July 3, 2005

A Church-State Solution

By NOAH FELDMAN

I. THE EXPERIMENT

For roughly 1,400 years, from the time the Roman Empire became Christian to the American Revolution, the question of church and state in the West always began with a simple assumption: the official religion of the state was the religion of its ruler. Sometimes the king fought the church for control of religious institutions; other times, the church claimed power over the state by asserting religious authority over the sovereign himself. But the central idea, formally enshrined at Westphalia in 1648 by the treaty that ended the wars of religion in Europe, was that each region would have its own religion, namely that of the sovereign. The rulers, meanwhile, manipulated religion to serve their own ends. Writing just before the American Revolution, the British historian Edward Gibbon opined that the people believed, the philosophers doubted and the magistrates exploited. Gibbon's nominal subject was ancient Rome, but his readers understood that he was talking about their world too.

All this changed with the radical idea, introduced during the American Revolution, that the people were sovereign. This arrangement profoundly disturbed the old model of church and state. To begin with, America was religiously diverse: how could the state establish the religion of the sovereign when the sovereign people in America belonged to many faiths -- Congregationalist, Anglican, Presbyterian, Baptist, Quaker? Furthermore, the sovereign people would actively believe in religion instead of cynically manipulating it, and elite skeptics would no longer be whispering in the ears of power. Religion would be a genuinely popular, even thriving, political force.

This model called for a new understanding of church and state, and the framers of the American Constitution rose to the occasion. They designed a national government that, for the first time in Western history, had no established religion at all. The Articles of Confederation, which were drawn up during the Revolutionary War, had been silent on religion -- itself something of an innovation. But the Constitution went further by prohibiting any religious test for holding office. And the first words of the First Amendment stated that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." If the people were to be sovereign, and belonged to different religions, the state religion would be no religion at all. Otherwise, the reasoning went, too many religious denominations would be in competition to make theirs the official choice, and none could prevail without coercing dissenters to support a church other than their own -- a violation of the liberty of conscience that Americans had come to believe was a God-given right. Establishment of religion at the national level was prohibited. Religious diversity had ensured it. The experiment had begun.

II. OUR PRESENT PREDICAMENT

During the two and a quarter centuries since America's founding, the experiment has progressed fitfully. The nonestablishment of religion, with a simultaneous guarantee of its free exercise, was an elegant solution but not a complete one. Generation after generation, fresh infusions of religious diversity into American life have brought with them original ideas about church and state -- new answers to the challenge of preserving the unity of the sovereign people in the face of their flourishing spiritual variety and often conflicting religious needs.

Consider the influx of Catholic immigrants that followed the Irish potato famine in the 1840's. In the overwhelmingly Protestant world of the framers' America, there was a common belief that taxation for religious purposes violated religious liberty. As a result, when public schools were invented a few decades later, they featured only "nonsectarian" Bible reading and prayer. But Catholic immigrants soon protested that the schools' nonsectarianism -- in which the Protestant King James Bible was free to be interpreted by the individual student but not by the teacher (let alone a priest) -- was in fact sectarian Protestantism in disguise. The unsuccessful struggle of Catholic immigrants to have their own schools publicly financed or, failing that, to take the King James Bible out of the public schools, generated half a century of vituperative and sometimes deadly struggle.

In our own era, two camps dominate the church-state debate in American life, corresponding to what are now the two most prominent approaches to the proper relation of religion and government. One school of thought contends that the right answers to questions of government policy must come from the wisdom of religious tradition. You might call those who insist on the direct relevance of religious values to political life "values evangelicals." Not every values evangelical is, technically speaking, an evangelical or a born-again Christian, although many are. Values evangelicals include Jews, Catholics, Muslims and even people who do not focus on a particular religious tradition but care primarily about identifying traditional moral values that can in theory be shared by everyone.

