

# CAPITAL COMMENTARY

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## A Supreme Challenge for John Roberts

John Roberts, President Bush's nominee for the U.S. Supreme Court, faces a major task if he is confirmed: helping to craft a coherent doctrine on the religion clauses of the First Amendment. Justice Sandra Day O'Connor, whose decision to step down created the vacancy, had many strengths, but her pragmatic approach contributed to the confusion about church-state issues. The question is: What's a better approach?

In a recent *New York Times Magazine* article (July 3), Noah Feldman of New York University School of Law proposed a "Church-State Solution." His analysis is thought-provoking. But his solution misses the mark. For Feldman, the core problem is how to preserve the unity of our religiously diverse nation. "Values evangelicals," he says, urge the government to adopt religiously based standards for the whole nation. Their opponents, the "legal secularists," claim that religion is divisive and must be confined to private life, leaving government entirely secular.

Both groups are wrong, Feldman rightly claims. The consensus presumed by values evangelicals doesn't exist, and if the government makes the standards of one religious group obligatory, we will have conflict, not unity. Yet the legal secularists are also wrong. Expelling religion doesn't make the public square equally hospitable to all; rather, it excludes citizens whose convictions shape their whole lives.

But Feldman's own solution is also a dead end. Here's his proposal: stop excluding religious argument and symbolism from public life and also stop government funding of religious organizations. That is, in order to end the unjust exclusion of religion from public debates, we must abandon the Court's genuine progress towards equal treatment, which undergirds the faith-based initiative.

Feldman is half right. In our democracy, all citizens are free to make public arguments, so religious views can't fairly be excluded. If secularists don't like the arguments, they should counter them, and if the

public doesn't find religious reasons convincing, then arguments based on those reasons will fail. Secularists should stop trying to stack the deck by banning religion from public debate. So far so good.

Unfortunately, Feldman flirts with authorizing officials to promote a civil religion. He's courageous to oppose the ACLU and others who seek to strip away all religious symbols, as if the Constitution requires the government to pretend that our society and history are religion-free. Still, while the government should accommodate the faiths of the citizens, it must be careful not to create an official religion—not to avoid divisiveness but because Caesar is not Lord.

The other half of Feldman's proposal is simply wrong. He says that government funding of religious social-service providers creates conflict, not common values, and so it must stop. But creating common values isn't the government's task. On the other hand, it surely is the job of government to deal fairly with organizations of every conviction and not to presume that faith-based services are somehow less legitimate than their secular counterparts.

There is a solution to the church-state confusion, just not Feldman's. The government should honor the convictions of all citizens, discriminating neither for nor against religion when funding social services and neither for nor against religious arguments and the religious symbols and activities that constitute so much of our history and our lives together. But government officials can't be the nation's clergy. That is not merely divisive but idolatrous.

We don't know how a Justice Roberts would rule on these important matters. We must hope that he will fight unjust restrictions on religious speech, symbols, and also institutions, while keeping limits on the government's tendency to put itself in the place of God.

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