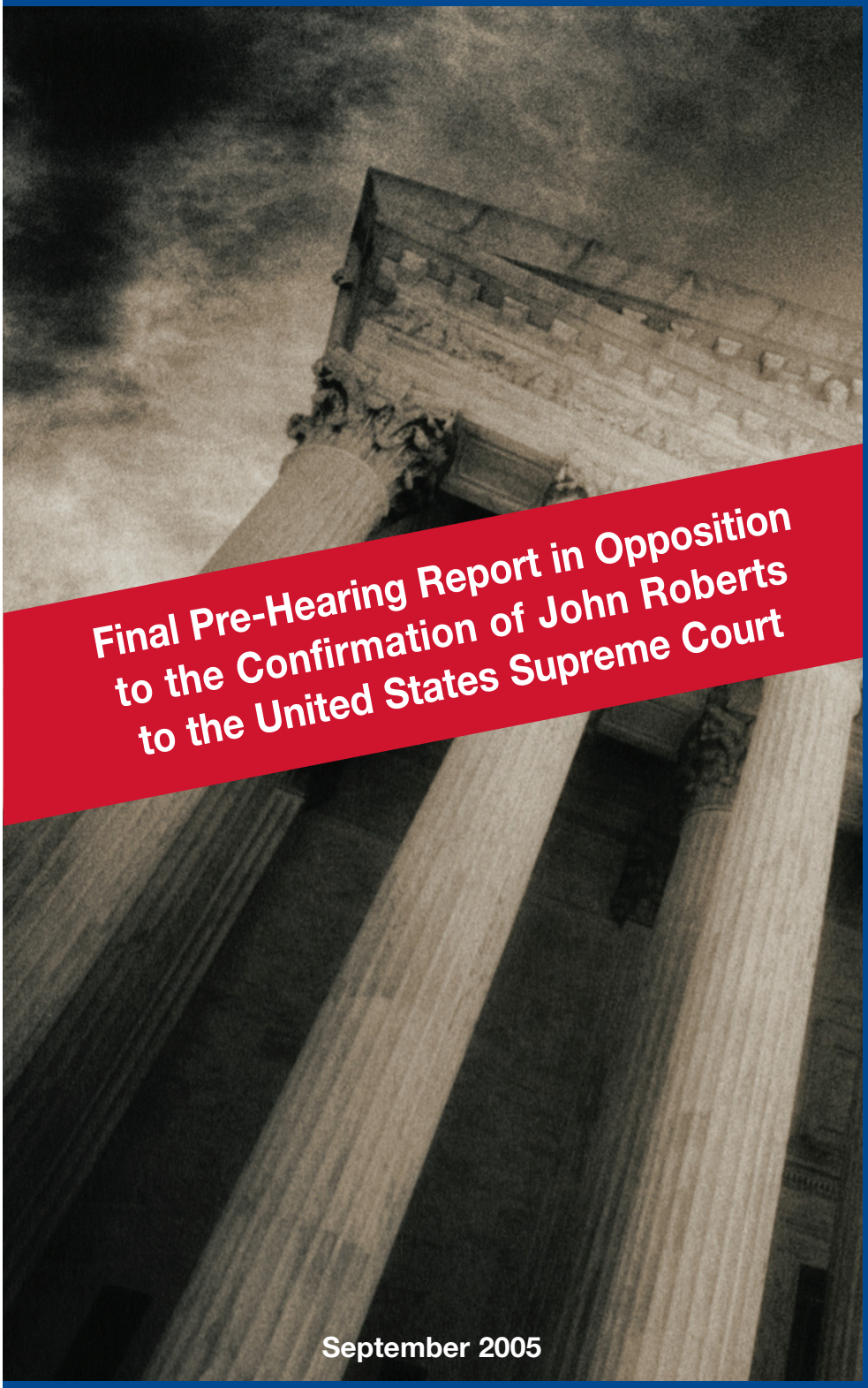
SPECIAL REPORT



Final Pre-Hearing Report in Opposition to the Confirmation of John Roberts to the United States Supreme Court

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Table of Contents

INTRODUCTION

Americans understand that the Supreme Court plays an important role in protecting their constitutional rights and freedoms. They do not believe that President Bush has a mandate to undermine basic liberties and legal principles. They emphatically do not want the Court to overturn Roe v. Wade and dismantle constitutional protections for personal privacy. Unfortunately, President Bush has picked a nominee whose record makes it clear that he would substantially upset the balance on the Court, undermining protections for privacy and much more. Sandra Day O'Connor was for years the pivotal justice at the Court's center; replacing her with Roberts, with his record of seeking to restrict the courts' role in safeguarding individuals' rights and interests, would leave Americans with far fewer protections for themselves, their families, and their communities.

Our August 24 report detailing the reasons for our opposition to Roberts' confirmation documented that the 25-year record of Judge John Roberts makes clear that he does not meet the appropriate standards for elevation to our nation's highest Court and his nomination should accordingly be rejected.

He has not demonstrated a "commitment to protecting the rights of ordinary Americans" and to "the progress made on civil rights, women's rights, and individual liberties," criteria suggested by more than 200 law professors in 2001.[1] To the contrary, throughout his career Roberts has worked to undermine protections for Americans' civil rights and civil liberties, rather than to uphold them.

He has not shown "respect for the constitutional role Congress plays in promoting these rights and health and safety protections, and ensuring recourse when these rights are

[1] See People For the American Way, Report in Opposition to the Confirmation of Supreme Court Nominee John Roberts (Aug. 24, 2005) ("PFAW Report") at 5 (quoting Letter of Law Professors to Senate Judiciary Committee, July 13, 2001)

breached." [2] To the contrary, as an official in the Reagan and Bush Administrations, in his own private capacity, and as a federal judge, he has sought to restrict Americans' access to justice and to support efforts to undermine Congress' authority to pass laws protecting individual rights and promoting the common good.

This report provides detailed legal analysis of Roberts' record as an attorney and judge and what it tells us about his judicial and legal philosophy in four basic areas: access to justice, civil rights, privacy and other civil liberties, and presidential and congressional authority.

Roberts' defenders have already sought to dismiss the concerns raised by People For the American Way by suggesting they are based only on documents from more than 20 years ago, when Roberts was acting as a lawyer serving a client in the Reagan Administration. This criticism completely misses the mark for several important reasons.

First, as this and our prior report demonstrate, our concerns are not simply with isolated statements and acts by Roberts during the Reagan Administration. Instead, the facts demonstrate that what happened at that time was part of a career-long pattern by Roberts opposing fundamental legal protections for all Americans and promoting his legal views without regard to its impact on individuals' lives and liberties.

For example, Roberts did not just take a position to the right of Ted Olson on court-stripping and complain about citizen access to the courts as a Reagan Administration official. He also strongly argued to limit access to justice as the principal deputy solicitor general in the Bush I Administration, in a law review article, in private practice, and as a federal judge.

Roberts did not just argue against affirmative action in employment as part of the Reagan Administration. He also took the extraordinary step as acting Solicitor General of

[2] Id. (quoting law professors' letter).

authorizing opposition in the Supreme Court to a federal affirmative action program, and he continued to oppose such programs as a private lawyer.

Roberts did not just use "federalism" arguments as a way to oppose federal civil rights protections in the Reagan Administration. He has also, as a private lawyer and commentator and in an important dissent as a federal judge, supported the "new federalism" revolution seeking to limit Congress' authority in key areas.

The revelations about Roberts' role promoting a right wing counterrevolution during the Reagan Administration provide significant context to a career-long pattern that demonstrates his failure to meet the standards for promotion to the Supreme Court.

Some commentators have suggested, unconvincingly, that Roberts' record in a series of influential legal jobs does not tell us about his own legal or judicial philosophy, because he was only a lawyer representing his client's wishes. This argument cannot be taken seriously.

Roberts was not a career government lawyer, serving from administration to administration, no matter who was in the White House. To the contrary, Roberts served for a total of almost ten years in three different influential positions in the Reagan/Bush administrations as a political appointee -- someone specifically selected by the administration,. He was as an advisor to the attorney general and then to the White House counsel, and then second in command to the solicitor general.

Moreover, Roberts chose "the client." He chose to serve administrations committed to rolling back civil rights protections, overturning *Roe v. Wade*, limiting access to the federal courts, and undermining the separation of church and state. And given the influential positions in which Roberts served those administrations, it is highly doubtful that the "client" would have chosen him unless he were ideologically compatible with its agenda. In fact, as discussed below, Roberts' memoranda often clearly express his own point of view, which on a number of occasions was further to the

right than that of ultraconservatives like Ted Olson, Brad Reynolds, and Robert Bork. Indeed, ultraconservative lawyer Bruce Fein, who served with Roberts in the Reagan administration, said they were among "a band of ideological brothers."[3] He added that the deeply held convictions that Roberts demonstrated "aren't principles that evaporate or walk away," underscoring the relevance of Roberts' Reagan/Bush record to his nomination today.[4]

Finally, Roberts' tenure as principal deputy solicitor general to Kenneth Starr during the first Bush administration deserves particular mention. The solicitor general is the government's chief lawyer before the Supreme Court, traditionally given special deference by the Court and thus sometimes called "the Tenth Justice." Historically, Supreme Court justices have relied on the solicitor general to maintain some independence from the executive branch -- to "look beyond the government's narrow interests . . . to help guide them to the right result in the case at hand, and to pay close attention to the case's impact on the law."[5]

The Reagan administration, however, politicized the office of the solicitor general, using it to promote its ideological viewpoints on social and political issues in the Supreme Court and turning the solicitor general into "the point man for a conservative transformation in the law."[6] Rex Lee, the first solicitor general during the Reagan administration, came under enormous pressure from administration officials and others to vigorously promote the administration's ideological views before the Court and resigned in frustration in 1985, saying: "'If I had done what was urged on me in a lot of cases, I would have lost those cases and the Justices wouldn't have taken me seriously in others. There has been this notion that my job is to press the Administration's policies at every

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[3] R. Jeffrey Smith, Amy Goldstein and Jo Becker, "A Charter Member of Reagan Vanguard," *Washington Post* (Aug. 1, 2005).

[4] Id.

[5] Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law*, at 3 (1987) ("*The Tenth Justice"*).

[6] David G. Savage, "With Starr, Roberts Pushed Reagan Agenda," *Los Angeles Times* (Aug. 5, 2005); *The Tenth Justice* at 51-64, 81-114.

turn and announce true conservative principles through the pages of my briefs. It is not. I'm the Solicitor General, not the Pamphleteer General.'"[7]

In sharp contrast, Roberts supported the use of the Solicitor General's Office to advance the Reagan administration's ideological agenda. For example, in a 1982 memorandum to Attorney General William French Smith criticizing a Supreme Court ruling striking down a Texas law passed to keep children of undocumented immigrants from attending public schools, Roberts and a Justice Department colleague wrote that the solicitor general (Rex Lee) should have weighed in on the case to get "our supposed litigation program to encourage judicial restraint . . . off the ground," and that, if he had, it could have altered the outcome.[8]

And in another memo to Attorney General Smith written the very next day, Roberts complained that in cases involving employment discrimination within the purview of the Equal Employment Opportunity Commission (EEOC) there should nonetheless be "greater coordination" between the Solicitor General's Office and the Civil Rights Division, because the Solicitor General, in consultation with the EEOC, had taken positions in two cases that were more protective of civil rights than the Administration would have taken.[9] "Fortunately," wrote Roberts, "the Solicitor General's office and EEOC lost in these cases, each time by a vote of 5-4."[10] It is, to say the least, astonishing that a member of the Department of Justice would consider it "fortunate" that the United States had lost two cases in the Supreme Court. Roberts urged Attorney General Smith to "direct the Solicitor General's office to keep the Civil Rights Division fully advised of all EEOC filings, and to solicit their views as they would in a case coming from the Civil Rights Division itself."[11]

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[7] *The Tenth Justice* at 107 (*quoting* interview with Lee); David G. Savage, "With Starr, Roberts Pushed Reagan Agenda," *Los Angeles Times* (Aug. 5, 2005).

[8] Memorandum from Carolyn B. Kuhl and John Roberts to the Attorney General re *Plyler v. Doe* -- "The Texas Illegal Aliens Case" (June 15, 1982).

[9] Memorandum from John Roberts to the Attorney General re Solicitor General Briefs in EEOC Cases (June 16, 1982).

[10] Id. at 2.

[11] Id. at 2.

Sometime within the next six months, the Reagan administration created an entirely new position within the office of the Solicitor General, that of "Counselor to the Solicitor General and Deputy Solicitor General," also called "the political deputy."[12] A main function of this new Principal Deputy, second in command to the Solicitor General, was to see to it "that cases argued before the Supreme Court conform to the Administration's political agenda."[13] Clearly, this high-level position, which Roberts filled for more than three years during the first Bush administration, was reserved for someone who shared the ideology of the administration. Indeed, Charles J. Cooper, Roberts' Reagan administration colleague and "longtime friend," recently confirmed that "Roberts 'was in that position as the principal political deputy to the solicitor general because he was simpatico with the administration. … He agreed with the thrust of what the administration was doing.'"[14] And Susan Carle, a professor of law at American University who was an attorney at the Civil Rights Division while Roberts was Principal Deputy Solicitor General, said that "[h]e had very strong ideological views about the law, and he saw his mission in life as bringing these conservative views to bear on civil rights and anti-discrimination laws."[15]

Perhaps the best evidence that John Roberts shared the ideology of the Reagan/Bush administrations is the fact that while Roberts still held the job of principal deputy solicitor general under the first President Bush, the President nominated him, at the age of 37, to a seat on the United States Court of Appeals for the District of Columbia Circuit.[16] As was reported at the time, President Bush's nominees were selected by "ideologically-driven-judge-pickers" who sought to "[b]uild[ ]on the record of Ronald Reagan" in selecting nominees with extremely conservative views.[17] For Roberts to have

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12 *The Tenth Justice* at 62.

13 Neil A. Lewis, "The 1992 Campaign: Selection of Conservative Judges Insures a President's Legacy," *New York Times* (July 1, 1992); accord, Maralee Schwartz and Al Kamen, "Starr's 'Political' Deputy," *Washington Post*, The Federal Page, A25 (Sept. 22, 1989).

14 David G. Savage, "With Starr, Roberts Pushed Reagan Agenda," *Los Angeles Times* (Aug. 5, 2005) (emphasis added).

15 Id.

16 Neil A. Lewis, "The 1992 Campaign: Selection of Conservative Judges Insures a President's Legacy," *New York Times* (July 1, 1992).

17 Id.

received a nomination to the powerful D.C. Circuit at that point in his career provides a strong indication that he was considered to share an extremely conservative legal philosophy.

As both this report and our prior report make clear, replacing Justice O'Connor with John Roberts would be particularly perilous for Americans' rights and freedoms. While often voting with her more conservative colleagues, O'Connor frequently was the crucial fifth vote that literally made the difference in preserving those liberties. The evidence is clear that Roberts would not play such a role, but would swing the Court to the right on access to justice, civil rights, civil liberties, and presidential and congressional authority. We urge senators to vote against his confirmation. And because it is important that the confirmation process help the public understand what is at stake, we urge senators on the Judiciary Committee to insist that John Roberts provide complete answers about his judicial philosophy, and to explain why his answers – or lack thereof – are so important to the rights and freedoms enjoyed by the American people.

I. ACCESS TO JUSTICE

Access to justice in America depends on a simple, but powerful premise: if someone wrongs you, you can get your day in court to try to set things right. Access to the courts is essential, whether the issue is civil rights or corporate wrongs. For judges, this simple premise is often translated into complicated legal doctrines like standing, jurisdiction, and collateral review. In recent years, narrow majorities on the Supreme Court, sometimes including Justice O'Connor, have issued decisions that have restricted access to the courts. Yet Justice O'Connor has been a key swing vote on these issues, sometimes casting the crucial fifth vote in 5-4 decisions that have preserved access to justice for Americans. *See, e.g., Hibbs v. Winn*, 542 U.S. 88 (2004)(5-4 ruling that federal courts can fully review the constitutionality of discriminatory and unconstitutional tax laws); *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) (5-4 ruling upholding legality of key source of legal funding for the poor).

John Roberts, however, has made troubling statements about the courts and the people who turn to them for redress. He has claimed that the courts frequently engage in "judicial policymaking"[18] and "have been drawn by litigants before them into areas properly and constitutionally belonging to the other branches or to the states."[19] "[T]oo frequently," he wrote, courts have "attempted to resolve disputes not properly within their province."[20] In fact, he responded to a suggestion intended to allow the Supreme Court to hear more cases by saying:

> [I]t strikes me as misguided to take action to permit them to do more. There are practical limits on the capacity of the Justices, and those limits are a significant check preventing the Court from usurping even more of

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[18] Draft Article on Judicial Restraint for ABA Journal at 2 ("judicial policymaking is also inevitably inadequate or imperfect policymaking"); see also Memorandum from John Roberts to Dean St. Dennis re Judicial Restraint Initiatives (Dec. 7, 1981).

[19] Draft Article on Judicial Restraint at 1.

[20] Suggested Remarks for the Attorney General [before] The American College of Trial Lawyers (2nd draft of March 30, 1982), at 8, delivered by John Roberts to Fred Fielding and Dave Gergen on March 30, 1982 [hereinafter Trial Lawyers Speech].

> the prerogatives of the other branches. The generally-accepted notion that the Court can only hear roughly 150 cases each term gives the same sense of reassurance as the adjournment of the Court in July, when we know that the Constitution is safe for the summer.[21]

As for the people who depend on the courts to enforce their rights, Roberts suggested they should simply go elsewhere. In a speech he drafted for the Attorney General, he quoted Chief Justice Burger, who felt that "[o]ne reason our courts have become overburdened is that Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties. . . .The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity . . . ."[22]

As detailed fully below in this section of our report, the record strongly indicates that replacing Justice O'Connor with John Roberts would swing the Court decidedly to the right on the key issue of access to justice. Roberts has supported the legality of proposals to strip even the Supreme Court of the ability to decide cases vindicating constitutional rights. He has worked to make it harder for individuals to enforce rights granted them under federal law, and has even advanced arguments that would make it harder for Congress to grant statutory standing to individuals whose rights are violated. He has argued for strict limits on the nature of injuries the court can address, making it difficult for plaintiffs – especially plaintiffs in environmental cases – to gain standing to bring suit in the public interest. Roberts issued an opinion as a judge on the D.C. Circuit reversing an award of attorneys' fees to plaintiffs who successfully argued against the

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[21] Memorandum from John Roberts to Fred Fielding, Department of Justice Recommendations on Creation of an Intercircuit Tribunal, Apr. 19, 1983. Indeed, Roberts even stated that "there is much to be said for changing life tenure to a term of years," for federal judges, in part because of his view that the federal judiciary "usurps the roles of the political branches." Memorandum from John Roberts to Fred Fieldrig re: Department of Justice Proposed Report on S.J. Res. 39 (Oct. 3, 1983). In opposing a Justice Department report that supported life tenure for federal judges, Roberts stated that "[T]he Framers adopted life tenure at a time when people simply did not live as long as they do now." However, in Roberts' view, "the case for insulating the judges from political accountability weakens" when judges "lose all touch with reality through decades of ivory tower existence" and fail to limit their task to "discerning and applying the intent of the Framers or legislators." Id.

[22] Trial Lawyers Speech at 7-8, (quoting Chief Justice Burger's 1982 Annual Report on the State of the Judiciary).

constitutionality of a law that violated their First Amendment rights. He has been hostile to prisoners' habeas corpus petitions, and has even suggested eliminating the federal rule that prevents illegally obtained evidence from being used against a defendant in court. Throughout his career, Roberts has advocated legal theories that would deprive Americans of access to justice in the federal courts on civil rights, reproductive freedom, environmental protection, religious liberty, and other crucial subjects.

A. ROBERTS AND COURT-STRIPPING

One of Roberts' earliest encounters with the question of access to justice concerned the court-stripping proposals widely promoted for years by some right-wing advocates. Dissatisfied with court decisions on such issues as school desegregation, school-sponsored prayer, and reproductive rights, these advocates have asserted that the courts should simply be stripped of any authority to hear and decide cases on such issues, severely limiting access to justice. Even today, for example, far-right advocates like Phyllis Schlafly have proposed to strip the federal courts of jurisdiction over claims relating to controversial issues.[23]

Conservative as well as progressive legal scholars and government officials have opposed such proposals, especially with respect to the Supreme Court. As reflected in materials in Roberts' own files in 1982, these have included Sen. Barry Goldwater and even Robert Bork.[24] Such proposals violate the fundamental principles recognized in *Marbury v. Madison* that the federal judiciary is supreme in determining what the Constitution provides, and that a constitutional wrong must have a remedy.[25] David Brink, then-President of the American Bar Association, described the court-stripping bills as "a legislative threat to our nation that may lead to the most serious constitutional crisis

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[23] See e.g., "Rally targets 'arrogant' judiciary," *Chicago Tribune* (Aug. 15, 2005); A. Fagan "GOP Eyes Taking Marriage From Courts," *Washington Times* (June 25, 2004).

[24] See "Mr. Conservative Is Too Liberal for Them," Baltimore Sun (Feb. 18, 1982) (article concerning Sen. Goldwater found in Roberts' files); Memorandum from John Roberts to the Attorney General re: Supreme Court Jurisdiction (Apr. 13, 1982).

[25] See *Marbury v. Madison*, 5 U.S. 137 (1803); *accord Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

since our great Civil War." [26] The Conference of Chief Justices of the States resolved unanimously that court stripping bills are a "hazardous experiment with the vulnerable fabric of the nation's judicial system."[27]

During Roberts' service as a special assistant to the Attorney General in 1981-82, the Department of Justice was formulating a response to several court-stripping proposals. In July 1981, then-Assistant Attorney General Ted Olson, who directed the Office of Legal Counsel, wrote a lengthy memorandum to the Attorney General explaining that proposals to strip the Supreme Court of jurisdiction over cases concerning school desegregation, abortion, and school prayer were unconstitutional, and that proposals to strip lower federal courts of jurisdiction to order busing as a remedy in segregation cases were constitutional only to the extent that the courts did not find that such remedies were constitutionally required.[28] When publicly announced, even this partial endorsement of court-stripping was severely attacked by civil rights advocates and others.[29] Yet Roberts was far to the right of even well-known ultra-conservative Ted Olson and argued that all such laws were constitutional in restricting federal and even Supreme Court jurisdiction.

With respect to the Supreme Court issue, Roberts wrote a 27-page memorandum arguing that it was proper to completely take away the Supreme Court's ability to consider cases concerning abortion, school desegregation, and school prayer under the so-called "exceptions clause" to Article III, section 2 of the Constitution concerning the

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[26] Stuart Taylor, Jr., "Bar Group to Debate Law School Issue Again," *New York Times*, Jan. 24, 1982.

[27] David Margolic, "State Judges are Shaping Law that Goes Beyond Supreme Court," *New York Times*, May 19, 1982.

[28] Memorandum for the Attorney General from Assistant Attorney General Theodore B. Olson, Constitutional Issues Raised by Provisions Removing or Limiting Federal Court Jurisdiction in Abortion, School Prayer, Busing and Draft Registration Bills (July 16, 1981) [hereinafter "July Olson Memo"].

[29] See, e.g., Citizens Commission on Civil Rights, "There Is No Liberty…" A Report on Congressional Efforts to Curb the Federal Courts and Undermine the Brown Decision (Oct. 1982) (hereinafter "CCCR Report").