What all values evangelicals have in common is the goal of evangelizing for values: promoting a strong set of ideas about the best way to live your life and urging the government to adopt those values and encourage them wherever possible. To them, the best way to hold the United States together as a nation, not just a country, is for us to know what values we really hold and to stand up for them. As Ralph Reed recently told an audience at Harvard, "While we are sometimes divided on issues, there remains a broad national consensus on core values and principles."

On the other side of the debate are those who see 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. You might call those who hold this view "legal世俗ists," not because they are necessarily strongly secular in their personal worldviews -- though many are -- but because they argue that government should be secular...
and that the laws should make it so. To the legal secularists, full citizenship means fully sharing in the legal and political commitments of the
nation. If the nation defines itself in terms of values drawn from religion, they worry, then it will inevitably tend to adopt the religious values of
the majority, excluding religious minorities and nonreligious people from full citizenship.

Despite the differences, each approach, values evangelicism and legal secularism, is trying to come to terms with the same fundamental tension
in American life. The United States has always been home to striking religious diversity -- diversity that has by fits and starts expanded over the
last 230 years. At the same time, we strive to be a nation with a common identity and a common project. Religious division threatens that unity,
as we can see today more clearly than at any time in a century in the disputes over stem-cell research, same-sex marriage and end-of-life issues.
Yet almost all Americans want to make sure that we do not let our religious diversity pull us apart. Values evangelicals say that the solution lies
in finding and embracing traditional values we can all share and without which we will never hold together. Legal secularists counter that we can
maintain our national unity only if we treat religion as a personal, private matter, separate from concerns of citizenship. The goal of reconciling
national unity and religious diversity is the same, but the methods for doing it are deeply opposed.

Yet neither legal secularism nor values evangelicism has lived up to its own aspirations. Each promises inclusion, but neither has delivered. To
make matters worse, the conflict between these two approaches is becoming a political and constitutional crisis all its own. Talk of secession of
blue states from red in the aftermath of the 2004 election was not meant seriously; but this kind of dark musing, with its implicit reference to the
Civil War, is also not coincidental. It bespeaks a division deeper than any other in our public life, a division that cannot be healed by the victory
of either side.

III. CLOSING THE RIFT

The split between legal secularism and values evangelicism was not born in a day. Legal secularism arose in the post-World War II era,
reflecting a growing concern about the need to protect religious minorities, especially newly visible Jews who were arguably excluded by public
displays of Christian religion like crèches or recitations of the Lord's Prayer. But instead of attacking religion directly, as some antireligious
secularists did earlier in the century with little success, organizations like Americans United for Separation of Church and State and the American
Civil Liberties Union argued more narrowly that government ought to be secular in word, deed and intent. In 1971, in Lemon v. Kurtzman, the
Supreme Court made this position law, requiring all government decisions to be motivated by a secular purpose, to have primarily secular effects
and not to entangle the state with religious institutions. This new standard -- known thereafter as the "Lemon test" -- did much more than simply
reaffirm a deeply rooted American norm of no government money for religion: it prohibited school prayer and Bible reading, which had been
practiced in the public schools since their founding, and in many instances it removed Christmas decorations from the public square. The framers
had neither known nor used the category "secular" as we understand it, but the court made secularism an official condition of all acceptable
government conduct.

In many quarters of religious America, there was outrage at this court-mandated secularism, which to many believers soon came to seem of a
piece with the Supreme Court's 1973 guarantee of abortion rights in Roe v. Wade. By 1980, the televangelist Jerry Falwell and the Moral
Majority, the political organization he founded, succeeded in mobilizing this frustration to help elect Ronald Reagan president. In time, Reagan's
judicial nominees began to roll back the advances of legal secularism by allowing the government to pay for religious education and other
activities via vouchers or other neutral and generally available government programs. In a particularly ingenious twist, evangelicals won these
cases by depicting themselves as a minority subject to discrimination by secularists who wanted to deny them government support.

