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Presented on August 17, 2005

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If confirmed, John Roberts has the potential to dramatically change the law with regard to the separation of church and state. As is true with many areas of constitutional law, he has not expressed his personal views on this topic in articles or speeches. But the briefs he wrote while in the Solicitor General's office, if indicative of his views, suggest that Roberts would be the fifth vote on the Court to shift the law in a much more conservative direction allowing far more government support for religion.

In this brief paper, I address three points. First, there are four Justices on the current Court – Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas – who would radically change the law of the establishment clause of the First Amendment. Second, the briefs Roberts wrote while a government lawyer take this position. Finally, considering Roberts' views on this issue – and for that matter all constitutional issues – in no way violates the constitutional provision which forbids a religious test for government office.

I. The Establishment Clause and the Court

For many years, the Court has been divided five-to-four as to the meaning of the First Amendment's prohibition against the government enacting laws respecting the establishment of religion. For over three decades, the majority of the Court has applied the three-part test

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articulated by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which provides that the government violates the establishment clause if it acts with the purpose of advancing religion, or if its actions have the effect of advancing or inhibiting religion, or if there is excessive government entanglement with religion. Using this test, the Court has limited government aid to parochial schools, prohibited government-sponsored prayers in public schools, and prevented government endorsement for religion. As recently as June 2005, the Court, in a 5-4 decision, reaffirmed this test and used it to declare unconstitutional a Ten Commandments display which was motivated by a government's desire to advance religion. See *McCreary County, Ky. v. ACLU of Ky.*, 125 S.Ct. 2722 (2005).

Conservative Justices, however, repeatedly have urged the overruling of the *Lemon* test in favor of allowing far more government support for religion. Justice Scalia, for example, has been particularly emphatic in urging the overruling of *Lemon*. Over a decade ago, he objected to the Court using the *Lemon* test and wrote: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District." *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398, (1993), (Scalia, J., concurring in the judgment).

Justice Thomas would go even further. He argues that the establishment clause of the First Amendment should not be applied to state and local governments at all. Almost 60 years ago, the Supreme Court unanimously held that the Establishment Clause, like almost all of the other provisions in the Bill of Rights, applies to state and local governments. *Everson v. Board*

of Education, 330 U.S. 1 (1947). Justice Thomas is the only Justice in all of this time to disagree

On several occasions in recent years, Justice Thomas has urged the Court to overrule *Everson* and hold that the Establishment Clause does not apply to state and local governments. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004) (Thomas, J., concurring in the judgment); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Thomas, J., concurring). From this perspective, a state could declare itself to have an official religion. A cross could be placed atop a state capitol or a city hall. Schools could institute official prayer and Bible reading in their schools and give unlimited aid to parochial schools.

Although the Court has nowhere near a majority to take this view, there are four Justices - Rehnquist, Scalia, Kennedy, and Thomas - who would overrule the Lemon test and replace it with an approach where the government would violate religion only if it literally established a church or coerced religious behavior. The implications of this can be seen in positions that these four Justices have taken in cases in which Justice O'Connor was the fifth vote for the majority coming to a contrary result.

For example, these four Justices have taken the view that the government should be able to give aid to parochial schools *even if it is used for religious instruction*, so long as the government does not discriminate among religions. In *Mitchell v. Helms*, 530 U.S. 793 (2000), Justice Thomas wrote a plurality opinion joined by Rehnquist, Scalia, and Kennedy, stating that the government should be able to give aid to parochial schools that may be used for religious education. The other five Justices rejected this position and the conclusion which emerged is that the government now may give instructional equipment to parochial schools so long as it is

not used for religious instruction.

Another example concerns religious symbols on government property. Five Justices – Stevens, O’Connor, Souter, Ginsburg, and Breyer – take the view that the government may not place symbols on government property if the reasonable observer would see the government action as a symbolic endorsement of religion. *See Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995). Most recently, these five Justices were the majority in a 5-4 decision to declare unconstitutional a display of the Ten Commandments in county buildings which was clearly motivated by a desire to advance religion. *McCreary County, Ky. v. ACLU of Ky.*, 125 S.Ct. 2722 (2005). But four Justices – Rehnquist, Scalia, Kennedy, and Thomas – would not limit the government’s ability to display profoundly religious symbols even in a manner that clearly endorses religion. This was clearly expressed in Chief Justice Rehnquist’s plurality opinion in *Van Orden v. Perry*, 125 S.Ct. 2854 (2005), which was joined by Justices Scalia, Kennedy, and Thomas.