Supreme Court's jurisdiction.[30] In a 21-page memorandum several months later, however, Olson decisively refuted Roberts' legal claims. The "exceptions clause" argument, Olson explained, "misperceives the proper role of constitutional interpretation" and presents a "greatly oversimplified and misleading view of the Constitution" by claiming that the "plain language" of a "few isolated words" in the Constitution should be a "conclusive guide to its interpretation."[31] It is the "Constitution itself, not Congress," Olson wrote, that "vests the federal judicial power in the Supreme Court" and lower federal courts.[32] Olson's conclusion was unequivocal:

> We do not believe that Congress may make "exceptions" which would negate the power of the Supreme Court to decide cases arising under the Constitution and laws of the United States. If it had the power to do so, it could remove the Court from the function which it has served for nearly two hundred years of providing an authoritative and final expression of the meaning of the Constitution. It would be exercising a power which was not mentioned once during the drafting of the Constitution or the ratification debates. We do not believe this power was intended and we believe that an exercise of it would be unconstitutional. George Washington's final words of advice to his countrymen are appropriate: "If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates."[33]

Both before and after Olson's refutation, however, Roberts adhered to his legal view. He suggested changes to a speech by Solicitor General Rex Lee because he thought

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30 See Memorandum from John Roberts on Proposals to Divest the Supreme Court of Appellate Jurisdiction: An Analysis in Light of Recent Developments (undated but attached to note from Kenneth Starr to Ted Olson on October 30, 1981). In the introduction to the memo, Roberts noted that participants at a recent conference were concerned about the issue because of "intrusive remedial orders" by lower courts and "what is broadly perceived to be the unprincipled jurisprudence of *Roe v. Wade*." Id. at 1.

31 Memorandum for the Attorney General from Assistant Attorney General Theordore B. Olson re Constitutionality of Bills Limiting Supreme Court Jurisdiction (Apr. 19, 1982), at 1, 5.

32 Id. at 2.

33 Id. at 20-21.

it offered "intimations" concerning whether the Court could be stripped of jurisdiction.[34] He and Kenneth Starr continued to disagree with language suggested by Olson and Lee for Attorney General Smith on the issue until at least late April 1982, several days before Smith's public letter siding with Olson's view.[35] Several years later while serving at the White House, Roberts noted that he "disagreed with that conclusion on legal grounds."[36]

With respect to proposals to strip lower courts of any authority to ever order mandatory reassignment or busing as a remedy for unconstitutional school segregation, Roberts was also to the right of Ted Olson. Although Olson agreed that such bills were generally constitutional, he believed, in accord with clear Supreme Court precedent, that the courts had held that such remedies were sometimes constitutionally required to remedy segregation, and that lower federal courts must retain the power to use them if and when absolutely necessary.[37] Roberts argued that the federal courts could be flatly prohibited from ordering such remedies in all desegregation cases, despite Supreme Court precedent, and continued to adhere to that legal view several years later even when he conceded to White House counsel Fred Fielding that Olson had achieved "victory in the extended internal debate."[38] Civil rights advocates have made clear that proposals like Roberts' would frustrate effective school desegregation, while even conservative legal scholars like the late Alexander Bickel have objected to the improper attack on the authority of the courts by such court-stripping proposals.[39]

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[34] Attachment to Memorandum from John Roberts to Solicitor General Rex Lee re BYU Antitrust Seminar Speech (Dec. 9, 1981), at 2.

[35] See, e.g., Memorandum from Theodore B. Olson to William French Smith (April 26, 1982), at 2.

[36] Memorandum from John G. Roberts to Fred F. Fielding re Senator Helms' Bill – A Legislative Restriction on the Appellate Power of U.S. Supreme Court (June 21, 1985) [hereinafter "June 21 Memo"].

[37] See Letter from William French Smith to House Judiciary Chair Peter Rodino (May 6, 1982), at 8-10 (reflecting this view); July Olson Memo at 14-15.

[38] Memorandum from John G. Roberts to Fred F. Fielding re Proposed Justice Report on S.139 (Anti-Busing Bill) (Feb. 15, 1984) [hereinafter "Feb. 15 memo"], at 1; see also Note for the Attorney General from John Roberts (Apr. 6, 1982) (suggesting alternative language for the May 6, 1982 letter cited above).

[39] See CCCR Report; at 260-6 n.52 (quoting Alexander Bickel).

Roberts' views on the policy questions raised by such court-stripping proposals remain unclear. In several memoranda written at the White House, Roberts recorded that he opposed such proposals on policy grounds.[40] In another White House memo, however, he continued to make the case for them and simply conceded that since Olson's view had gone forward as the Administration view, "it would probably not be fruitful to reopen the issues at this point."[41] Even more revealing may be Roberts' hand-written notes on a memo from Olson specifically addressing the policy implications of the Supreme Court court-stripping proposals. While Olson wrote that opposition to such proposals would be perceived as a "courageous" decision, Roberts wrote that "real courage would be to read the Constitution as it should be read and not kowtow" to progressives and others who argued the contrary.[42]

Whatever Roberts' policy views were, however, his legal views are extremely disturbing. His legal views were significantly more restrictive on access to justice issues than those of ultra-conservatives like Robert Bork and Ted Olson. Roberts was also criticized by Olson for adhering to an "oversimplified and misleading" argument based on the alleged "plain language" of the Constitution, a method of interpretation that could have dangerous implications on other Constitutional questions, as discussed below with respect to privacy and other issues.

B. ROBERTS AND THE WEAKENING OF SECTION 1983

Throughout his career, Roberts has been particularly involved in the body of law concerning proper application of Section 1983 of Title 42 of the U.S. Code, the law giving individuals the right to bring suit against state and local agencies and officials to enforce their rights under federal law, and the Supreme Court's interpretation of Section

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40 See June 21 Memo, Memorandum from John G. Roberts to Fred F. Fielding re S.47, "Voluntary School Prayer Act of 1985" (May 6, 1985).

41 Feb. 15 Memo, at 2.

42 See Memorandum from Theodore B. Olson for the Attorney General re Policy Implications of Legislation Withdrawing Supreme Court Appellate Jurisdiction over Classes of Constitutional Cases (Apr. 12, 1982) (handwritten notes of John Roberts in margin at page 9).

1983 in the case of *Maine v. Thiboutot*.[43] Roberts has consistently sought to limit Americans' access to justice in this important area.

Section 1983, enacted in 1871 to address the reluctance or inability of some Southern officials to allow black citizens full protection under federal laws following the Civil War, allows any person to file suit against state officials and some state-run institutions that deprive them of rights "secured by the Constitution and laws. …"[44] In its 1980 decision in *Maine v. Thiboutot*, the Supreme Court held that the section "means what it says," and allows individuals to seek redress for violation of any of the federal "laws" - not just the Constitution, but also those enacted later by federal statutes enacted by Congress.[45]

Roberts had serious concerns about *Thiboutot* and its interpretation of Section 1983 from the beginning. A 1982 memo from the Department of Justice Office of Legal Policy notes that, at the request of Ken Starr and John Roberts, the office had been "survey[ing] the law governing § 1983 actions" and "outlining the range of legislative changes that could be considered" to reduce the types of rights that could be vindicated under Section 1983.[46] A copy of the memo sent to Roberts demonstrates that he took issue even with OLP's understanding of the law. When, in a section devoted to explaining the history of Section 1983 and its application, the OLP memo explains that, in *Thiboutot* "the Supreme Court has held that the phrase 'and laws' in § 1983 is not limited to civil rights or equal protection laws but applies to all statutory rights," Roberts underlined the declaration and wrote "NO" next to it in the margin (emphasis in original).[47] He then responded to the draft with a memo of his own, alleging that the OLP had misinterpreted the Supreme Court precedent. Roberts refered to the OLP memo discussing "the § 1983 problem" and complained that the memo, "in its discussion of

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43 448 U.S. 1 (1980).
44 42 U.S.C. §1983.
45 448 U.S. at 4.
46 Memorandum of Jonathan C. Rose to Edward C. Schmults, Development of Legislative Changes to 42 U.S.C. § 1983 (Aug. 6, 1982).
47 Draft Memorandum of Jonathan C. Rose to Edward C. Schmults, Development of Legislative Change to 42 U.S.C. § 1983 (Aug. 6, 1982).

current law and legislative proposals to limit statutory claims . . . assumes that the Supreme Court held, in Maine v. Thiboutot, that the coverage of § 1983 extends to 'all statutory rights.'" [48] Roberts admitted that this is the "generally accepted view" of *Thiboutot*, but urged that the Administration "recognize limits . . ., and not necessarily accept the broadest reading of Thiboutot as the only one."[49] He also suggested that "[o]ur legislative proposals" to decrease the types of rights enforceable under Section 1983 "could perhaps even be cast as efforts to 'clarify' rather than 'overturn' that decision."[50] Roberts' overall view is clear; action should be taken to "undo the damage" he claimed was caused by *Thiboutot*.[51]

By 1983, the "clarification" Roberts hoped for had yet to materialize. In a memo to White House Counsel Fred Fielding, he claimed that "§ 1983 abuse really has become the most serious federal court problem." [52] He mentioned that "Justice has been looking into several avenues of § 1983 reform" but, apparently aware of how unpopular it would be to limit the ability of individuals to seek redress for violations of their federally protected rights, admits that "the general sense is that it would be impolitic to touch the provision . . . until after 1984"– an apparent reference to President Reagan's upcoming reelection bid.[53]

Roberts's crusade to limit the rights that can be vindicated under § 1983 continued into the next stage of his career in public life, when he became Principal Solicitor General. There, Roberts signed an *amicus* brief filed before the United States Supreme Court in the case of *Wilder v. Virginia Hospital Association*, arguing that Section 1983 could not be used by a health care provider to challenge the adequacy of

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[48] Memo from John Roberts to Steve Brogan, Development of Legislative Changes to 42 U.S.C. § 1983, Aug. 9, 1982, at 1 (citations omitted).

[49] Memorandum from John Roberts to Steve Brogan re Development of Legislative changes to 47 U.S.C. § 1983 (Aug. 9, 1982) at 3.

[50] Id.

[51] Id. at 3.

[52] Memo from John Roberts to Fred Fielding, Letter to the President from Alabama Attorney General Charles Graddick, April 28, 1983 at 1.

[53] Id.

reimbursements it was receiving under Medicaid.[54] According to the government brief, the text and history of the Medicaid Act did not create "specific and definite" rights that could be enforced in federal court.[55] The Court rejected the government's argument, finding the Act did create rights enforceable by health care providers under § 1983, as evidenced by the fact that Congress had done nothing explicitly to foreclose enforcing the Act via Section 1983.[56] The *Wilder* decision remains good law, and has become the basis of most decisions allowing individuals to enforce rights under the Medicaid Act.

In 1992, while still at the Solicitor General's Office, Roberts argued before the Supreme Court for the weakening of protections under the Adoption Assistance and Child Welfare Act. The government's *amicus* brief argued that the Act, which requires states to make "reasonable efforts" to avoid placing children in foster care and to return children in such care to their homes when possible, did not create a private cause of action children could enforce under Section 1983.[57] Though the Court sided with Roberts on this occasion,[58] Congress reacted to the decision by amending the Social Security Act to ensure that the holding of that case would not be applied to Social Security claims made by individuals in the future.

In 2002, while in private practice, Roberts had another opportunity to weaken the ability of individuals to enforce rights under Section 1983. In the case of *Gonzaga University v. Doe*,[59] a student was seeking to enforce privately provisions of the Family Educational Rights and Privacy Act (FERPA), which prohibits federal funding to educational institutions with a policy or practice of releasing education records to

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54 Brief for the United States as Amicus Curiae Supporting Petitioners, *Baliles v. Virginia Hospital Association*, No. 88-2043, 1988 U.S. Briefs 2043, 520-24 (Nov. 16, 1989).

55 Id. at *5.

56 *Wilder v. Virginia Hospital Assn'*, 496 U.S. 498, 520-24 (1990).

57 Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Suter v. Artist M.*, No. 90-1488, 1990 U.S. Briefs 1488 (July 18, 1991). The *Suter* brief was an amicus brief that the government need not have filed. Senate Judiciary Committee Democrats have requested access to Justice Department documents in the case, but the Administration has so far refused. Office of Senator Patrick Leahy, Democratic Senators Request Information on 16 Cases Handled By Supreme Court Nominee (July 29, 2005).

58 *Suter v. Artist M.*, 503 U.S. 347 (1992).

59 536 U.S. 273 (2002).

unauthorized persons. In his brief for the petitioners, Roberts argued that no language in FERPA indicates that Congress intended to create a right privately enforceable under Section 1983 when enacting the legislation. The Court agreed, holding that FERPA's nondisclosure rules do not create privately enforceable rights, and that federal funding provisions may not be privately enforced under § 1983 unless Congress manifested an "'unambiguous' intent to confer individual rights."[60]

The Court did not agree with Roberts on all points, however, and refused to adopt one particularly radical argument he made in the *Gonzaga* case. Having apparently grown weary of arguing that § 1983 does not allow individuals to enforce privately "laws," Roberts took the radical leap of arguing that FERPA was not a "law" at all. FERPA, in the opinion of Roberts, is, instead, a contract. In his brief, Roberts made much of the fact that FERPA was enacted pursuant to Congress's powers under the Spending Clause. He refers to FERPA as a "Spending Clause contract" between the federal government and the school accepting funds under FERPA, and states that the plaintiff is "not part[y] to the Spending Clause contract."[61] Furthermore, Roberts claimed that, under this contract theory, there can be no cause of action for an individual whose rights are violated under the "Spending Clause contract" because, when Section 1983 was enacted in 1871, a third-party beneficiary was "stranger to the contract, and could not sue upon it.'"[62] This radical interpretation, which the Court did not even address in its opinion and which criticized by the *amicus* brief filed by the United States in this case,[63] would strip individuals of their ability to privately enforce rights provided under dozens of federal spending clause statutes, including the Children's Internet Protection Act and the Adoption Assistance and Child Welfare Act.

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60 536 U.S. at 280.

61 Brief for Petitioners, *Gonzaga University v. Doe*, No. 01-679, 2001 U.S. Briefs 679 (Feb. 25, 2002), at * 39.

62 Id. at *40 (quoting *Blessing v. Freestone*, 520 U.S. 329, 349 (1997) (Scalia, J., concurring)).

63 Brief for the United States as *Amicus Curiae* Supporting Petitioners *Gonzaga University v. Doe*, no. 01-679, 2001 U.S. Briefs 679 (Feb. 22, 2002), at *18 ("[I]t would be erroneous to adopt the contention … that individuals may not enforce the provisions of Spending Clause Legislation through actions under Section 1983 because, at the time Section 1983 was enacted, a third-party beneficiary of a contract could not sue to enforce its terms.").

C. STANDING AND "ACTUAL INJURY"

Roberts has also attempted to reduce the ability of individuals to have their day in court by encouraging restrictive standing rules. "Standing," according to Black's Law Dictionary, "is a requirement that the plaintiffs have been injured or been threatened with injury by governmental action complained of" and also considers "whether the litigant is the proper party to fight the lawsuit."[64] According to a law review article by Roberts, standing is "properly regarded as a doctrine of judicial self-restraint"[65] that is "designed to implement the Framers' concept of 'the proper – and properly limited – role of the courts in a democratic society.'"[66] In his law review article Roberts states that federal judges should "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record."[67]

It was the opinion of many in the Reagan Administration – Roberts included -- that by the 1980s the courts had become too lax in enforcing standing requirements and were improperly allowing litigants to bring suit where they had been harmed but not personally targeted by, a particular defendant. The Administration was determined to put a stop to this trend, and as Roberts wrote in a 1981 memo, though "certain parts of the Justice Department previously followed a policy of not raising standing challenges in the most vigorous fashion" it would be the Reagan Administration's "policy to raise standing and other justiciability challenges to the fullest extent possible."[68] "We will urge courts," Roberts wrote in another memo, "to accept only those cases brought by litigants with a

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64 Black's Law Dictionary Standing, 978 (6th ed. 1991).

65 John G. Roberts, Jr., Article III Limits on Statutory Standing, 42 Duke L.J. 1219, 1221 (1993) [hereinafter Duke Article].

66 Id. at 1220 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

67 Id. at 1226 (internal quotation marks omitted) (quoting *Renne v. Geary*, 111 S. Ct. 2331, 2336 (1991), *Bender v. Williamsport Area School Dist,* 475 U.S. 534, 546 (1986), and *King Bridge Co. v. Otoe County*, 120 U.S. 225, 226 (1887)).

68 Memo from John G. Roberts to the Attorney General re Judicial Activism Q & A's: Specific Examples (Nov. 25, 1981), at 1.

specific injury which can be redressed by the court. Generalized grievances are the subject of policymaking and should be presented to legislatures."[69]

As reflected in an article Roberts wrote for the *Duke Law Journal* in his personal capacity in 1993, the injuries he considered adequate for the purposes of satisfying standing requirements needed to be "distinct and palpable, concrete, certainly impending, real and immediate, and actual or imminent, not conjectural or hypothetical."[70] Despite the "occasional difficulty of defining injury, this difficulty is hardly reason to abandon [the inquiry] altogether – to throw up one's hands and announce that an injury standard 'can have no ascertainable meaning,'".[71] "The need to insist upon meaningful limitations on what constitutes injury for standing purposes- regardless of what the Hindus or Nietzsche have to say about it- flows from an appreciation of the key role that injury plays in restricting the courts to their proper function in a limited and separated government," Roberts claimed.[72] According to Roberts, standing is also a limitation on Congress, preventing the legislature from creating causes of action absent a "distinct and palpable injury."[73]

The limiting view of injury advocated by Roberts can make it very difficult for plaintiffs, such as plaintiffs in environmental cases, to vindicate their rights in court. In the case of *Lujan v. National Wildlife Federation*,[74] Roberts, as Acting Solicitor General, made an argument to deny standing to an environmental group that claimed it had been harmed by a government decision to allow mining on public land used recreationally by its members. Only one member produced an affidavit claiming to use the land in question, and she did not explicitly claim to use any of the specific portions being used for mining operations. Roberts argued in his reply brief for the petitioners that the

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69 Memorandum from John Roberts to Dean St. Dennis, Judicial Restraint Initiatives, Dec. 7, 1981, at 2.

70 Duke Article at 1223 (internal quotation marks omitted) (quoting select case law).

71 Id. (quoting disapprovingly Gene R. Nichol, Jr., Justice Scalia, Standing, and Public Law Litigation, 42 Duke L.J. 1141, 1157-58 (1993)).

72 Id. at 1224 (disapproving again of the Nichols article and, apparently, certain sources cited therein).

73 Id. at 1226.

74 497 U.S. 871 (1990).

member's affidavit did not contain the necessary specificity to confer standing, and that, in order to find this specificity, the Court would have to "'presum[e]' facts that the parties did not – and perhaps cannot – allege on their own": namely, that the member used the specific land impacted by the mining operations and was therefore harmed by the mining activity.[75] In a 5-4 decision authored by Justice Scalia, the Court agreed with Roberts and found that merely showing that the affected land was "in the vicinity" of the land in use was not specific enough to survive a rule 56 motion for summary judgment.[76] The narrow Court majority, like Roberts, apparently gave little consideration to the possibility that one's enjoyment of land could be harmed by mining that is *adjacent* to the land one uses recreationally.

Roberts also argued for a strict definition of "injury" to the detriment of an environmental plaintiff when he aggressively defended Justice Scalia's majority opinion in *Lujan v. Defenders of Wildlife*[77] in his *Duke Law Journal* article in 1993. In that case, the majority held that an environmental group lacked standing to challenge a regulation interpreting the Endangered Species Act as not applying to actions taken in foreign nations because the group did not suffer the "injury in fact" necessary to satisfy Article III standing requirements.[78] Several of its members claimed they were harmed because they planned to visit regions of the world where projects allegedly funded by an agency of the United States were negatively impacting wildlife populations. In a 7-2 decision, the Supreme Court held that the injury claimed was too "speculative" to justify standing.[79]

As discussed above, in his law review article, Roberts argued that even when individuals bring claims under acts such as the Endangered Species Act, which encourage

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75 Reply Brief for the Petitioners, *Lujan v. National Wildlife Federation*, No. 89-640, 1989 U.S. Briefs 640 (Apr. 6, 1990), at 1. Senate Judiciary Committee members have requested access to Justice Department documents in the *Lujan* case, but the Administration has so far refused. Office of Senator Patrick Leahy, Democratic Senators Request Information on 16 Cases Handled By Supreme Court Nominee (July 29, 2005).

76 497 U.S. at 889-90.

77 504 U.S. 555 (1992).

78 Id. at 560

79 Id. at 564.

private enforcement, the Court should not consider the claim absent evidence the plaintiff suffered a "concrete" injury. Roberts wrote:

> If Congress directs the federal courts to hear a case in which the requirements of Article III are not met, that Act of Congress is unconstitutional. *Defenders* is apparently the first Supreme Court case to so hold because of lack of Article III standing, but the conclusion that Article III limits congressional power can hardly be regarded as remarkable.[80]

Still, this does not inhibit Congress's ability to pursue responsible environmental policy, Roberts argues, because:

> Congress is perfectly free to cut off funding for . . . projects if it concludes those projects threaten endangered species. It can also exercise its oversight power if it believes agencies are not consulting adequately about such effects. The one thing it may not do is ask the courts in effect to exercise such oversight responsibility at the behest of any John Q. Public who happens to be interested in the issue.[81]

Notwithstanding similar arguments by dissenting Justices Thomas and Scalia, the Supreme Court upheld the right of citizens to sue under the Clean Water Act for harm suffered by all citizens in the vicinity of a polluting facility, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.,* 528 U.S. 167 (2000). Roberts' article, written in his personal capacity, suggests he would follow the position of Thomas and Scalia in *Friends of the Earth*, and Justice Scalia's opinion in *Lujan*. If confirmed to the Court, the risk is great that Roberts would demonstrate his troubling views toward enforcement of individuals' rights in court, even where Congress has specifically authorized such

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80 Duke Article at 1226.

81 Id. at. 1229.

enforcement, and would make it impossible for Congress to depend on a vigilant, participatory public to defend itself against violations of the laws passed by Congress.

D. ATTORNEYS' FEES

Roberts has also proven unsympathetic to awards of attorneys' fees to parties who prevail in bringing suit against the United States to enforce their rights. Awards of attorneys' fees are important in ensuring access to justice, as they permit parties who have been injured by government action but cannot afford trial and counsel costs to obtain skilled representation.

While serving as White House associate counsel, Roberts took issue with a bill reauthorizing the Equal Access to Justice Act, which provides attorneys' fees to prevailing parties in civil cases against the United States if the court finds the position of the United States was not "substantially justified."[82] Roberts stated in a memo that "disapproval . . . is warranted because of the [proposed] change in the definition of "position of the United States."[83] According to Roberts, the original version of the Equal Access to Justice Act defined "position of the United States" as the "litigating position of the Government," while the reauthorization bill would allow courts to consider not only the government's position, but "the justification for underlying agency action."[84] "Thus," Roberts explained, "a court considering a fee application . . . would not simply consider whether the Government position . . . passed some 'red-faced' test, but would have to conduct a collateral inquiry into why the agency took the action in the first place."[85] This was unacceptable to Roberts, because, in his opinion, "[i]t is inevitable that such an inquiry would precipitate discovery of the most sensitive sort into the agency deliberative process, with a likely chilling effect on the free exchange of ideas by agency

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82 28 U.S.C. § 2412 (d)(1)(A).

83 Memorandum from John Roberts to Fred Fielding, H.R. 5479 – Equal Access to Justice Act Amendments, (Nov. 5, 1984), at 2.

