Americans United for Separation of Church and State: A Report in Opposition to the Nomination of John G. Roberts Jr. to the United States Supreme Court

RELIGIOUS MINORITIES AT RISK: A REPORT IN OPPOSITION TO THE NOMINATION OF JOHN G. ROBERTS JR. TO THE UNITED STATES SUPREME COURT

John G. Roberts Jr. has consistently called for dismantling the wall that separates church and state. His brand of Establishment Clause jurisprudence would bring about remarkable — indeed, radical — results, with potentially devastating consequences for religious minorities.

Overview

At every step of his legal career, Roberts has advanced an exceedingly narrow reading of the constitutional provision that was designed to ensure a healthy separation of church and state. He has time and again advocated a legal standard that jettisons longstanding protections against over-reaching by religious majorities. Under his view of the law, highly sectarian prayers would be permitted at public-school ceremonies, and perhaps even in public school classrooms; displays of sectarian religious symbols would be allowed to proliferate in public schools and other government buildings; public dollars could be used to subsidize religious discrimination and other religious activities; and religious minorities could be deprived of access to the federal courts to seek constitutional protections against such over-reaching.

Roberts may claim that he took some of these positions because they represented the views of his clients or employers, rather than his own. But if that were so, one would expect to find writings advancing varied positions from a range of perspectives. Instead, Roberts' writings — whether on behalf of clients, the Attorney General, the Solicitor General, or the Reagan White House — present a remarkably consistent vision: a federal court system that is wholly unreceptive to the Establishment Clause concerns of religious minorities.

I. Roberts Supports a View of the Establishment Clause That Gives Short Shrift to the Concerns of Religious Minorities.

In an address to the Supreme Council of the Knights of Columbus on August 7, 1985, then-Secretary of Education William J. Bennett expressed the view that the United States is founded on Judeo-Christian religious principles and that these principles are, and should be, "wedded together" with "our values, our principles, the animating spirit of our institutions."[1] A more clear repudiation of the separation of

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[1] Bennett Address at 12 (on file with the Ronald Reagan Presidential Library).

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church and state is difficult to fathom. Yet, rather than objecting to this statement, Roberts supported it: he approved the address, stating, "I have no quarrel" with it.[2]

Roberts recognized the controversial nature of Bennett's remarks, stating that they would "stir up the debate."[3] Indeed, the remarks were nothing short of incendiary, taking the view that "[o]ur values as a free people and the central values of the Judeo-Christian tradition are flesh of the flesh, blood of the blood," and that "our history has . . . deepened the intimate relationship between the Judeo-Christian tradition and the American political order."[4] But Roberts concluded nonetheless that there was no "legal reason to object to them."[5]

In fact, there was ample legal reason to object to these remarks. Just three years before Roberts' memo, the United States Supreme Court had held that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[6] As the Court recognized in *Larson*, "Madison's vision — freedom for all religion[s] being guaranteed by free competition between religions — naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference."[7] Yet, Roberts chose in his 1985 memo to turn a blind eye to this vital principle.

II. Roberts Would Abandon the Longstanding Legal Standard That Protects Against Majoritarian Over-Reaching.

In order to ensure that government remains neutral on religious matters, the Supreme Court held over thirty years ago that governmental action will be found to violate the Establishment Clause

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[2] Memorandum from John G. Roberts, Associate Council to the President, to Fred F. Fielding, Council to the President (Aug. 6, 1985) (on file with the Ronald Reagan Presidential Library).

[3] *Id.*

[4] Bennett Address at 9, 11.

[5] Memorandum from Roberts to Fielding (Aug. 6, 1985).

[6] *Larson v. Valente*, 456 U.S. 228, 244 (1982).

[7] *Id.* at 245.

of the First Amendment if it was taken with a religious purpose, has a primarily religious effect, or excessively entangles church and state.[8]

Since that time, the "*Lemon* test" has served as a bulwark against over-reaching by religious majorities. The test has been used to strike down the indoctrination of public school students through the posting of the Ten Commandments in classrooms,[9] to prohibit the delivery of Christian prayers at high school football games,[10] and to preclude government funding of the religious activities of anti-choice organizations.[11]

Although the *Lemon* test has been the subject of some criticism, and the Court has declined to apply it in certain narrow circumstances,[12] the test remains the operative standard in Establishment Clause cases.[13] Just last term, five of the current Justices — including Justice O'Connor — made

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[8] *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

[9] *See Stone v. Graham*, 449 U.S. 39, 40-41 (1980).

[10] *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000).

[11] *See Bowen v. Kendrick*, 487 U.S. 589, 602 (1988).

