ACLJ Responds to Americans United for Separation of Church and State's Attack Against Supreme Court Nominee John Roberts

Introduction

On August 29, 2005, Americans United for Separation of Church and State (AU) published a Report opposing confirmation of John Roberts to the Supreme Court of the United States.[1] The Report is a diatribe that insinuates that confirmation of John Roberts would endanger religious liberty in America. In reality, AU is afraid that John Roberts does not subscribe to its extreme secularist view that the government must avoid any recognition of the nation's religious heritage. Because AU cannot be straightforward about its real fears, however, it resorts to hysterical warnings that do not bear up under rational scrutiny. This ACLJ Rebuttal responds to the outlandish claims made in the AU report and rebuts AU's conclusion that John Roberts would trample on the rights of religious minorities.

Rebuttal

Contrary to AU's assertions, confirming John Roberts would not pose any threat to the religious liberty of minorities. What is really at stake for AU is the supposed "right" of religious minorities to make a federal case out of a personal offense: AU argues that government cannot acknowledge the Nation's religious heritage because some Americans might be offended. AU believes, for example, that the Establishment Clause requires the words "under God" to be purged from the Pledge of Allegiance.[2] AU wants more than religious liberty for all faiths; it wants "a relentless extirpation of all contact between government and religion."[3] The Founding Fathers never intended the Establishment Clause to require such hostility to governmental accommodation of religion.

1. **AU's Claim: Roberts will be insensitive to the rights of religious minorities because in 1985, he expressed agreement with a statement in a speech given by William J. Bennett that America was founded on Judeo-Christian principles and that these principles are reflected in American institutions.[4]**

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[1] Americans United for Separation of Church and State, *Religious Minorities at Risk: A Report in Opposition to the Nomination of John G. Roberts Jr. to the United States Supreme Court*, *available at* http://www.au.org/pdf/050826RobertsReport.pdf (Aug. 29, 2005) ("AU Report").

[2] Brief for Americans United for Separation of Church and State et al. as Amici Curiae Supporting Affirmance, *Elk Grove Unified Sch. Dist v. Newdow*, 124 S. Ct. 2301 (2004) (No. 02-1624).

[3] *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring).

[4] AU Report at 1-2.

The truth: If such a statement indicates insensitivity to minority religious rights, AU's quarrel is not only with William Bennett and John Roberts but with the Supreme Court and the Nation's Founding Fathers.

This Nation's Founders based a national philosophy on a belief in God. The Declaration of Independence[5] and the Bill of Rights locate inalienable rights in a Creator rather than in government, precisely so that such rights cannot be stripped away by government. In 1782, Thomas Jefferson wrote, "Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with His wrath?"[6]

The Father of the Country, George Washington, acknowledged on many occasions the role of Divine Providence in the Nation's affairs. His first inaugural address contains many references to God, including thanksgivings and supplications.[7] In Washington's Proclamation of a Day of National Thanksgiving, he wrote that it is the "duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor."[8] The Founders may have differed over the contours of the relationship between religion and government, but they never deviated from the conviction that "there was a necessary and valuable moral connection between the two."[9]

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[5] The Declaration of Independence recognizes that human liberties are a gift from God: "All men are created equal, that they are endowed by *their Creator* with certain unalienable Rights." *The Declaration of Independence* para. 2 (U.S. 1776) (emphasis added). Jefferson wrote further that the right to "dissolve the political bands" connecting the Colonies to England derives from Natural Law and "*Nature's God*." *Id.* para. 1 (emphasis added). The founders also believed that God holds man accountable for his actions as the signers of the Declaration "appeal[] to the *Supreme Judge of the world* to rectify their intentions." *Id.* para. 32 (emphasis added). In 1774, Jefferson wrote that "The God who gave us life gave us liberty at the same time; the hand of force may destroy, but cannot disjoin them." Thomas Jefferson, *Rights of British America*, 1774. ME 1:211, Papers 1:135.

[6] Thomas Jefferson, *Notes on Virginia* Q.XVIII (1782).

[7] "Such being the impressions under which I have, in obedience to the public summons, repaired to the present station, it would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes, and may enable every instrument employed in its administration to execute with success the functions allotted to his charge. In tendering this homage to the Great Author of every public and private good, I assure myself that it expresses your sentiments not less than my own, nor those of my fellow-citizens at large less than either. No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States." George Washington's First Inaugural Address, *available at* http://www.archives.gov/exhibits/american_originals/inaugtxt.html (last visited Aug. 30, 2005).