Simply stated, Justice O’Connor was the consistent fifth vote to continue an approach to the establishment clause of the First Amendment that has been followed for over a half century. The key question is whether John Roberts will follow this approach or whether he will be the fifth vote for a dramatic change in the law which would greatly increase the presence of religion in government and the government’s ability to aid religion.

II. John Roberts and the Establishment Clause

As Deputy Solicitor General John Roberts co-authored two briefs urging the overruling of *Lemon v. Kurtzman*. There is no indication that these briefs do not also reflect his personal views.

As Deputy Solicitor General under President George H. Bush, John Roberts wrote a merits brief in *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) and an amicus brief in *Lee v. Weisman*, 505 U.S. 577 (1992). In *Mergens*, the issue was whether the Equal Access Act, 20 U.S.C. §§ 4071-4074, violated the establishment clause when construed to prohibit a high school from denying a student religious group permission to meet on the school premises during non-instructional time. In *Weisman*, the issue was whether the Establishment Clause permitted clergy to offer invocation and benediction prayers as part of a public school's official graduation ceremony.

In *Mergens*, Roberts' brief expressly urged the Court to abandon the *Lemon* test. Brief for the United States, at 43 n.61. The government argued that the "Lemon test has generated results that often obfuscate as much as they illuminate proper action under the Establishment Clause." *Id.* at 43. The government said that "the Lemon test is divorced from the context in which it was spawned . . . it sweeps within its breadth a whole range of practices and traditions with ancient roots in the history and experience of the American people." *Id.* In other words, the Roberts' brief urged the overruling of *Lemon* so as to allow much more government support for religion.

In *Lee v. Weisman*, Roberts' brief to the Supreme Court again urged the overruling of *Lemon*. The government argued that graduation practice did not violate the Establishment Clause because it did not "establish any religion nor coerce nonadherents to participate in any religion or religious exercise against their will." Brief for the United States as Amicus Curiae, at 6. Furthermore, the government proposed that the *Lemon* test be replaced with a "single, careful inquiry into whether the practice at issue provides direct benefits to religion in a manner that

threatens the establishment of an official church or compels persons to participate in a religion or religious exercise contrary to their consciences.” Id. at 9-10.

If these briefs reflect Roberts’ views of the establishment clause, then he agrees with Rehnquist, Scalia, Kennedy, and Thomas that *Lemon v. Kurtzman* should be overruled and that there should be no limit on government endorsement or support of religion so long as the government does not coerce religious participation. As explained above, this would allow vast increases in aid to parochial schools, religious symbols on government property, and religious activities in public schools.

III. The Prohibition of a Religious Test for Government Office

Some have argued that asking Roberts for his views on issues that relate to his religious views – whether the establishment clause or abortion or the death penalty – violates the constitutional provision prohibiting a “religious test” from being “required as a qualification to any office.” U.S. Const. art VI, cl. 3. For example, Senators Orrin Hatch and John Cornyn have argued that inquiring into ideological beliefs that are religiously motivated violates the Religious Test Clause. See 148 Cong. Rec. S1966 (statement of Senator Hatch); John Cornyn, *Restoring Our Broken Judicial Confirmation Process*, 8 Tex. Rev. L. & Pol. 1, 19 (2003).

This objection is clearly wrong. The Senate can ask a nominee’s views on any issue and may deny confirmation if it deems those views out of the ideological mainstream. This never would violate the prohibition of religious tests for office so long as the nominee was not being rejected solely for being (or not being) a member of a particular religion.

A simple example makes this clear. Imagine a person who belongs to a religion that believes in separation of the races. The nominee surely could be asked if he or she believed in

legally-mandated segregation and if so, denied confirmation. The Senate would not be using a religious test for office, but rather an entirely appropriate ideological consideration. Indeed, an opposite conclusion – such as that of Senators Hatch and Cornyn – would mean that a nominee could refuse to answer any question and ensure confirmation just by invoking religion as the basis for all of his or her views. This would favor religious beliefs over all others and that is obviously inconsistent with the First Amendment.