[12] The two principal cases in which the Supreme Court has opted not to apply the *Lemon* test are *Lee v. Weisman*, 505 U.S. 577 (1992), and *Marsh v. Chambers*, 463 U.S. 783 (1983). In the former case, the Court had no need to apply the *Lemon* test because it found prayers at public school graduation ceremonies to violate even the more demanding coercion test. *Lee*, 505 U.S. at 587. In *Marsh*, the Supreme Court opted to apply a standard of original intent, rather than the *Lemon* test, to uphold legislative prayers because the First Congress had explicitly approved the practice. *Marsh*, 463 U.S. at 786-92. *Marsh* is considered a "one-of-a-kind" case in Establishment Clause jurisprudence, with little impact beyond the context of legislative prayers. *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 380-82 (6th Cir. 1999); *accord Kurtz v. Baker,* 829 F.2d 1133, 1147 (D.C. Cir. 1987) (noting that *Marsh* "fits into a special nook — a narrow space tightly sealed off from otherwise applicable first amendment doctrine"); *see also Lee*, 505 U.S. at 596-97 (finding *Marsh* inapplicable to public high school graduation prayers because of the unique nature of state legislative sessions). The brief that Roberts joined in *Lee* advocated expansion of *Marsh* beyond the context of legislative prayers to all civic ceremonies in public schools and elsewhere. Brief for United States as *Amicus Curiae* in Supp. of Cert. in *Lee* at 9-10 (at http://www.usdoj.gov/osg/briefs/1990/sg900354.txt).

[13] *See Agostini v. Felton*, 521 U.S. 203, 222 (1997) (noting that "the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed"

(continued...)

clear that they continue to support the *Lemon* test; four Justices made plain their interest in abandoning it.[14] The continued viability of the *Lemon* test thus hangs in the balance of Justice O'Connor's impending resignation.

While at the Solicitor General's Office,[15] then-Deputy Solicitor General Roberts filed briefs asking the Supreme Court to overrule the *Lemon* test.[16] Roberts advocated replacement of the *Lemon* test with a "coercion" test, under which religious action by government would be permissible

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[13] (...continued)
and that "we continue to ask whether the government acted with the purpose of advancing or inhibiting religion . . . [and] whether the aid has the 'effect' of advancing or inhibiting religion").

[14] *See McCreary County, Ky. v. ACLU of Ky.*, 125 S. Ct. 2722 (2005).

[15] During his confirmation hearings for his nomination to the D.C. Circuit, Roberts attempted to distance himself from some of the positions taken in briefs that he joined while at the Solicitor General's Office. *See Confirmation Hearings on Fed. Appointments: Hearing Before the Comm. on the Judiciary*, 108th Cong. 96-97 (2003) (exchange between Sen. Hatch, Chairman, Sen. Comm. on the Judiciary, and John G. Roberts, Jr., Nominee, D.C. Circuit). He will presumably seek to do so again. This effort, however, should be resisted. As Principal Deputy Solicitor General, Roberts was one of only two political appointments to the office, the other being the Solicitor General himself. As Principal Deputy Solicitor General, Roberts "participated in formulating the litigation position of the government." *See* U.S. Dept. of Justice, Office of Legal Policy, *John G. Roberts, Biography*, http://www.usdoj.gov/olp/robertsbio.htm. Roberts has himself explained that it was his responsibility to "supervise[] the preparation and filing of petitions for and briefs in opposition to certiorari." *Confirmation Hearings on Fed. Appointments: Hearing Before the Comm. on the Judiciary*, 108th Cong. 307-08 (2003) (questionnaire of John G. Roberts, Jr., Nominee, D.C. Circuit).

[16] *See* Brief for the United States as *Amicus Curiae* in Supp. of Cert. in *Lee* at 5; Brief for the United States as *Amicus Curiae* Supporting Petitioners in *Lee* at 4, 9 (at http://www.usdoj.gov/osg/briefs/1990/sg900105.txt); *see also* Brief for the United States in *Board of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990), at 20 (at http://www.usdoj.gov/osg/briefs/1989/sg890427.txt) (claiming that "the *Lemon* test has generated results that often obfuscate as much as they illuminate" and that it improperly "sweeps within its breadth a whole range of practices and traditions with ancient roots in the history and experience of the American people"). The United States was not a party to the *Lee* case; nor was a federal statute under attack in the litigation. The Solicitor General's Office was thus under no obligation to participate in the case.

provided that it does not "coerce nonadherents to participate in any religion or religious exercise against their will."[17]

Justice O'Connor has explicitly repudiated the coercion test that the government's brief proposed. As she has explained, "[t]o require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy."[18] Adoption of the coercion test would amount to "abandoning our settled law,"[19] law that would undoubtedly be up for grabs if Roberts is elevated to the High Court.