84 Id. at 2.

85 Id.

personnel."[86] Three days later, President Reagan vetoed the bill, stating that the bill's altered standard for the awarding of attorneys' fees could "undermine the free exchange of ideas and positions within each agency that is essential for good government."[87]

Roberts again found himself contemplating the language of the Equal Access to Justice Act while sitting on the D.C. Circuit, this time with a focus on the meaning of "substantially justified." In the case of *Taucher v. Brown-Hruska*, 396 F.3d 1168 (D.C. Cir. 2005), Roberts wrote the majority opinion in the court's 2-1 ruling overturning an award of attorneys' fees to the plaintiffs under the Equal Access to Justice Act ("EAJA").

This particular case was brought against the Commodity Futures Trading Commission ("CFTC") by publishers of books, newsletters and other publications providing information and advice on commodity futures trading. The plaintiffs challenged - as an unconstitutional restraint on speech - a provision of the Commodity Exchange Act imposing certain burdensome registration requirements. The lower court agreed that the relevant portion of the Act was unconstitutional as applied to the publishers. The CFTC appealed, but then "adopted regulations exempting persons like the publishers in this case from the registration requirement," thus mooting the case.[88] "The parties then agreed to voluntarily dismiss the appeal."[89]

Having prevailed, the plaintiffs, who were represented *pro bono* (without charge) by a public interest law firm, sought and were awarded attorneys' fees under the Equal Access to Justice Act by the district court. The magistrate judge who considered the fee petition "held that the Commission was not substantially justified in its position" on the merits of the case.[90] The CFTC appealed the award of fees. In an opinion by Judge Roberts, a divided panel of the D.C. Circuit overturned the fee award, holding that the

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86 Id.

87 Memorandum of Disapproval of President Ronald Reagan on H.R. 5479, dated Nov. 8, 1984, reproduced at 1984 Congressional Quarterly Almanac 29-E.

88 *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1180 (D.C. Cir. 2005) (Edwards, J., dissenting).

89 Id.

90 Id. at 1181.

CFTC's position was sufficiently justified to bar the award and that "it was an abuse of discretion to conclude otherwise."[91]

Judge Harry Edwards issued a sharp dissent, accusing Roberts and the majority of exceeding the very limited scope of appellate review of the Equal Access to Justice Act awards set out by the Supreme Court in *Pierce v. Underwood*, 487 U.S. 552 (1988), requiring, in Judge Edwards,' "significant deference under an abuse-of-discretion standard."[92] As Judge Edwards explained, in *Underwood*, the Court held that "a district court's judgment may be reversed only when the record '*commands* the conclusion that the Government's position was substantially justified.'"[93] According to Judge Edwards,

> [A]dherence to *Underwood* means that our review of the District Court's decision is narrow, limited, and deferential. Under this standard of review, *there is no conceivable way* that the record in this case can be seen to 'command' the conclusion that the Government's position was substantially justified.[94]

E. HABEAS CORPUS

Throughout his legal career, Roberts has demonstrated hostility toward consideration of prisoners' habeas corpus petitions, which allow prisoners to petition for review of their case in federal court and act as a check against state court abuses. In one memo written during his time in the Reagan Administration, he called the "restrict[ing of] prisoner petitions" a "basic [judicial] reform."[95] And, in another, he suggested that if the

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91 Id. at 1178.

92 Id. at 1179.

93 Id. (emphasis by Judge Edwards) (quoting *Pierce v. Underwood*, 487 U.S. 552, 570-71 (1988)).

94 Id. at 1179-80 (emphasis added).

95 Memorandum from John Roberts to Fred Fielding, Statement of Jonathan Rose Before the House Judiciary Committee on November 10, 1983 Concerning the Intercircuit Tribunal (With Fielding-Schmults Changes), Feb. 27, 1984.

Supreme Court wished to reduce its caseload, it should consider fewer habeas petitions and "abdicat[e] the role of fourth or fifth guesser in death penalty cases."[96]

Roberts continued his crusade against habeas petitions when he moved to the Solicitor General's office. In two cases, *Withrow v. Williams*, 507 U.S. 680 (1993), and *Herrera v. Collins*, 506 U.S. 390 (1993), he joined briefs that sought to greatly diminish the habeas rights of the prisoners.

In *Withrow*, the defendant brought a federal habeas claim to address an alleged violation of his *Miranda* rights. Law enforcement officers had told the defendant they would "lock [him] up" if he did not cooperate with them. He then made a series of incriminating statements and, only at that point, the officers read him his *Miranda* rights. The state court nevertheless found the defendant had been given timely notice of his *Miranda* rights, and the defendant brought a federal habeas petition to seek relief. When the case reached the Supreme Court, the United States intervened in the proceedings as an uninvited *amicus*, urging that "[f]ederal courts . . . should not entertain *Miranda* claims in habeas corpus petitions filed by state prisoners."[97] Roberts participated in the brief and argued the position of the United States before the Court.

The United States compared the situation in the case to the situation in *Stone v. Powell*, 428 U.S. 465 (1976), which resulted in a ruling limiting federal habeas review based on alleged violations of the Fourth Amendment. According to the government "like the exclusion of evidence obtained in violation of the Fourth Amendment, the exclusion of voluntary confessions obtained without strict compliance with *Miranda* imposes heavy costs on society by 'deflect[ing] the truthfinding process and often freeing the guilty.'"[98] Roberts also argued that *Miranda* was ineffective and its effects were

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[96] Memorandum from John Roberts to Fred Fielding, Chief Justice's Proposals, Feb. 10, 1983 at 2.

[97] Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Withrow v. Williams*, No. 91-1030, 1991 U.S. Briefs 1030 (June 11, 1992), at *4. Senate Judiciary Committee Democrats have also requested Justice Department documents concerning this case, but the Administration has so far refused to produce them.

[98] Id. at * 7 (quoting *Stone v. Powell*, 428 U.S. 465, 490 (1976)) (alteration in original)

harmful to society. "[T]here is no reason," the government argued, "to doubt the reliability of evidence produced by questioning that does not result in an involuntary confession, simply because it fails to conform strictly to *Miranda*'s mandated requirements."[99] Furthermore, "relitigation of *Miranda* claims offers little or no additional structural incentive to the police to abide by the dictates of that decision . . .[I]t is absurd to think that this added possibility of exclusion years after the police conduct at issue will have any appreciable effort on police training or behavior."[100]

In a 5-4 decision, the Court rejected Roberts' arguments, holding that "*Stone*'s restriction on the exercise of federal habeas jurisdiction does not extend to a state prisoner's claim that his conviction rests on statements obtained in violation of the safeguards mandated by *Miranda v. Arizona*."[101] The Court distinguished the case at hand from other, similar cases, holding that *Miranda* safeguards "'a fundamental *trial* right'" protecting against self-incrimination.[102] Thus, "[b]y bracing against 'the possibility of unreliable statements in every instance of incustody interrogation,' *Miranda* serves to guard against 'the use of unreliable statements at trial.'"[103] Had the position of the United States and Roberts been adopted, *Miranda* and habeas corpus rights would have been weakened significantly.

In *Herrera v. Collins*, Roberts signed a government *amicus* brief making a shockingly harsh argument seeking denial of a habeas petition. "Even under the harshest of circumstances," Roberts argued, "where a defendant's innocence seems manifest, an untimely motion cannot be entertained."[104] In that case, the defendant was convicted in Texas for the murders of two police officers and sentenced to death. Eight years after his

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99 Id. at *6.

100 Id. at *7 (quoting *Duckworth v. Eagan*, 492 U.S. 195, 211 (1989)).

101 *Withrow v. Williams*, 507 U.S. 680, 683 (1993).

102 Id. at 691 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)) (emphasis added by *Withrow* Court).

103 507 U.S. at 692 (quoting *Johnson v. New Jersey*, 384 U.S. 719, 730 (1966)).

104 Brief for the United States as *Amicus Curiae* Supporting Respondent, *Herrera v. Collins*, No. 91-7328, 1991 U.S. Briefs 7328 (July 10, 1992), at *11 [hereinafter Herrera Brief]. Senate Judiciary Committee members have requested access to Justice Department documents in the *Herrera case,* but the Administration has so far refused.

conviction, he sought federal habeas relief, claiming new evidence had come to light proving his actual innocence. A federal appeals court denied his petition, stating his claim was not cognizable because "'the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.'"[105] The *amicus* brief of the United States, in which Roberts participated, argued that the Due Process Clause does not require judicial review of a claim of actual innocence based on newly discovered evidence. And, if a state does allow such claims, the United States argued the state could "fix a reasonable time" for making such claims.[106] After that time had passed, executive clemency becomes the only recourse available for the innocent. In Texas, the limit for considering evidence after verdict is set at 30 days. The Supreme Court agreed with the government's case for the most part, holding 6-3 that the Due Process Clause does not require new evidence to be considered after conviction and that, when the government does allow such consideration, it is within the rights of the government to set deadlines for doing so. The Court did, however, depart from the United States' brief in one crucial respect.

The Court noted that, despite the fact that clemency is usually the appropriate recourse for considering new evidence after the deadline for judicial review, it would "assume" that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution . . . unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim."[107] The government's brief argued, however, that executive clemency is the *only* relief available when a condemned person becomes aware of new evidence of his innocence after the deadline for judicial review has passed. [108] The amicus brief joined by Roberts considered such a circumstance hypothetical, however, stating: "There is no reason to fear that there is a significant risk that an innocent person will be executed under the procedures that the States have in place."[109] This extremely callous view could have the effect of forcing the justice system

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105 *Herrera v. Collins*, 506 U.S. 390, 398 (1993) (quoting appellate court).
106 *Herrera* Brief at *7.
107 Id. at 417.
108 *Hererra* brief, at *11.
109 Id. at *9 n.18.

to carry out death sentences against even those who are able to plainly prove their innocence unless a benevolent executive affirmatively orders the state not to carry out such a sentence.[110]

[110] Although this report focuses on Roberts' record concerning non-criminal law issues, it should be noted in connection with his views on habeas corpus that Roberts also wrote approvingly of a Reagan Administration effort to amend or abolish the exclusionary rule. If successful, the proposal would have allowed courts to consider evidence obtained in clear violation of the Fourth Amendment so long as it was determined that law enforcement gathered the evidence in "good faith." In one memo, Roberts suggested that the Supreme Court could reduce its caseload by "giving coherence to Fourth Amendment jurisprudence by adopting the 'good faith' standard," refusing to consider claims of violation of the exclusionary rule. Memorandum from John Roberts to Fred Fielding re Chief Justice's Proposals (Feb. 10, 1983), at 2. This view of the Fourth Amendment could have opened the door to significant abuses of privacy rights.

II. CIVIL RIGHTS

The Supreme Court has played a critical role in protecting the right of all Americans to be free from discrimination. In recent years, however, civil rights protections have become increasingly endangered, as the Court's far right justices, sometimes joined by Justices O'Conner and Kennedy, have voted to roll back such protections. Justice O'Connor has been a key swing vote, often providing the fifth vote in important 5-4 decisions that have preserved civil rights. *See, e.g., Jackson v. Birmingham Board of Education*, 125 S.Ct. 1497 (2005)(5-4 decision upholding federal legal protection against retaliation for complaining about illegal sex discrimination in federally assisted education programs); *Grutter v. Bollinger*, 539 U.S. 982 (2003) (5-4 decision upholding use of affirmative action in state higher education). The record is clear, however, that replacing Justice O'Connor with John Roberts would swing the Court clearly to the right on such issues, threatening civil rights protections concerning sex discrimination, voting rights, employment and affirmative action, equal educational opportunity, and other areas.

A. SEX DISCRIMINATION

One of the most significant civil rights gains in the past several decades has been in the area of women's rights. During this period, Congress passed laws recognizing that women are entitled to achieve their full potential as human beings through education and employment, without the burden of discrimination on the basis of sex. Time and again, however, John Roberts stood on the wrong side of social justice progress for women, writing dismissively, sarcastically, and derisively about matters pertaining to women's efforts to achieve equality and taking positions and urging court rulings that were obstacles to that goal.

There can be no question that Roberts' record fails to demonstrate a commitment to the progress made on women's rights, an important criterion for confirmation to the

Supreme Court. To the contrary, as discussed below, Roberts has stood as a barrier to that progress.

- **Roberts justified sex discrimination on the basis of cost**

As a political appointee in the Reagan Department of Justice, Roberts on more than one occasion advanced legal positions that were even more conservative than those of others in the ultraconservative Department, including William Bradford Reynolds, the anti-civil rights head of the Department's Civil Rights Division.[111] In one such instance, Roberts recommended that the Attorney General not approve a request by Reynolds to intervene on behalf of the women plaintiffs in a sex discrimination case brought by female prisoners in Kentucky. Specifically, Reynolds asked for approval for the United States to intervene in the case "to challenge alleged disparities between the vocational training programs available to male prisoners and those available to female prisoners. Our challenge would be based on the Equal Protection Clause of the Constitution and Title IX."[112]

Upon reviewing Reynolds' request to intervene, Roberts wrote to the Attorney General: "I recommend that you do not approve intervention in this case, for several reasons."[113] Among other things, Roberts stated that intervention was unwarranted essentially because the price of achieving equality for the women would be too high, a dangerous view of equal protection and of civil rights laws that could effectively preclude progress toward equality for women and minorities. According to Roberts:

> Many reasonable justifications for the Kentucky practices can be readily advanced, such as economies of scale calling for certain programs for the male

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111 Reynolds himself had such a record of hostility to civil rights that his subsequent nomination to be Associate Attorney General was rejected by the Senate Judiciary Committee, 10 to 8. The *Washington Post* called the Reynolds defeat "a stunning rejection of the chief architect of the Reagan Administration's civil rights policies." Howard Kurtz, "Reynolds' Nomination Voted Down," *Washington Post* (June 28, 1985).

112 Memorandum from John Roberts to the Attorney General, re Proposed Intervention in *Canterino v. Wilson* (Feb. 12, 1982).

113 Id. (emphasis in original).

> prisoners but not for the many fewer female prisoners. If equal treatment is required, the end result in this time of tight state prison budgets may be no programs for anyone.[114]

Fortunately, Roberts' troubling advice was not taken, and the government successfully moved to intervene in the case. *Canterino v. Wilson*, 538 F. Supp. 62 (W. D. Ky. 1982). After a bench trial, the district court found that the disparity between prison conditions for men and women violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Canterino v. Wilson*, 546 F. Supp. 174 (W. D. Ky. 1982). The women's prison in Kentucky operated a levels system that allocated privileges based on behavior and seniority. None of the men's prisons had a similar system. The district court found that the levels system had a "detrimental effect" on the plaintiffs and resulted in "massive disparities . . . between male and female prisoners in the availability of privileges and the opportunity to fulfill basic human needs," and that there was no "penological justification" for the disparities. Id. at 188. The court also found that that the quality and quantity of vocational courses, job training, work assignments, academic opportunities and community release opportunities for the women were "markedly inferior." Id. at 197. In particular, the court held that "disparities in opportunity for vocational education and training and jobs violated federal statutes and the Equal Protection Clause of the Fourteenth Amendment." Id. at 209.

Echoing Roberts' troubling concerns that the cost of equality for women was too expensive, the defendants had argued that a lack of resources was to blame for the disparities. The court soundly rejected such a defense:

> Even if the institutional resources argument had factual support in the record, it could not serve as a defense for the unequal treatment to which women inmates are subjected in the allocation of basic privileges. It is well established that economic considerations alone cannot serve as an excuse for failure to meet constitutional standards.

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[114] Id. (emphasis in original).

Id. at 207 (emphasis added).[115]

- **Roberts advanced narrow views of Title IX that would have effectively gutted the statute**

During his years in the Reagan and first Bush Administrations, Roberts participated in and advocated in favor of attempts to limit both the scope of Title IX as well as the remedies available to victims of sex discrimination in violation of that statute. Roberts' efforts and advocacy also would have undermined parallel civil rights laws that prohibit discrimination on other bases, including race and disability.

One of Roberts' earliest known attempts to undermine Title IX -- as well as other civil rights laws -- came on December 8, 1981, when he wrote a memorandum to the Attorney General supporting the proposal by the Department of Education to narrow the coverage of several civil rights laws by redefining the definition of "federal financial assistance" in the regulations issued under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Section 504 of the Rehabilitation Act.[116] These laws prohibit, respectively, race discrimination, sex discrimination, and discrimination on the basis of disability in "any program or activity receiving federal financial assistance," except that Title IX applies only to "educational" programs and activities.

Prior to the Reagan Administration, the government's regulations provided that educational institutions were covered by these anti-discrimination laws even if the only "federal financial assistance" they received was through federal financial assistance to their students, such as Pell grants and loans. In 1981, however, the Reagan Department

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[115] A single aspect of the court's ruling regarding the inadequacy of the female prisoners' access to law library facilities and related resources was appealed and affirmed. *Canterino v. Wilson*, 875 F.2d 862 (6th Cir. 1989), cert. denied, 493 U.S. 991 (1989).

[116] Memorandum from John Roberts to the Attorney General re Department of Education Proposal to Amend Definition of "Federal Financial Assistance" (Dec. 8, 1981).

of Education proposed to amend the regulations so that educational institutions were not considered to receive "federal financial assistance" -- and therefore not subject to these civil rights laws -- solely because their students received federal financial aid through Pell grants disbursed directly to students and through student loans.[117]

Roberts wrote in his December 1981 memorandum that the legislative history as to whether "indirect assistance, such as student loans" would trigger coverage of the statutes "was vague and certainly does not provide a definitive answer, one way or the other."[118] Roberts noted that "the argument against the Department of Education's proposed regulations is primarily that they would overturn a long-established administrative interpretation of the statutes."[119] However, in Roberts' view, the long-standing position of the government in favor of coverage of the civil rights laws by virtue of aid to students provided no bar to the government's changing its interpretation now to a position that would limit coverage of the statutes: "This argument will carry weight with some courts, but is certainly not strong enough to prevent us from arguing the contrary."[120]

Roberts specifically discounted the ruling in *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D. S.C. 1974), aff'd per curiam, 529 F.2d 514 (4th Cir. 1975), which held that federal financial aid to students was sufficient to trigger coverage under Title VI prohibiting race discrimination. According to Roberts, that decision "is only that of a district judge -- the per curiam affirmance by the 4th Circuit was not a considered treatment of the issues. The Bob Jones case has been given far greater prominence than it deserves by the proponents of the current regulations."[121]

Roberts noted that the Department of Education's proposal applied both to Pell grants disbursed directly to students and to the guaranteed student loan program. Roberts

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117 See, e.g., id., Steven R. Weisman, "Reagan Eases Law on College Biases," *The New York Times*, A21 (Mar. 17, 1982).

118 Memorandum from John Roberts to the Attorney General, at 1 (Dec. 8, 1981).

119 Id., at 2 (Dec. 8, 1981).

120 Id.

121 Id.

stated that while schools have a role in administering these aid programs, "it probably cannot be said that the institution receives federal financial assistance simply because of its role in administering these programs."[122]

Roberts concluded his memo by advising that while the courts might not uphold the Department of Education's proposed regulations if they were to be adopted, "the case has not been made that the legislative history clearly ban's Education's proposed change, and therefore I recommend acceding to it."[123] Thus, when confronted with what he perceived to be a close call as to the scope of coverage of significant civil rights laws, Roberts chose to support a proposal that would narrow the scope of coverage, a proposal that reversed course on prior civil rights policy by the government.

Roberts' narrow view apparently was too much even for the Civil Rights Division of the Justice Department, headed by the ultraconservative William Bradford Reynolds. According to a background paper that Roberts later wrote summarizing the chronology of the issue, "[t]he Civil Rights Division concluded that the legislative history does not support excluding grants to students -- even under the alternate [direct to students] disbursement system -- from the definition of federal financial assistance."[124] The Civil Rights Division did conclude that guaranteed student loans, however, could be deemed not to be included in the definition of federal financial assistance.[125] This position, while less than what the Department of Education had asked for, was still a significant reversal in the government's policy, and when made public was described by the press as "the latest action [by the Reagan Administration] that narrows the applicability of civil rights laws."[126]

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122 Id.

123 Id. at 3 (emphasis added).

124 Background paper "prepared by John Roberts," at 3 (emphasis added), attached to Memorandum from Kenneth W. Starr to William Bradford Reynolds (Mar. 8, 1982).

125 Id.

126 Steven R. Weisman, "Reagan Eases Law on College Biases," *The New York Times*, A21 (Mar. 17, 1982).

Also being debated within the Reagan Administration at that time was another means to significantly limit Title IX (and by extension other civil rights laws) by taking the position that only the specific program that received federal funds within an educational institution was subject to Title IX, not the entire school. Roberts made it clear in a memorandum written in 1982 that he personally supported this extremely limited interpretation of Title IX, one that would effectively eviscerate the law by allowing schools that received federal funds in one program (e.g., scientific research) to engage in sex discrimination in other programs (e.g., athletics). Writing to the Attorney General in support of a recommendation by William Bradford Reynolds that the government not appeal a district court ruling holding that Title IX coverage extended only to the specific program within a school that received federal financial assistance, Roberts stated:

> I strongly agree with Brad's recommendation not to appeal. Under Title IX federal investigators cannot rummage wily-nily [sic] through institutions, but can only go as far as the federal funds go. Congress elected to make the anti-discrimination provisions of Title IX program-specific, and the arguments properly rejected by the district court -- which we would repeat if we appealed -- would essentially nullify this limitation. The women's groups pressuring us to appeal would have regulatory agencies usurp power denied them by Congress to achieve an anti-discrimination goal. Under your leadership the Department is committed to opposing such legislation by bureaucracy, and the commitment should continue in this case.[127]

The case in question was *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982), and the court's ruling prevented the U.S. Department of Education from investigating a claim of sex discrimination in the university's athletics program, since that specific program did not receive federal funds. A later memorandum by Roberts stated that Clarence Pendleton, President Reagan's appointee to head the U.S.

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[127] Memorandum from John Roberts to the Attorney General re *University of Richmond v. Bell*, at 2 (Aug. 31, 1982) (emphasis added).

Commission on Civil Rights, had sent a letter to Attorney General William French Smith "urging that the Department appeal in the *Richmond* case."[128] Roberts' memo further noted that "[w]e decided not to appeal . . ."[129]

An internal memorandum from Education Secretary Terrel Bell to Ed Meese, Counselor to the President, underscores that the Reagan Administration was well aware that adopting the narrow, program-specific interpretation of Title IX would not only be a reversal of prior governmental policy, but would have drastic consequences for Title IX and other civil rights laws. As Bell put it, referring to the *University of Richmond* case and a similar ruling:

> If the decision is to apply the *Richmond* and *Hillsdale* cases nationwide, we must understand that this is a very far-reaching action that turns radically from the position of the past. The withdrawal of coverage of Title IX, Title VI, and Section 504 will be very dramatic. (There is virtually no Federal financial assistance to athletic programs if one accepts that student aid applies only to the student aid program and not to the athletic program . . . .)[130]

The Reagan Administration litigated the issues concerning the scope of coverage of Title IX -- both federal financial assistance to students as well as program specificity -- in *Grove City College v. Bell*, 465 U.S. 555 (1984). Grove City College was a private school that did not receive federal funds, except in the form of financial aid to students. The college had sued rather than certify that it complied with Title IX, and argued that the statute did not apply to it because it did not receive federal funds. Before the Supreme Court, the Reagan Administration did contend that federal financial assistance

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128 Memorandum from John Roberts to the Attorney General, re Meeting with Clarence Pendleton (Sept. 15, 1982).

129 Id. Reynolds wrote to Pendleton: "While we found ourselves in disagreement with your recommended course of action on this occasion, the wise counsel of the Civil Rights Commission is always valued and we trust that you will continue to share your thoughts and analysis with us on future issues of similar importance." Letter from Wm. Bradford Reynolds to Clarence M. Pendleton, Jr., at 1 (Sept. 16, 1982).

