

## RETHINKING THE RELIGION CLAUSES OF THE FIRST AMENDMENT: REFLECTIONS ON RECENT SCHOLARSHIP.

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**Richard S. Myers**

*Ave Maria School of Law*

*There has been much ferment in the church-state field for some time. Despite the many book-length treatments of the issue, these scholarly efforts dealing with the Religion Clauses of the First Amendment show no sign of abating. This article considers two recent, noteworthy efforts: Noah Feldman's *Divided By God: America's Church-State Problem—And What We Should Do About It* (2005) and Patrick M. Garry's *Wrestling with God: The Courts' Tortuous Treatment of Religion* (2006). The article provides an overview of both books and then discusses the lessons that can be learned from considering these very different books. In the end, Garry's book, which offers a more convincing historical survey and recognizes the special value of religion, offers more constructive insights about how we ought to move forward in this contentious area of the law.*

There has been considerable ferment in the church-state field for quite some time.<sup>1</sup> Much of this dates from the reaction from both on and off the Court to the strict separationist decisions of the Supreme Court in the 1960s and 1970s.<sup>2</sup> Much of this critique is based on the emphasis on originalism or textualism that characterized much of the opposition to the judicial activism of that era.<sup>3</sup>

Since the early 1980s, there has been significant change in doctrine as the result of Supreme Court decisions. In many respects, the case law is far better than it was during that era. I have explored this topic in detail in several articles, including in two papers that were presented at SCSS conferences (in 2000 and 2005),<sup>4</sup> and will just provide a brief summary here. In the mid-1970s, the Supreme Court's decisions emphasized separation to a significant degree. Notable landmarks were the school prayer decisions,<sup>5</sup> which I think are entirely defensible,<sup>6</sup> and the series of decisions significantly restricting aid to religious schools,<sup>7</sup> most of which are entirely indefensible.<sup>8</sup> Many thought, with considerable justification, that the Court's decisions reflected a hostility to religion and that these decisions contributed greatly to the privatization of religion.<sup>9</sup> This began to change in the early 1980s. Currently, the Court no longer seems to place religion under special disabilities, which was true under the Court's cases dealing with aid to religious institutions through about 1985. The Court's current

approach—and this is most clearly seen in the *Zelman* case (the Ohio voucher case from 2002)<sup>10</sup>—is that there is no Establishment Clause violation if religion is treated on equal terms with secular alternatives. This neutrality is not required by the Constitution; equal treatment seems to be largely a matter of legislative grace, as the 2004 decision in *Locke v. Davey*<sup>11</sup> revealed. There, a 7-2 majority had no problem permitting the state of Washington to discriminate against religion.

In general, though, the Court no longer expresses the negative views of religion that characterized the earlier cases. The Court seems willing to allow religion an equal role in the political process and that improvement is worth noting. We have moved from hostility towards a public role for religion to neutrality.

This situation is, however, highly unstable. In certain cases, the Court denies a public role for religion and religiously-informed moral principles. *Lawrence v. Texas*<sup>12</sup> in 2003 seemed to condemn the state's reliance on religiously informed moral norms.<sup>13</sup> In addition, the Court has not been able to settle on an analytical framework for Establishment Clause cases; the fate of the *Lemon* test or the principal alternatives to the *Lemon* test—the endorsement test or the coercion test—is still not clear.<sup>14</sup> This leads to rulings that are highly fact specific and that make it clear that the Court doesn't have a clear conception of how to approach these issues. The two decisions from June 2005 involving the public display of the Ten Commandments are illustrative. In *McCreary County v. ACLU of Kentucky*,<sup>15</sup> the Court held that the displays of the Ten Commandments in two county courthouses in Kentucky violated the Establishment Clause. In *Van Orden v. Perry*,<sup>16</sup> the Court upheld the constitutionality of “the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds.”<sup>17</sup>

Perhaps even more troubling, some of the recent Establishment Clause opinions have revived the divisiveness doctrine.<sup>18</sup> This is extremely troubling because that doctrine is typically used to try to force religion into the wholly private sphere.<sup>19</sup> Moreover, the Court seems unwilling to acknowledge a special role for religion.<sup>20</sup>

There has also been a flood of scholarly efforts dealing with the Religion Clauses of the First Amendment. It is a bit surprising that this flood shows no sign of abating. This is not the place for a comprehensive examination of the judicial and scholarly developments in this area.