But the values evangelicals did not succeed entirely in reversing the Supreme Court's embrace of legal secularism. Throughout the 90's, in a
series of 5-4 decisions in which Justice Sandra Day O'Connor provided the swing vote, the Supreme Court refused to permit the government to
take any symbolic action that might be seen to "endorse" religion, thus preserving and even expanding the ban on school prayer. The other eight
justices on the Rehnquist Court held that government financing and state-sponsored religious symbolism should be treated the same way: either
both were permissible or both weren't. But since those justices were split 4-4 on whether to allow more of each or less of both, O'Connor's
compromise -- allowing some government financing of religion but no government endorsement of religious symbols -- has been the law of the
land for the last two decades.

The resulting doctrine has been the cause of the major church-state controversies of recent years. In 2004, for instance, when a California man
named Michael Newdow pressed the court to find that the words "under God" in the Pledge of Allegiance impermissibly endorsed religion, the
court ducked the issue. The more liberal justices seemed afraid to rule the pledge unconstitutional yet were unwilling to embrace the view
(advanced awkwardly by O'Connor, given her usual opposition to endorsing religious symbols) that there is no endorsement when the religious
symbol is longstanding and common.

During the same Supreme Court term, a young man named Joshua Davey asked the court to require the state of Washington to let him use his
public scholarship money to pay for his studies as a theology major at an evangelical college. But the court, including Chief Justice William
Rehnquist, refused to overturn the state's policy against paying for religious courses of study, even though Davey was as much the victim of
"discrimination" as were earlier evangelical plaintiffs whom the court had granted access to government money to pay for their student
publications. In essence, the court, divided itself and uneasy about O'Connor's fence-sitting, is unwilling or unable to take a unified stand on what
the Constitution really means when it comes to the relation between religion and government. It will be surprising if the Ten Commandments
cases just decided by the court bring to an end the judicial wrangling over the church-state question.

The O'Connor compromise between values evangelicism and legal secularism may be unsatisfactory, but the truth is that neither approach
deserves to prevail. Both are self-contradictory: they fail precisely where they want to succeed, namely in reconciling religious diversity with
unity. The values evangelicals want to find shared values, but that leads them to rely on the unexamined assumption that deep down, Americans
agree on what matters. The trouble is that "we" often do not agree. The Ten Commandments may appeal to Jews and Christians, but to Muslims,
they are an imperfect revelation superseded by the Koran, and Buddhists and Hindus find no appeal in the Commandments' self-attribution to the
single God who took the Children of Israel out of Egypt.

Even a joint commitment to "the culture of life" turns out to be very thin. Catholics and conservative Protestants may agree broadly on abortion and euthanasia; but what about capital punishment, which Pope John Paul II condemned as an immoral usurpation of God's authority to determine life and death but which many evangelical Christians support as biblically mandated? To reach consensus, the values evangelicals have to water down the "values" they say they accept to the point where they would mean nothing at all. They are left either acknowledging disagreement about values or else falling into a kind of relativism (I'm O.K., you're O.K.) that is inconsistent with the very goal of standing for something rather than nothing.

Meanwhile, the legal secularists have a different problem. They claim that separating religion from government is necessary to ensure full inclusion of all citizens. The problem is that many citizens -- values evangelicals among them -- feel excluded by precisely this principle of keeping religion private. Keeping nondenominational prayer out of the public schools may protect religious minorities who might feel excluded; but it also sends a message of exclusion to those who believe such prayer would signal commitment to shared values. Increasingly, the symbolism of removing religion from the public sphere is experienced by values evangelicals as excluding them, no matter how much the legal secularists tell them that is not the intent.

Despite the gravity of the problem, I believe there is an answer. Put simply, it is this: offer greater latitude for religious speech and symbols in public debate, but also impose a stricter ban on state financing of religious institutions and activities. This approach, the mirror image of O'Connor's compromise, is drawn from the framers' vision and the historical experience of separating church and state in America. The framers might well have been mystified by courthouse statues depicting the Ten Commandments, but they would not have objected unless the monuments were built with public money. Having made a revolution over unfair taxation, they thought of government support in terms of dollars spent, not abstract symbols.

