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Noah Feldman. *Divided By God: America's Church-State Problem - and What We Should Do About It*. New York: Farrar, Straus and Giroux, 2005. Pp. 352. \$25.00 (Cloth).

[1] The role of religion in American public life has become one of the most contentious issues in American politics, and Noah Feldman's *Divided by God* is one of the best books to appear on this subject in a long time. In the end, Feldman's recommendations are less persuasive than the rest of his book, but that fact only slightly detracts from his impressive accomplishment. Most commentators tell the story of church/state relations in the United States as a sequence of Supreme Court cases, as though it is a narrative acted out in stages of judicial opinions. The refreshing thing about this book is that Feldman (an academic lawyer himself) tells a much broader story - a narrative of social movements, political motivations, and economic and cultural trends in the society as a whole. He takes the dispute beyond the confines of legal arguments, and beyond divisive political polemics, and situates it in a broader historical context. While he adds little new information, his contextualized account is grounded in excellent scholarship, and it situates controversies concerning the public role of religion as a pervasive theme in American history.

[2] Feldman traces these conflicts from their origins at the beginning of our history as a nation and its constitutional origins. Feldman is a master storyteller; his historical narratives are as engaging as a good novel. Because public schools have been so often the major battlefield for church/state disputes, he pays particular attention to such topics as the nineteenth century emergence of a "nonsectarian" (but pervasively Protestant) public school system, conflicts over Catholic education, and twentieth century controversies over religious exercises in public schools. Before analyzing contemporary developments, he sets the stage by carefully explaining the origins of American secularism in the late nineteenth century and the early twentieth century roots of fundamentalism. Still, his real interest is contemporary and the cultural divide between "values evangelicals" and "legal secularists" - terms he has chosen carefully and defines with care.

[3] Values evangelicals (a movement which includes many Catholics, Jews, and Muslims as well as Protestants) "care primarily about identifying traditional moral values that can in

theory be shared by everyone.” Their goal is evangelizing for values and urging government to adopt and promote them. Legal secularists are not necessarily personally secular, but those who believe that government and its laws should be secular in order to be inclusive in a religiously plural society. Feldman traces the origins of both movements, and very perceptively observes the internal tensions within each camp.

[4] Following the inclusive and pervasive - but ultimately bland - religiosity of the 1950’s, religion has become both less public in some ways and far more public in other ways. Some striking victories by legal secularists in the 1960’s and 1970’s (again, part of much larger developments) created its own reaction, newly politicized values evangelicals, who now perceive (or portray) themselves as oppressed or vulnerable minorities. Both sides have won impressive victories in the past 50 years, so that religion is more highly divisive and politicized than ever. For both sides, the perceived stakes are very high. Hence, Feldman’s key aim is to defuse the culture war.

[5] Although the conflict over the role of religion in public life is a broadly cultural and political one, its battlefields are courtrooms and its weapons are legal doctrines interpreting the Establishment Clause of the First Amendment. (Feldman pays rather little attention to the Free Exercise of Religion guarantee, reflecting the fact that it has been the source of less controversy in recent years, but perhaps minimizing its importance.) His analysis of constitutional law developments are accessible and engaging, without sacrificing accuracy and precision. But even when he is specifically focusing on legal precedents, they are always a part of a larger story.

[6] Feldman finds fault with both of the currently most influential Establishment Clause doctrines - the *Lemon* test and Justice Sandra Day O’Connor’s endorsement test. The so-called *Lemon* test, enunciated in *Lemon v. Kurtzman* (403 US 602, 1971) is the most longstanding doctrine for interpreting the permissible scope of state/church interaction. Briefly, in order to survive an Establishment Clause challenge, a government action must have a secular (rather than religious) purpose and effect, and avoid entangling government and religion. The first “prong” of this test - which invalidates laws with discernable religious purposes - is at the heart of Feldman’s criticism. In his view, when courts invalidate laws because they have discovered a religious purpose, they discriminate against religious speech or drive it underground. This rule encourages legislators to be disingenuous, inventing bogus explanations for religiously inspired proposals. The most striking example was the decision in *Wallace v. Jaffre* (472 US 38, 1985) when the Supreme Court struck down Alabama’s moment of silence law because State legislators had made the mistake of putting their real motivations on record. The effect of this doctrine is to make values evangelicals feel excluded from the public conversation.