[8] Jared Sparks, *The Writings of George Washington*, Vol. XII, p. T19 (1833-1837).

[9] Philip Hamburger, *Separation of Church and State* 480 (2002).

As one commentator has observed,

> Anchoring basic rights upon a metaphysical source is very much part of that structural separation, for without God, the law is invited to become god. This was well known to Rousseau and Marx who both complained that acknowledging God creates a competition or check upon the secular state.[10]

The Supreme Court also agreed with Bennett's recognition of the primacy of religion in the Nation's heritage in *Zorach v. Clauson*, stating:[11]

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. *That would be preferring those who believe in no religion over those who do believe*.[12]

The Court has discussed the historical role of religion in our society and concluded that "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."[13] In *Abington v. Schempp*,[14] the Court recognized that "religion has been closely identified with our history and government."

2. AU's Claim: Roberts's criticisms of the Supreme Court's "*Lemon*" test prove that he will be insensitive to minority religious rights.[15]

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[10] Douglas W. Kmiec, *Symposium on Religion in the Public Square: Oh God! Can I Say That in Public?*, 17 NOTRE DAME J.L. ETHICS & PUBLIC POL'Y 307, 313 (2003).

[11] 343 U.S. 306 (1952).

[12] *Id*. at 313-14 (emphasis added).

[13] *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984).

[14] 374 U.S. 203, 212 (1963).

[15] AU Report at 3-5.

The truth: The aptly named "*Lemon* test" has long fallen into disrepute among Justices of the Supreme Court, as well as throughout legal academia.

The "*Lemon* test," has been criticized by six of the current Supreme Court Justices,[16] as well as many of the Nation's most prominent legal scholars.[17] Just this past term, a seventh Justice, Justice Breyer, refused to apply *Lemon* in the Court's recent decision upholding a Ten Commandments display.[18] Contrary to AU's assertion,[19] there have been many Establishment Clause cases in which the Court has not used the *Lemon* test.[20] In several other cases, the Court has given lip service to *Lemon*, but has avoided the strict application of the test that AU thinks warranted.[21] Justice O'Connor, whom

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[16] *See Cutter v. Wilkinson*, 125 S. Ct. 2113, 2125, n.1 (2005) (Thomas, J., concurring) (the Court declined to apply "the discredited test of *Lemon v. Kurtzman*"); *City of Elkhart v. Books*, 532 U.S. 1058, 1060-61 (2001) (Rehnquist, C.J., and Scalia and Thomas, JJ., dissenting from denial of certiorari); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting) ("*Lemon* has had a checkered career in the decisional law of this Court."); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("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."); *Allegheny County v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part) (stating that he did "not wish to be seen as advocating, let alone adopting, [the *Lemon*] test as our primary guide in [holiday display cases]"); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring) (suggesting that the Court abandon the Lemon Test); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 346-48 (1987) (O'Connor, J., concurring in judgment) (suggesting a reformulation of the inquiry framed by the *Lemon* test); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (lamenting the "sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon*").

[17] *See e.g.*, R. Cord, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); Bell, *'God Save this Honorable Court': How Current Establishment Clause Jurisprudence Can be Reconciled With the Secularization of Historical Religious Expressions*, 50 AM. U.L. REV. 1273 (2001); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U.L. REV. 1 (1984); Marks & Bertolini, Lemon *Is a* Lemon*: Toward a Rational Interpretation of the Establishment Clause*, 12 BYU J. PUB. L. 1 (1997); Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986); McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1; McConnell & Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989); Paulsen, *Religion and the Public Schools after* Lee v. Weisman*:* Lemon *Is Dead*, 43 CASE W. RES. 795 (1993); Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657 (1998).

[18] *Van Orden v. Perry*, 125 S. Ct. 2854, 2869 (2005) (Breyer, J., concurring).

[19] AU Report at 3.

[20] *See, e.g., Cutter v. Wilkinson*, 125 S. Ct. 2113, 2120 (2005); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Lee v. Weisman,* 505 U.S. 577 (1992); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Larson* v. *Valente,* 456 U.S. 228 (1982).