III. Roberts Would Advance a Historical Test That Would Abridge Longstanding Protections.

Roberts' briefs in *Lee* took the position that the Establishment Clause should be interpreted today in precisely the same way that it was understood at the time of its adoption in 1789 — and, according to Roberts, the Clause was understood at that time to impose a coercion standard.[20] Indeed, the briefs argued that the Court should not only approve those religious activities that existed

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[17] Brief for the United States in Supp. of Cert. in *Lee* at 4-8; *accord* Brief for the United States Supporting Petitioners in *Lee* at 4, 9-10 ("The proper approach recognizes that in this setting coercion is the touchstone of an Establishment Clause violation.").

[18] *County of Allegheny v. ACLU*, 492 U.S. 573, 628 (O'Connor, J., concurring).

[19] *Lee*, 505 U.S. at 618 (Souter, J., concurring, joined by Stevens & O'Connor, J.J.).

[20] Brief for the United States in Supp. of Cert. at 5; Brief for the United States Supporting Petitioners in *Lee* at 9. The Solicitor General's brief was wrong not only as a matter of law, but as a matter of history. Both Jefferson and Madison believed that official prayers were unconstitutional *and* that coercion was not a necessary element of an Establishment Clause violation. Letter from Thomas Jefferson to Rev. Mr. Millar (Jan. 23, 1808), *reprinted in* THE REPUBLIC OF REASON: THE PERSONAL PHILOSOPHIES OF THE FOUNDING FATHERS, at 136-37 (Norman Cousins ed., 1998) (refusing to set aside days of thanksgiving and prayer because the government has "no power to prescribe any religious exercise, or to assume authority in religious discipline" and noting that the Establishment Clause is not limited to "fine and imprisonment"); JAMES MADISON, DETACHED MEMORANDA, *reprinted in* JAMES MADISON ON RELIGIOUS LIBERTY, at 93-94 (Robert S. Alley ed., 1985) (regretting past presidential encouragement of prayer as unconstitutional because it "naturally terminates in a conformity to the creed of the majority" and expressing the view that the Establishment Clause protects against not only ultimate harms, but the incremental steps leading to that harm).

at the Founding and were approved by the Framers, but should also be willing to "draw inferences from long-established traditions to approve [religious] practices in contemporary settings."[21]

While the Supreme Court has found historical evidence persuasive in interpreting the Establishment Clause, a majority of the Court has declined to make such evidence dispositive, holding that not "all accepted practices 200 years old and their equivalents are constitutional today."[22] The Court has noted that a standard that makes history dispositive would result in the approval of highly sectarian actions:

> The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically. Some of these examples date back to the Founding of the Republic, but this heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause. Whatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions). . . . There have been breaches of this command throughout this Nation's history, but they cannot diminish in any way the force of the command.[23]

Indeed, the rationale espoused in the Solicitor General's briefs in *Lee* was the very same rationale used to uphold slavery in the *Dred Scott* decision.[24]

IV. The Effect on Establishment Clause Jurisprudence Would Be Staggering.

Overruling *Lemon* and replacing it with the coercion/historical test that Roberts has advanced would throw church-state jurisprudence into disarray — and threaten a return of the "heritage of official discrimination against non-Christians" that the Court rejected in *Allegheny*. The *Lemon* test

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[21] Brief for the United States in Supp. of Cert. at 5-6; *accord* Brief for the United States Supporting Petitioners in *Lee* at 9-10.

[22] *Allegheny*, 492 U.S. at 603.

[23] *Id.* at 604-05 (citations omitted).

[24] *See Scott v. Sanford*, 60 U.S. 393, 410 (1856) (holding that Blacks are not included within the phrase "all men are created equal" because "if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted").

is the backbone of Establishment Clause law; jettisoning it is akin to the proverbial removal of the tablecloth from under the dishes: only a magician could prevent the destruction of longstanding caselaw.

As described more fully below, replacement of the *Lemon* test with the coercion standard advanced by Roberts would have the following results: government officials would be permitted to deliver prayers at all civic events, including those that take place in the public schools; legislators and other officials could choose to adorn government buildings with displays of the Ten Commandments, other biblical texts, and even religious iconography; and government dollars could be used to support religious activities, including religious discrimination.

Because the decisions about the nature of those religious messages and activities will generally result from majoritarian processes, one may assume that the prayers that get said, the displays that get erected, and the organizations that get funded will, in the vast majority of cases reflect certain Christian traditions or beliefs. These developments would marginalize religious minorities, whose voices are likely to be drowned out by the proliferation of majoritarian messages in the halls of schools, legislatures, and other government arenas.

To make matters worse, Roberts has supported legislative measures that would deprive the federal courts of jurisdiction over church-state issues, leaving state courts as the final arbiters of these controversial questions. Because state courts, which are often staffed by elected judges, are far more likely to be subject to majoritarian influences, this would only exacerbate the negative impact on religious minorities, for whom the federal court system has historically functioned as a forum of last resort.