I thought that it would be appropriate, however, to focus on two very recent and noteworthy scholarly efforts. In these remarks, I will discuss two recent books—Noah Feldman's book *Divided By God: America's Church-State Problem—And What We Should do About It*<sup>21</sup> and Patrick M. Garry's *Wrestling with God: The Courts' Tortuous*

*Treatment of Religion*.<sup>22</sup> I will begin with an overview of each book. I will then offer some thoughts about what we can learn from these two efforts and offer some suggestions about the possible future directions in this area.

Noah Feldman is a prominent young scholar. He teaches at one of the nation's leading law schools,<sup>23</sup> and his law review articles have found homes in the leading law journals.<sup>24</sup> An excerpt from his book under consideration here was the cover story in the *New York Times Magazine*.<sup>25</sup>

Feldman begins his book by focusing on America's church-state problem. He states: "The deep divide in American life, then, is not primarily over religious belief or affiliation—it is over the role that belief should play in the business of politics and government."<sup>26</sup> He explores the "two sides [that] dominate the church-state debate in contemporary American life, corresponding to what today are the two most prominent approaches to the proper relation of religion and government."<sup>27</sup> One side he calls the "values evangelicals." This group "insist[s] on the direct relevance of religious values to political life."<sup>28</sup> The other side he calls the "legal secularists." This group "see[s] religion as a matter of personal belief and choice largely irrelevant to government, and who are concerned that values derived from religion will divide us, not unite us."<sup>29</sup> Both groups, he says, are trying to reconcile national unity ("we strive to be a nation with a common identity and a common project") with religious diversity, but their goals differ.<sup>30</sup> This conflict "itself now threatens to destroy a common national vision."<sup>31</sup>

Feldman "propose[s] a different approach to the question of religion and government, one that eschews the extremes of both the values evangelicals and the legal secularists. In place of their mutually exclusive visions, [he] suggest[s] 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."<sup>32</sup>

This Solomonic solution will, Feldman believes, promote reconciliation. Both sides will have to give up something they value. The legal secularists will have to give up their effort to screen religious symbolism from public life (e.g., the Ten Commandments and the Pledge of Allegiance); Feldman rejects this effort to privatize religious expression because it excludes the values evangelicals. The values evangelicals will have to give up their fight for government dollars (e.g., through vouchers and funding for other faith-based social services); this effort to seek "government funding for religion will, in the long run,

generate disunity, not unity.”<sup>33</sup> Moreover, this effort to obtain government funding is inconsistent with what Feldman states was “the dominant idea organizing church-state relations in the framers’ era...—liberty of conscience, understood to protect religious dissenters—representing the religious diversity of the time—against compelled taxation to support teachings with which they disagreed.”<sup>34</sup>

His “answer...lies in preserving the value of religious liberty that has been a consistent feature of all the eras in American church-state relations, while simultaneously respecting the institutional separation of church and state that has been with us since the beginning.”<sup>35</sup> This solution avoids the extremes of the two sides. According to Feldman, “we want to acknowledge the centrality of religion to many citizens’ values while keeping religion and government in some important sense distinct.”<sup>36</sup> He captures his approach with a slogan—“no coercion and no money.”<sup>37</sup> This “offer[s] greater latitude for public religious discourse and religious symbolism [as long as there is no coercion], and at the same time insist[s] on a stricter ban on state funding of religious institutions and activities.”<sup>38</sup> Feldman believes that “this approach is not only faithful to our constitutional traditions. It also stands a chance of winning over secularists and evangelicals alike and beginning to close the rift between them.”<sup>39</sup>

Patrick Garry is also a prolific young scholar. He is not as well known as Feldman. He doesn’t teach at an elite law school,<sup>40</sup> and his law review articles have not been published in the most prestigious law reviews.<sup>41</sup> The book under consideration here is a bit breezier than Feldman’s book, but Garry’s book is in many ways more interesting and offers more constructive insights about how we ought to move forward in this contentious area of the law.