130 Memorandum from T.H. Bell to Edwin Meese, III, at 2 (Dec. 21, 1982) (emphasis added).

to students triggered Title IX coverage, but in a reversal of the position taken by three prior administrations, contended that the law's coverage extended only to the specific program within the school receiving that aid, not the entire school.[131] As we know from Roberts' 1982 memorandum discussed above, he agreed with this narrow, program-specific interpretation of Title IX.[132]

In *Grove City*, the Supreme Court held unanimously that the college was a recipient of federal financial assistance by virtue of the federal funds granted to its students. However, by a vote of 6-3, the Court also held -- as the Administration had contended -- that this financial assistance did not trigger Title IX coverage of the entire college, but only the specific "education program or activity" of the school that was receiving the funds -- the financial-aid program. The dissenting opinion by Justice Brennan, joined by Justice Marshall, called the Court's decision an "absurdity," explaining that it would allow students given federal financial aid in order to attend the college to then be discriminated against in its academic departments and in athletic programs. 465 U.S. at 601.

The program-specific aspect of *Grove City* was a critical blow to Title IX, significantly limiting the scope of the statute by allowing a school to receive federal funds in one program while engaging in sex discrimination in another. As the *Washington Post* described the ruling the next day, "The Supreme Court, in a triumph for the Reagan Administration, yesterday sharply limited the reach of the federal law barring sex discrimination in schools and colleges receiving federal aid."[133]

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[131] As the *New York Times* reported, in *Grove City*, the Reagan Administration "had reversed the interpretation that three previous administrations had given to the law at issue, Title IX of the Education Amendments of 1972. The previous Administrations had regarded Title IX as covering an entire institution once any program received federal funds." Linda Greenhouse, "High Court Backs Reagan's Position on a Sex Bias Law," *New York Times*, A1 (Feb. 29, 1984).

[132] Memorandum from John Roberts to the Attorney General re *University of Richmond v. Bell* (Aug. 31, 1982).

[133] Fred Barbash, "Court Restricts Application of Sex Bias Law," *Washington Post*, (Feb. 29, 1984). Shortly thereafter, Roberts and two White House colleagues prepared questions and answers regarding *Grove City* for President Reagan's use at an upcoming Women State Legislators Luncheon, attempting to make the ruling look like something positive for women, when in fact it had significantly narrowed Title IX:

Corrective legislation was immediately introduced in Congress to overturn the program-specific aspect of *Grove City* by specifying that federal aid to any program of an educational institution would trigger Title IX coverage of the entire institution, as well as coverage by parallel civil rights laws such as Title VI. Various legislative proposals that would have achieved this result were considered in Congress during the next few years, some of which were opposed by the Reagan Administration, which considered them too broad.

The records released to date regarding Roberts' role during this period on this issue are sparse (he left the Administration in May 1986), but what has been released indicates that while he was still in the White House he was periodically called upon to review proposed reports and testimony to be given by Administration officials in opposition to what it considered the broader legislative proposals, and that he found no problems in such opposition materials "from a legal perspective."[134] Indeed, Roberts wrote on April 12, 1985 that "we are engaged in a struggle to prevent the dramatic expansion of civil rights coverage proposed by some under the guise of overturning *Grove City*."[135] Several months later, he wrote that the proposed "Civil Rights Restoration Act of 1985" would "radically expand the civil rights laws to areas of private conduct never before considered covered."[136]

In 1985, Roberts also expressed support for a proposal by former Education Secretary Bell that if the program-specific aspect of *Grove City* were to be overturned, so

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> This case is just not clearly understood and has been misportrayed. … Rather than narrowing the scope of enforcement in the Grove City case, we succeeded in broadening its reach. … If we hadn't won the case, we would not be able to extend enforcement at all to colleges like Grove City.

Memorandum from Lee L. Verstandig to Richard G. Darman (Mar. 1, 1984).

[134] See, e.g., Memorandum from John G. Roberts to Branden Blum re: William Bradford Reynolds Draft Testimony on H.R. 700, the "Civil Rights Restoration Act of 1985" (Mar. 6, 1985).

[135] Memorandum from John G. Roberts to Fred Fielding re "Grove City -- Civil Rights Legislation" (Apr. 12, 1985).

[136] Memorandum from John G. Roberts to Fred Fielding re Correspondence from T.H. Bell on Grove City Legislation (July 24, 1985).

should the student aid aspect. Roberts concluded that there was "a good deal of intuitive appeal to the argument" that federal aid to students should not trigger Title IX coverage of an entire school.[137] According to Roberts, "[t]riggering coverage of an institution on the basis of its accepting students who receive Federal aid is not too onerous if only the admissions program is covered. If the entire institution is to be covered, however, it should be on the basis of something more solid than Federal aid to the students."[138] However, given that the Reagan Administration had already argued that student aid should trigger Title IX coverage, and that this aspect of *Grove City* "is the only aspect agreeable to the civil rights lobby," Roberts advised that "[r]eversing our position on that issue at this point would precipitate a firestorm of criticism, with little if any chance of success."[139] Apparently, had it not been for the expected political fallout, Roberts would have continued to press for this limitation on Title IX. On the Supreme Court, Roberts would not be constrained by the need for such pragmatism.

In 1988, by large bipartisan margins in both houses, Congress passed the Civil Rights Restoration Act of 1987, and then again by large bipartisan margins overrode President Reagan's veto of the bill. The Act overturned the program-specific aspect of *Grove City* -- the narrow interpretation of Title IX that Roberts had endorsed -- and thus restored the pre-Reagan Administration interpretation of Title IX, Title IV, Section 504, and the Age Discrimination Act of 1975.

The impact that Title IX has had in the education and the lives of women and girls, including particularly in athletics and sports -- school programs in which females faced widespread sex discrimination before Title IX -- cannot be understated. As the National Women's Law Center reported in 2002,

> Since its passage thirty years ago, Title IX has led to greater opportunities for girls and women to play sports, receive scholarships, and obtain other important benefits that flow from sports participation. When Congress passed Title IX in

137 Id. at 2.
138 Id.
139 Id.

> 1972, fewer than 32,000 women competed in intercollegiate athletics. Women received only 2% of schools' athletic budgets, and athletic scholarships for women were nonexistent. Today, the number of college women participating in competitive athletics is nearly five times the pre-Title IX rate. Title IX has had tremendous impact on female athletic opportunities at the high school level as well. Before Title IX, fewer than 300,000 high school girls played competitive sports. By 2001, the number had climbed to 2.78 million.
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> Largely as a result of the opportunities made available to female athletes by Title IX, women won a record 19 Olympic medals in the 1996 Summer Olympic Games. These successes in team sports in particular, including gold medals in basketball, soccer, softball, and gymnastics, as well as the women's ice hockey gold in the 1998 Winter Olympics, are a tribute to the impact of Title IX. In 2002, the first African-American ever to win a gold medal in the Winter Olympics was a woman.

The Battle for Gender Equity in Athletics: Title IX at Thirty, National Women's Law Center, at 2, 6 (June 2002).[140]

- **Roberts attempted to deprive women of meaningful remedies for unlawful sex discrimination under Title IX**

Roberts' efforts in the Reagan Administration to undermine Title IX continued during the first Bush Administration. As Principal Deputy Solicitor General in that administration, Roberts urged the Supreme Court -- unsuccessfully -- to limit drastically the scope of remedies available to victims of unlawful sex discrimination under Title IX. At issue in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), was whether, having already implied the existence of a private right of action under Title IX

[140] Available at <http://www.nwlc.org/pdf/Battle%20for%20Gender%20Equity%20in%20Athletics%20Report.pdf> (visited Aug. 25, 2005).

for victims of discrimination, the Court would also hold that money damages were available as a remedy. In *Franklin*, the Court unanimously rejected Roberts' argument that victims of unlawful discrimination under Title IX do not have the right to obtain such damages, putting Roberts to the right not only of Justices O'Connor and Kennedy in this case, but also of Chief Justice Rehnquist and Justices Scalia and Thomas.

The lawsuit was brought by Christine Franklin, a high school student who charged that she had been subjected to repeated sexual harassment by a male teacher, including coercive intercourse, and that other teachers and school officials had been aware of the harassment but had done nothing to stop it. Franklin filed a complaint with the Office for Civil Rights ("OCR") of the U.S. Department of Education, which investigated and "concluded that the school district had violated Franklin's rights by subjecting her to physical and verbal sexual harassment . . . ." 503 U.S. at 64, n.3 (emphasis added). However, because the teacher who had harassed Franklin had resigned and because the school had adopted a grievance procedure, OCR determined that the school district had come into compliance with Title IX and ended its investigation. Id.

This left Franklin with no remedy for what had been done to her, and so she filed suit against the school district seeking monetary damages as compensation for the violation of her legal rights. The district court dismissed her suit, holding that Title IX does not authorize an award of damages, and the court of appeals upheld the dismissal. Franklin then asked the Supreme Court to review the case; before deciding whether to do so, the Court invited the Solicitor General "to file briefs in this case expressing the views of the United States." 498 U.S. 1080 (1991).

Roberts then co-authored a brief on behalf of the government submitted to the Court stating that "In our view, the court of appeals was correct in its conclusion that Title IX does not impliedly authorize a private plaintiff to recover compensatory legal

damages, even if the plaintiff alleges an intentional violation of the statute."[141] The brief noted, however, that there was a conflict among the courts of appeals on this issue and therefore urged the Supreme Court to review the case and resolve the conflict.

Roberts' brief also asserted that there was uncertainty over the right of individual victims of discrimination to recover compensatory legal damages for unlawful race discrimination under Title VI of the Civil Rights Act of 1964 and for unlawful discrimination on the basis of handicap under Section 504 of the Rehabilitation Act of 1973. The brief stated that this case thus presented the Court with the opportunity "to clarify the scope of private rights of action under Title IX and other similar statutes."[142] Clearly, given the express assertion in the brief that damages should not be available to plaintiffs in Title IX cases, it was the intent of Roberts and his co-authors that the Court take the case not only to limit the scope of remedies available to victims of unlawful sex discrimination under Title IX, but also to victims of other forms of discrimination as well, under other critical civil rights and anti-discrimination laws.

In addition, the brief echoed a disturbing concern that Roberts had previously expressed (in connection with the Kentucky women prisoners' case, discussed above) about the financial burden of achieving equality placed upon those who discriminate**.** According to Roberts' brief, "[a]wards of legal damages to selected beneficiaries of federal financing programs . . . would threaten 'a potentially massive financial liability,' . . . while securing compliance only indirectly through deterrence."[143]

The Supreme Court did agree to hear *Franklin*. Roberts then co-authored a brief on the merits filed by the government in support of the school district, urging the Court to hold that an individual plaintiff cannot recover compensatory damages under Title IX.[144]

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[141] Brief for the United States as *Amicus Curiae*, *Franklin v. Gwinnett County School District*, No. 90-918, at 6 (May 1991). The Bush Administration has refused to provide Senators with internal Justice Department documents concerning this case.

[142] Id. at 7 (emphasis added)**.**

[143] Id. at 19.

[144] Brief for the United States as *Amicus Curiae* Supporting Respondents, *Franklin v. Gwinnett County School District*, 1990 U.S. Briefs 918 (Sept. 16, 1991).

The brief argued that in the absence of an "affirmative demonstration of congressional intent" that damages be available, the Court should not imply the existence of such a remedy.[145] Once again Roberts and his co-authors expressed a disturbing concern about the financial costs of vindicating civil rights, contending that Congress "should not be deemed to have saddled educational programs with the burden of litigating private actions seeking damages proximately caused by a past violation."[146]

In a unanimous ruling, the Court rejected the government's position, and held that victims of sex discrimination in violation of Title IX do have the right to obtain money damages. Six Justices -- including O'Connor and Kennedy -- joined the majority ruling written by Justice White. In this opinion, the Court strongly criticized the government's brief that Roberts had co-authored, accusing the government of citing "inapposite" cases and of "fundamentally misunderstand[ing] the nature of the inquiry" and thus "needlessly dedicating large portions" of its brief to essentially irrelevant discussions. 503 U.S. at 70, n.6, 71. The majority further explained that the government's position that Title IX remedies be limited to backpay and prospective relief (such as injunctions) "conflicts with sound logic." Id. at 75. And perhaps most important, the majority specifically recognized that such relief would be "clearly inadequate" here, and underscored that the government's approach "would leave [Franklin] remediless." Id. at 76.[147]

Chief Justice Rehnquist and Justice Thomas joined an opinion written by Justice Scalia concurring in the judgment in which they expressly stated their agreement with the Court's disposition of the case. Id. at 78. Although these three justices stated their belief that when a private right of action is judicially created, as in the case of Title IX, courts can also imply limits on the remedies, they further explained that because of legislation enacted after the Court had recognized a private right of action under Title IX that

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145 Id. at *4.

146 Id. at *11.

147 As one newspaper account put it, "These remedies are useless to most students, who receive no pay in the first place and who will have typically graduated and cut their ties to a school by the time a lawsuit can result in an injunction." Linda Greenhouse, "Court Opens Path for Students in Sex-Bias Cases," *The New York Times*, A1 (Feb. 27, 1992). The article also reported that the majority's opinion had "adopted an impatient, almost scolding tone toward the Administration." Id.

implicitly acknowledged "that damages are available," it was "too late in the day" to address the appropriateness of the Court's excluding damages as a remedy. Id. at 77-78.

Advocates for women's rights immediately hailed the Court's decision, explaining that "the unanimous ruling was important because it provides the victims of sex discrimination with a meaningful remedy that will spur schools to guard against such misconduct."[148] If it had been up to Roberts, however, such a remedy would not exist.

- **Roberts attempted to make it lawful for employers to deny certain jobs to women even though they can perform them**

As Principal Deputy Solicitor General, Roberts also attempted to undermine legal protections for women by urging the Supreme Court to make it lawful for employers to deny certain jobs to fertile women, even though they are fully qualified to perform them. At issue in *UAW v. Johnson Controls*, 499 U.S. 187 (1991), was whether an employer's fetal-protection policy prohibiting all women of childbearing age, except those "whose inability to bear children is medically documented," id. at 192, could be barred from manufacturing jobs involving exposure to lead because of the health risks posed by lead exposure to fetuses. Despite evidence concerning "the debilitating effect of lead exposure on the male reproductive system," the employer, Johnson Controls – "the country's biggest manufacturer of automobile batteries"[149] -- did not bar fertile men from the same jobs. 499 U.S. at 198.

A class action was brought against Johnson Controls by employees who had been affected by the discriminatory policy, including one woman who "had chosen to be sterilized in order to avoid losing her job." Id. at 192. The plaintiffs charged that Johnson Controls' policy was unlawful under Title VII, the federal law prohibiting discrimination in the workplace on the basis of sex or other factors. The plaintiffs lost in

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148 Ruth Marcus, "Harassment Damages Approved; High Court Expands Protection Against Sex Bias in Schools," *Washington Post*, A1 (Feb. 27, 1992).

149 Linda Greenhouse, "Court Backs Right of Women to Jobs with Health Risks," *New York Times*, A1 (Mar. 21, 1991).

the lower courts, which held that Johnson Controls' policy could be justified by business necessity. See id., at 193. The Supreme Court agreed to hear the case.

In the Supreme Court, Roberts co-authored a brief for the United States and the Equal Employment Opportunity Commission as *amici curiae* in support of the employees.[150] Roberts' brief agreed with the employees that Johnson Controls' policy was facially discriminatory and therefore unlawful unless it could be justified under Title VII's exception for a "bona fide occupational qualification" ("BFOQ").[151] The BFOQ exception allows an employer to discriminate on the basis of the otherwise prohibited factors of religion, sex, or national origin "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise…." 42 U.S.C. § 2000e-2(e)(1). (In law schools, the job of "wet nurse" is often cited as the paradigm example of a job by necessity requiring an employee of a specific gender.)

However, in yet another instance in which Roberts attempted to narrow the reach of civil rights laws, Roberts' brief urged the Supreme Court to adopt a broad definition of a BFOQ that would not *per se* prohibit gender-based fetal protection policies by employers, but that would instead allow employers who could justify such policies to have them and thus deny jobs to fertile women even though they were qualified to perform them. According to Roberts' brief, the BFOQ exception should not be confined to an employee's ability to do the job but should also encompass "a concern for direct harm to third parties from the manufacturing process," in this case, fetuses.[152] Roberts' brief did not ask that the Court give a final victory to the employees, but rather that the Court send the case back to the court of appeals "for further consideration in light of a clarified standard for evaluating the defense of sex-based fetal protection policy."[153]

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150 Brief for the United States and the Equal Employment Opportunity Commission as *Amici Curiae* Supporting Petitioners, *UAW v. Johnson Controls*, No. 89-1215, 1989 U.S. Briefs 1215 (June 1, 1990).

151 Id. at *8-9.

152 Id., at *12.

153 Id., at *18.

The Supreme Court, however, went further. In a unanimous ruling, the Court held in favor of the employees. Significantly, a five-justice majority, including Justice O'Connor, soundly rejected the broad BFOQ definition that Roberts had urged, and instead held that a sex-based fetal protection policy can never be justified under the BFOQ exception. In an opinion by Justice Blackmun, the majority underscored that the BFOQ exception "is written narrowly, and this Court has read it narrowly. . . Our emphasis on the restrictive scope of the BFOQ defense is grounded on both the language and the legislative history of [the statute]." 499 U.S. at 201. According to the majority, the language chosen by Congress to define the BFOQ limited it to "qualifications that affect an employee's ability to do the job." Id.

The majority further explained that expanding the BFOQ exception to cover fetal protection policies -- the position Roberts had urged -- would "contradict[ ] not only the language of the BFOQ and the narrowness of its exception, but also the plain language and history" of the Pregnancy Discrimination Act ("PDA"). Id. at 204. The PDA amended Title VII to specify that, for purposes of Title VII, "discrimination on the basis of sex" includes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions. …" 42 U.S.C. § 2000e(k). As the majority explained,

> [w]ith the PDA, Congress made clear that the decision to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman to make for herself. . . Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents. Congress has mandated this choice through Title VII, as amended by the PDA. Johnson Controls has attempted to exclude women because of their reproductive capacity. Title VII and the PDA simply do not allow a woman's dismissal because of her failure to submit to sterilization.

499 U.S. at 206-07 (emphasis added).

Underscoring the context of fetal protection policies in the long history of employment discrimination against women, the majority concluded with the observation that

> [c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities. . . Congress in the PDA prohibited discrimination on the basis of a woman's ability to become pregnant. We do no more than hold that the PDA means what it says. It is not more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make.

499 U.S. at 211 (emphasis added). Roberts, however, who apparently would deny reproductive choice to women (as discussed below), would have allowed employers who could justify it to take this employment choice away from women as well.

A *New York Times* article called the Court's decision "one of its most important sex discrimination rulings in recent years," noting that "opponents [of fetal protection policies] had warned that as many as 20 million women exposed to toxins on the job could face exclusion if the policies became more widespread."[154]

- **Roberts harshly ridiculed the gender pay equity concept of comparable worth, despite support for it expressed by Republican Congresswomen**

In December 1983, Judge Jack E. Tanner, a federal district court judge in Washington state, issued a ruling in an employment discrimination lawsuit against the state in which he embraced a gender pay equity concept known as "comparable

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[154] Linda Greenhouse, "Court Backs Right of Women to Jobs with Health Risks," *New York Times*, A1 (Mar. 21, 1991).

worth."[155] "The comparable worth theory . . . postulates that sex-based wage discrimination exists if employees in job classifications occupied primarily by women are paid less than employees in job classifications filled primarily by men, if the jobs are of equal value to the employer, though otherwise dissimilar."[156] In his ruling, Judge Tanner held that Washington state's wage system unlawfully discriminated against state employees in jobs predominantly held by women, who were paid significantly less than employees in jobs predominantly held by men that "require[d] an equivalent or lesser composite of skill, effort, responsibility and working conditions . . . ."[157]

Shortly after the court's ruling, three female, Republican members of Congress -- Olympia J. Snowe, Claudine Schneider, and Nancy Johnson -- wrote to Michael Deaver, President Reagan's Deputy Chief of Staff, to express their deep concern "about reports that the Justice Department [was] preparing a legal challenge" to the court's ruling.[158] The Congresswomen stated:

> As you know, this landmark decision by Judge Tanner found the state of Washington guilty of discrimination and ordered a settlement of back pay and raises for women found to have been paid less than men holding jobs of comparable worth. We strongly urge the Administration to refrain from involvement in this case.[159]

The Congresswomen then went on to explain the importance of the case and the serious "wage gap" between women and men, adding that "[t]he guarantee of equal pay for equal work has fallen short, and it will continue to fall short because, by and large, women do not work in the same jobs as men. Rather, women are concentrated in a small number of

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155 See *AFSCME v. Washington*, 578 F. Supp. 846 (W.D. Wash. 1983), rev'd, 770 F.2d 1401 (9th Cir. 1985).

156 *AFSCME v. Washington*, 770 F.2d 1401, 1404 (9th Cir. 1985). The comparable worth theory is distinct from the concept of "equal pay for equal work," which pertains to pay equity for what are essentially the same jobs.

157 *AFSCME v. Washington*, 578 F. Supp. at 863.

158 Letter from Olympia J. Snowe, Claudine Schneider, and Nancy Johnson to Michael K. Deaver (Jan. 26, 1984).

159 Id. at 1.

low-paid, predominantly female occupations."[160] The letter observed that "[s]upport for pay equity -- or the belief that people should receive equal pay for work that, although not identical in nature, is comparable in skill, effort, and responsibility -- is not a partisan issue."[161]

After White House Counsel Fred Fielding was asked for guidance in responding to the Congresswomen's letter,[162] Roberts reviewed Judge Tanner's ruling.[163] He then wrote Fielding a memo in which he expressed strong hostility to the very concept of comparable worth, stating, "It is difficult to exaggerate the perniciousness of the 'comparable worth' theory. It mandates nothing less than central planning of the economy by judges."[164]

Shortly thereafter, Roberts wrote a second memo to Fielding, specifically addressing the question of responding to the letter from the three Congresswomen, stating

> The letter contends that women stand to gain substantially from Judge Tanner's decision, which is doubtless true as a conclusion [but] unavailing as an argument. I honestly find it troubling that three Republican representatives are so quick to embrace such a radical redistributive concept. Their slogan may as well be "from each according to his ability, to each according to her gender."[165]

Roberts' dismissive, mocking language stands in sharp contrast to the respectful, measured letter that the Congresswomen had sent. Whatever one may believe about the wisdom of attempting to achieve pay equity for women through the theory of comparable

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160 Id.

161 Id. at 2.

162 Note from Nancy Risque to Fred Fielding and Jack Svahn (Feb. 2, 1984); see also Memorandum from Fred F. Fielding to Nancy J. Risque re Your Request for Guidance on Letter from Congresswomen Snowe, et al. (Feb. 20, 1984).

163 Memorandum from John G. Roberts to Fred F. Fielding re *AFSCME v. Washington*: Comparable Worth Case (Feb. 3, 1984).

164 Id. at 2 (emphasis added).

165 Memorandum from John G. Roberts to Fred F. Fielding re Nancy Risque Request for Guidance on Letter from Congresswomen Snowe et al. (Feb. 20, 1984) (emphasis added).

worth, and although Judge Tanner's ruling was subsequently reversed as a legal matter, Roberts' exceedingly harsh language and apparent unwillingness even to consider the validity of comparable worth as a matter of social policy indicates enormous hostility toward women's equality.