[7] Justice Sandra Day O’Connor’s “endorsement test” fares no better. First enunciated in a concurring opinion in the case of *Lynch v. Donnelly* (465 US 668, 1984), this standard for interpreting the Establishment Clause asks whether the government “intends to convey a message of endorsement or disapproval to religion.” In the interests of promoting equality in a religiously plural society, “the Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community.” But Feldman is sympathetic to those values evangelicals who find this

approach anti-majoritarian. He disagrees with Justice O'Connor that public religious symbolism "endorses" religion in ways that make others feel like outsiders. By forbidding government to give the appearance of endorsing a religion, her rule allows religious minorities a kind of veto over majority expressions of collective identity and faith. He argues that feelings of exclusion are somewhat under the control of the individual; in his words, it is largely "their interpretive choice to feel excluded." Feldman, who was raised in an orthodox Jewish tradition, is familiar with the role of religious minority (both in the US and within Judaism as well) and suggests that it is not such a bad thing to be a minority after all, and nothing is gained by pretending to hide the fact that some people belong to religious minorities. Hence he would be much more willing for religious majorities to adopt policies based on their convictions and to introduce their symbolism into public life, as long as such acts do not coerce minorities.

[8] Feldman's reasoning is essentially Madisonian in its faith in the democratic process. He is convinced that the very pluralism of American society (with rapidly growing populations outside the "Judeo Christian tradition") will make it politically impossible for any one group to dominate American symbolic life, or even local areas, for very long; the democratic process itself will prevent excessive religious exclusiveness. This is a very appealing argument. But in its optimism that democracy will prevent serious abuses in the long run, it does overlook short-term abuses. While being reminded of one's minority status is not always a bad thing, Feldman may nevertheless underestimate the temptation of "values evangelicals" to dominate the public square to carry that domination to religiously exclusive policies in other areas.

[9] After rejecting both of the dominant approaches to Establishment Clause jurisprudence, Feldman's solution to the current battle between "values evangelicals" and "legal secularists" is a Solomonic halving of the prize - just the opposite balance taken by the judicial centrist Justice O'Connor. In general, and with many counter-examples, current jurisprudence has been rather scrupulous in forbidding laws with religious motivations and government sponsored religious symbolism, but rather causal about the public funding of programs sponsored by religious institutions. Or in Feldman's terms, secularists have been winning the culture war, and evangelicals winning the economic war. His recommendation is just the opposite: the Establishment Clause should permit wider use of religious symbolism in "the public square" if democratic majorities choose to do so, but should be extremely scrupulous in preventing public monies from flowing to religious organizations. His reasoning here is that public funding inevitably "entangles" church and state in ways that invites conflict - and hence politicizes sectarian struggles. Policies touching on religion would not violate the Establishment Clause as long as they did not allocate public monies and as long as they were not coercive. "No money and no coercion" are his two Establishment Clause tests. His solution is probably faithful to what the First Amendment's Framers would have expected - at least it seems consistent with James Madison's views, and a seemingly sensible compromise that gives each side partial victories.

[10] Nevertheless, on closer inspection, Feldman's solution seems based on exceptionally optimistic views of American pluralism and democratic discourse. His eagerness to open up the public square to religious expression seems to be based on unrealistically optimistic faith in inter-religious dialogue and our ability to convince each other based on the strength of our

theological arguments. Moreover, I believe that he both underestimates the power of symbolism and misunderstands coercion. Humans are symbol-creating animals; we live and die by symbols. While symbols may not coerce in any tangible sense, the Court has long recognized that coercion is only one of the ways that the Establishment Clause may be violated. His solution would seriously diminish the scope of Establishment Clause protections for religious minorities.

[11] Moreover, Feldman's insistence on a high wall of separation between public monies and religious coffers may be excessively optimistic as well. Distinguishing between religious and public functions of organizations such as hospitals and social service organizations is notoriously difficult. The functions have been so entwined for more than a century (as he himself recounts) that it is difficult to imagine reversing the policies that have for so long entwined the two. He argues that because "charitable choice" has not yet developed strong stakeholders, now is the time to nip it in the bud. Feldman thinks that if values evangelicals win on the religious symbolism issue, they will be content to keep their hands out of the public pockets. Once they no longer feel like beleaguered minorities "in their own land," the steam will go out of their demands. They will realize that battles over the public purse are extremely divisive, hence undercutting their goal of fostering shared values. (Imagine the debates over public funding requests for an Islamic madrasa or a Wiccan high school?) But his solution might have just the opposite effect: being empowered on the issue of public symbolism, values evangelicals might well be emboldened to demand access to public coffers.

[12] In the end, I am skeptical of Feldman's solutions, but do not reject them outright. His solution is a profoundly Madisonian one, and Madison's insights have served us well for over 200 years. Feldman offers a very intelligent and well-argued proposal for defusing the "culture war" between values evangelicals and legal secularists that has dominated our politics for a generation. At the very least, his solution is worth serious study by constitutional scholars, political analysts, and advocates on all sides of the issue. After all, religion is not a "conversation stopper," and neither should be this proposal on how to resolve the conflict about the public role of religion. Noah Feldman's book should be a conversation starter.

Bette Novit Evans, Creighton University