A. Majoritarian Prayers at Public-School Ceremonies and Other Civic Events Would Become Commonplace.

Consistent with his view that only coercive governmental actions should be prohibited under the Establishment Clause, Roberts joined two briefs in *Lee v. Weisman*,[25] arguing that school officials and local clergy should be allowed to deliver prayers at public-school graduation ceremonies.[26] According to one of those briefs, "an individual is not coerced by a civic

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[25] 505 U.S. 577 (1991).

[26] *See* Brief for the United States in Supp. of Cert. in *Lee, passim*; Brief for the United States Supporting Petitioners in *Lee, passim*.

acknowledgment of religion so long as that person is not *required* to witness it."[27] And because "[s]tudents were not compelled to attend the ceremony,"[28] no coercion existed.

Government-sponsored prayers are permissible, Roberts argued, because they "merely respect the religious heritage of the community"[29] and are "an expression of civic tolerance and accommodation to all citizens."[30] Apparently, only those persons reflected in the prayers are "citizens" of this "community." Buddhists, Hindus, Muslims, and members of other minority religions are not: they can simply choose "not to be present for [the] graduation."[31]

Recognizing that the government's view was inconsistent with a public school community that welcomes people of *all* religious faiths, the Supreme Court, in a 5-4 opinion written by Justice Kennedy, rejected the government's argument, finding that it "demonstrates fundamental inconsistency" and "turns conventional First Amendment analysis on its head" by allowing the wishes of the majority to trump the concerns of the adherents of minority religions.[32] As the Court explained, "[w]hile in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us [by the government]."[33]

The Supreme Court found that the government's argument that attendance at graduation ceremonies is voluntary "lacks all persuasion."[34] The Court found that "to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme" because "in our culture high school graduation is one of life's most significant occasions."[35]

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27 Brief for the United States Supporting Petitioners in *Lee* at 11 (emphasis added).

28 *Id.* at 13.

29 Brief for the United States in Supp. of Cert. in *Lee* at 8

30 *Id.* at 7-8.

31 Brief for the United States Supporting Petitioners in *Lee* at 12.

32 *Lee,* 505 U.S. at 595-96.

33 *Id.* at 596.

34 *Id.* at 595.

35 *Id.*

Yet, under the view of the Establishment Clause advocated in the briefs joined by Roberts, school officials would be permitted to deliver prayers not only at graduation ceremonies, but at other public school events and ceremonies at which attendance is not mandatory, such as sporting events and school assemblies.[36] Under this vision of America, Jewish and Muslim children would be forced to choose between forfeiting their right to full participation in the public schools or being bombarded with sectarian prayers at school ceremonies and events.

Indeed, the briefs indicate that, if given the opportunity, Roberts would vote to allow prayers at *all* civic events, in the public schools and elsewhere. That is because the brief joined by Roberts argued that religious ceremonies should be permitted in all aspects of "our public life," in proper recognition of our "Nation's religious heritage."[37]

To make matters worse, the Solicitor General's briefs did not ascribe any importance to the fact that the School District had chosen to limit the prayers to nonsectarian messages. The briefs joined by Roberts did not advocate any limits on the content of prayers, instead advancing a standard

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[36] *See* Brief for the United States Supporting Petitioners in *Lee* at 11 (referring generally to non-coercive "civic acknowledgment[s] of religion"). Roberts has recognized that his views have not carried the day in the Supreme Court. Speaking in 2000 on "Capital Conversation," a weekly public affairs program on the ABC Dallas affiliate WFAA, Roberts conceded that "the argument about government-sponsored, government-initiated prayer in schools is over, but that's not necessarily all that we're talking about." Kathryn J. Lopez, *Roberts, on the Record: "listening to this man, that he is a conservative,"* BENCH MEMOS, http://bench.nationalreview.com/archives/072295.asp. He went on to offer an extremely narrow interpretation of *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) — in which the Court struck down the delivery of prayers over the public address system at high school football games — stating as follows:

> The test, as I see it, is, if the prayer is genuinely student-initiated, student-led and does not look like something the government, the school district is sponsoring, then it's going to be all right.
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> You have a situation where it's not school-initiated, it's school-sponsored, but it's the students themselves or groups of students themselves who are engaging in prayer or religious activity. That's an entirely different question.

Id.

[37] Brief for the United States in Supp. of Cert. in *Lee* at 4; *accord* Brief for the United States Supporting Petitioners in *Lee* at 4 (noting that the case provides the Court the opportunity to hold "that civic acknowledgments of religion in public life do not offend the Establishment Clause").

that would permit not only the nonsectarian prayers that the School District sought in *Lee*, but even overtly proselytizing messages. Nor did the briefs proffer any limits on the nature of acceptable prayer-givers, thereby countenancing the delivery of prayers by even those at the top of the governmental hierarchy, such as a school Principal or School District Superintendent.