History indicates that the framers intended the Religious Test Clause to prohibit status-based religious requirements for federal office, but not as a blanket prohibition on inquiring into issues that flow from a nominee’s religious beliefs. Early state constitutions limited public office on the basis of denomination or theology. Winston E. Calvert, *Judicial Selection and the Religious Test Clause*, 82 Wash. U. L.Q. 1129, 1145 (2004). For example, some states reserved office for Protestants or Christians, and others required public servants to profess beliefs in the Christian Trinity or an eternal system of rewards and punishments. *Id.* at 1146.

The framers radically broke from tradition in prohibiting religious tests. Even more remarkable was that the Clause “was adopted by a great majority of the convention, and without much debate.” See C. Antineau, A. Downey & E. Roberts, *Freedom from Federal Establishment* 95 (1964) (quoting Luther Martin, a Maryland delegate). Edmund Randolph remarked: “[O]fficers . . . are to swear that they will support this constitution, yet they are not bound to support one mode of worship, or to adhere to one particular sect. It puts all sects on the same footing. A man of abilities and character, of any sect whatever, may be admitted to any office or public trust under the United States.” *Id.* at 1150. Inquiring into a judicial nominee’s religious

beliefs to ascertain how he or she is likely to decide issues that will come before the Court does not bind nominee's to support "one mode of worship" or "adhere to one particular sect" and thus does not violate the prohibition of a religious test for office.

There is little case law interpreting the Religious Test Clause. But two opinions help sketch its outer bounds and make clear that a nominee may be asked his or her views on the issues likely to come before the Court and denied confirmation if those views are outside the ideological mainstream. *Torcaso v. Watkins*, 367 U.S. 488 (1961), and *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).

In *Torcaso*, the issue was whether a state constitutional provision requiring state officers to declare a belief in God violated the Free Exercise Clause. The Court decided the case on First Amendment grounds to avoid the question of whether the Religious Test Clause applied to state office. *Torcaso*, 367 U.S. at 489 n.1. But the Court clearly indicated that a federal requirement to declare a belief in God (or other deity) would violate the Religious Test Clause.

In *American Communications Association*, the issue was whether a Labor Management Relations Act ("LMRA") provision violated the First Amendment when it prohibited the NLRB from investigating labor organization complaints unless there was an affidavit on file with the NLRB stating that each officer of the labor organization was not affiliated with the Communist Party, and was not affiliated with or supported an organization advocating the overthrow of the federal government. 339 U.S. at 385-86, 390. Like *Torcaso*, *American Communications Association* was decided on First Amendment grounds. In support of its argument, the labor union analogized the affidavit to a prohibited "religious test oath." *Id.* at 414. The Court rejected that argument since it did not "think that the oath here involved can rightly be taken as falling

within that category.” Id. at 414-15.

Taken together, *Torasco* and *American Communications Association* suggest that requiring a declaration of belief in a deity violates the Religious Test Clause, but an oath affirming lack of certain political beliefs or affiliations does not violate the Clause. In the context of judicial confirmations, these cases and the Religious Test Clause mean that a person should not be denied confirmation because of belonging, or not belonging, to a particular religion. Nor should confirmation be denied because the person believes, or doesn’t believe, in God. But a nominee’s views about specific issues can be considered, whatever the reason why the nominee holds them. A nominee who believes in segregation or polygamy could be denied confirmation, whether those beliefs come from secular or religious foundations. A nominee who would never uphold a death sentence likewise could be denied confirmation, regardless of why the nominee takes such a position.

Finally, it must be remembered that the Religious Test Clause is directed at preventing the government from having a formal qualification for any office which requires being part of a specific faith. There is no indication, from the Constitution’s text or history or any cases, that it ever was meant to limit what Senators may consider in deciding whether to vote to confirm a nominee. That, under the Constitution, is left entirely to the discretion and wisdom of each member of the Senate.

Conclusion

John Roberts has the potential to dramatically change the law with regard to the establishment clause. The only available evidence, briefs he co-authored in the Solicitor General’s office, indicates that he is likely to do so.