the relations between church

7. For my own attempt to escape this debilitating equation in reconstructing the original meaning of the establishment clause, see Smith, Separation and the "Secular": Reconstructing the Disestablishment Decision, 67 TEX. L. REV. 1195 (1989).

and state. Though generally historical in character, his discussion does not adopt a chronological organization—or any other organization that I can discern—but instead leaps from ancient Greece to modern times, back to Constantinian Rome, forward to the Enlightenment, back to Old Testament Israel, forward again to the present, back to the Middle Ages and the Gregorian reforms and Marsilius of Padua and the Conciliar Movement and the Inquisition and on and on with astonishing agility. These historical acrobatics all return to a recurring motif: Modern civilization has rejected the supremacy of God in favor of the sovereignty of man. This rejection expresses itself in the form of humanism, statism, fascism, and the idolatry that seeks salvation in the messianic state.

The sovereignty of man creates an unhappy situation for Christians, who can escape persecution only by sacrificing their faith and embracing the reigning humanistic theology. But the current situation cannot endure; because true legitimacy requires acceptance of the authority of God, the humanistic state survives only by usurping more and more power, and in the long run must collapse. What is needed is a new theology of the state which acknowledges "the crown rights of Christ the King." Rushdoony concludes on an apocalyptic note:

> [T]he conflict between church and state . . . is more than a *jurisdictional* dispute now: it is a *religious* conflict, and a war unto death. The modern humanistic state is history's most jealous god, and it will tolerate no rivals. Hence, its war against Christianity. In this struggle, however, the state has taken on a power far greater than itself. As the humanistic world powers take "counsel," planning to overthrow His law and government, "He that sitteth in the heavens shall laugh: the LORD shall have them in derision" (Ps. 2:4). He shall break his enemies with a rod of iron.

Rushdoony's book does little to enhance constitutional understanding, but it is important to be clear about why this is so. It would be easy to dismiss the book out of hand simply because of its unapologetically religious orientation. That would be a mistake. Considering the current condition of church-state doctrine, we have no business rejecting possible illumination from any source, religious or otherwise. Scholars working from religious premises have often provided thoughtful analyses of politics and government; John Courtney Murray and Reinhold Niebuhr are modern examples. As a historical matter, moreover, the defense of religious freedom rested heavily upon religious premises; consider, for example, Locke's *A Letter Concerning Toleration* or Madison's *Memorial and Remonstrance*. Thus, in arguing that religious liberty must be grounded in religion, Rushdoony may actually come closer to the framers' point of view than does either Cord or an apostle of secularism.

Indeed, Rushdoony's religious perspective frees him from debilitating modernist assumptions, and thereby generates occasional helpful insights. For instance, he insists that a community cannot do without a "religion" of some kind, even if it is a secular or humanistic one. Hence, the modern state's "myth of neutrality" merely means that the state has discarded one form of religion—Christianity—in favor of another one. A critic might quarrel with Rushdoony's terminology, and his argument hardly demonstrates that "secular humanism" should be classified as a "religion" for constitutional purposes. Still, his overall assessment provides a plausible interpretation of judicial decisions which on the one hand prohibit prayer, Bible reading, displays of the Ten Commandments, and even "moments of silence" in public schools, while on the other hand forbidding states either to exclude the teaching of evolution from public schools or to require "balanced treatment" of both evolution and creationism, and rejecting the claims of parents and students whose fundamentalist religious beliefs are undermined or offended by the schools' secular curriculum. Although commonly justified by reference to the ideal of "neutrality," such decisions are not "neutral" in any significant sense; it is far more plausible to view them as favoring a new secular orthodoxy over the older Christian one. In this respect, Rushdoony displays a clearer vision than do scholars or judges for whom a secular world view is so axiomatic that it seems "neutral."

On the whole, however, Rushdoony's book is unhelpful, not because of its religious perspective, but rather because of its tendency to fall into what orthodox Christianity regarded as a religious heresy: manicheanism.[8] This label covered an assortment of errors, whose common feature was a tendency to view the world in starkly dualistic terms. The realm of spirit was light and good; the material world was dark and evil. To be sure, there *is* a Christian perspective from which "the whole world lieth in wickedness." (1 John 5:19) But a rigidly "light versus darkness" perspective, with its consequent eagerness to condemn all that is of this world, is of little help in dealing with the most universal human concerns, which occur mostly in the shade. Thus, manicheanism is ultimately antithetical to the essence of Christianity, which holds that God did not reject or despise the world, but instead took upon himself humanity precisely so that he could understand, forgive, and redeem it.