Garry begins by discussing the strict separationist decisions of the 1960s and 1970s. He notes that these decisions often reflected a hostility to religion. According to Garry, “[t]he conflicted judicial treatment of religion has not only failed to produce clear First Amendment doctrines, it has actually fueled a more intense cultural and legal struggle over the public role and presence of religion.”<sup>42</sup> The Court has “vastly overextended the reach” of the Establishment Clause<sup>43</sup> and “[t]he result has been a jurisprudence of minutia.”<sup>44</sup> The Court has ignored the core value of the Religion Clauses—the preservation of religious liberty—and used the Establishment Clause “as a tool in the secularization of American culture.”<sup>45</sup>

Garry admits that the Court’s decisions have gotten a lot better. He details the twists and turns and the failings of the various tests that the Court has used over the last several decades to decide Establishment

Clause cases. Although he acknowledges recent improvements, he concludes, however, that the “neutrality” approach reflected in the recent cases such as *Zelman* doesn’t go far enough. According to Garry, “The real problem with neutrality as it pertains to religion cases is that the doctrine only goes halfway: it remedies many of the overt prejudices against religion, but it does not adequately recognize the elevated constitutional status of religious liberty. In a sense [he continues], neutrality only pulls religion out of the hole that was dug in the 1970s.”<sup>46</sup> He believes that “a consistent and historically supported model of the establishment clause is needed.”<sup>47</sup> Garry “offers an interpretation of the establishment clause that sees it as complement to the [free] exercise clause in the common pursuit of religious liberty. Under this interpretation, the establishment clause narrowly addresses a specific kind of religious coercion—the kind of coercion that occurs when the government permanently aligns itself with one particular religious sect and then discriminates against all others.”<sup>48</sup> Under this model, the Constitution would not be interpreted to prevent the state from recognizing the special role and value of religion. The state would be permitted to, and in fact ought to (because of religion’s unique capacity to contribute to the public good) “confer[] on religion nondiscriminatory benefits not otherwise given to secular groups or institutions.”<sup>49</sup>

I think there are several lessons that can be learned from considering these two books. First, I think these books, from different sides of the spectrum, illustrate the waning influence of the strict separationist view. Invocations of the “wall of separation” metaphor in the service of privatization and secularization are less and less common. I don’t want to overstate this. There still are some scholars who advocate this sort of approach.<sup>50</sup> Some judicial opinions also reflect these sentiments.<sup>51</sup> And, of course, there are still strong cultural pressures in this direction.<sup>52</sup> But there has been real progress in this area. Serious scholars, who pay attention to history, have an increasingly difficult time maintaining that a strict separationist approach to the Establishment Clause reflects a plausible reading of the constitutional text and of the Nation’s historical appreciation for the value of religion. Feldman’s book makes this point. He is a careful, thoughtful scholar and he has to acknowledge that extreme invocations of the “wall of separation” metaphor are not plausible readings of the Establishment Clause.

Second, despite their profound differences, these two books are in fundamental agreement at many levels. They both conclude that the real focus ought to be on coercion and on the institutional separation of church and state. The disagreements are because of some important defects in Feldman’s approach.

Feldman does focus on an important element of our history—the opposition to compulsory taxation to support religion. This effort, in the late 18th century, was motivated by a concern for religious liberty. Feldman makes the common error of anachronistically applying this concern to our present situation. The “no money” portion of Feldman’s slogan only works well when the government’s role is limited. When the government’s role is pervasive, which it is in the area of education for example, the “no money” slogan doesn’t work at all. In these contexts, the proper focus is not to isolate the portion of government funding that goes to a religious school. The proper focus is on the government’s overall role in funding education.<sup>53</sup> When considered from this perspective, the funding involved in a voucher program doesn’t involve a “subsidy” at all. This type of “aid” is really more like the even-handed provision of basic governmental services—such as police and fire protection. In reality, the government is providing a modest redress for a situation that would otherwise involve a penalty on parents who exercise the basic right of choosing to provide a religious education for their children.<sup>54</sup>

As Michael McConnell noted years ago, under the current situation, “the majority gets the schools that it wants, using tax dollars extracted from everyone; minority religious groups are forced to support the majority’s school system and also to pay for their own.”<sup>55</sup> The government’s efforts to redress this problem—by providing limited vouchers or equal access to scholarships—don’t involve coercive taxation in support of religion, any more than providing police and fire protection do.

Feldman doesn’t seem to understand this point at all. He endorses the denial of state “funding” for Catholic schools; he states that “the rejection [of this funding] was consistent with maintaining the practice of institutional separation.”<sup>56</sup> I suppose it was that, but Feldman doesn’t recognize that the denial of funding (when the government is already spending massive amounts of money on education) results in a penalty on the exercise of a constitutional right. In this context (unlike the compulsory tax support for Christian ministers in the founding era), the “funding” is designed to redress an inequity and the even-handed allocation of money (although vouchers do not rise to that level) is not properly viewed as a compulsory exaction from those who send their children to the government’s schools but the lifting of a burden on those who are exercising a basic liberty of parental control over the education of their children.