From this logic, it follows that a moment of silence to begin the school day should not be invalidated just because it is intended to let children pray if they wish. Though it will never be easy to determine when schoolchildren are being coerced by peer pressure, at least some older students at optional events like a Friday-night football game surely are not being forced to pray when others are doing so voluntarily. Intelligent-design theory, itself a product of the ill-advised demand that religion disguise itself in secular garb, should be opposed on the educational ground that it is poor science, not on the constitutional reasoning, which some secularists have advanced, that it is a cover for religious creationism. If its advocates can persuade a local school board to put it in the curriculum, the courts need not strike it down as an establishment of religion. On the other hand, charitable choice, which permits billions of dollars in federal money to support faith-based organizations, should not be a vehicle for allowing government to pay for programs that treat alcoholics by counseling them to accept Christ. Schools that teach that Shariah (or Jewish rabbinic law or canon law) is the ultimate source of values should not be supported by tuition vouchers.

Such a solution would both recognize religious values and respect the institutional separation of religion and government as an American value in its own right. This would mean abandoning the political argument that religion has no place in the public sphere while simultaneously insisting that government must go to great lengths to dissociate itself from supporting religious institutions. It would mean acknowledging a substantial difference between allowing religious symbols and speech in public places (so long as there is no public money involved) and spending resources to sustain religious entities like churches, mosques and temples. Public religious symbolism expressed in statues, oaths and prayers reflects citizens' desires to see their deeply held beliefs expressed in those public situations where moral commitments are relevant: legislatures, schools and, yes, courthouses and statehouses. Religious proclamations or prayers may open sessions of Congress without costing anyone a dime.

But government money, even when nominally available equally to all, inevitably creates political competition between religious groups over how and where scarce money will be spent. Zero-sum appropriations drive zero-sum politics. A tuition voucher is never priced out of thin air: its amount is set by a political process that favors some schools (for example, Catholic schools that already have infrastructures and support from a centralized church) at the expense of others.

In the courts, the arrangement that I'm proposing would entail abandoning the Lemon requirement that state action must have a secular purpose and secular effects, as well as O'Connor's idea that the state must not "endorse" religion. For these two tests, the courts should substitute the two guiding rules that historically lay at the core of our church-state experiment before legal secularism or values evangelicalism came on the scene: the state may neither coerce anyone in matters of religion nor expend its resources so as to support religious institutions and practices, whether generic or particular. These constitutional principles, reduced to their core, can be captured in a simple slogan: no coercion and no money. If no one is being coerced by the government, and if the government is not spending its money to build religious-themed monuments or support religious institutions and practices, the courts should hold that the Constitution is not violated.

Admittedly, this approach goes against the trends of the last several decades, which are for stricter regulation of public religious symbolism and more permissive authorization of government financing and support for religion. At first blush, then, the proposal may strike both sides of the current debate as mistaken, since it requires each to give up some victories in exchange for an alternative solution. Nonetheless 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.

IV. FAITH IS NOT A CONVERSATION STOPPER

The solution I have in mind rests on the basic principle of protecting the liberty of conscience. So long as all citizens have the same right to speak and act free of coercion, no adult should feel threatened or excluded by the symbolic or political speech of others, however much he may disagree with it. If many congressmen say that their faith requires intervening to save Terri Schiavo, that is not a violation of the rules of political debate. The secular congresswoman who thinks Schiavo should have the right to die in peace can express her contrary view and explain why it is that she
believes a rational and legal analysis of the situation requires it. She may lose the vote, but she is not excluded from the process or from the body that votes against her, any more than a Republican would be "excluded" from a committee controlled by Democrats.

