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The Nomination of John G. Roberts as Chief Justice of the United States

My name is Susan Brooks Thistlethwaite and I am President and Professor of Theology at Chicago Theological Seminary. My academic training is in historical theology. My teaching and writing has emphasized contemporary religious life with particular attention to religion and social justice. It is an honor to be asked to give testimony before the Senate Judiciary Committee.

The Constitution's Promise

Our Constitution's promises -- such as the right to live free of tyranny and be able to worship freely -- are generous, even extravagant promises. They are promises made after freedom had been won from tyranny, a tyranny both political and ecclesiastical. They are promises made to the best of the human spirit as created by God.

A Supreme Court Justice entrusted to interpret the Constitution must embrace the fundamental element of our democracy—we will strive to be a body politic rooted in justice and fairness for all citizens. A Justice trusted to interpret the Constitution must understand that the prohibition of any establishment of religion and the protection of the free exercise of religion are particularly critical to the way in which this Constitution promises to "establish justice, insure domestic tranquility… promote the general welfare and secure the blessings of liberty to ourselves and our posterity."

Based on his writings available to the public, John Roberts holds a very limited view of the Constitutional protection of religious liberty and an exceptionally permissive view of religious establishment. John Roberts sees a very small arena for the protection of the individual from tyranny including a rejection of a fundamental right to privacy and a very expansive view of the role of presidential power and law enforcement authority. In short, John Roberts' views seem not to reflect the deep and broad promise of the Constitution, but to risk, in fact permit the very tyranny over the individual's freedoms that the framers who wrote the Constitution most feared.

The Promise of the Constitution in the Thought of Dr. Martin Luther King, Jr.

Few Americans have understood the promises inherent in our Constitution better than Dr. Martin Luther King, Jr. The life and work of Dr. King have had a formative impact on my life. I was present as a teenager on the mall when Dr. King gave his "I Have a Dream" speech and while there almost by accident, it moved me and taught me. I have learned two fundamental lessons from Dr. King. One is that as a Christian it is not enough to talk the talk. You have to the walk the walk. Christianity is not just peppering your speech with a frequent "Amen" or even "Lord". If you can't love your neighbor as yourself, you are no kind of a person of faith.

The second thing I learned from Dr. King is how to be a citizen, indeed, even how to be a patriot. The

true patriot wants her or his country to be a shining example to the world of what a community can and should be, what Dr. King called "the Beloved Community." And when your country stumbles or fails to realize the Beloved Community, then the patriot speaks up and speaks out and witnesses to that fact, no matter what the cost.

Dr. King, in his "I Have a Dream" speech, was able, as few before or since, to reach into our Constitutional past and proclaim the deep sense of the words.

"When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory to which every American was to fall heir."

King argued that so far this promissory note to African Americans had been returned "insufficient funds." But the promise held. This promise for King was then a dream, but not a fantasy. "I have a dream that one day this nation will rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident: that all men are created equal.'"

Dr. King's speech on the Mall is a solemn word of judgment on those who would interpret our Constitution in too specific or even narrow ways when it comes to the duty of the state to establish justice, to promote the general welfare, and secure the Blessings of Liberty for all Americans. Prophetic religion proclaims, "Justice shall roll down like waters and righteousness like an ever-flowing stream". The rushing river of justice cannot be parsed out by our Supreme Court justices in little droplets. It is not enough to be merely correct in interpreting our founding document. We must hold any candidate for the Supreme Court to the test of the Constitution's promise as King interprets it.

Like the framers of the Constitution, who were writing out of their own experience of resistance to tyranny, Dr. King's experience was with the tyranny of racism. This is certainly one reason why he was able to understand both the depths from which come the Constitution's promise to America, and its reach toward the stars.

The Framers of the Constitution Prohibited Establishment of Religion and Protected the Free Exercise of Religion for Theological Reasons

Dr. King's vision, as is well known, was a deeply theological vision. It is less well known that the framers of the Constitution also drew on a theological vision and that their prohibition of the establishment of any religion and their insistence on the protection of the free exercise of religion was made for religious reasons.