One of Roberts' briefs even opined, contrary to longstanding Supreme Court precedent, that "[n]o level of heightened scrutiny . . . should be triggered merely because a challenge involves a ceremony that children might attend"[38] and that "no special rule for children is justified in the setting of a public school graduation or in any other ceremonial setting where children may compose part of the audience."[39] This, too, was rejected by the Supreme Court, which explicitly reaffirmed that "there are heightened concerns with protecting freedom of conscience . . . in the elementary and secondary public schools."[40]

Allowing public school events and other civic ceremonies to be hijacked by those with a religious agenda runs counter to the mission of the public schools in particular and our constitutional ideals in general. Roberts' elevation to the high Court would pave the way for extreme marginalization of religious minorities through the introduction of majoritarian religious messages into all aspects of American civic life.

B. Roberts Would Permit Public School Classrooms To Be Hijacked By A Sectarian Agenda.

Roberts appears to espouse a position even more hostile to religious minorities than that advocated in the Solicitor General's briefs in *Lee*. The Solicitor General's briefs in *Lee* recognized that the risk of coercion may be greater in the "classroom setting" than at graduation ceremonies because the latter context is "more properly understood as a civic ceremony than part of the educational mission."[41] But Roberts has expressed no such concern, with respect to silent or spoken prayer, when writing under his name alone.

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[38] Brief for the United States Supporting Petitioners in *Lee* at 5.

[39] *Id.* at 12.

[40] *Lee*, 505 U.S. at 592.

[41] Brief for the United States in Supp. of Cert. in *Lee* at 8; *accord* Brief for the United States Supporting Petitioners in *Lee* at 12.

Roberts is plainly of the view that nothing in the Constitution prohibits a daily moment of silent prayer in public school classrooms. In *Wallace v. Jaffree*,[42] the Supreme Court struck down a statute that called for a daily classroom period of silence for "meditation or voluntary prayer" because legislators had passed the statute in a backdoor effort to circumvent the prohibition on school prayer. In response to the holding, some lawmakers proposed a constitutional amendment to permit "individual or group silent prayer or reflection in public schools." Roberts expressed no objection to the administration's support of the amendment because, in his view, the conclusion "that the Constitution prohibits such a moment of silent reflection — or even silent 'prayer' — seems indefensible."[43]

Roberts has supported efforts to return even *spoken* prayer to public school classrooms. For example, he supported a constitutional amendment that authorized voluntary prayers — on both an individual and group basis — to take place in the public schools, without expressing any reservation about the application of the amendment to the classroom context.[44]

He expressed a similar view in another memo addressing a written response to a question posed by Dr. Pat Robertson. The question asked "[w]hy is Washington seemingly the last place to be receptive to issues like school prayer, when 60-80% of Americans want to allow prayer in public schools?"[45] The proposed response was to express a plan "to try again for passage of school prayer

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[42] 472 U.S. 38 (1985).

[43] Memorandum from John G. Roberts to Fred F. Fielding (Nov. 21, 1985) (on file with the Ronald Reagan Presidential Library).

[44] *See* Memorandum from Roberts to Fielding (June 11, 1985) (on file with the Ronald Reagan Presidential Library). Roberts' memo was written in support of constitutional amendments S.J. Res. 3, 99th Cong. (1985), and the identical H.R.J. Res. 279, 99th Cong. (1985). The amendment provided as follows:

> Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer. Neither the United States nor any State shall compose the words of any prayer to be said in public schools.

Id. The amendment did not limit its reach to the non-classroom context or to silent, as opposed to audible, prayer.

[45] Memorandum from Roberts to Fielding (Apr. 23, 1985) (on file with the Ronald (continued...)

amendment," a response to which Roberts expressed "no objections," again without reservation.[46] Here, again, Roberts failed to recognize that the purpose of the Establishment Clause is to remove from those in the majority the ability to impose their religious views on others.

Roberts removed any ambiguity about his interest in returning prayer to the public schools in a 1985 memo addressing the Supreme Court's decision in *Wallace v. Jaffree*. He explained in the memo that while the Court had struck down the particular moment of silence statute at issue in *Wallace* because of its reference to "prayer," a majority of the Justices had explained that they would likely approve a simple moment-of-silence statute.[47] He expressed dissatisfaction with this result, however, because "we still have an uphill battle to return prayer to schools."[48] He lamented the fact that "there is nothing positive in the opinion for prayer, only for a moment of silence."[49]

C. Displays of Sectarian Religious Symbols Would Proliferate in Public Schools and Other Government Buildings.

A slim majority of the Supreme Court has consistently held that the Establishment Clause prohibits government officials from erecting a religious monument or other religious display when they do so with a religious purpose, or when the religious item is not incorporated into a larger display that sends a secular message.