Legal secularists may fear that when facing arguments with religious premises, they have the deck stacked against them. If values evangelicals begin by asserting that God has defined marriage as the union of one man and one woman, then, say the secularists, the conversation about same-sex marriage is over. But in fact, secularists can make arguments of their own, which may be convincing: if the state is going to regulate marriages, shouldn't they be subject to the same equality requirement as every other law? Some might even go further and ask the evangelicals how they can be so sure that they have correctly identified God's will on the question. They may discover that few evangelicals treat faith as a conversation stopper, and most consider it just the opposite.

In any event, when the debate is over, the people will vote, and they will decide the matter. Legal secularists cannot realistically expect that they will win more democratic fights by banning the evangelicals' arguments, which can usually be recast, however disingenuously, as secular. Once in a while they may, if the composition of the Supreme Court is just right, thwart the values evangelicals' numerical superiority with a judicial override; but in the long run, all they will accomplish is to alienate the values evangelicals in a way that undercuts the meaningfulness of participatory democracy.

When it comes to religious symbolism, typically some group will ask the state for a display or an acknowledgment of their holiday or tradition -- a crèche or a statue, a song or pageant. Invoking Justice O'Connor's endorsement test, legal secularists ordinarily object that if the state acquiesces, then it is embracing the religious symbol and excluding adherents of other religions. But this interpretation of what state support would mean may not be the best or most natural one. The fact that others have asked for and gotten recognition implies nothing about the exclusion of any religious minority except for the brute fact that it is a religious minority. There is no reason whatever for religious minorities to be shielded from that fact, since there is nothing shameful or inherently disadvantageous in being a religious minority, so long as that minority is not subject to coercion or discrimination.

Take the fact that the government treats Christmas as a national holiday. It would be absurd if Jews or Muslims or Hindus or Buddhists felt fundamentally excluded from citizenship by this fact -- and I would venture to suggest that very few do. Most Americans are still Christians who celebrate Christmas, and the state acknowledges that fact, just as the culture does through the songs on the radio and the merchandise in the stores. The celebration may not always be deeply religious, but the atmosphere corresponds to the realities of the Christian majority. Just what is threatening to religious minorities about Christians celebrating the holiday or singing carols in school? What, exactly, is the harm in being wished Merry Christmas even if you're not celebrating? The state has not made Christianity relevant to citizenship nor has it spent taxpayers' money to advance the cause of the church. It has simply acknowledged the preferences of a majority. Some members of religious minorities may choose to spend December feeling bad that they are not part of the majority culture -- but they would have this same problem even if Christmas were not a national holiday, since Christmas would still be all around them. The answer is for them to strengthen their own identities and be proud of who they are, not to insist that the majority give up its own celebration to accommodate them.

In the last 50 years, legal secularists have expressed concern that public manifestations of religion marginalize religious minorities and hence reduce the capacity of those minorities to participate in a common national public life. And at times, that has been a valid complaint, as with mandatory religious exercises in schools. But today the increasing presence of other non-Christian religious minorities, and an attendant atmosphere of religious multiculturalism, mean that public manifestations of religion -- at least at the national level -- are becoming increasingly pluralistic and inclusive. Consider the televised memorial service led by President Bush on Sept. 14, 2001, a day he had designated as a national day of prayer and remembrance for the victims of the 9/11 attacks. With the cabinet, members of Congress and the foreign diplomatic corps in attendance, the president assured the congregation that God created a world "of moral design" and that "the Lord of life holds all who die and all who mourn." Suffused with theology as much as any presidential address since Lincoln's second inaugural, the speech took on the problem of evil while commending the future of the republic to God's grace.

Yet despite the high-Protestant venue -- the Episcopal Washington National Cathedral -- the president was preceded in the pulpit by the dean of the cathedral as well as by the Roman Catholic archbishop of Washington, an African-American Methodist minister, Billy Graham, a rabbi and an imam who quoted verses from the Koran. The display of inclusiveness was driven not only by political imperative but also by the recognition that this extraordinary national-religious moment must reach out to America's religious diversity.