Feldman’s insensitivity to this point is probably why he has almost nothing to say about *Locke v. Davey*.<sup>57</sup> In that case, the Supreme

Court authorized the state of Washington to discriminate against religion in the award of scholarships. As Justice Scalia explained in his dissent, the situation in *Locke v. Davey* was light years apart from a program that solely funded clergy. As Justice Scalia stated: “When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.”<sup>58</sup>

If Feldman properly understood how religious liberty plays out in the context of the modern state (with its pervasive presence in many areas—e.g., education, health care, etc.), then his focus on institutional separation and the avoidance of coercion might well bring him to the same place as Garry.

Third, I do, however, have some doubts about the prospect for this sort of agreement between Feldman and Garry. The other principal deficiency in Feldman’s account is that he doesn’t appreciate the special value of religion, and in fact seems more worried about what a former colleague of mine called “The Other Side of Religion.”<sup>59</sup> Feldman does weakly admit that religion plays a central role in the life of many individual believers. He doesn’t seem willing to even entertain the idea that religion might provide a true account of man and his place in the world. And he doesn’t appreciate the social benefits religious institutions provide. His primary focus is on the political realm and he seems to think that everyone else shares that focus. I doubt whether values evangelicals are really preoccupied with national unity and the promotion of a common national project. They are more concerned that their religious liberty be respected, even when this might involve the distribution of public resources. Feldman thinks that the pursuit of equal treatment with regard to funding (never mind the nonpreferential support for religion that Garry advocates) will jeopardize the goal of national unity. Rather than being a source of public benefits, religious institutions, at least when they are seeking government money, are likely to “create conflict and division.”<sup>60</sup>

I think Garry is correct to end his book with a focus on the special role of religion. The Constitution, properly interpreted, doesn’t prevent the government from favoring religion. And, religion, in his account, ought to be appreciated for the manifold benefits it provides. Principal among these is the sense that the government is of limited sovereignty, which provides the foundation for human rights.

*Dignitatis Humanae* makes the point that the government ought to acknowledge the special role of religion. That Declaration states:

“Government...ought indeed to take account of the religious life of the citizenry and show it favor, since the function of government is to make provision for the common welfare.”<sup>61</sup> As Garry points out (as have Justices Scalia and Thomas in recent cases), the Constitution doesn’t stand in the way of this recognition, and a concern for the health of our society may well suggest that the government would do well to act upon this view.

## Notes

1. For some of my earlier discussions of these issues, see Richard S. Myers, *The Ten Commandments Cases and the Future of the Religion Clauses of the First Amendment*, 11 *Cath. Soc. Sci. Rev.* 245 (2006); Richard S. Myers, *School Choice: The Constitutional Issues*, 8 *Cath. Soc. Sci. Rev.* 167 (2003); Richard S. Myers, *The United States Supreme Court and the Privatization of Religion*, 6 *Cath. Soc. Sci. Rev.* 223 (2001); Richard S. Myers, *Reflections on the Teaching of Civic Virtue in the Public Schools*, 74 *U. Det. Mercy L. Rev.* 63 (1998); Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 *Cath. U. L. Rev.* 19 (1991); Richard S. Myers, *The Establishment Clause and Nativity Scenes: A Reassessment of Lynch v. Donnelly*, 77 *Ky. L. J.* 61 (1988-89).
2. For a discussion, see Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 *Cath. U. L. Rev.* 19, 26-33 (1991). For an excellent discussion of this theme, see Philip Hamburger, *Separation of Church and State* (2002).
3. See Lee J. Strang, *The (Re)Turn to History in Religion Clause Law and Scholarship*, 81 *Notre Dame L. Rev.* 1697 (2006).
4. Richard S. Myers, *The United States Supreme Court and the Privatization of Religion*, 6 *Cath. Soc. Sci. Rev.* 223 (2001); Richard S. Myers, *The Ten Commandments Cases and the Future of the Religion Clauses of the First Amendment*, 11 *Cath. Soc. Sci. Rev.* 245 (2006).
5. See *Abington Township v. Schempp*, 374 U. S. 203 (1963); *Engel v. Vitale*, 370 U. S. 421 (1962).
6. See Richard S. Myers, *School Choice: The Constitutional Issues*, 6 *Cath. Soc. Sci. Rev.* 167, 168 (2003).
7. Most of these decisions applied the Lemon test. See, e.g., *Lemon v. Kurtzman*, 403 U. S. 602 (1971).
8. For critical discussion of these cases, see Myers, *supra* note 6, at 171-173; Myers, *supra* note 2, at 26-33.
9. See generally Myers, *supra* note 2.