[21] *Van Orden*, 125 S. Ct. at 2861 (*Lemon* test "not useful" in this case); *Agostini v. Felton*, 521 U.S. 203, 233 (1997) (stating that *Lemon's* entanglement test is merely "an aspect of the inquiry into a statute's effect"); *Hunt v. McNair*, 413 U.S. 734, 741 (1973) (stating that the *Lemon* factors are "no more than helpful signposts").

Roberts was nominated to replace, has advocated replacing the *Lemon* test.[22] Thus, AU deludes itself and readers of its Report by suggesting that the vitality of the *Lemon* test, which has been on life support for years, hinges upon John Roberts's confirmation.

3. AU's claim: "Roberts would permit Public School Classrooms to be Hijacked by a Sectarian agenda."[23]

The truth: Twenty years ago, Roberts criticized the Supreme Court's decision holding that a moment of silence at the beginning of the school day constitutes an establishment of religion, and supported a constitutional amendment allowing *voluntary* prayer in schools.

In *Wallace v. Jaffree*,[24] the Supreme Court struck down a state statute requiring Alabama public schools to begin the school day with a moment of silence. Students were not forced to pray; they were given the opportunity to daydream, think, or plan.[25] The Court nonetheless applied a test to determine that this harmless law affected an establishment of religion. As a young attorney with the Reagan administration, Roberts wrote a memorandum criticizing that extreme result.

During the same period, Roberts also wrote a memorandum expressing support for a proposed constitutional amendment allowing voluntary individual and group prayer in public schools. The amendment specifically stated that no one would be coerced into participating in the prayer, and that the state could not be involved in composing the prayer. AU's apparent objection to that amendment is based on its extreme view of religious "liberty:" AU believes that public religious exercise by the "majority" must be subjugated to the sensibilities of a few. The Establishment Clause provides no support for this secularist perspective.

AU's claim that Roberts would "permit public schools to be hijacked by a sectarian agenda" has to qualify as the most absurd. One might suppose from AU's report that a single Justice has the power to convert America's schools into hotbeds of religious fervor along the lines of Islamic Wahhabi schools. Such hyperbole is symptomatic of the absolute lack of genuine substance in AU's Report.

4. AU's claim: Roberts favors proposals to strip the federal courts of jurisdiction.[26]

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[22] *See Bd. of Educ. v. Grumet*, 512 U.S. at 720 (O'Connor, J., concurring); *Amos*, 483 U.S. at 346-48 (O'Connor, J., concurring in judgment).

[23] AU Report at 10.

[24] 472 U.S. 38 (1985).

[25] 472 U.S. at 89 (Burger, C.J., dissenting).

[26] AU Report at 7.

The truth: As a young attorney, Roberts wrote a memorandum at the request of his superiors in the Reagan Administration discussing the constitutionality of a law narrowing the Supreme Court's authority. Roberts's conclusions were based on explicit language in the Constitution, and he opined that the law at issue was "bad policy."

The Constitution gives authority to Congress to make "exceptions" to the Supreme Court's appellate jurisdiction.[27] At the request of Kenneth Starr, then counselor to the Attorney General, Roberts wrote a memorandum discussing the constitutionality of proposed congressional legislation to remove certain issues from Supreme Court jurisdiction.[28] Such "court-stripping" proposals had long been introduced in Congress by those objecting to various federal court decisions.[29] At the time of Roberts's memorandum, twenty such bills were pending.[30] Roberts wrote this memorandum to help the Reagan administration decide whether to support any of the pending bills. While Roberts concluded that such legislation was constitutional, he also said that it would be "bad policy."[31] In any event, under the Constitution, the authority to divest the Supreme Court of appellate jurisdiction lies exclusively with Congress. It is not clear why a potential Supreme Court nominee's views on the matter are even relevant.

Conclusion

AU's Report reflects its frustrated desire that America become a completely secularized nation such as France where religion is strictly excluded from the public forum. This is not what the Founders designed America to be, and it is not what a majority of Americans now wish. AU's report deserves no credence at all from either the American people or the United States Senate.

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[27] U.S. CONST., art. III, § 2. Since Congress has broad authority to create lower federal courts, it also has the authority to limit their jurisdiction or even close them.

[28] Warren Richey, *Roberts's Papers: Congress Tops High Court*, CHRISTIAN SCIENCE MONITOR, Aug. 23, 2005, *available at* http://search.csmonitor.com/search_content/0823/p02s01-uspo.html.

[29] *Id*.

[30] *Id*.

[31] *Id*.