Thus, in *Stone v. Graham,*[50] the Supreme Court struck down a statute that required copies of the Ten Commandments to be posted on the walls of every public school classroom. The Court explained that the Ten Commandments can be incorporated into an appropriate study of history, civilization, comparative religion, or the like, but they cannot be posted in a manner that indicates that they are being depicted "to induce the schoolchildren to read, meditate upon, perhaps to

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[45] (...continued)
Reagan Presidential Library).

[46] *Id.*

[47] Memorandum from Roberts to Fielding (June 4, 1985) (on file with the Ronald Reagan Presidential Library).

[48] *Id.*

[49] *Id.*

[50] 449 U.S. 39 (1980).

venerate and obey, the Commandments."[51] That is because the Commandments do not confine themselves to secular matters such as killing and stealing, but also extend to plainly religious duties such as worshipping the Lord God alone and observing the Sabbath Day.[52]

Similarly, in *Allegheny v. ACLU*,[53] the Court held 5-4 that a crèche depicting Jesus' birth could not be placed, by itself, in the Grand Staircase of a County Courthouse. And just last month, again in a 5-4 decision, the Court struck down displays that paired the Ten Commandments with a variety of other secular documents because the history of the displays revealed that the Counties had added the other items in an effort to"reach[] for any way to keep a religious document on the walls of courthouses."[54]

It is clear that Roberts would support none of these decisions. Because Roberts believes that the government should be allowed to acknowledge our "Nation's religious heritage" without limit,[55] provided that it does so without requiring the active participation of viewers,[56] these decisions would most certainly be overturned on his watch.

Roberts has made his position known, explicitly opining that both *Stone* and *Allegheny* were wrongly decided. In his August 6, 1985, memo addressing Bennett's comments to the Knights of Columbus, Roberts said he was not "bothered by the criticism" of *Stone*, and has "no quarrel with Bennett on the merits," disclosing that he "worked for Justice Rehnquist when he filed the lone

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51 *Id.* at 42.

52 *Id.* at 41-42.

53 492 U.S. 573 (1989).

54 *See McCreary*, 125 S. Ct. at 2741.

55 Brief for the United States in Supp. of Cert. in *Lee* at 4.

56 *See id.* at 4, 7-8; *accord* Brief for the United States Supporting Petitioners in *Lee* at 11.

dissent in *Stone*."[57] Likewise, one of the briefs that Roberts submitted in *Lee* took the position that the decision in *Allegheny* was misguided.[58]

Thus, under Roberts' watch, government officials would have license to place religious messages and iconography in government buildings and other public spaces. Indeed, under his proposed coercion test, government officials would be permitted to erect highly sectarian displays. Displays that reflect a preference for Christianity over other faiths, such as that erected by Alabama Chief Justice Roy S. Moore in 2001, would be permitted — at the inevitable expense of the rights of religious minorities.

D. Public Dollars Would Be Used to Subsidize Religious Activities.

The Supreme Court held long ago that, in order to ensure that the government remains neutral on religious matters, "[t]he State may not adopt programs or practices . . . which aid . . . any religion."[59] While, in the ensuing years, the High Court has taken exception to this general principle when the aid is "indirect" — as in voucher programs[60] — it has steadfastly maintained that public aid that is provided directly to religious institutions cannot be put to religious use.

In *Mitchell v. Helms*,[61] the Court considered a program that provided aid to public and private schools — including parochial schools — for non-religious use. Four of the Justices in the majority took the view that support for religious institutions, such as churches and parochial schools, is constitutionally permissible even when the aid is used for religious purposes.[62] This view, however, did not prevail. Justice O'Connor, who provided the fifth vote for the majority, wrote a concurring

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[57] Memorandum from Roberts to Fielding (Aug. 6, 1985). In a 1985 memo, Roberts advised President Reagan not to endorse a Kentucky resolution calling for the posting in public schools of plaques inscribed with the national motto "In God We Trust." Memorandum from Roberts to Anita Bevacqua (May 24, 1985) (on file with the Ronald Reagan Presidential Library). Roberts advice, however, was premised on the fact that the Supreme Court's decision in *Stone* suggested that the posting would be unconstitutional. That is, Roberts was informing Reagan of what the law *is*, rather than what it *should be*.

[58] *See* Brief for the United States in Supp. of Cert. in *Lee* at 8.

[59] *Epperson v. Arkansas,* 393 U.S. 97, 106 (1968).

[60] *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)

[61] 530 U.S. 793 (2000).

[62] *Id.* at 807-08.

opinion that reiterated the longstanding prohibition on the diversion of public dollars to religious use.[63] Replacing Justice O'Connor with someone who shares the view of the other Justices in the majority would result in overturning this time-tested prohibition.