The popular debate uses the "founding fathers" on both sides of any specific controversy on what are called separation of church and state issues. Those who vigorously oppose any perceived breach in the separation of church and state understand the authors of the Constitution as secularists and revolutionaries who established a nation on the concept of liberty, including not only freedom of religion, but also freedom from religion. These strict separationists see religion as a threat to the secular sphere and the individual freedom from religious control that a secular public life entails. On the other hand, those who want to lower the bar in the separation of church and state debates also cite the founders in support of their position. They argue that the founders were not "secularists" who wished to keep religion locked away from public life. As is so often the case, there is truth on both sides of this argument.

The thought of John Locke, on whose work "founding fathers" such as Thomas Jefferson drew, is instructive. Locke, like others in the 17th century, had seen the terrible results of religious wars as Catholics and Protestants struggled for power in England. At first Locke was dubious about the capacity of human reason to provide the bulwark against the terrible abuses that result when "Priest and Prince" are combined. But his own faith led him finally to believe that it is only in the absolute protection of human civil society from any control by religious authorities that people are enabled to come to have faith in God. He paid a high personal cost for challenging the abusive power of the religious state, as he had to flee to Holland to escape execution for treason.

It was, therefore, for a theological reason, not a secular one that Locke and the American founders who drew on his work separated church and state and prohibited establishing one religion over any others. In that way, they protected religious freedom. Locke believed that people could only come to know God under the conditions of absolute freedom from any state control of their consciences. All state control gives you, argued Locke, is the "sin of hypocrisy, and contempt of his divine majesty."

Locke made this simple point: 'God doesn't need the help of the state for there to be faith.' Also, Locke and the framers of the U.S. Constitution were deeply and profoundly suspicious of the motives of those who wanted to bring religious and state control together. Locke notes "how easily the pretence of religion, and of the care of souls, serves for a cloak to covetousness, rapine, and ambition."

The Framers' Construct—The Prohibition of Establishment of Religion and the Free Exercise of Religion—Have Stood the Test of Time

From our vantage point in the twenty-first century we can see that the framers were right. They did not just protect political freedom. They protected religious freedom. It is no accident that the United States through all of its history so far has been free from the terrible effects of religious war. The framers of the Constitution knew what they were doing. Don't merge religion and the state.

This has recently been said with great acumen by retiring Supreme Court Justice Sandra Day O'Connor. As she wrote in a concurring opinion last term, "At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. Americans attend their places of worship more often than do citizens of other developed nations, and describe religion as playing an especially important role in their lives. Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?" McCreary County v ACLU, 125 S. CT. 2722, 2746 (2005).

The Prophetic and Progressive Faith Traditions

It is helpful for the health of our political life to realize that some people can vigorously object to any attempt to merge religion and the state from deeply held religious conviction. Those who point out the remarkable danger to American society from tendencies to merge religion and the state are not by definition "faithless secularists" or "liberal ideologues".

The faith communities who vigorously defend separation of church and state, who oppose any establishment of religion and who vigorously protect the free exercise of religion are a diverse group.

Some may best be described as "progressives," while others could be called "the prophetic."

The Progressive Faith community is, in large part, the most direct heir to the religious perspectives that informed thinkers such as Locke. Progressive people of faith have roots in the European Enlightenment and in the Protestant movement in Christianity. The root word of "Protestant" is "protest" and the protest was, in part, against the temporal power wielded by the Catholic Church of the 16th century.

These movements were responsible for inventing a concept called the "secular," a place in social life where organized religion does not hold absolute authority. It is the invention of this sphere of "worldliness" (the root of the word "secular" being the Latin for world) that gave rise to the political philosophy that informs the framers of the American Constitution. Subsequently, other religions have brought their faith traditions into the modern era and similarly defined a "world" where government holds sway. Reformed Judaism and Vatican II Catholicism are examples of this.

Progressive people of faith come from many religious traditions today. They share a commitment to the use of reason in human affairs, the duty of religious people to help create a just society and they believe that religious freedom and pluralism are religious and social goods.

The Prophetic faith traditions are also opposed to any infringement on the free exercise of religion and to any breach in the separation of church and state. Prophetic faith traditions often draw significantly on the spirit and want the church and the state to be separate because the latter is not spiritual.