Notably, Roberts had expressed the same dismissive views of "comparable worth" in a memorandum he had written earlier that year, responding to the request of Elizabeth Dole that the White House Counsel's Office comment on the proposed distribution of a status report on the "Fifty States Project." According to Roberts, the status report was an "inventory of efforts at the state level to address" what Roberts called "perceived problems of gender discrimination" -- language troubling in and of itself for its minimization of the existence and consequences of sex discrimination.[166] In this memo, Roberts described as "staggeringly pernicious" a law to codify "the anti-capitalist notion of 'comparable worth' (as opposed to market value) pay scales."[167]

Roberts' dismissive and often sarcastic attitude toward women's equality was expressed in other writings. For example, in a memorandum concerning a potential award to a woman who had "left schoolteaching at age 30 to enter law school . . . and encouraged many former homemakers to enter law school and become lawyers," Roberts wrote, "[s]ome might question whether encouraging homemakers to become lawyers contributes to the common good, but I suppose that is for the judges to decide."[168]

And Roberts was strongly opposed to a proposal by a Republican professional women's organization that the White House support an alternative version of the Equal Rights Amendment in order, as Roberts put it, to "help bridge the purported 'gender gap.'"[169] According to Roberts, "Any amendment would ipso facto override the

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166 Memorandum from John G. Roberts to Fred F. Fielding re Draft "Status of the States" 1982 Year End Report (Jan. 17, 1983) (emphasis added).

167 Id.

168 Memorandum from John G. Roberts to Fred F. Fielding re Clairol Loving Care Scholarship Program Rising Star Award (July 31, 1985).

169 Memorandum from John G. Roberts to Fred F. Fielding re New Constitutional Amendment (Sept. 26, 1983).

prerogatives of the States and vest the federal judiciary with broader powers in this area, two of the central objections to the ERA."[170] Roberts also had a pragmatic reason to reject the proposal that President Reagan support a version of the ERA: "The President would be perceived as crassly opportunistic, and would risk losing the devotion of some of his most loyal supporters."[171]

The views that Roberts expressed in these memoranda, and the manner in which he expressed them, are particularly disturbing when considered in light of his entire record on sex discrimination. As discussed above, that record is a dismal one in which Roberts has, time and again, taken positions and advocated rulings that would limit the rights of women and remedies for discrimination. There can be no question that when it comes to women's rights, Roberts not only lacks a demonstrated commitment to achieving them, he has stood as a barrier to women's progress toward equality.

B. VOTING RIGHTS

Through significant portions of his career, beginning in the Reagan Administration, Roberts has sought to limit voting rights. Documents reveal that as special assistant to Attorney General Smith, Roberts fought against bipartisan congressional efforts to restore the full effectiveness of the Voting Rights Act of 1965. Widely hailed as "the most successful civil rights law ever enacted," the Act has helped eliminate a wide range of government practices that have denied equal access to the right to vote to minority citizens.[172] In 1980, however, a divided Supreme Court seriously weakened the Act through a plurality opinion that ruled that government action must have the intent of discriminating against minority voters in order to violate the law in *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

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170 Id. (emphasis in original).

171 Id.

172 Leadership Conference on Civil Rights, Without Justice (Feb. 1982) ("Without Justice") at 56.

Civil rights advocates and legislators of both parties agreed that this decision violated the intent of Congress and previous court decisions and would make effective enforcement of voting rights much more difficult. "Local officials don't wallpaper their offices with memos about how to restrict minority-group members' access to the polling booth," noted Vernon Jordan, Jr., then-president of the National Urban League.[173] In October 1981, the House of Representatives passed by an overwhelming margin of 389 to 24 a renewal of the Voting Rights Act that restored the effects test in Section 2 of the Act and made clear that voting practices that have the effect of discriminating against minorities violate the law without proof of bad intent.[174] In response to concerns raised by some, both the text of and the House Report on the bill made clear that the legislation "does not create a right of proportional representation" and that "the fact that members of a racial or language minority group have not been elected in numbers equal to the group's proportion of the population does not, of itself, constitute a violation."[175]

Until then, the Reagan Administration had not taken a position on the issue or on the Voting Rights Act. Documents reveal, however, that Roberts urged the Administration to oppose the House bill and promoted efforts to do so because of the "effects" language.[176] In 1981-1982, the Administration in fact opposed the House bill, and Roberts was active in that effort. In early November 1981, he praised the *Mobile* decision to the Attorney General and complained that the House bill would improperly "give courts far broader license to interfere with voting practices" with discriminatory effects.[177] He wrote numerous op-eds and talking points to promote the opposition to the House bill. In what could have been a precursor to later views about "federalism" and

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173 See Robin Toner and Jonathan D. Glater, "Roberts Helped to Shape 80's Civil Rights Debate," New York Times (Aug. 4, 2005)("8/4 NYT")(quoting Jordan).

174 Id.

175 H.R. Rep. 97-227 (1981) at 29-30, quoted in Washington Council of Lawyers Report, Reagan Civil Rights: The First Twenty Months (1982), reproduced in Hearings before the Senate Judiciary Committee, Nomination of William Bradford Reynolds to be Associate Attorney General of the United States, 99th Cong., 1st Sess., S. Hrg. 99-3374 (June 4,5, and 18, 1985)("WCL Report") at 678-79.

176 See generally David G. Savage and Richard B. Schmitt, "Portrait of Nominee as a Young Lawyer," Los Angeles Times (Aug. 7, 2005).

177 Memorandum from John Roberts to the Attorney General re Section 2 of the Voting Rights Act and *City of Mobile v. Bolden* (Nov. 6, 1981) at 2.

"states' rights", Roberts wrote that the effects test would produce a "drastic alteration of local governmental affairs" which should be disfavored "under our federal system."[178] Violations of Section 2 "should not be made too easy to prove," Roberts claimed, because they can lead to "the most intrusive interference imaginable by federal courts into state and local processes," even if their efforts may be discriminatory.[179]

Roberts used charged language in claiming that "[a]s Justice Stewart correctly noted in his opinion in *City of Mobile v. Bolden*, incorporation of an effects test in § 2 would establish essentially a quota system for electoral politics by creating a right to proportional racial representation."[180] This was despite the fact that the House language and report were directly to the contrary, and that Justice Stewart never used the word quota in his opinion. Roberts continued to use such language throughout his advocacy in 1981-82.[181]

As the debate continued, however, it was clear that conservatives as well as progressives disagreed with the Administration's position. For example, James Sensenbrenner and Newt Gingrich voted for the House bill, while Dan Quayle was an original Senate co-sponsor of the same language.[182] Roberts was asked to prepare "fallback" or compromise positions.[183] In each such effort reflected in the files, however, Roberts stubbornly insisted on requiring some form of proof of intent; even when proposing language allegedly adopting the "effects test in the House bill," Roberts

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178 Memorandum from John Roberts to the Attorney General re Voting Rights Act: Section 2 (Dec. 22, 1981)(Attachment at 3).

179 Id.

180 Id. at 2 (emphasis in original).

181 See, e.g., Memorandum from John Roberts to the Attorney General re Voting Rights Act Testimony: Questions and Answers (Jan. 21, 1982) (Attachment at 4) (suggesting that Attorney General state that the House bill "would establish a quota system for electoral politics")(emphasis in original); Memorandum from John Roberts to Attorney General re: Today's Meeting on Voting Rights (March 12, 1982) (Attachment at 2) (suggesting that the Attorney General advise the President to state that the effects test "could lead to a quota system in electoral politics.").

182 CQ House Votes 227-234, 228: H.R. 3112, Voting Rights Act Extension (Oct. 5, 1981); Bill Summary and Status for the 97th Congress: Cosponsors of S. 1992, at http://thomas.loc.gov/cgi-bin/bdquery/z?d097:SNO1992@@@p (last visited Aug. 30, 2005)

183 Memorandum from John Roberts to Brad Reynolds, et al. re Compromise Position on Section 2 of the Voting Rights Act (Feb. 16, 1982) at 1.

proposed that the challenged voting practice must be proven to have been "used invidiously" to harm minorities.[184] Roberts apparently never suggested that the intent of the House bill to avoid proportional representation simply be spelled out in the language of the Senate bill.

In May 1982, however, language was agreed upon in the Senate and by the Administration that incorporated the effects language from the House bill and did make even more explicit the language and intent of that bill that it did not create a right to proportional representation.[185] No indication has been found of any involvement by Roberts in, or specific approval by Roberts of, this language. Several later memoranda by Roberts, however, indicate continued skepticism and apparent opposition to the effects test. In a later 1982 memorandum, he supported Department of Justice intervention in a voting case to help give meaning to the "vague terms of the new section 2" and help "avoid the outcomes which we argued against and which the proponents of an amended section 2 assured us were never intended."[186] While at the White House in 1984, Roberts tartly responded to a state attorney general's complaint about a proposed section 2 action by stating that "I do not recall him leading the opposition to the 1982 amendments to the Voting Rights Act that compel the bringing of such suits."[187] As discussed below, moreover, Roberts continued to argue against the use of "effects" standards in defending civil rights; for example, in June 1982, after the Senate language was agreed to, a Roberts memorandum referred specifically to the "clear philosophical opposition to the effects test by the Department, most clearly articulated in the voting rights area."[188]

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184 Memorandum from John Roberts to the Attorney General re Voting Rights Act (March 24, 1982). See also Memorandum from John Roberts to Brad Reynolds et al. re Compromise Position on Section 2 of the Voting Rights Act (Feb. 16, 1982).

185 See WCL Report at 680-682.

186 Memorandum from John Roberts to the Attorney General re Attorney General Certification to Authorize Intervention in Voting Rights Cases (Sept. 14, 1982).

187 Memorandum from John G. Roberts to Fred F. Fielding re Justice Department Actions (Dec. 5, 1984).

188 Memorandum from John Roberts to the Attorney General re Solicitor General briefs in EEOC cases (June 16, 1982).

In its May, 1982 report on the Voting Rights Act, the Senate Judiciary Committee conclusively refuted the arguments made by Roberts and others against the effects test. As the Committee found, "[r]equiring proof of a discriminatory purpose is inconsistent with the original legislative intent and subsequent legislative history of Section 2."[189] The *Mobile* intent test, the Committee explained, "focuses on the wrong question and places an unacceptable burden upon plaintiffs in voting discrimination cases."[190] For example, the Committee noted, the intent test led to the rejection of a voting rights challenge in Georgia "even though the evidence showed pervasive discrimination in the political process."[191] Perhaps most important, the Committee emphasized that even before the Section 2 language agreed upon in the Senate, the courts had made clear "[i]n case after case" that "there is no right to proportional representation" under the effects test.[192]

In any event, it is clear that Roberts' arguments against the effects test threatened to severely harm voting rights progress. "[H]ad the Roberts view prevailed," one election law specialist has commented, "we would have many fewer minority elected representatives in Congress and in state and local government."[193]

Roberts also worked on voting rights issues while serving as Principal Deputy Solicitor General in the first Bush Administration. While for the most part he simply defended in the Supreme Court positions taken by the Justice Department in lower courts, one case in particular raises further concerns about his views on voting rights. In *Voinovich v. Quilter,* 507 U.S. 146 (1993), Roberts signed a friend of the court brief urging the Court to overrule a lower court ruling that a redistricting plan violated Section 2 of the Voting Rights Act and the Fifteenth Amendment. Roberts' brief opposed the

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189 S.Rep. No. 97-417 on Voting Rights Act Extension (97th Cong., 2d Sess.) ("SJC Rept.") at 16.

190 Id.

191 Id. at 39. That evidence included, for example, evidence that an all-white private club was responsible for supervising elections, that a polling place was moved to a less convenient location after residents of a black neighborhood registered in substantial numbers, and that black candidates had encountered difficulties in campaigning in white neighborhoods. See *Cross v. Baxter*, 604 F.2d 875, 880-81 (5th Cir. 1979) (cited at SJC Rept. at 39 n.144).

192 SJC Rept. at 16. Senators joining the report with no qualifications included, among others, Senators Specter, Biden, Kennedy, Byrd, and Leahy.

193 8/4 NYT (quoting election law specialist Richard L. Hasen of Loyola Law School).

position of the NAACP Legal Defense and Education Fund, which filed an *amicus curiae* brief urging affirmance. Among other arguments, Roberts' brief urged the Court to reverse the lower court's apparent determination that the plan violated the Fifteenth Amendment because the plan, which "packed" minorities into majority-minority districts, was the result of intentional vote dilution undertaken for political purposes.[194] While the Court agreed to reverse the lower court decision, it "express[ed] no view on the relationship between the Fifteenth Amendment and race-conscious redistricting."[195] *Voinovich* is one of the sixteen cases as to which the Administration has refused even to consider Senate Judiciary Democrats' request for internal Justice Department documents concerning Roberts' role. The available documents concerning Roberts' activities on voting rights, however, clearly raise troubling concerns.

C. EMPLOYMENT DISCRIMINATION AND AFFIRMATIVE ACTION

In addition to his involvement with sex discrimination issues as discussed above, Roberts was directly involved during the Reagan and Bush Administrations in issues concerning employment discrimination and affirmative action. Available documents demonstrate that Roberts took an extremely restrictive view on these subjects, sometimes to the right of even ultra-conservative officials like William Bradford Reynolds.

In particular, in a memo to civil rights division chief William Bradford Reynolds and his assistant Charles Cooper in 1981, Roberts strongly challenged a proposed settlement for a job discrimination case, saying that lawyers in the civil rights division had gone too far by advising school systems to offer jobs and back pay not only to those who had been turned down for work due to discriminatory policies but also to those who could show they were deterred by bias from applying for jobs. Roberts called the

[194] Brief for the United States as *Amicus Curiae* Supporting Appellants, *Voinovich v. Quilter*, No. 91-1618, 1991 U.S. Briefs 1618 (July 31, 1992) at *7-8.
[195] *Voinovich v. Quilter*, 507 U.S. at 160.

requirement "staggering."[196] Roberts also made the incredible claim that an employer with a "blanket policy of rejecting all blacks simply because they were black" would "not give rise to a claim for relief under Title VII" unless it could be proved that the rejected applicants were "more qualified than white applicants who were hired," directly contradicting established employment discrimination law.[197] In this case, Roberts was more resistant to civil rights remedies than was Reynolds, who was later rejected for promotion to associate attorney general by a Republican-majority Senate Judiciary Committee, based largely on Reynolds' restrictive approach to enforcing civil rights laws.[198]

While at the Justice Department in 1981, Roberts also tried to undermine a long-standing Executive Order supported by Republican and Democratic presidents calling for affirmative action by government contractors. Reagan Secretary of Labor Raymond Donovan and his staff, including the Office of Federal Contract Compliance Programs (OFCCP), had made clear their intent to continue to carry out the order. But Roberts complained to the Attorney General that DOL and OFCCP were promoting "offensive preferences" based on race and gender, questioning even affirmative action recruitment

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196 Memorandum from John Roberts to William Bradford Reynolds and Chuck Cooper re: Employment Discrimination Suits against Clayton and Gwinnett Counties (Oct. 26, 1981) ("Reynolds memo") at 3; See, generally, R. Jeffrey Smith, Amy Goldstein and Jo Becker, "A Charter Member of Reagan Vanguard: Court Nominee Was Part of Legal Team Seeking to Shift Course on Civil Rights Laws," *Washington Post*, A01 (August 1, 2005).

197 Reynolds memo at 2. Roberts' claim is contrary to then-established Supreme Court jurisprudence. For example, in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the Supreme Court stated that a claim of disparate treatment in employment is established if the plaintiff proves that "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." 431 U.S. at 335, n.15. Furthermore, in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Supreme Court held, contrary to Roberts' assertion, that for a black applicant to establish a prima facie case of unlawful discrimination, he or she would need to establish not that they were more qualified than a white applicant who was hired, but instead, simply "that he applied and was qualified for a job for which the employer was seeking applicants… that, despite his qualifications, he was rejected… and… that, after his rejection, the position remained open …" *McDonnell Douglas Corp v. Green*, 411 U.S. at 802.

198 See Nomination of William Bradford Reynolds to be Associate Attorney General of the United States, Hearings Before the Senate Judiciary Committee, 99th Cong., 1st Sess., S.Hrg. 99-3374 (June 4, 5, and 18, 1985).

programs.[199] In one memorandum, he accused an undersecretary of labor of endorsing the use of "quota-like concepts" such as goals and timetables in congressional testimony, even though the undersecretary's statement made clear that "[p]referential treatment or quotas" are "not proper or defensible."[200] Roberts claimed, even though the Supreme Court had ruled voluntary affirmation action to be legal under federal law in *United Steelworkers v. Weber,* 443 U.S. 193 (1979), that *Weber* "has only four supporters on the current Supreme Court" and that "[we] do not accept it as the guiding principle in this area."[201] Roberts suggested that under his view, "there will be no need for an OFCCP at all," a result that would have totally undermined the Executive Order.[202]

Roberts' efforts in 1981 were followed several years later by attempts to explicitly weaken the Executive Order itself. This attempt failed, not only because of opposition by government officials of both parties, but also because of strong opposition by the conservative National Association of Manufacturers, which strongly supported the Executive Order and affirmative action.[203] While working for Attorney General Smith, however, Roberts continued to oppose affirmative action, derisively commenting in one memorandum, for example, that the "obvious reason" for failure of affirmative action was that it mandated "the recruiting of inadequately prepared candidates."[204] This statement is not only false with respect to affirmative action but also suggests a cavalier attitude toward the effects of discrimination and effective remedies.

While at the Justice Department under Attorney General Smith, Roberts also sought to ensure that all parts of the Department reflected the restrictive views on

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199 Memorandum from John Roberts to the Attorney General re: Meeting with Secretary Donovan on Affirmative Action (December 2, 1981) ("Donovan memo") at 2.

200 Memorandum from John Roberts to the Attorney General re Conflict Between DOL and DOJ Testimony on Affirmative Action (Oct. 13, 1981); attached statement of undersecretary Malcolm Lowell (Oct. 7, 1981) at 17.

201 Donovan memo at 2. (emphasis in original).

202 Id.

203 See Leadership Conference on Civil Rights Education Fund, Civil Rights 101 – Affirmative Action at www.civilrights.org/research_center/civilrights101/affirmaction.html (last visited August 22, 2005).

204 Memorandum from John Roberts to the Attorney General re U.S. Civil Rights Commission Statement on Affirmative Action (Dec. 22, 1981) at 2. See also, e.g., Memorandum from John Roberts to the Attorney General re Civil Rights Op-Ed Piece (Aug. 9, 1982).

employment discrimination that he promoted. In a 1982 memorandum to the Attorney General, Roberts complained that the Solicitor General's office was not "sufficiently sensitive to the policy views of the Civil Rights Division," headed by ultra-conservative Brad Reynolds.[205] Roberts criticized the Solicitor General for defending the position of the Equal Employment Opportunity Commission in favor of discrimination victims in several cases, including one in which the Solicitor General reportedly sought to expand the use of the "effects test in employment cases." Id. Roberts urged the Attorney General to rein in the Solicitor General by ensuring, even in cases where he was representing the independent EEOC, that he fully advised and consulted the Civil Rights Division as he would in a case involving the Division itself. Id. at 2.

Roberts' restrictive view on employment discrimination and affirmative action, as well as on the obligation of the Solicitor General to support the views of independent agencies, was reflected later in his career as well. As acting Solicitor General in the first Bush Administration, Roberts took the unusual step of directing that the federal government oppose in the Supreme Court a federal affirmative action plan – the Federal Communications Commission's affirmative action program with regard to applications for new broadcast licenses.[206] The Supreme Court narrowly rejected Roberts' view and upheld the FCC program in *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990). Documents concerning this case are among those being sought by the Judiciary Committee Democrats in their document request to the Administration.

The history of the affirmative action issue illustrates clearly the decisive role that John Roberts could play if elevated to the Supreme Court. The Court rejected Roberts' arguments in a 5-4 ruling in *Metro Broadcasting*, then partially overruled *Metro Broadcasting* in striking down a federal affirmative action program in a 5-4 decision in *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995), and then ruled 5-4 to uphold

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[205] Memorandum from John Roberts to the Attorney General re Solicitor General Briefs in EEOC Cases (June 16, 1982) at 1.

[206] Brief for the United States as *Amicus Curiae*, *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, No. 89-453, 1989 U.S. Briefs 453 (Feb. 9, 1990).

affirmative action in higher education in an opinion by Justice O'Connor in *Grutter v. Bollinger,* 539 U.S. 306 (2003). Roberts twice filed *amicus curiae* briefs in the Supreme Court opposing affirmative action in the *Adarand* litigation, and as a commentator in his private capacity, characterized such affirmative action as "racism."[207] On the Supreme Court, Roberts' views could severely restrict employment discrimination law and could literally spell the end of affirmative action.

D. EDUCATION AND SCHOOL DESEGREGATION

While serving in the Reagan Administration, Roberts repeatedly took positions that opposed court action to help produce equal educational opportunity. This pattern continued later in his career in the Bush I Administration, when he opposed or sought to limit the efforts of people to turn to the federal courts to challenge state and local laws and policies that resulted in unequal access to educational opportunities.

Thirty years ago, as part of a wave of anti-immigrant sentiment and activity, the Texas legislature passed a law designed to keep undocumented immigrant children from attending public schools in the state. In 1982, in its ruling in *Plyler v. Doe,* 457 U.S. 202 (1982), the Supreme Court struck down the Texas law as unconstitutional. The Court majority said it was "difficult to conceive of a rational justification for penalizing these children" for being in the U.S. based on the actions of their parents.[208] "By denying these children a basic education, we deny them the ability to live within the structure of our

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[207] See Brief for Associated General Contractors of America, Inc. as *Amicus Curiae,* in *Adarand Constructors, Inc. v. Mineta*, No. 00-730, 2000 U.S. Briefs 730 (June 11, 2001); Brief by Roberts for Associated General Contractors of America, Inc. as *Amicus Curiae* in *Adarand Constructors, Inc. v. Pena*, No. 93-1841, 1993 U.S. Briefs 1841 (Nov. 7, 1994); Transcript of McNeil-Lehrer News Hour (June 12, 1995) at 6 (stating that "what the Supreme Court said today" in the *Adarand* decision "is that you don't overcome racism by engaging in it yourself"). Although the case did not concern employment-related issues, Roberts in private practice was hired to defend a provision of the Hawaii Constitution that limited the right to vote for trustees of a state agency that administered programs designed for native Hawaiians to only native Hawaiians; the Supreme Court struck down the provision in *Rice v. Cayetano*, 528 U.S. 495 (2000).

[208] Id. at 220.

civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."[209]

The decision was a major victory for the constitutional principle of equal protection under the law, and made a huge difference in the lives of thousands – if not millions – of children and their families. The notion that the government would choose to marginalize a generation of young people was viewed by Justice William Brennan as "an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit."[210]

As special assistant to Attorney General William French Smith, however, Roberts criticized the Supreme Court's ruling in *Plyler*. In an internal memo, Roberts and a colleague complained that the Reagan Administration should have weighed in on the case on the side of the state and "could well have" changed the outcome.[211] In fact, the Justice Department had supported the children in the lower courts, and had already retreated by its non-action in the Supreme Court.[212] Americans who care about equal opportunity, equal protection, and the rights of immigrants should be deeply troubled about Roberts' opposition to the Supreme Court ruling in *Plyler*.

Roberts also took a position in support of weakening the Education of the Handicapped Act. In *Hendrick Hudson Dist. Bd. of Educ. v. Rowley,* 458 U.S. 176 (1982)**,** the case of a deaf student who got by in school by lip-reading and using a hearing aid to boost her minimal residual hearing, lower federal courts ruled that her achievement was well below the student's potential and that she was qualified under the Act to receive the services of a sign-language interpreter in the classroom. The Solicitor General's office supported the student's claim in the Supreme Court, but in a majority opinion

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209 Id. at 223.