And that is, indeed, the kind of person Roberts appears to be. In a 1984 memo Roberts wrote while at the White House, he cautioned administration officials against language in a presidential statement saying that the Constitution's Establishment Clause prohibited government "support" of religion.[64] The advice came after Roberts reviewed a proposed statement for President Reagan on the signing of the Equal Access Act into law. Reagan's draft statement said the equal access provisions "appropriately balance [] free speech [and] 'the prohibition against government support of religion.'"[65] Roberts suggested changing the word "support"to "establishment" because, in his view, "[t]here is no such prohibition."[66]

Similarly, in his remarks to the Knights of Columbus, Bennett included the comment that the Constitution does not prohibit, and indeed authorizes, "public support of religion."[67] Again, Roberts stated that he had "no quarrel" with this assertion.[68] It is thus clear that Roberts would seek to undo the longstanding prohibition on the use of public dollars for religious purposes.

E. Public Dollars Would Be Used to Support Religious Discrimination.

In *Zelman v. Simmons-Harris*,[69] the Supreme Court addressed the constitutionality of a Cleveland voucher program that made vouchers available to parochial schools but disallowed those schools from engaging in racial or religious discrimination against applicants. The Supreme Court approved the program in a 5-4 vote but did not say whether it would have reached a different conclusion had schools been allowed to engage in discrimination.

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[63] *Id.* at 837-39 (O'Connor, J., concurring).

[64] Memorandum from Roberts to Fielding (Aug. 9, 1984) (on file with the Ronald Reagan Presidential Library).

[65] *Id.*

[66] *Id.*

[67] Bennett Address at 9.

[68] Memorandum from Roberts to Fielding (Aug. 6, 1984).

[69] 536 U.S. 639 (2002).

The Court has not had occasion to address whether public subsidies — whether in the form of vouchers or direct cash grants — can be provided to private schools, social-service providers, or other organizations that engage in religious discrimination against employers, students, or beneficiaries. This civil-rights issue has been thrust to the forefront of legal debate as a result of the Faith-Based Initiative, and is likely to be decided by the Supreme Court in the coming years.

It is likely that four Justices on the Court would vote to uphold the provision of government funds to subsidize even religious discrimination.[70] It is unclear, however, what the other five Justices — including Justice O'Connor — would hold.

The High Court has held that government may, in limited circumstances, take measures to accommodate religious practices.[71] The Court has cautioned, however, that such accommodations must be carefully circumscribed to ensure that they do not "devolve into an unlawful fostering of religion."[72]

But Roberts took the position while in private practice that "efforts to accommodate religion are *invariably* constitutional when the State simply chooses to relieve religious institutions" of legal obligations.[73] Although two judges on the three-judge panel of the Fourth Circuit voted to uphold the ordinance at issue — which exempted certain parochial schools from various zoning requirements — as a permissible accommodation of religion, they recognized that "[t]he line between benevolent neutrality and permissible accommodation, on the one hand, and improper sponsorship or interference, on the other, must be delicately drawn both to protect the free exercise

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[70] *See Mitchell*, 530 U.S. at 801, 807-08 (Thomas, J., joined by Rehnquist, C.J., and Scalia & Kennedy, J.J.) (finding that Establishment Clause places no limits on religious organizations' use of public aid, provided that aid reaches recipients through a religion-neutral process).

[71] *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (upholding exemption of religious organizations from Title VII's prohibition on religious discrimination, in a context that did not involve the provision of public funds).

[72] *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2117 (2005) (internal quotation marks and citation omitted).

[73] Brief of Appellant in *Renzi v. Connelly School of the Holy Child Inc.*, 224 F.3d 283 (4th Cir. 2000), at 11 (emphasis added).

of religion and to prohibit its establishment."[74] But Roberts did not proffer a "delicately drawn" line, instead advocating that government be given unlimited freedom to exempt religious institutions from legal obligations.

This extremist advocacy — which was unnecessary to the disposition of the case at hand — suggests that Roberts would vote to allow publicly-funded religious organizations to be exempted from civil-rights laws and to use taxpayer dollars to finance discrimination.

F. The Federal Judiciary Could Be Stripped of Jurisdiction Over Church-State Issues.

Proposals to strip the federal courts of jurisdiction over controversial matters have been commonplace in Congress for decades, but virtually none have passed. In the early 1980s, when Roberts was working at the United States Attorney General's Office, several court-stripping bills were under consideration. The bills were designed to divest the Supreme Court (and, in some instances, lower federal courts) of jurisdiction over cases raising certain issues, including school prayer, desegregation, and abortion. It was commonly understood that these bills were motivated by legislators' disagreement with the positions taken by some federal courts on these issues.