Among the Prophetic faith traditions, African American Christianity, in particular, is very clear about both religious freedom and separation of church and state. African American Christianity was born under horrific state abuses of the individual rights of kidnapped and enslaved African people that were not only legal under American law, but also most often sanctified by the dominant churches. Enslaved African people were prevented, sometimes violently, from practicing their African religious faith and from forming independent Christian churches. This historical experience has given African American Christianity a very healthy skepticism about the dangers of merging religion and political authority and a deep conviction that both need to be constantly held accountable to the demands of true justice.

Jewish Americans contribute to this same perspective out of their experience of the Holocaust and underline that the systematic kidnapping, torture, and extermination of millions and millions of people was legal under the laws of Germany. Nuremberg has established that too narrow a reading of what is "legal" can profoundly betray the duty of the nation state to the claims of transcendent justice. Moreover, the American Jewish experience has been one of the flourishing of Jewish life due to the protections of religious liberty in the United States (though this has not always been perfectly observed by all citizens).

The women's movement in the United States blends elements of both the Progressive and the Prophetic traditions. Nineteenth and twentieth century American women had to counter strong, even virulent, opposition from churches to have their right to vote recognized. To this day, American women do not have an Equal Rights Amendment to the Constitution due, in part, to vocal opposition from the religious quarter in the latter part of the twentieth century.

Together the Progressive and the Prophetic faith communities are united in the view that any move to privilege one religion over another and to blur the lines that separate the power of religion and the power of the state is to run a grave risk of damaging both religion and the state. It is an oft-repeated

phrase, but one that is particularly apt in relationship to the effect of merging religion and politics, "Power tends to corrupt and absolute power corrupts absolutely."

Adherence to Religious Freedom Principles in the First Amendment is Critical in a Pluralistic Society

It might seem contradictory that while as a nation we are more religiously pluralistic than ever before, we see contemporary efforts by some to establish the doctrines of only one religion, Christianity, and indeed only of part of Christianity, as social policy. The strenuous objections to embryonic stem cell research, for example, are directly based on a particular religious conviction that the human soul is made present by God at the time of conception and that the newly fertilized embryo is ensouled .

When we look more closely, however, this is not as contradictory as it seems. While the Constitution protected religious freedom, our culture has been functionally Protestant since its beginning. In the 19th century, public school children were taught from readers that were patently a tutorial in the Protestant faith. Catholic immigrants in the 19th century formed their own parochial schools because they correctly perceived that this so-called public education was in truth nothing short of indoctrination in Protestantism.

What has become evident in the last half of the twentieth century and into the twenty-first is that our society is becoming more genuinely religiously pluralistic. The Harvard "Pluralism Project" has documented this astonishing growth of religious pluralism. As Dr. Diana Eck writes in her widely praised book A New Religious America: How a "Christian Country" Has Become the World's Most Religiously Diverse Nation (HarperSanFrancisco, 2005), "there are now more Muslims than Episcopalians, Jews or Presbyterians" in the United States.

Such increasing religious pluralism calls for even greater vigilance both in protecting religious minorities and clearly avoiding even the appearance of the establishment of any particular religion.

John Roberts and the Supreme Court

It is critical that the Supreme Court be particularly vigilant in these times of vast religious change to maintain our national protections of freedom of religion and to resist any weakening of the vast body of legal precedent prohibiting various forms of religious establishment.

In the limited documents available to discern John Roberts' views, there is evidence that his judicial posture is toward more permissiveness in religious establishment and is less than vigorous in the defense of religious minorities and their freedoms.

It is clear that as a member of the court and especially as Chief Justice, John Roberts is in a position to significantly influence whether the court remains consistent on establishment and free exercise or whether there will be a profound change that would greatly increase the government's endorsement of specific religion(s) and limit the rights of religious minorities. There are currently three justices of the Supreme Court who have consistently attempted to change the way the Establishment Clause of the First Amendment has been interpreted by the Court for decades (Lemon v. Kurtzman, 403 U.S. 602 (1971), Justices Scalia, Kennedy and Thomas. Chief Justice Rehnquist was of a similar view; Justice O'Connor has been the fifth vote for the majority coming to a contrary result.