In this latest demographic version of a religiously diverse environment, where Protestants may soon cease to be a majority in the United States, the danger that Christmas crèches or prayer at high-school graduations will marginalize non-Christians is substantially decreased. Some parts of the country are still dominated by particular denominations or trends; but even in the heart of the Bible Belt, diversity is growing as a result of immigration and shifting population patterns. Indeed, the Ten Commandments monument that Judge Roy Moore erected in the Alabama Supreme Court was thought by its supporters, however inaccurately, to be nonsectarian, on the theory that Jews and Christians alike respect the ideals it represents. Although insensitivity and ignorance are still very much with us, today we are unlikely to see the religious majority refusing to allow religious minorities to display their symbols alongside those of the majority. The five-times daily broadcast of the Muslim call to prayer from a mosque may at first raise hackles, but when the comparison to church bells is made, public acceptance is likely to follow, as it did in the town of Hamtramck, Mich., last summer.

V. WHAT INCLUSION REALLY LOOKS LIKE

Atheists will doubtless maintain that any public religion at all -- like "under God" in the Pledge of Allegiance -- excludes them by endorsing the idea of religion generally. But this misses the point: it is an interpretive choice to feel excluded by other people's faiths, and the atheist, like any other dissenter from a majoritarian decision, can just as easily adhere to his own views while insisting on his full citizenship. So long as no one is coerced into invoking God, it makes little sense to accommodate the atheist's scruples by barring everyone else from saying words that he alone
finds to be metaphysically empty. Complete subjective inclusion is impossible, so if our goal is to include as many people as possible, we need to reach as widely as possible by letting the ordinary democratic process take its course. The Jehovah's Witnesses, who in the 1940's fought for the right not to salute the flag, never insisted that the salute or the pledge should be abolished altogether -- they just wanted their children to be exempt from a mandatory ritual that violated their consciences and hence their religious liberty.

In some instances, pluralistic, public expressions of religion even hold out the possibility of enabling new religious minorities to participate fully in the American public sphere. Muslims, Hindus and Buddhists, for whom religion and immigrant status may be closely connected, may well seek opportunities for the symbolic recognition of their citizenship that can be gained in schools, legislatures and elsewhere. Acknowledging holidays like the Muslim Eid al-Fitr or the Hindu Divali in what has traditionally been a Christian country may validate a sense of belonging in a way that no secular civic symbol can. Such an embrace of minority faith might go beyond symbols like legislative prayers, which remain legal despite secularist objections, and extend to celebrating holidays in the schools or granting adherents those days off from work, which would be of questionable constitutionality under current law. Ultimately, the nation may have more success generating loyalty from religiously diverse citizens by allowing inclusive governmental manifestations of religion than by banning them.

Observing the political clout of the values evangelicals, many legal secularists cannot imagine how the former could possibly feel marginalized from American society. They must realize, however, that the evangelicals' political strength has not only extended to the cultural realm, about which values evangelicals care the most. These evangelicals feel defensive not only because they believe they are losing the culture war and have trouble enacting religious values into public policy -- though, in fact, they have made some strides on issues like abortion and same-sex marriage - but because they have difficulty making the religious sources of their ideas acceptable in the cultural-political conversation. To give a religious reason for passing a law is still to run the risk of that law being held unconstitutional as serving a religious rather than a secular purpose. So evangelicals end up speaking in euphemisms ("family values") or proposing purpose-built dodges like "creation science" that even they often privately acknowledge to be paradoxical.

A better approach would be for secularists to confront the evangelicals' arguments on their own terms, refusing to stop the conversation and instead arguing for the rightness of their beliefs about their own values. Reason can in fact engage revelation, as it has throughout the history of philosophy. The skeptic can challenge the believer to explain how he derives his views from Scripture and why the view he ascribes to God is morally attractive -- questions that most believers consider profoundly important and perfectly relevant.