During Roberts' tenure at the Attorney General's Office, he prepared a 36-page memorandum in support of these court-stripping measures.[75] Although the memo explained that its purpose was to "marshal the arguments . . . in favor of Congress' power to control the appellate jurisdiction of the Supreme Court,"[76] the memo purported to represent a balanced view of the issue.[77]

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[74] *Renzi*, 224 F.3d at 287-88.

[75] *See* Memorandum from John G. Roberts, Special Assistant to the Attorney General, to William F. Smith, United States Attorney General (Sept. 29, 1981) (dated in handwriting in top right corner) (on file with the National Archives). This memorandum appears to be a draft of a more formal 27-page memorandum that has been quoted in the press. *See, e.g.*, Jeffrey Smith et al., *Documents Show Roberts Influence In Reagan Era*, WASHINGTON POST, July 27, 2005, at A1; Jeffrey Smith et al., *A Charter Member of Reagan Vanguard*, WASHINGTON POST, Aug. 1, 2005, at A1. The subsequent memorandum states that it does "not purport to be an objective review of the issue." *See* Memorandum from John G. Roberts to William F. Smith (Sept. 29, 1981). This language is missing from the earlier draft.

[76] *Id.* at 1.

[77] *See, e.g., id.* at 33 (claiming that "[e]qual protection challenges would seem to present (continued...)

And it was by no means an academic exercise: it was written in Roberts' own, highly personal voice.

The memo argued that the Exceptions Clause — which gives Congress the power to create "exceptions" to Supreme Court jurisdiction — "by its terms contains no limit."[78] Roberts characterized the language of the Clause as "clear and unequivocal" and as a "stumbling block for those who would read the clause in a . . . restricted fashion."[79] He reiterated this point on several occasions, noting later in the memorandum that "it is important to recognize that we are not considering a constitutional clause that is by its nature indeterminate and incapable of precise or fixed meaning."[80]

Roberts went on to interpret a Supreme Court decision as giving "broad, indeed unlimited scope" to the exceptions power.[81] He argued that the Supreme Court's decisions concerning congressional power "clearly indicate that the Court accepted the proposition that Congress could, if it desired, totally divest the Supreme Court of appellate jurisdiction in [certain categories] of cases."[82] He dismissed a contrary decision as "a red herring"[83] and concluded that there is "a long and consistent line of judicial opinions reading the exceptions clause as meaning exactly what it says."[84]

Roberts did not premise his support of the court-stripping bills on the continued availability to litigants of the lower federal courts. Rather, in his view, the Constitution requires only that

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[77] (...continued)
the most serious hurdle for the pending bills").

[78] *Id.* at 2.

[79] *Id.* at 2-3.

[80] *Id.* at 4.

[81] *Id.* at 13.

[82] *Id.* at 15.

[83] *Id.*

[84] *Id.* at 17.

review be available in "*some* judicial forum, either the lower federal courts or state courts."[85] In his view, "[d]ue process does not require judicial review in a federal court *or* final review by the Supreme Court."[86]

Any claim that this memo does not reflect Roberts' personal views is belied by his subsequent writings. In an April 12, 1982, memorandum that then-Assistant Attorney General Theodore B. Olson sent to then-Attorney General William French Smith, Olson advocated opposing the pending court-stripping bills, explaining that opposition would "be perceived as a courageous and highly principled position."[87] Roberts opposed Olsen's position, scrawling "NO!" in the margins and observing that"[r]eal courage would be to read the constitution as it should be read and not kowtow to [those opposing the bills]."[88]

Fortunately, Roberts' position did not prevail: the Administration ultimately elected to oppose the court-stripping measures and they were not enacted into law, leaving the federal courts available to enforce constitutional protections.

Conclusion

Roberts' elevation to the Supreme Court would herald a sea change in Establishment Clause jurisprudence, resulting in further erosion of the wall that separates church and state. The Supreme Court — to the extent that it retained jurisdiction — would cease to be receptive to the complaints of religious minorities, and the longstanding protections against government-sanctioned majoritarian over-reaching would be weakened, if not eliminated altogether.

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[85] *Id.* at 33.

[86] *Id.* (emphasis added).

[87] Memorandum from Theodore B. Olsen to William F. Smith (Apr. 12, 1982) (on file with the National Archives).

[88] *Id.* Roberts' advocacy of court-stripping measures likely related to his substantive disagreement with some of the Supreme Court decisions of that era. In a 1983 memo opposing the creation of a temporary court between the Courts of Appeals and the Supreme Court, Roberts stated that "[s]o long as the Court views itself as ultimately responsible for governing all aspects of our society, it will, understandably, be overworked." Memorandum from John G. Roberts to Fred F. Fielding (Feb. 10, 1983) (on file with the Ronald Reagan Presidential Library).