As Deputy Solicitor General, John Roberts co-authored two briefs urging the overruling of Lemon v. Kurtzman. The viewpoint expressed is that there should be no limit on government endorsement or

support of religion as long as there is no coerced participation. In Lee v Weisman, for example, the government made the argument that clergy should be allowed to offer invocation and benediction prayers as part of a public school's official graduation ceremony because it did not "establish any religion nor coerce non-adherents to participate in any religion or religious exercise against their will." This seems a very severe interpretation of "coercion," since parents and other family attending graduation services really are trapped in their seats and forced to listen to prayers perhaps not of their own tradition to see their child or relation graduate. One can be coerced without the actual use of force. In a related fashion, in the Reagan administration, John Roberts approved a speech by Education Secretary Bill Bennett criticizing Supreme Court decisions barring religion in schools as antithetical to "the preservation of a free society."

In an increasingly religiously pluralistic society, these are particularly egregious positions to have taken since there is an absence of sensitivity to the fact that prayer at public school functions or including religion in schools will inevitably violate right of religious minorities to equal treatment.

John Roberts has, in more than one of the distributed documents, referred to the "so-called right to privacy" and has indicated his view that "arguing we have such an amorphous right is not to be found in the Constitution." This is a source of concern to me as well. Women have benefited greatly from the protection of the right to privacy in reproductive rights. Furthermore, Roberts' aversion to the right of privacy, if reflected in future rulings of the Court, of course, would have adverse affects well beyond the arena of reproductive rights. We are, for example, experiencing a dramatic increase in medical technologies and their use to artificially prolong life. Should the American family have the right to privacy in decisions affecting medical procedures used on their loved ones, or will we see this privacy eroded and the government allowed to legally interfere?

Advocates of his nomination tend to dismiss concerns regarding Judge Roberts' narrow judicial interpretations, including those just discussed, as consistent with a man who has a preference for specific and narrow interpretations of the law.

Disturbingly, however, Judge Roberts' narrowness only runs in one direction – a direction that undercuts the promises Dr. King understood to be inherent in our Constitution. The rejection of affirmative action because it is not "related to curing any violation of the law" is typical and illustrative. "Under our view of the law it is not enough to say that blacks and women have been historically discriminated against as groups are therefore entitled to special preferences." The idea that the redress for historic patterns of systematic, even structural discrimination is "special" and "preferential" indicates a clear unwillingness to consider how a society may become just where injustice has long reigned.

But while narrow and specific interpretation is applied to those who have suffered discrimination, there is also a pattern of an expansion of both the authority of the President and law enforcement. Judge Roberts, for example, joined a D.C. Circuit decision adopting the Bush administration's position that detainees designated as "enemy combatants" could be tried before military commissions without basic procedural safeguards, that the Geneva Convention was unenforceable in U.S. Courts and in any case did not apply to these detainees. Given the multiple sources of indisputable evidence of mistreatment and even torture of these detainees, this is alarming in the extreme and bodes ill for this country and its moral health.
Furthermore, when on the bench Judge Roberts rejected several significant claims of improper search and seizure, demonstrating an expansive view of the authority of law enforcement. This is a source of concern in one who would now be nominated to interpret the Fourth Amendment's prohibition against unreasonable searches and seizures.

Conclusion

The Constitution is a document that sought to implement a vision of fundamental rights, a vision of a society such as none in human history had seen before. This is both a profoundly human vision that has as its source the rise of the human spirit in the Enlightenment, but has another and more profound source, the notion that certain fundamental human rights are endowed by the Creator and that no authority of any kind has the right to overturn them.

Our legislatures are subject to the polarizations of politics and the pressures of special interest groups. To whom can we turn then to care for the "fundamentals" of the vision of this Constitution to "establish Justice," "promote the general welfare", and secure the "Blessings of Liberty" than, as the Constitution provides, that "one supreme Court"?

I have certainly been impressed with the incisive mind of John Roberts. That is a necessary but not sufficient credential for Chief Justice. I ask you to inquire about his passion for justice, his care for the general welfare and his concern to secure the blessings of liberty for all Americans. I ask you to inquire whether he believes in the dream that is the United States of America.