This kind of exchange need not produce agreement on abortion or same-sex marriage or anything else. To the contrary, hard moral questions will remain controversial. But acknowledging a moral debate as a moral debate in which all sides deserve a say will have the effect of communicating to evangelicals that their voices count. In the long run, this approach is more likely to focus our national debates on substance instead of procedure -- on what God or reason or whatever source of values teaches about human life and intimate choices, not about whether God belongs in the conversation at all. Secularists who are confident in their views should expect to prevail on the basis of reason; evangelicals who wish to win the argument will discover that their arguments must extend beyond simple invocation of faith.

VI. THE PROBLEM WITH MONEY

If we are to progress toward reconciliation of our church-state problem, it will not be enough for legal secularists to re-evaluate their attitude toward religious symbols and religious discourse. Values evangelicals must also change their ways and give something up -- by reconsidering their position in favor of state support for religious institutions. The reason they should be prepared to do so is that such state support actually undercuts, rather than promotes, the cohesive national identity that evangelicals have wanted to restore or recreate. When filtered through vouchers distributed by the government and directed by individual choice, state financial aid for religious institutions like schools or charities does not encourage common values; it creates conflict and division.

Today's voucher programs, like the one in Florida that is currently under challenge before the Florida Supreme Court, focus on helping kids in failing schools. But imagine a broader voucher system. Many or most parents might well use the vouchers to send their children to private, mostly religious schools; more than half the beneficiaries of the Florida program do exactly that, and in other, more focused plans, the numbers have been upward of 90 percent. Because we value religious liberty so highly, most Americans would surely agree that it would be wrong to regulate and supervise religious schools closely enough to ensure that they teach some version of prescribed American values. That is precisely why the Constitution has been interpreted to protect the right to educate your children in private religious schools altogether. But given this right to educate according to your own values, what is to ensure that the curriculum in state-supported religious schools will 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.

While the great majority of schools run by most religious groups do encourage loyal citizenship by their lights, we cannot simply assume that any school of any religious denomination will teach shared American national identity or values. Some schools will teach that the best form of life is to prefer your fellows -- whether Protestants or Jews or Muslims or Catholics -- to other Americans. No religious tradition is without at least a hint of such particularism, which is just one mechanism by which common citizenship may be undermined by some forms of religion. Different religious schools will also teach disparate values, increasing national disagreement when it comes to controversial issues. There is nothing inherently wrong with that type of values diversity, of course. Private schools unsupported by vouchers can in any case teach whatever they want about citizenship and loyalty. But while values evangelicalism claims to advocate national unity and inclusion through shared values, school-voucher programs cut exactly the other way, promoting difference and nonengagement. Permitting schools supported by private money to teach that there is no common American undertaking is not the same as encouraging that teaching through state subsidy.

Now consider what will happen when some delegate in a state legislature rises to argue that voucher payments should not be extended to schools that teach racism, or anti-Americanism, or sexism. Under the law as it is developing, the state cannot pick and choose but must pay for all the schools or none. Cutting financing for the offending school would require cutting it for every school. There will then inevitably ensue a debate about whether the outrage of financing this one school outweighs the benefits of financing all the others. In essence, this will be a debate about
how bad the teachings of the religion under attack are, and how good the others.

This situation, reminiscent of 19th-century legislative debates about the supposed ills of the Catholic Church, captures precisely the sort of divisiveness in politics that institutional separation aims to avoid. Only this time it will probably not be Catholicism in the dock but something else -- Islam, say, or polytheistic Hinduism, or some religion so new that it still seems like a cult. The framers' innovation of nonestablishment was designed so that the sovereign people should not spend their legislative sessions debating the relative merits of different faiths and their compatibility with American values. That is a recipe for real and deep division.