A stark dualism pervades Rushdoony's discussion. Most of the political and philosophical achievements upon which human

8. For an interesting treatment of this heresy in its various guises, see S. RUNCIMAN, THE MEDIEVAL MANICHEE (1960).

freedom has been founded are simply relegated to the realm of darkness: Under the broad headings of the sovereignty of man or the idolatry of the state, Rushdoony dissolves all manner of distinctions that might prove helpful in the practical realization of freedom, including religious freedom. For Rushdoony, Soviet communism, German Naziism, and American democracy are not different in principle, but are merely variations on a common humanistic theme. The postal service, Amtrak, Billy Graham, "and much, much more represent borrowings from Mussolini," whom Rushdoony regards as "the patron saint of 20th century humanism." The views about human nature of Plato, Aristotle, Rousseau, Marx, and yes, even B.F. Skinner are lumped together for common condemnation under the heading of "the classical view of man." And at least since Woodrow Wilson, American presidents have been committed to the humanistic state, which is "antichristian in origin, conception, and administration." Thus, Jimmy Carter "declared the radical irrelevance of Christianity to life over and over again," and Ronald Reagan presided over a "decline of religious freedom." The problem goes further back, however; for example, "Lincoln's contempt of religious liberty was obvious."[9]

The problem is not just that Rushdoony shows little interest in dealing with the realm of darkness—i.e., the world as we know it; he offers only the dimmest vision of the realm of light. The basic principle is clear enough: Rushdoony believes that "the state . . . must recognize the Lord Christ, the Messiah, and, like all things else, serve and obey Him." Consequently, "Christians must once again take over government in education, welfare, health, and other spheres." But what does this mean in concrete terms? What should our polity actually look like? Moses's Israel? Calvin's Geneva? John Winthrop's Massachusetts? Brigham Young's Deseret? Rushdoony never says.

In an odd way, reading Rushdoony is a lot like reading Critical Legal Studies. You encounter stark and frightening "fundamental contradictions." You find the current state of affairs described under sweeping labels—"humanism," "liberalism"—that are used in unfamiliar ways, and then condemned under other sweeping labels—"idolatry" and "statism," "hierarchy" and "reification"—used in equally unfamiliar ways. You are startled to learn that you and your friends have all along been committed to insidious assumptions and views—the divinity of the state, the subjectivity of all values along with the objectivity of legal reasoning—without

9. Since the fact is "obvious," no explanation is apparently needed; and none is offered.

even knowing that you believed such things (and without quite understanding just what it is that you have unwittingly been believing). All of this is presented with a ferocity of conviction that leaves you unsettled. And at the end of it all, you have no idea how to go about correcting the situation.[10] Manicheanism, it seems, is a heresy not limited to Christians.

III

Perhaps the most unfortunate consequence of these books is that they may lend support to the view—a view that many are wont to adopt anyway—that history offers little help in understanding current constitutional issues. To be sure, good history is not easily come by. The historian has the difficult task of writing *about* the past but *for* the present; he must moderate a conversation between generations that may not speak in the same terms or, worse yet, may use the same terms but with different meanings. Conversing face-to-face with a friend is often hard enough; conversing with generations long dead is even harder. And when the conversation breaks down, as it frequently does in these books, the historian risks becoming merely a polemicist.

But when the historical conversation prospers, it can be tremendously illuminating; the analyses of American religious history offered by Mark DeWolfe Howe and Henry May are noteworthy examples. We can still learn a good deal from our forebears, but only by actually listening to them before we conscript them to serve in our current spiritual and political battles.

A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES. By Melvin I. Urofsky.[1] New York: Alfred A. Knopf. 1988. Pp. xxii, 969. Cloth, $24.00; paperback, $12.00.

Herman Belz[2]

The legal realist movement had its origin in the philosophical

10. Insofar as Rushdoony does offer prescriptions, they are much like those of CLS not only in the level of their abstraction but even, sometimes, in their substance. For instance, Rushdoony explains that we must "take government back from the state and restore to man his responsibility and freedom to be, in every sphere of life, a participating and governing power." Perhaps Rushdoony and Roberto Unger should collaborate on their next book.

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