210 Id. at 221-22.

211 Memorandum from Carolyn B. Kuhl and John Roberts to the Attorney General re "*Plyler v. Doe*- 'The Texas Illegal Aliens Case'" (June 15, 1982) at 2.

212 See Without Justice at 20.

written by Justice Rehnquist, the Court reversed the lower court's ruling, saying the student was entitled only to an adequate education and that states were not required to "maximize the potential of handicapped children 'commensurate with the opportunity provided to other children.'"[213] In a dissent, Justice White noted the law's guarantee of a "free appropriate public education,"[214] and its definition of special education and "specifically designed instruction, at no cost to parents or guardians, to *meet the unique needs* of a handicapped child."[215] After the ruling, Roberts wrote a memo to the Attorney General calling Justices Brennan and Marshall, who had joined in dissenting in the case, "the activist duo" and denouncing the lower court rulings as "an effort by activist lower court judges" and saying the Solicitor General had been wrong to support the student's claims.[216]

As discussed above, Roberts also argued while working for Attorney General Smith that Congress could pass a law preventing all federal courts from ordering busing to achieve school desegregation under any circumstances, a position even more extreme than that advanced by Theodore Olson and adopted by the Reagan Administration.[217] As Olson explained, Congress could not by such a law countermand federal court judgments that such remedies were sometimes required under the Fourteenth Amendment.[218] Nevertheless, Roberts continued to adhere to his view several years later at the White House, where he claimed that Olson had misread Supreme Court cases indicating that mandatory reassignment was necessary to achieve desegregation under some circumstances and that Congress could prohibit such remedies under Section 5 of the Fourteenth Amendment because of what Roberts claimed was clear evidence that they actually "promote[ ]segregation." Id.

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213 Id at 189-90 (quoting trial court opinion).

214 Id. at 212 (White, J., dissenting).

215 Id. at 215 (White, J., dissenting) (emphasis added).

216 Memorandum from John Roberts to the Attorney General re Government Participation and Supreme Court Decision in *Board of Education v. Rowley* (July 7, 1982).

217 See also Jo Becker and Amy Argetsinger, "The Nominee as a Young Pragmatist," *Washington Post*, July 22, 2005.

218 Memorandum from John G. Roberts to Fred F. Fielding re Proposed Justice Report on S.139 (Anti-Busing Bill) (Feb. 15, 1984) at 2.

Roberts' views were contradicted not just by Ted Olson. Previous Republican as well as Democratic administrations, court decisions, reports by the House Judiciary Committee and education experts, as well as experience in desegregating school systems have refuted his claims about desegregation remedies.[219] Even more disturbing, Roberts' constitutional views about Section 5 of the Fourteenth Amendment ignore the principle that while that provision allows Congress to more vigorously enforce civil rights against state governments, "it provides no authority for Congress to interfere with the execution or enforcement of federal court judgments or to overturn federal judicial determinations of the requirements of the [F]ourteenth [A]mendment."[220]

Roberts' restrictive view of equal educational opportunity and school desegregation continued later in his career. As political deputy to Ken Starr in the Solicitor General's office, Roberts argued in an *amicus* brief against the efforts of black families to pursue claims that schools in a district that had been ordered to desegregate would become resegregated without further court action.[221] Also as Principal Deputy Solicitor General, Roberts urged the Supreme Court to reverse a Court of Appeals ruling and order the partial termination of a school district's desegregation decree.[222] In both cases, Roberts' office chose to file briefs where the United States was not a party, and opposed civil rights groups like the NAACP and the Lawyers' Committee for Civil Rights Under Law. Documents concerning these cases, *Board of Education of Oklahoma City v. Dowell,* 498 U.S. 237 (1991), and *Freeman v. Pitts*, 503 U.S. 467 (1992), are among those being sought by the Judiciary Committee Democrats in their document request to the Administration.[223]

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219 See WCL Report at 649-55; "'There is No Liberty…': A Report on Congressional Efforts To Curb the Federal Courts and To Undermine the Brown Decision," Citizens Commission on Civil Rights (Oct. 1982) ("CCCR Report").

220 Ronald Rotunda, Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing, 64 Geo. L.J. 839, 859 (1976), cited in CCCR report at 18-19. See also CCCR Report at 33-42.

221 Brief for the United States as *Amicus Curiae*, *Board of Education of Oklahoma City v. Dowell*, No. 89-1080, 1989 U.S. Briefs 1080 (June 1, 1990).

222 Brief for the United States as *Amicus Curiae*, *Freeman v. Pitts,* No. 89-1290, 1989 U.S. Briefs 1290 (May 3, 1991).

223 Office of Senator Leahy, "Democratic Senators Request Information on 16 Cases Handled By Supreme Court Nominee," July 29, 2005.

And even in a case in which the U.S. had taken the side of black citizens protesting segregation and inequality, a Roberts-filed brief significantly retreated from that position. In *U.S. v. Fordice*, 505 U.S. 717 (1992), the Justice Department had earlier argued that Mississippi could not remedy segregation and inequality in higher education simply by offering all students so-called "freedom of choice," in light of the historic and continuing segregation and inferiority of the state's historically black colleges.[224] Yet the brief supervised and approved by Roberts asserted that the state had no obligation to correct severe disparities harming historically black schools.[225] The Supreme Court rejected the Roberts position and held that so-called freedom of choice was not enough and that Mississippi must fully dismantle all policies and practices that continued to foster segregation.[226]

E. OTHER CIVIL RIGHTS ISSUES

Particularly during his time in the Reagan and Bush I Administrations, Roberts also took extremely troubling positions on other civil rights issues. Specifically:

Rights of disabled persons: As discussed above, Roberts supported weakening the protections of the Education of the Handicapped Act while at the Reagan Justice department. At the Reagan White House, he took the extraordinary step of disagreeing with briefing points for President Reagan and with the Centers for Disease Control on the proper, nondiscriminatory treatment of children with AIDS.

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[224] Susan D. Carle, "What Roberts Argued," Legal Times (Aug. 1, 2005). ("What Roberts Argued").

[225] Brief for the United States as Petitioner, *United States v. Mabus*, Nos. 90-1205 and 90-6588, 1990 U.S. Briefs 1205 (July 1, 1991), at *14 -16. In fact, this position was effectively withdrawn by the government in an unusual reply brief signed solely by Solicitor General Starr, not by Roberts. See Reply Brief for the United States in *Fordice*.

[226] *United States v. Fordice*, 505 U.S. 717, 729 (1992); "What Roberts Argued," *Legal Times*.

Specifically, Roberts was asked to review eleven pages of briefing materials for a scheduled White House press conference on September 17, 1985. The first and one of the few recommendations he made was to delete a suggested statement by the President assuring the public about children with AIDS in public schools by stating that "as far as our best scientists have been able to determine, AIDS virus is not transmitted through casual or routine contact."[227] This was in accord with a report released two weeks earlier by the Centers for Disease Control to widespread publicity that "[c]asual person-to-person contact, as among schoolchildren, appears to pose no risk" of AIDS transmission.[228] Yet Roberts wrote that the scientific "'conclusion'" has been "attacked by numerous [unnamed] commentators," that we should "assume AIDS can be transmitted through casual or routine contact," and that the President should not take a position on what he characterized as a "disputed" scientific issue.[229] As a matter of science as well as civil rights, Roberts' position is extremely troubling.

Disability groups have also raised concerns about later aspects of Roberts' record. As Principal Deputy Solicitor General, Roberts twice sought to limit the ability of disabled and other Americans to enforce their rights under federal law. As discussed above, these include *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), where a Roberts-filed brief unsuccessfully argued that Medicaid rights were not privately enforceable, and *Suter v. Artist M.,* 503 U.S. 347 (1992), where Roberts successfully argued that children could not enforce their rights under the Adoption Assistance and Child Welfare Act to ensure that states make reasonable efforts to preserve and reunite their families.[230]

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[227] Memorandum from John G. Roberts and Deborah K. Owen to Fred F. Fielding re Domestic Briefing Materials for Press Conference (Sept. 13, 1985) ("Sept. 13 memo") at 1 and attached briefing materials at 7.

[228] "U.S. Says Schools Shouldn't Bar Pupils with AIDS," *New York Times*, B2 (Aug. 30, 1985).

[229] Sept. 13 memo at 1.

[230] See Bazelon Center on Mental Health Law, John Roberts' Problematic Record on Disability Rights, at www.bazelon.org/issues/disabilityrights/judicial nominees/roberts.htm (last visited Aug. 23, 2005) ("Bazelon"). *Suter* is one of the sixteen cases as to which Senate Judiciary Committee Democrats have requested Solicitor General documents.

Concerns have also been raised about Roberts' record as a private lawyer on disability issues, particularly with respect to *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002). In that case, Roberts successfully argued on behalf of Toyota that a woman with severe carpal tunnel syndrome and tendonitis was not a person with a disability under the Americans with Disabilities Act because she was not sufficiently limited in major life activities outside of her job. According to the Bazelon Center for Mental Health Law, Roberts' brief "greatly distorted the extent of the woman's limitations," and the resulting test for who is protected by the ADA is thus "more stringent than the test set forth in the law itself."[231] The Bazelon Center concluded that Roberts has "repeatedly argued to narrow the protections" of the ADA and other civil rights laws, and his nomination "poses serious concerns for people with disabilities." Bazelon.

Immigrants' Rights: As discussed elsewhere in this report, troubling concerns are raised with respect to Roberts' criticism of *Plyler v. Doe* and his support for a national I.D. card. In addition, however, other memoranda during his work in the Reagan Administration reveal a disregard and even disdain for immigrants' rights. In one memo, Roberts criticized a proposal approved by OMB and the Departments of State and Interior to grant citizenship and other benefits to a group of Indian migrant workers as "overly generous -- particularly in light of the fact that these are, generally speaking, Mexican Indians and not American Indians."[232] In 1983, he opposed an effort to proceed with a federal initiative to provide help in the southwest region because of severe economic problems due to difficulties in the Mexican economy, commenting that "[e]very area of the country has peculiar economic concerns."[233] He later commented on

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231 See Bazelon. The brief for respondents in the case similarly faults Roberts' brief for mischaracterizing the record concerning the extent of the woman's impairments See Brief for respondents in *Toyota Motor Manufacturing v. Williams,* No. 00-1089, 2000 U.S. Briefs 1089 (August 31, 2001), at *15-18.

232 Memorandum from John G. Roberts to Fred F. Fielding re Enrolled Bill H.R.- Texas Band of Kickapoo Reservation Act 4496 (Jan. 4, 1982[sic]). Roberts derisively stated in the memo that the Kickapoos were "originally from the Great Lakes area" and "did not stop running from their encounter with Europeans until they reached Mexico."

233 Memorandum from John G. Roberts to Fred F. Fielding re Options for Federal Initiative in the Southwest Border Region (July 29, 1983) at 1.

a draft written interview with a Hispanic publication, suggesting that it include a reference to Administration-backed legislation that would provide legalization for a limited number of illegal immigrants. Notwithstanding his comments on the earlier OMB-supported legalization bill, Roberts now suggested that "this audience would be pleased that we are trying to grant legal status to their illegal amigos."[234]

Native Americans' Rights: Roberts similarly displayed a troubling attitude toward issues concerning Native Americans' rights. Despite consistent U.S. policy of treating Native American tribal governments as sovereign, Roberts wrote in early 1983 that he found the practice "objectionable as a policy matter."[235] Later that year, while acknowledging that he had no legal objection to a bill recommended by OMB to resolve an Indian land claim, he derisively commented that the bill "essentially does nothing more than take money from you, me, and everyone else and give it to 143 people in Nevada…simply because they want it."[236] In July 1984, he sarcastically commented on the resolution of another Indian land claim that "if OMB wants to give away $7.5 million worth of Federal land, there is no legal bar to its doing so."[237] Several months later, he characterized the settlement of an Indian tribe claim recommended by OMB and the Departments of Justice and Interior as "another Indian giveaway."[238]

Fair Housing: While in the White House, Roberts also sought to slow progress on combating discrimination in housing. He argued that the Administration should "go slowly" on proposed fair housing legislation, claiming that such legislation represented

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234 Memorandum from John G. Roberts to Fred F. Fielding re Presidential Interview with Spanish Today (Sept. 30, 1983) (emphasis in original).

235 Memorandum from John G. Roberts to Fred F. Fielding re Enrolled Bill H.R. 5470 (January 10, 1983).

236 Memorandum from John G. Roberts to Fred F. Fielding re Enrolled Bill H.R. 3765 (Nov. 30, 1983).

237 Memorandum from John G. Roberts to Fred F. Fielding re S. 2403 (July 3, 1984).

238 Memorandum from John G. Roberts to Fred F. Fielding re Enrolled Bill S. 1735 (Sept. 26, 1984).

"[g]overnment intrusion."[239] In 1988, President Reagan proudly signed far-reaching fair housing legislation, which was enacted with overwhelming bipartisan support.[240]

Combating Practices with Discriminatory Effects: As discussed above, Roberts played a major role in trying to help stop Congress from restoring the principle that actions with discriminatory effects in voting violate federal law. But Roberts' strong advocacy against protecting discrimination victims from conduct with discriminatory effects did not stop in the voting area. In 1982, he objected to efforts by the Solicitor General allegedly seeking to expand the effects test in employment discrimination cases.[241] In complaining about "government intrusion" through fair housing legislation in 1983, he specifically pointed to the "effects test."[242] In 1984, he objected to proposed Administration testimony referring to school discipline as a "civil rights issue" because of the disproportionate impact of school violence on minority students, making a very revealing comment. "The basis of our whole effort in the civil rights area," Roberts wrote, "has been to move away from contentions that disparate impacts are evidence of discrimination."[243]

This view by Roberts undercuts the very basis of federal civil rights law and enforcement. The courts have long recognized that Congress' bipartisan intent in enacting laws against discrimination in such areas as housing, employment, and voting was to combat the "consequences" of discrimination, "not simply the motivation,"[244] since even discrimination not caused by blatant prejudice "can be as disastrous and unfair to private

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[239] Memorandum from John G. Roberts to Fred F. Fielding re Fair Housing (January 31, 1983).

[240] National Council on Disability. "Reconstructing fair housing" 11/6/01 at www.ncd.gov/newsroom/publications/2001/fairhousing.htm (last visited 8/29/05).

[241] Memorandum from John Roberts to the Attorney General re Solicitor General Briefs in EEOC Cases (June 16, 1982).

[242] Memorandum from John G. Roberts to Fred F. Fielding re Fair Housing (Jan. 31, 1983).

[243] Memorandum from John G. Roberts to Fred F. Fielding re Statement of Alfred S. Regnery (Jan. 24, 1984) at 1.

[244] See *Griggs v. Duke Power Co.,* 401 U.S. 424, 432 (1971) (employment).

rights and the public interest as the perversity of a willful scheme."[245] In addition, focus on discriminatory effects or disparate impact is important in proving discrimination; as one court cogently observed, "clever men may easily conceal their motivations" in discrimination cases.[246] Roberts' expressed belief that disparate impact should not even be "evidence of discrimination" could not be more troubling. A Supreme Court justice with that view would threaten civil rights protections for all Americans.

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245 *United States v. City of Black Jack,* 508 F.2d 1179, 1185 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (quoting *Hobson v. Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967), aff'd, 408 F.2d 175 (1969)); WCL Report at 630-31.

246 *Black Jack*, 508 F.2d at 1185.

III. PRIVACY, REPRODUCTIVE CHOICE AND OTHER CONSTITUTIONAL LIBERTIES

One of the most crucial roles of the Supreme Court is interpreting and enforcing constitutional provisions that protect individual liberty, such as the right to privacy, reproductive choice, and religious liberty. Justice O'Connor has been a critical swing vote in cases concerning these issues, sometimes siding with justices who have voted to restrict such rights, but often providing the crucial fifth vote that has preserved key constitutional liberties for all Americans. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914 (2000)(5-4 decision overturning State law restricting abortion rights); *Lee v. Weisman*, 505 U.S. 577 (1992) (5-4 decision upholding principle of government neutrality toward religion and ruling unconstitutional school-sponsored prayer at high school graduations). The evidence is clear, however, that replacing Justice O'Connor with John Roberts would swing the Supreme Court far to the right on such issues, threatening reproductive choice, the right to privacy, religious liberty, and other key constitutional protections for all Americans.

A. RIGHTS TO PRIVACY AND REPRODUCTIVE FREEDOM

Privacy -- the right to be left alone, the right to be free of government intrusion into the most personal, important and intimate aspects of human existence -- is a right cherished by most Americans. As a constitutional matter, however, privacy is a right protected by only the narrowest of margins on the Supreme Court. For example, Justice O'Connor provided the critical fifth vote in *Stenberg v. Carhart*, 530 U.S. 914 (2000), in which the Court overturned a state law that would have had the effect of banning abortion as early as the 12th week of pregnancy and that lacked any exception to protect a woman's health.

Although Justice O'Connor's record in privacy cases has been mixed, the record strongly indicates that Roberts would be a far more reliable vote for the Court's right wing on these issues and that replacing O'Connor with Roberts would turn the Court

decidedly to the right. Indeed, religious right attorney Jay Sekulow of Pat Robertson's American Center for Law and Justice, referring specifically to *Stenberg* and two other cases that he believes the Court wrongly decided (upholding affirmative action and striking down a government display of the Ten Commandments), recently stated that, with Roberts on the Court, "you will see a sizeable shift, and the case could definitely go the other way."[247]

- **Roberts' record strongly indicates that he does not believe the Constitution protects a right to privacy**

There are strong indications in Roberts' record that he does not recognize a constitutional right to privacy, and also that he would vote to overturn *Roe v. Wade* if he were confirmed.

In a December 1981 memorandum to Attorney General William French Smith, Roberts wrote disparagingly of the constitutional right to privacy, referring to it as the "so-called 'right to privacy.'"[248] The memorandum concerned an article by Erwin Griswold in which Roberts informed Smith that Griswold argued "as we have that such an amorphous right is not to be found in the Constitution. He specifically criticizes *Roe v. Wade*."[249] Roberts' characterization of the right to privacy as "so-called" strongly suggests that he does not interpret the Constitution as containing and protecting such a right.

Further evidence that Roberts holds this very harmful view of the Constitution is found in a document entitled "Draft Article on Judicial Restraint" contained in Roberts' Department of Justice files from the Reagan Administration. The article condemns what it calls judicial activism; according to its text, it appears to have been prepared for the

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247 *Hugh Hewitt Show,* Transcript of Hugh Hewitt interview with Jay Sekulow (Aug. 16, 2005) (emphasis added), available at <http://hughhewitt.com/archives/2005/08/14-week/index.php#a000085> (visited Aug. 17, 2005).

248 Memorandum from John Roberts to the Attorney General re Erwin Griswold Correspondence (Dec. 11, 1981).

249 Id.

Journal of the American Bar Association ("ABA"). While this draft does not bear Roberts' name, a memorandum also in Roberts' files dated Nov. 30, 1981 to Roberts from Associate Deputy Attorney General Bruce E. Fein re "ABA Article on Judicial Activism" provides a suggested insert to Roberts for "your draft article on judicial activism."[250] Fein was recently asked about the authorship of the draft article and stated that "'my judgment is yes, that John wrote it.'"[251] In addition, Senate Judiciary Chairman Arlen Specter apparently accepts that the draft article was written by Roberts.[252]

In this draft article, Roberts criticizes courts for "arrogat[ing] to themselves functions reserved to the legislative branch or the states . . . through so-called 'fundamental rights' and 'suspect class' analyses . . . ."[253] (Note again the use of the adjective "so-called," indicating that Roberts does not believe such rights are protected by the Constitution. Interestingly, in the article as published under the Attorney General's name, the dismissive "so-called" was removed.[254]) In the draft, Roberts goes on to state:

> It is of course difficult to criticize "fundamental rights" in the abstract. <u>All of us, for example, may heartily endorse a "right to privacy." That does not, however, mean that courts should discern such an abstraction in the Constitution</u>, arbitrarily elevate it over other constitutional rights and powers by attaching the label "fundamental," and then resort to it as, in the words of one of Justice Black's dissents, "a loose, flexible, uncontrolled standard for holding laws unconstitutional." *Griswold v. Connecticut*, 381 U.S. 479, 521 (1965). The broad

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250 Memorandum from Bruce E. Fein to John Roberts re ABA Article on Judicial Activism (Nov. 30, 1981).

251 Mike Allen and R. Jeffrey Smith, "Judges Should Have 'Limited' Role, Roberts Says," *Washington Post*, A05 (Aug. 3, 2005).

252 Letter from Hon. Arlen Specter to Hon. Patrick J. Leahy (Aug. 10, 2005), numbered paragraph (3) (identifying as one of Roberts' writings "[a]n extensive draft of an article on judicial restraint prepared by John Roberts for submission by Attorney General William French Smith to the American Bar Association Journal on judicial restraint, which criticized the concept of 'fundamental rights' not found in the Constitution's text, citing *Griswold v. Connecticut* (1965) as an example").

253 Draft Article on Judicial Restraint, at 4.

254 William French Smith, "Urging Judicial Restraint," *ABA Journal* (Jan. 1982).

range of rights which are now alleged to be "fundamental" by litigants, with only the most tenuous connection to the Constitution, bears ample witness to the dangers of this doctrine.[255]

As this draft article itself underscores, if Roberts does not believe in a constitutional right to privacy, this would have profound implications not only in the area of reproductive freedom but also in other matters going to the core of individual rights and human dignity. For example, in *Griswold v. Connecticut*, cited in the draft article, the Supreme Court invoked the right to privacy in holding that a state could not prohibit married couples from using contraceptives. (Note that Roberts' draft article approvingly cited Justice Black's dissent in *Griswold*.) And in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court struck down state laws that criminalized sex between consenting adults in private, a case particularly critical to the civil rights of gay men and lesbians. In its ruling, the Court in *Lawrence* relied heavily on its prior cases recognizing a constitutional right to privacy, including *Griswold* and *Roe v. Wade*. In addition, according to Justice Scalia, who does not believe in a constitutional right to privacy concerning reproduction or bodily integrity whatsoever, a fully competent adult has absolutely no constitutional right to refuse unwanted medical treatment. *Cruzan v. Missouri Department of Health*, 497 U.S. 261, 293-301 (1990) (Scalia, J., concurring).

- **Roberts has a record of hostility toward women's reproductive freedom**

In addition to the fact that Roberts appears not to believe in a constitutional right to privacy in general, he has a specific record of hostility to women's reproductive freedom and in fact has sought to have the Supreme Court overturn *Roe v. Wade*. In 1990, for example, Roberts, then Principal Deputy Solicitor General in the first Bush Administration, co-authored a brief for the government in *Rust v. Sullivan*, 500 U.S. 173 (1991). *Rust* concerned the so-called "gag rule" that prohibited federally funded family planning clinics from discussing the option of abortion with patients, and did not directly

[255] Draft Article on Judicial Restraint, at 5 (emphasis added).

concern the validity of *Roe* itself. Nonetheless, Roberts' brief argued that "[w]e continue to believe that *Roe* was wrongly decided and should be overruled . . . [T]he Court's conclusion[] in *Roe* that there is a fundamental right to an abortion . . . find[s] no support in the text, structure, or history of the Constitution."[256]

Roberts' supporters have attempted to dispel any suggestion that this brief represented Roberts' own views that *Roe* is invalid and should be overturned, claiming that he was merely a lawyer representing a client. To the contrary, as discussed above, Roberts was far more than that; he was a high level political appointee in the Solicitor General's Office, chosen specifically to advance the Administration's ideological agenda in the Supreme Court. Given Roberts' position as the Political Deputy Solicitor General, it is fair to conclude that Roberts shared the ideology of the Administration, including on abortion. This was recently confirmed by Bruce Fein, "'who worked closely with Roberts at the Justice Department.'"[257] According to Fein, "'I know he [Roberts] thought *Roe* was totally ill-reasoned and extra-constitutional. Everyone in the department did -- we talked about it.'"[258]

Any possible doubts that Roberts was not expressing his own views that *Roe* should be overturned are further dispelled by the outpouring of support that Roberts' nomination to the Supreme Court has received from anti-choice organizations and advocates. For example, the radical anti-choice group Operation Rescue praised President Bush for "being a man of his word by appointing a judge that will respect the Right to Life. . . ."[259] And Joe Scheidler, the National Director of the Pro-Life Action League, proclaimed that Roberts is "exactly the kind of judge I want to appear before

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[256] Brief for the Respondent, *Rust v. Sullivan*, Nos. 89-1391, 89-1392, 1989 U.S. Briefs 1391 (1990), at *7. Although the majority upheld the rules at issue in *Rust*, it did not even mention Roberts' argument that it should overturn *Roe* and thus uphold the rules.