The tradition of institutional separation that must be reasserted goes beyond blocking money for religious schools. All attempts to use government resources to institutionalize religious practices countermand the American tradition of nonestablishment, grounded historically in the belief that government has no authority over religious matters. When government pays for social programs through the rubric of charitable choice, the programs must not be ones that rely on faith to accomplish their goals -- or else the government is institutionally sponsoring the religious mission of the church in question. This is also why the state itself must not compose or mandate public prayers, which then take on the shape of state-imposed religious exercises in a way that is very different from voluntary prayers chosen and led by individuals in public contexts. The founding father James Madison himself understood that paying the chaplains of the House and Senate out of the public till was a constitutional anomaly, and he wisely, if belatedly, suggested that the members of Congress ought to pay for their services from their own pockets.

Surprising as it may at first sound, the changes from existing laws and practices that I'm advocating have a realistic chance of being adopted and even embraced by values evangelicals. It may already be possible to glimpse a growing recognition among values evangelicals that voucher programs do not necessarily promote common values but may do just the opposite. The ballooning of school-voucher programs that some expected in the wake of the Supreme Court's 2002 decision holding them constitutional has not come to pass. Faith-based charities have not yet managed to crowd out secular service providers, although more extensive government financing for faith-based social services remains a stated goal of the Bush administration. Given that voucher programs have not spread, it should be relatively easy for values evangelicals to abandon them -- especially since they will be getting something in return, namely greater recognition and acceptance for their values-based arguments and the corresponding symbols of public religion.

Government financing of religion is, after all, a relative latecomer to the ideology of values evangelicalism. The movement from the start drew its energy from symbolic questions of culture and morality, not from any desire to see a merger of church and state. Catholics may have pressed hard from within the movement to make vouchers an important issue, but even they turn out to be relying little on those voucher programs for educating their own children; the voucher students in Catholic schools in Milwaukee or Cleveland are heavily inner-city non-Catholics. Even evangelicals should also be prepared to acknowledge the historical fact that our constitutional tradition, flawed though it assuredly is, has always made institutional separation the touchstone of nonestablishment.

VII. THE EXPERIMENT REVISITED

The proposal is a simple one -- and it looks backward to history in order to look forward. If we could be more tolerant of sincere religious people drawing on their beliefs and practices to inform their choices in the public realm, and at the same time be more vigilant about preserving our legacy of institutional separation between government and organized religion, the shift would redirect us to the uniqueness of the American experiment with church and state. Until the rise of legal secularism, Americans tended to be accepting of public, symbolic manifestations of faith. Until values evangelicalism came on the scene, Americans were on the whole insistent about maintaining institutional separation. These two modern movements respectively reversed both those trends.

The novelty of these developments does not mean they are wrong, of course. But in an America grown so religiously diverse that it can no longer easily be called "Judeo-Christian," we need to learn from our history if we are to have any hope of constructing a single nation that will endure. Muslims, Buddhists and Hindus will have to join Protestants, Catholics, Jews and atheists in finding a resolution to our church-state problem that all can embrace. A solution that will work for our generation must bind us to the past. But like all successful nation-building, it will work only if it also sets a foundation for our future.

Noah Feldman is a professor at the New York University School of Law and a fellow at the New America Foundation. His book "Divided by God: America's Church-State Problem -- and What We Should Do About It," from which this article is adapted, will be published later this month by Farrar, Straus & Giroux.
Church-State Relations and Secularization. Throughout history there has developed a variety of relationships between Christian churches and governments, sometimes harmonious and sometimes conflictual. The major forms of relationships between Christian churches and governments are in large measure grounded in various perspectives in the Christian Bible. Sinai became the central framework for the relationship of the people of Israel to God. The Book of Deuteronomy renews and reflects upon this covenant a generation later, as Moses is at the end of his life. These four options would shape, respectively, later Greek Orthodox, Roman Catholic, Lutheran, and Calvinist views of the proper relation between church and state.