10. *Zelman v. Simmons-Harris*, 536 U. S. 639 (2002).
11. 540 U. S. 712 (2004).
12. 539 U. S. 558 (2003).
13. For critical discussion, see Richard S. Myers, Pope John Paul II, Freedom, and Constitutional Law, 6 *Ave Maria L. Rev.* 61 (2007).
14. See Richard S. Myers, The Ten Commandments Cases and the Future of the Religion Clauses of the First Amendment, 11 *Cath. Soc. Sci. Rev.* 245, 249 (2006).
15. 545 U. S. 844 (2005).
16. 545 U. S. 677 (2005).
17. *Id.* At 681. For commentary on these two decisions, see Myers, *supra* note 14.
18. For discussion, see Myers, *supra* note 14, at 251.
19. See Myers, *supra* note 2, at 37-38.
20. See Myers, *supra* note 14, at 251-53.
21. (2005).
22. (2006).
23. Feldman taught at NYU Law School when the book under consideration here was published, and he now teaches at Harvard Law School.
24. See, e.g., Noah Feldman, *Cosmopolitan Law*, 116 *Yale L. J.* 1022 (2007); Noah Feldman, *The Theorists' Constitution—and Ours*, 117 *Harv. L. Rev.* 1163 (2004).
25. Noah Feldman, *A Church-State Solution*, *New York Times Magazine*, July 3, 2005.
26. Feldman, *supra* note 21, at 6.

27. Id. At 7.

28. Id.

29. Id. at 8.

30. Id.

31. Id. at 9.

32. Id.

33. Id. at 15.

34. Id. at 12.

35. Id. at 236.

36. Id.

37. Id. at 237.

38. Id.

39. Id. at 237-238.

40. Garry teaches at the University of South Dakota School of Law.

41. The articles on which this book builds were published in such places as the law reviews of Wake Forest, Hofstra, Florida, and Utah. See Patrick M. Garry, *An Inequality Among Equals: Disparities in the Judicial Treatment of Free Speech and Religious Exercise Claims*, 39 *Wake Forest L. Rev.* 361 (2004); Patrick M. Garry, *The Myth of Separation: Church-State Relations in the U.S.*, 33 *Hofstra L. Rev.* 475 (2005); Patrick M. Garry, *Religious Freedom Demands More Than Neutrality: The Constitutional Argument for Nonpreferential Aid to Religion*, 57 *Fla. L. Rev.* 1 (2005); Patrick M. Garry, *The Institutional Side of Religious Liberty: A New Model of the Establishment Clause*, 2004 *Utah L. Rev.* 1155.

42. Garry, *supra* note 22, at 4-5.

43. *Id.* at 8.

44. *Id.*

45. *Id.* at 9.

46. *Id.* at 14.

47. *Id.* at 12.

48. *Id.* at 16

49. *Id.* at 17.

50. See, e.g., Steven G. Gey, *Rewriting the Establishment Clause for One Nation Under (A) God*, 41 *Tulsa L. J.* 737 (2006).

51. For a discussion, see, Myers, *supra* note 14, at 251-53.

52. See generally Richard S. Myers, *The Privatization of Religion and Catholic Justices*, 47 *J. Cath. Stud.* (2008)(forthcoming).

53. Myers, *supra* note 6, at 174-176.

54. *Id.* at 175.

55. Michael W. McConnell, *The Selective Funding Problem: Abortion and Religious Schools*, 104 *Harv. L. Rev.* 989, 1043 (1991).

56. Feldman, *supra* note 21, at 247.

57. 540 U. S. 712 (2004).

58. *Id.* at 726-27 (Scalia, J., dissenting).

59. William P. Marshall, *The Other Side of Religion*, 44 *Hastings L. J.* 843 (1993).

60. Feldman, *supra* note 21, at 245.

61. *Dignitatis Humanae* section 3 (1965).