[257] Amy Goldstein and Jo Becker, "Memo Cited 'Abortion Tragedy,'" *Washington Post*, A01 (Aug. 16, 2005).

[258] Id. Records of the Solicitor General's Office regarding *Rust v. Sullivan* are among those sought by Senate Judiciary Committee Democrats in connection with their consideration of Roberts' nomination.

[259] Operation Rescue Press Release, July 19, 2005, <http://www.earnedmedia.org/or20719.htm> (visited Aug. 16, 2005).

when I bring my case to the Supreme Court. . . I encourage all advocates for life to strongly support his nomination."[260]

Some of Roberts' supporters, attempting to dispel the notion that his confirmation would threaten *Roe v. Wade*, have pointed to his 2003 Senate Judiciary Committee testimony in connection with his appellate court nomination that *Roe* is "settled law."[261] This effort is unavailing, since Roberts was referring to *Roe* in the context of his nomination to a lower court, which is required to follow Supreme Court precedent. If confirmed to the Supreme Court, however, Roberts would be free to attempt to overturn that precedent, as he had urged the Court to do in 1990. Indeed, this was specifically confirmed by Attorney General Alberto Gonzales, who, when recently asked in an interview with the Associated Press about Roberts' 2003 testimony that *Roe* was "settled law" replied, "'If you're asking a circuit court judge, like Judge Roberts was asked, yes, it is settled law because you're bound by the precedent. … If you're a Supreme Court justice, that's a different question because a Supreme Court justice is not obliged to follow precedent if you believe it's wrong.'"[262]

In another case involving the right of women to reproductive choice, Roberts weighed in on the side of those trying to prevent women from exercising that right, and did so by urging a narrow interpretation of federal civil rights laws. In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), Roberts, then the Principal Deputy Solicitor General, co-authored an *amicus curiae* brief for the United States and argued in the Supreme Court on the side of Operation Rescue and six individuals who were part of a nationwide campaign to obstruct access to reproductive health care clinics.

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260 Pro-Life Action League Press Release, July 20, 2005 <http://www.earnedmedia.org/plal0720.htm> (visited Aug. 16, 2005).

261 Hearings Before the Committee on the Judiciary, 108th Cong., 1st Sess. (Apr. 30, 2003), available at < http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.52&filename=92548.wais&directory=/disk2/wais/data/108_senate_hearings> (visited Aug. 25, 2005).

262 Dan Eggen, "Roberts's Right to Vote Against Roe is Defended; Gonzales Cites High Court's Special Role," *Washington Post*, A06 (July 27, 2005).

Bray was brought by clinics that perform abortions and organizations supporting reproductive choice for women, asserting that Operation Rescue and the individual defendants had violated a federal civil rights statute -- the Civil Rights Act of 1871 (also called the Ku Klux Klan Act) -- which was passed to prohibit mobs from preventing Americans from exercising their constitutional rights. The Act provides a federal cause of action against persons who conspire to deprive "any person or class of persons of the equal protection of the laws . . . ." 506 U.S. at 267, n. 1 (quoting 42 U.S.C. § 1985 (3)). In *Bray*, a federal district court in Virginia ruled in favor of the clinics, holding that the blockaders had violated the Act by "conspiring to deprive women seeking abortions of their right to interstate travel." 506 U.S. at 267. The Fourth Circuit affirmed. Id.

In his oral argument before the Supreme Court in *Bray*, Roberts stated that "[t]he United States appears in this case not to defend petitioners' tortious conduct, but to defend the proper interpretation of [the Civil Rights Act]."[263] In his brief, Roberts argued that, under Supreme Court precedent, the claim against Operation Rescue required a showing of a "class-based, invidiously discriminatory animus" on the part of the conspirators.[264] Roberts' brief further contended that the blockaders' conduct did not constitute discrimination against women, "even though only women can have abortions,"[265] and that the Civil Rights Act therefore did not apply. As he had done in other circumstances, Roberts thus sought again to limit the scope of federal civil rights laws, here to the detriment of women seeking to exercise their constitutional right to reproductive choice by removing federal protections that had been critical to their access to clinics. As the City of Falls Church, Virginia, explained to the Supreme Court in its own *amicus* brief in *Bray* filed in support of the reproductive health clinics, the local

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[263] Transcript of Oral Argument, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (Oct. 6, 1992) (on reargument).

[264] Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Bray v. Alexandria Women's Health Clinic*, No. 90-985, 1990 U.S. Briefs 985 (Apr. 11, 1991), at *3.

[265] Id.

police force had not been able to "combat effectively the military-style tactics of these blockades."[266]

The United States was not a party in *Bray* and need not have filed a brief, yet chose to weigh in on the side of Operation Rescue and use the case as a means of narrowing the reach of federal civil rights laws. The decision by the Solicitor General's office to file an *amicus* brief in the Supreme Court is of great consequence. Roberts himself has acknowledged the importance to a litigant of having the United States file an *amicus* brief on its side: "One of the most significant advantages a litigant before the Supreme Court can gain is to have the United States support its position."[267]

Notably, Operation Rescue was represented in *Bray* by religious right attorney Jay Sekulow of Pat Robertson's American Center for Law and Justice. Sekulow was counsel to parties in other cases in which Roberts filed *amicus* briefs on behalf of the United States in support of Sekulow's clients, including *Lee v. Weisman*, discussed below, in which Roberts joined Sekulow in seeking to have the Supreme Court uphold school-sponsored prayer. Pat Robertson recently stated in support of Roberts' nomination to the Supreme Court that Roberts "was at the top of the list of candidates that the staff at the American Center of [sic] Law and Justice compiled."[268]

Several months after the government filed its brief in *Bray*, and while *Bray* was still pending in the Supreme Court, the Bush Administration again weighed in on the side of Operation Rescue, this time in a highly charged case in Wichita, Kansas, where, in July 1991, as described on the MacNeil/Lehrer NewsHour:

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[266] Brief for Falls Church, Virginia as *Amicus Curiae* in Support of Respondents, *Bray v. Alexandria Women's Health Clinic*, No. 90-985, 1990 U.S. Briefs 985 (May 13, 1991), at *2 (May 13, 1991).

[267] John G. Roberts, Jr., "Riding the Coattails of the Solicitor General," *Legal Times* (Mar. 29, 1993), reprinted in *Legal Times*, at 60 (Aug. 15, 2005).

[268] Pat Robertson Comments on President Bush's Supreme Court Nomination, July 20, 2005 <http://www.cbn.com/cbnnews/news/050720b.asp> (visited Aug. 16, 2005).

> hundreds of demonstrators from the militant anti-abortion group Operation Rescue blocked entrances to two abortion clinics. On July 23, U.S. District Judge Patrick Kelly issued an order barring Operation Rescue from blockading the clinics or physically harassing patients and staff. Police have made more than 1900 arrests in the protests. Many demonstrators have been arrested repeatedly. On Monday, Judge Kelly went a step further, strengthening the injunction by ordering federal marshals to help keep the clinics [open]. Yesterday, patients were able to enter the clinics freely for the first time in weeks. But later in the day, the Justice Department weighed in on the side of the anti-abortion forces, arguing that Judge Kelly had exceeded his authority. Randall Terry, founder of Operation Rescue, said he was pleased to have the Bush Administration on his side.[269]

An incensed Judge Kelly "lambasted the Administration on two network television programs, saying he was 'disgusted' by what he saw as a 'political' action calling for a 'license for mayhem.'"[270] Roberts, who said at the time that "he participated in the decision to intervene in Wichita, said that 'politics had nothing to do with it.'"[271]

Roberts appeared on the MacNeil/Lehrer broadcast to defend the government's action, stating that the federal marshals would carry out the court's order but that the court had no authority to issue it. Repeating the arguments he had made in *Bray*, Roberts said, "people who are against abortion are not discriminating against women. It's a different issue."[272] Roberts continued, "We just think that the federal court is not the proper place for this case. It should be in state court and it may be appropriate for the state court to issue an injunction against these activities. We take no position on that. Our position is simply that this is not within the federal court's jurisdiction."[273]

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269 Transcript, The MacNeil/Lehrer NewsHour (Aug. 7, 1991).

270 Aaron Epstein and Angelia Herrin, "Thornburgh OKD Abortion-Case Intervention," *Philadelphia Inquirer, A01* (Aug. 8, 1991).

271 Aaron Epstein and Angelia Herrin, "Thornburgh OKD Abortion-Case Intervention," *Philadelphia Inquirer,* A01 (Aug. 8, 1991).

272 Transcript, The MacNeil/Lehrer NewsHour (Aug. 7, 1991) (emphasis added).

273 Id.(emphasis added).

Constitutional law scholar Laurence Tribe, also appearing on the MacNeil/Lehrer broadcast, took Roberts to task, not only for his argument that obstruction of abortion clinics did not involve discrimination against women but in particular for Roberts' efforts to prevent the federal courts from enforcing women's right to reproductive choice against such obstruction. Tribe explained:

> [T]he suggestion that one shouldn't make a federal case out of it, just go to state court, is not nearly as simple as it sounds. This is exactly the argument -- the argument about going to state court -- that was made in Little Rock, Arkansas, in 1957, when federal courts were taking the locally unpopular position of enforcing desegregation orders and when the argument was made that the federal courts had no business doing exactly that. That took a while but President Eisenhower finally saw the light and exerted the legal and moral leadership in saying that because federal rights were at stake, this did, indeed, belong in federal court. … And if he hadn't done that, there might have been bloodshed.[274]

The Supreme Court did not decide *Bray* until 1993. In a 6-3 ruling, the Court majority, in an opinion by Justice Scalia, adopted Roberts' argument that the Civil Rights Act did not apply to the blockading of abortion clinics because such conduct was not prompted by discriminatory animus toward women, and women seeking abortions were not a class protected by the law.

Justices O'Connor, Blackmun, and Stevens dissented. According to Justice Stevens' dissent, which Justice Blackmun joined, the aim of Operation Rescue was "to deny every woman the opportunity to exercise a constitutional right that only women possess." 506 U.S. at 324. Further, the Court had "ignore[d] the obvious (and entirely constitutional) congressional intent behind [§] 1985(3) to protect this Nation's citizens from what amounts to the theft of their constitutional rights by organized and violent mobs across the country." 506 U.S. at 309. Justice O'Connor wrote a dissent, also

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274 Id.

joined by Justice Blackmun, in which she stated that "This case is not about abortion. . . Rather, this case is about whether a private conspiracy to deprive members of a protected class of legally protected interests gives rise to a federal cause of action." 506 U.S. at 354-55. Justice O'Connor explained that Operation Rescue and the other defendants

> act in organized groups to overwhelm local police forces and physically blockade the entrances to respondents' clinics with the purpose of preventing women from exercising their legal rights. [The Civil Rights Act] provides a federal remedy against private conspiracies aimed at depriving any person or class of persons of the "equal protection of the laws," or of "equal privileges and immunities under the laws." In my view, respondents' injuries and petitioners' activities fall squarely within the ambit of this statute.

506 U.S. at 345.

Congress responded to *Bray* by enacting the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, to protect women and health care providers from harassment and violence. Recognizing the importance of federal enforcement of a woman's right to choose, Congress made it a federal offense to obstruct access to abortion clinics and provided a cause of action in federal court for those whose rights under FACE have been violated. Once again, as it did after *Grove City*, Congress had to pass new legislation to remedy the great harm caused by a Supreme Court ruling that Roberts had either supported or affirmatively urged.

Recently, attorney Deborah Ellis, who represented the abortion clinics in *Bray*, wrote this about the government's intervention in the case: "To be fair, in Roberts's Supreme Court argument he pointed out that the Justice Department was defending the proper interpretation of the 1871 law, not Operation Rescue's unlawful conduct. But no courtroom caveat can erase the impact of the federal government's lending its weight on

the side of the mob intent on stopping women from exercising a constitutional right. It was a devastating blow."[275]

B. RELIGIOUS LIBERTY AND CHURCH-STATE SEPARATION

The First Amendment guarantees religious liberty and freedom of conscience to every American. It ensures that no American can be required to adhere to any particular religious faith, or to any faith at all. This precious liberty, however, hangs precariously in the balance on a very divided Supreme Court. Justice O'Connor has been a key vote in Establishment Clause cases, and more than once has cast the critical fifth vote in 5-4 decisions that have preserved religious liberty for all Americans. See, e.g., *McCreary County v. ACLU of Kentucky,* 125 S. Ct. 2722 (2005) (5-4 decision striking down county courthouse displays of the Ten Commandments created for the impermissible government purpose of advancing religion), and *Lee v. Weisman*, 505 U.S. 577 (1992) (5-4 ruling holding school-sponsored prayer at public school graduations to be unconstitutional).

It is clear that replacing Justice O'Connor with John Roberts would move the Court well to the right on issues of religious liberty. Roberts' record indicates that he interprets the Establishment Clause in a manner that would allow government to favor religion and interfere with Americans' freedom of conscience. Indeed, Roberts has participated in efforts to undermine religious liberty and the separation of church and state. In the White House Counsel's Office, Roberts expressed troubling views concerning the Establishment Clause that as an advocate in subsequent positions he later urged on the courts. If he were to be confirmed to the Supreme Court, Roberts would be in a position to implement these harmful views of the Constitution. In fact, Jay Sekulow, head of Pat Robertson's American Center for Law and Justice, has reassured his right wing base that he knows Roberts, has worked with Roberts, and that Roberts'

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[275] Deborah Ellis, "Questions for John Roberts," *Washington Post*, A13 (Aug. 17, 2005).

confirmation would create a "sizeable shift" in the Court in a number of areas, including the Establishment Clause.[276]

As Associate White House Counsel, Roberts on June 4, 1985 wrote a memorandum to Fred Fielding concerning *Wallace v. Jaffree*, 472 U.S. 38 (1985), which had just been decided by the Supreme Court.[277] In *Jaffree*, the Court in a 6-3 ruling struck down an Alabama statute authorizing public schools to begin the day with a minute of silence for "meditation or voluntary prayer." This statute had been enacted even though the state already had a law authorizing a minute of silence in public schools for "meditation." The sponsor of the new law expressly stated that "the legislation was an 'effort to return voluntary prayer' to the public schools." 472 U.S. at 57. Given this legislative history, as well as the existing law, the Court concluded that the only purpose for the new statute was to encourage children to use the moment of silence to pray, a religious purpose that rendered the law unconstitutional.

In so holding, the Court applied criteria long used by it to determine the constitutionality of challenged laws and practices under the Establishment Clause. Because these criteria were collected in a case called *Lemon v. Kurtzman*, 403 U.S. 602 (1971), their application has come to be called "the *Lemon* test." Among other things, this test requires that a law or government practice "must be invalidated if it is entirely motivated by a purpose to advance religion," the flaw in the statute at issue in *Jaffee*. 472 U.S. at 56.

Then-Justice Rehnquist was one of the dissenters in *Jaffree*. In a long dissenting opinion that went well beyond an examination of the Alabama law at issue, Rehnquist attacked the Court's Establishment Clause jurisprudence itself and the very concept of a wall of separation between church and state. Among other things, Rehnquist wrote that

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[276] *Hugh Hewitt Show,* Transcript of Hugh Hewitt interview with Jay Sekulow (Aug. 16, 2005), available at <http://hughhewitt.com/archives/2005/08/14-week/index.php#a000085> (visited Aug. 17, 2005).

[277] Memorandum from John G. Roberts to Fred F. Fielding re *Wallace v. Jaffree* (June 4, 1985).

"[t]here is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in *Everson*." 472 U.S. at 106 (referring to *Everson v. Board of Education*, 330 U.S. 1 (1947)). Rehnquist saw no constitutional basis for requiring government neutrality toward religion -- a fundamental premise that has guided the Court's Establishment Clause jurisprudence -- and, as Roberts described it, "called for abandoning the *Lemon* test . . . ."[278]

In Roberts' memo to Fielding about *Jaffree*, Roberts speculated that, given the length of Rehnquist's dissent, it had originally been written as a majority opinion in which Rehnquist not only "had five votes to uphold the statute" but also "tried to use the occasion to go after the bigger game of the *Lemon* test itself."[279] Roberts concluded that Rehnquist had lost the majority because of his sweeping effort to overturn long-standing Supreme Court precedent concerning the Establishment Clause, an effort that Roberts wrote of with approval:

> Thus, as I see it, Rehnquist took a tenuous five-person majority and tried to revolutionize Establishment Clause jurisprudence, and ended up losing the majority. Which is not to say the effort was misguided. In the larger scheme of things what is important is not whether this law is upheld or struck down, but what test is applied.[280]

Roberts informed Fielding that he had attached to his memo "press guidance" about the case, adding that "there is nothing positive in the opinion for prayer, only for a moment of silence."[281] The "press guidance" stated, "The opinions in *Wallace v. Jaffree* demonstrate the need to continue to push for a school prayer amendment."[282]

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278 Id. at 2.

279 Id.

280 Id. (emphasis added).

281 Id. at 2.

282 Memorandum from Fred F. Fielding to Russell Mack re *Wallace v. Jaffree* (June 4, 1985), accompanying Memorandum from John G. Roberts to Fred F. Fielding re *Wallace v. Jaffree* (June 4, 1985).

Several months later, Roberts wrote that he would have "no objection" to an announcement by the Department of Justice in support of a proposed constitutional amendment "to permit 'individual or group silent prayer or reflection in public schools.'"[283] According to Roberts, "[m]any who do not support prayer in school support a 'moment of silence' . . . and the conclusion in *Jaffree v. Wallace* that the Constitution prohibits such a moment of silent reflection -- or even silent 'prayer' -- seems indefensible."[284] Roberts' support for such a constitutional amendment is disturbing for several reasons. First, students were then as they are now free to pray silently at any time, just as they may engage in any other silent thought during the school day. No constitutional amendment is or was needed. Moreover, Roberts' characterization of the holding in *Jaffree* as prohibiting a moment of silent reflection was disingenuous, as his own June 4, 1985 memo to Fielding underscores. In that earlier memo, Roberts correctly explained that the Alabama law in question was "struck down because of the peculiarities of the particular legislative history, <u>not because of any inherent constitutional flaw in moment-of-silence statutes</u>."[285]

Additional indications of Roberts' troubling interpretation of the Establishment Clause can be found in another memorandum that he wrote to Fred Fielding in August 1985 in the White House Counsel's Office.[286] Roberts wrote the memo in response to a request that the Office comment on a proposed speech by Education Secretary William Bennett to be delivered to the Supreme Council of the Knights of Columbus. Roberts noted in his memo that an initial draft of the speech had already been criticized by someone else in the White House as "too divisive," and that the current draft was a "considerably toned down version."[287]

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[283] Memorandum from John G. Roberts to Fred F. Fielding re S.J. Res. 2 -- Constitutional Amendment to Permit Silent Prayer in Schools (Nov. 21, 1985).

[284] <u>Id</u>.

[285] Memorandum from John G. Roberts to Fred F. Fielding re *Wallace v. Jaffree*, at 1 (June 4, 1985) (emphasis added).

[286] Memorandum from John G. Roberts to Fred F. Fielding re Address by Secretary Bennett to Supreme Council Meeting of Knights of Columbus (Aug. 6, 1985), and attached draft Bennett speech (dated Aug. 7, 1985).

[287] Memorandum from John G. Roberts to Fred F. Fielding re Address by Secretary Bennett to Supreme Council Meeting of Knights of Columbus (Aug. 6, 1985).

The "toned down" draft speech that Roberts reviewed was a scathing criticism of the Supreme Court, which Bennett asserted was hostile to religion. Bennett contended in the speech that American democracy and what Bennett called "the Judeo-Christian tradition" are intertwined. According to the speech,

> No one demands doctrinal adherence to any religious beliefs as a condition of citizenship . . . But at the same time we should not deny what is true: that from the Judeo-Christian tradition come our values, our principles, the animating spirit of our institutions. That tradition and our tradition are entangled. They are wedded together. When we have disdain for our religious tradition, we have disdain for ourselves.[288]

And "borrowing words used during the consecration at a Roman Catholic mass,"[289] the speech stated, "Our values as a free people and the central values of the Judeo-Christian tradition are flesh of the flesh, blood of the blood."[290]

A good portion of the speech, as Roberts' memo noted, was "a discussion of Supreme Court establishment clause cases as examples of a new sort of aversion to religion."[291] Bennett's speech decried "almost four decades of misguided Court decisions, intensifying in the last twenty or so years."[292] As Roberts further noted, "*Stone v. Graham*, a decision holding unconstitutional the posting of the Ten Commandments in Kentucky schools," was one of the cases that Bennett "singled out for criticism. There is

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[288] Draft Bennett speech at 12, (emphasis in original), attached to Memorandum from John G. Roberts to Fred F. Fielding re Address by Secretary Bennett to Supreme Council Meeting of Knights of Columbus (Aug. 6, 1985).

[289] "Religious-political Order 'Wedded,' Bennett Says," *Chicago Sun-Times* (Aug. 8, 1985).

[290] Draft Bennett speech at 9, attached to Memorandum from John G. Roberts to Fred F. Fielding re Address by Secretary Bennett to Supreme Council Meeting of Knights of Columbus (Aug. 6, 1985).

[291] Memorandum from John G. Roberts to Fred F. Fielding re Address by Secretary Bennett to Supreme Council Meeting of Knights of Columbus (Aug. 6, 1985) (emphasis added).

[292] Draft Bennett speech at 4, attached to Memorandum from John G. Roberts to Fred F. Fielding re Address by Secretary Bennett to Supreme Council Meeting of Knights of Columbus (Aug. 6, 1985).

general criticism of the chaotic state of establishment clause jurisprudence. Bennett's point is that such decisions betray a hostility to religion not demanded by the Constitution." Roberts then immediately added, "I have no quarrel with Bennett on the merits." He further added "[i]n the interests of full disclosure" that he had clerked for then-Justice Rehnquist when "he filed the lone dissent in *Stone v. Graham*."[293]

That Roberts appears to agree with Bennett's general criticism of "almost four decades" of Supreme Court Establishment Clause jurisprudence and, more specifically, of *Stone v. Graham*, 449 U.S. 39 (1980), as indicating "hostility to religion" is a further indication that Roberts would stand the Establishment Clause on its head, by allowing government to endorse religion and religious belief. In *Stone*, the Supreme Court, as Roberts noted in his memo and well knew from his clerkship, struck down a Kentucky law requiring that a copy of the Ten Commandments be posted in every public school classroom in the state. The Court held that the law had no secular purpose and was therefore unconstitutional. As the Court explained,

> The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths . . . The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder . . . Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.

449 U.S. at 41-2.

Far from evidencing "hostility to religion," the Court specifically recognized in *Stone* that public school students could constitutionally engage in study about the Ten Commandments when "integrated into the school curriculum, where the Bible may

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[293] Memorandum from John G. Roberts to Fred F. Fielding re Address by Secretary Bennett to Supreme Council Meeting of Knights of Columbus (Aug. 6, 1985) (emphasis added).

constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." Id. at 42. In *Stone*, the Court recognized that the Constitution's requirement of government neutrality toward religion requires that a distinction be drawn between instruction undertaken for a religious purpose or to advance religion, and instruction undertaken as part of academic study. In that case, as the Court observed, "[p]osting of religious texts on the wall serves no such educational function." Id.

That Roberts could view the careful balance struck by the Supreme Court in *Stone* as evidencing hostility to religion further indicates that he does not support genuine church-state separation and government neutrality toward religion.[294]

Roberts accurately predicted that Bennett's "remarks will stir up the debate," but added that "I see no purely legal reason to object to them."[295] Disturbingly, Roberts saw no legal problem with a member of the President's Cabinet so blatantly embracing government endorsement of religion generally and particular faiths specifically. Once the speech was delivered, others certainly did. As the press reported, "[c]ivil libertarians reacted sharply to the speech, accusing Bennett of turning his office into a pulpit for his own religious beliefs."[296]

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[294] Indeed, Roberts advised on another occasion changing a draft statement that referred to "'the prohibition against government support of religion'" stating "[t]here is no such prohibition," and recommending that "'support'" be replaced with "'establishment,' to avoid any suggestion of a gloss on the constitutional text." Memorandum from John G. Roberts to Fred F. Fielding re H.R. 1310, at 2 (Aug. 9, 1984) (emphasis added).

[295] Memorandum from John G. Roberts to Fred F. Fielding re Address by Secretary Bennett to Supreme Council Meeting of Knights of Columbus (Aug. 6, 1985).

[296] "Cabinet Officer Says Church, State 'Wedded,'" *Houston Chronicle* (Aug. 8, 1985). Apparently in an effort to mitigate Roberts' record of hostility toward the concept of government neutrality toward religion, some Roberts supporters have pointed to a memorandum that Roberts wrote in May 1985, objecting to the request from a resident of Kentucky that the President endorse a resolution before the Kentucky legislature that would require all public schools in the state to post plaques stating "In God We Trust" as well as the preamble of the state Constitution (giving thanks to "Almighty God for the civil, religious, and political liberties we enjoy"). Memorandum from John G. Roberts to Anita Bevacqua re Message for Kentucky Public Schools (May 24, 1985). In his memo, Roberts stated that it would be "inappropriate" for the President to "interfere" in the consideration of the measure by the state legislature. And, citing *Stone v. Graham*, Roberts also observed that "the resolution raises First Amendment establishment clause concerns . . . and the President should not gratuitously opine on the constitutionality of this

In yet another memorandum written in the White House, Roberts displayed a very flippant attitude to those genuinely concerned about unconstitutional government endorsement of religion, stating the following in his review of a proposed speech by President Reagan:

> In the last paragraph on page 10, the President refers to the role of religion in shaping the American character, noting that most Americans derive their religious belief from the Holy Bible. This formulation strikes me as broad enough to be generally unoffensive (except perhaps to the ACLU) . . . .[297]

Significantly, it appears that Fred Fielding sent a note back to Roberts and directed that the sentence be removed from the President's speech.[298]

When Roberts became the Principal Deputy Solicitor General in the first Bush Administration, he was in a position to urge the Supreme Court to adopt his views of the Establishment Clause -- including his own hostility to the *Lemon* test and to the idea of government neutrality toward religion -- and he did just that. In 1991, Roberts co-authored an *amicus curiae* brief filed by the United States in the case of *Lee v. Weisman*, 505 U.S. 577 (1992), in which he urged the Court to rule that it was constitutional for a public school to sponsor prayer at its graduation ceremonies. While Roberts' brief acknowledged that coerced participation in a religious ceremony was improper, the brief claimed that no such coercion was present here, since students were free not to attend

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specific resolution." All this memo demonstrates is that Roberts, as he did in numerous other instances, provided pragmatic advice for the President, particularly in light of binding Supreme Court precedent. However, if confirmed to the Court, Roberts would be in a position to attempt to overturn that precedent, as Justice Rehnquist did in *Stone v. Graham*.

[297] Memorandum from John G. Roberts to Fred F. Fielding re Proposed Presidential Address: Fudan University (Apr. 13, 1984).

[298] Handwritten note "To John G. Roberts" stating "I have problems w/pg 10 & 11 as noted," on copy of Memorandum from John G. Roberts to Fred F. Fielding re Proposed Presidential Address: Fudan University (Apr. 13, 1984), and Memorandum from Fred F. Fielding to Ben Elliott re Proposed Presidential Address: Fudan University (Apr. 13, 1984) ("Counsel's Office has reviewed the above-referenced remarks. … I recommend deleting the last sentence on page 10").

their graduations: "A voluntary decision not to witness a civic acknowledgment of religion . . . cannot be considered a response to coercion."[299]

In a 5-4 decision authored by Justice Kennedy, the Court rejected Roberts' argument, holding that public schools may not sponsor prayer at graduation ceremonies. The Court specifically noted the coercive nature of the event. While recognizing that students may not formally be required to attend their own graduation ceremonies, the Court likewise recognized that the importance of this event means that attendance is not "voluntary" in "any real sense of the term." 505 U.S. at 595. The Court stated that the government's argument to the contrary "lacks all persuasion," noting that the "[l]aw reaches past formalism." Id. And the Court specifically criticized the government's argument for its erroneous First Amendment analysis:

> The Government's argument gives insufficient recognition to the real conflict of conscience faced by the young student. The essence of the Government's position is that with regard to a civic, social occasion of this importance it is the objector, not the majority, who must take unilateral and private action to avoid compromising religious scruples, hereby electing to miss the graduation exercise. This turns conventional First Amendment analysis on its head. It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to a state-sponsored religious practice.

Id. at 596 (emphasis added).

The government was not a party to this case and need not have filed a brief. Indeed, the asserted "interest" of the United States set out in the brief to justify its filing was questionable.[300] In addition, the defendant school officials were represented by two

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[299] Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Lee v. Weisman*, No. 90-1014, 1990 U.S. Briefs 1014 (1991), at *11.

[300] According to the brief, the United States had a "significant interest" in the case because the government is authorized "to operate primary and secondary schools for military and foreign

of Roberts' Reagan Administration colleagues, Charles J. Cooper and Michael A. Carvin, as well as by religious right advocate Jay Sekulow. (Sekulow was also counsel to Operation Rescue in *Bray*, where Roberts also co-authored an *amicus* brief in support of Sekulow's clients, as discussed above.) There can be little question that the brief was filed by Roberts to advance a right wing ideological agenda that is destructive of genuine First Amendment freedoms. Had the position advocated by Roberts been accepted, students in public schools could have been subjected to religious coercion as the price of attending their own graduation ceremonies.[301]

In addition, playing out the hostility to the *Lemon* test that Roberts had expressed in 1985 when working in the White House Counsel's Office, Roberts' brief urged the Court to jettison the *Lemon* test in favor of "the more general principle implicit in the traditions relied upon in *Marsh* and explicit in the history of the Establishment Clause."[302] In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court upheld the practice of a state legislature of beginning its sessions with non-sectarian prayer, noting that the practice existed when the Constitution was ratified. *Marsh* is a unique case that has never been applied by the Court outside its factual setting and certainly not in the public school context. Roberts' argument that the Court should adopt *Marsh* as a general Establishment Clause rule was not only radical, but it also went far beyond the case at hand.

As a lawyer in private practice, Roberts again was in a position to advance his disturbing views of the Establishment Clause. In *Ehlers-Renzi v. Connelly School of the Holy Child, Inc.*, 224 F.3d 283 (4th Cir. 2000), *cert. denied*, 531 U.S. 1192 (2001), Roberts represented a religious school in defending the constitutionality of a special exemption given by Montgomery County, Maryland, to private or parochial schools

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service dependents under certain circumstances" as well as for Native Americans. In addition, the brief noted that the government conducts "numerous public ceremonies in which religion is acknowledged in some manner." Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Lee v. Weisman*, No. 90-1014 1990 U.S. Briefs 1014 (1991), at *1.

[301] Records of the Solicitor General's Office pertaining to *Lee v. Weisman* are among those sought by Senate Judiciary Committee Democrats in their consideration of Roberts' nomination.

[302] Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Lee v. Weisman*, No. 90-1014, 1990 U.S. Briefs 1014 (1991), at *4.

located on land owned by a church or other religious organization from certain zoning rules applicable to other nonresidential users in residential neighborhoods. Specifically, the nonreligious landowners were required to obtain approval before undertaking construction projects in residential neighborhoods.

In this case, the religious school planned to construct a 30,000 square foot, two story building as well as additional parking areas on its property in a residential neighborhood, without going through the zoning approval process required of nonreligious landowners. Neighbors filed suit challenging the constitutionality of the exemption from the zoning approval process given by the County to religious landowners. The district court held that the exemption was unconstitutional, but in a 2-1 ruling, with Roberts representing the religious school, the Fourth Circuit reversed, holding that the exemption was a permissible accommodation of religion. Judge Murnaghan, dissenting, viewed the exemption as "ordinary favoritism for religious property owners in Montgomery County," forbidden by the Establishment Clause. 224 F.3d at 293.[303]

However one may view the facts or outcome of this particular case, Roberts' brief for the religious school set out an expansive view of "accommodation" that could swallow up the Establishment Clause by permitting the government to accord special rights and favoritism to religion and religious institutions under the guise of mere "accommodation." Indeed, Roberts specifically argued that "efforts to accommodate religion are invariably constitutional when the State simply chooses to relieve religious institutions of burdens placed on secular elements of society or society at large."[304] While legal arguments made by a lawyer in private practice cannot necessarily be

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[303] See also "Recent Cases: *Ehlers-Renzi v. Connelly School of the Holy Child, Inc.*," 114 Harv. L. Rev. 932, 939 (Jan. 2001) ("The Ehlers-Renzi court misapplied the second prong of the Lemon test by holding that the exemption from the zoning ordinance does not have the effect of impermissibly assisting religion. . . Whether the zoning ordinance is characterized as a subsidy or an exemption, its obvious consequence is that religious institutions benefit as a direct result of state action, while nonreligious institutions do not. Such preferential treatment violates both the letter and spirit of the Establishment Clause.").

[304] Brief for Appellant, *Renzi v. Connelly School of the Holy Child, Inc.*, No. 99-2352, 2000 WL 33982797 (4th Cir.) (Jan. 20, 2000), at 9 (Westlaw pagination, emphasis added).

assumed to be the lawyer's own legal views, it likewise cannot be assumed that they are not, particularly where, as here, they appear to be in accord with positions advocated by the lawyer in other instances.

Indeed, the hostility that Roberts' brief in *Renzi* expressed toward the *Lemon* test echoes that expressed in his brief in *Lee v. Weisman*, as did the tenor of acceptance of government favoritism of religion by calling it "accommodation." Roberts' brief in *Renzi* reinforces the conclusion from the rest of his record that he holds disturbing views of the Establishment Clause and would allow government favoritism and sponsorship of religion and religious belief.

There can be no serious question that Roberts' confirmation to the Court would shift the Court far to the right in cases involving religious liberty. Indeed, as noted above, religious right activist Jay Sekulow of the ACLJ has as much as assured his supporters that this will be the case.[305] In fact, Sekulow is confident that if Roberts had been on the Court last spring when it struck down government displays of the Ten Commandments in county courthouses because the displays had been created for the unconstitutional purpose of promoting religion, the Court would have upheld the displays:

> I definitely think that a John Roberts on the Court, with his view of the establishment clause, would have come out the other way on that. We would have carried the day.[306]

That case, *McCreary County v. ACLU of Kentucky***,** 125 S. Ct. 2722 (2005), was decided by a 5-4 vote, with Justice O'Connor in the majority, underscoring the enormous difference that Roberts would make in the outcome of cases such as this, and just how much is at stake with this nomination.

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[305] See, e.g., *Hugh Hewitt Show,* Transcript of Hugh Hewitt interview with Jay Sekulow (Aug. 16, 2005), available at <http://hughhewitt.com/archives/2005/08/14-week/index.php#a000085> (visited Aug. 17, 2005).

[306] Id. (emphasis added).

C. OTHER CIVIL LIBERTIES ISSUES

As discussed above, Roberts' record strongly indicates that he does not believe in a constitutional right to privacy, which he has written of dismissively by characterizing it as "so-called."[307] In addition, the record indicates that Roberts has leveled a similar criticism at the Supreme Court's recognition of "so-called 'fundamental rights'" that Roberts apparently believes are not found within the text of the Constitution, and the recognition of which he apparently considers to be judicial activism.[308] Apparently, in addition to privacy, this also includes what Roberts has dismissed as "the so-called 'fundamental right to travel.'"[309] As a Supreme Court justice, Roberts would be in a position to reconsider more than 60 years of Supreme Court jurisprudence protecting fundamental rights, threatening the liberty of all Americans.

Roberts' record reflects his consideration of several specific issues regarding civil and constitutional liberties, in addition to those discussed above, that raises additional troubling concerns. For example, as Associate White House Counsel, Roberts in 1983 wrote a memo to Fred Fielding in which he expressed support for a national identification card, although that was not the position of the Counsel's Office, and also minimized the civil liberties concerns. In response to a note from Fred Fielding in which Fielding stated that "I am adamantly opposed to a Nat'l I.D. process,"[310] Roberts wrote to Fielding: "I recognize that our office is on record in opposition to a secure national identifier, and I

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307 Memorandum from John Roberts to the Attorney General, re Erwin Griswold Correspondence (Dec. 11, 1981).

308 Draft Article on Judicial Restraint, at 4.

309 Memorandum from John Roberts to the Attorney General re Judicial Activism Q & A's: Specific Examples, at 2 (Nov. 25, 1981). In this memo written for Attorney General Smith, Roberts singled out *Shapiro v. Thompson*, 394 U.S. 618 (1969), as an example that Smith could give of a case in which the Court had "erred in applying 'fundamental rights' . . . analysis." Memorandum from John Roberts to the Attorney General re: Judicial Activism Q & A's: Specific Examples, at 1 (Nov. 25, 1981). According to Roberts' memo, "In that case the Supreme Court relied upon the so-called 'fundamental right to travel' to strike down state laws imposing a one-year residency requirement before individuals could apply for welfare benefits." Id. at 2.

310 Handwritten note to "John" from Fred Fielding (Oct. 20, 1983) on copy of memo from John G. Roberts to Fred F. Fielding re Statement of Roger P. Brandemuehl Regarding Federal Identification Systems and Fraudulent Use of Identification Documents (Oct. 19, 1983).

will be ever alert to defend that position. I should point out, however, that I personally do not agree with it."[311]

The idea of a national identification card has more recently been discussed in the aftermath of the 2001 terrorist attacks. While many members of Congress as well as conservative and progressive leaders have concerns about the civil liberties implications of a national identification card, Roberts in his 1983 memo dismissed concerns regarding individual liberties and a national identification card "as largely symbolic . . . ."[312] Roberts went on to add: "And I think we can ill afford to cling to symbolism in the face of the real threat to our social fabric posed by uncontrolled immigration."[313]

In his short time on the federal bench, Roberts has been involved in one case particularly raising concerns with respect to civil liberties. In *Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148 (D.C. Cir. 2004), Judge Roberts upheld the arrest of a child for a minor infraction for which an adult would not have been arrested. The case grew out of an infamous incident in the District of Columbia several years ago -- the arrest of a 12-year-old girl for eating a single french fry on the Metro during a "zero tolerance" crackdown by transit police on Metro riders violating the subway's rules against eating and drinking. The child was arrested, searched, handcuffed, her shoelaces were removed, she was taken away in a windowless police vehicle, fingerprinted, and held for three hours until she was released into her mother's custody. The mother brought a civil rights action on behalf of her daughter under 42 U.S.C. § 1983, claiming that her daughter's Fourth and Fifth Amendment rights had been violated. In particular, the mother claimed that the child's equal protection rights had been violated because, under then-D.C. law, adults in the same situation would only have been given a citation, while juveniles had to be arrested. (In response to the negative publicity surrounding this incident, the no-citation policy for juveniles was changed.)

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311 Memorandum from John G. Roberts to Fred F. Fielding re National I.D. Comments (Oct. 21, 1983) (emphasis added).

312 Id.

313 Id. (emphasis added).

Judge Roberts' opinion (joined by Judges Karen LeCraft Henderson and Stephen Williams) affirmed the district court's ruling against the mother. In rejecting the equal protection claim, Roberts held that the law requiring harsher treatment of juveniles was rationally related to "the legitimate goal of promoting parental awareness and involvement with children who commit delinquent acts." 386 F.3d at 1156. According to Roberts, juveniles given citations might give the police "an entirely fanciful [name] or, better yet, the name of the miscreant who pushed them on the playground that morning," and their parents would then never know about their transgression. Id.

Although Roberts began his opinion by noting that "[n]o one is very happy about the events that led to this litigation," and that the district court had termed the policy "foolish," Roberts appeared dismissive of the serious concerns raised by the use of police power in this case, stating that "the policies were changed after those responsible endured the sort of publicity reserved for adults who make young girls cry." Id. at 1150. The police, however, did far more than make the child cry; they arrested her, handcuffed her, took her away in a police vehicle, and gave her an arrest record that she must now live with.

IV. PRESIDENTIAL POWER AND CONGRESSIONAL AUTHORITY

One of the most important issues regularly before the Supreme Court is the constitutional authority of Congress to enact and enforce legislation. In recent years, a narrow majority on the Court has pursued a new "federalism" revolution, undermining congressional power to enact important legislation protecting Americans' rights, health, safety, and environment. Many Senators have criticized what Senator Specter has recently called the Supreme Court's "judicial activism which has usurped Congressional authority" through its interpretations of the Commerce Clause, the Eleventh Amendment, and Section 5 of the Fourteenth Amendment.[314] Another critical issue facing the Court, particularly given the war on terror, is the extent of presidential authority. A major concern is that the President will exercise untrammeled unilateral power, unchecked by Congress or the Court.

Justice Sandra Day O'Connor has played a crucial role in the Court's rulings on these issues. Although she has often joined justices like Scalia and Thomas in striking down Congressional statutes on "federalism" grounds, she has also been the deciding vote in one recent 5-4 decision rejecting such a challenge to Congress' authority. *Tennessee v. Lane,* 541 U.S. 509 (2004) (upholding the constitutionality of Title II of the Americans with Disabilities Act in requiring that courthouses be accessible to the disabled). See also *Alaska Department of Environmental Conservation v. EPA,* 540 U.S. 461 (2004) (5-4 decision upholding EPA authority to enforce Clean Air Act to combat pollution when state fails to act.) Justice O'Connor has also played an important role in vindicating the fundamental principle that executive power must be constrained by the constitution and federal law. As she wrote in *Hamdi v. Rumsfeld*, for example, even "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[315]

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314 Letter from Senator Arlen Specter to Judge John G. Roberts, Jr. (Aug. 23, 2005) at 1.

315 *Hamdi v. Rumsfeld* 124 S. Ct. 2633, 2650 (2004).

Judge Roberts' record unfortunately indicates, however, that he would move the Court decidedly to the right on these issues. During his career, particularly during the Reagan-Bush Administrations and as a federal judge, he has sought to promote or give particular deference to the executive branch of government. His record also suggests that he supports the new "federalism" revolution that has already undercut the ability of Congress to protect Americans' rights and interests.

A. PRESIDENTIAL AND EXECUTIVE POWER

In his role in the White House counsel's office during the Reagan Administration, Roberts advocated what even former Reagan White House Counsel Fred Fielding has called an "expansive" view of presidential powers.[316] Several examples of Roberts' advocacy raise serious concerns.

For example, in a July 15, 1983 memorandum to White House counsel Fred Fielding, Roberts commented favorably on proposed Justice Department testimony suggesting that it was time to "reconsider the existence" of independent regulatory agencies and to "take action to bring them back within the executive branch." Roberts recognized that the suggestion was "provocative" but specifically agreed that such agencies are a "Constitutional anomaly."[317] This view of independent agencies like the FCC and the FTC is extremely troubling. It would significantly expand presidential power and undermine the independence of agencies charged with regulating corporate behavior.

Roberts also sought to promote secrecy of executive branch information, sometimes contradicting his own colleagues or Congress. For example, as special assistant to Attorney General Smith, he reviewed a recommendation from a colleague in

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316 See R. Jeffrey Smith and Jo Becker, "Record of Accomplishment -- And Some Contradictions," *Washington Post*, A01 (July 20, 2005) (explaining that former White House counsel Fred Fielding, for whom Roberts worked, stated that Roberts "supported expansive presidential powers"); Jo Becker and Amy Argetsinger, "The Nominee as a Young Pragmatist," *Washington Post*, A01 (July 22, 2005).

317 Memorandum from John G. Roberts to Fred F. Fielding (July 15, 1983).

the Office of Information and Privacy (OIP) concerning release of documents sought in a Freedom of Information Act (FOIA) lawsuit. The documents concerned espionage prosecutions against the Rosenbergs and others in the 1950s. The lawyer from OIP, which is charged with dealing with FOIA requests, recommended release of several documents reflecting Justice Department internal deliberations that technically could be withheld under FOIA. As the OIP lawyer explained, the deliberative issues addressed in the documents were "very narrow and virtually obsolete," especially since all the relevant laws and policies had been "superseded or amended." The documents were more than 15 years old, the judge in the case was "aware of the historical significance" of the records sought, and the OIP lawyer could "discern no actual harm in disclosing the records…." Nevertheless, Roberts directed that the records be kept secret.[318]

A year later, Roberts wrote about another issue concerning executive branch secrecy that is directly relevant to his own nomination. Some in the White House expressed concern that in the confirmation hearings of Edwin Meese and William Bradford Reynolds at the Justice Department, the Senate Judiciary Committee had received "near-full access" to internal Justice Department files reflecting pre-decisional advice, similar to the Solicitor General files now being sought concerning Roberts himself.[319] Roberts strongly agreed with the concerns, hoping that the White House "would be in a better position to resist committee demands" in the future. He also took the opportunity to criticize the Presidential Records Act passed by Congress. "[B]y 2001 Hill staffers need only go to the Reagan Library to see <u>any</u> internal White House deliberative document they want to see" under the Act, he lamented. "The pernicious effect" of the Act, he wrote, "will have to be addressed" to "revitalize the deliberative privilege."[320] Had Roberts' advice been followed, the Reagan Library documents that have provided important information about his record and his legal views could well have been kept secret.

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[318] <u>See</u> Memorandum from Miriam M. Nisbet of OIP to John G. Roberts re *Meeropol v. Bell* (June 28, 1982) at 3, 4.

[319] Memorandum from Mike Horowitz to Edwin Meese III et al. re inroads on the deliberative privilege through the confirmation process (July 19, 1983).

[320] Memorandum from John G. Roberts to Michael Horowitz re your memorandum of July 19 on deliberative privilege and the confirmation process (Aug. 29, 1985)(emphasis in original).

While at the White House, Roberts took a position to the right of arch-conservative Ted Olson on the issue of recess appointments. In response to concerns about recess appointments by President Reagan to the Legal Service Corporation (LSC) board ordering deep cutbacks to legal services programs, Congress enacted a provision requiring that any such funding cuts be authorized by LSC board members properly confirmed by Congress. Roberts reported that there was a "sharp difference of views" with the Justice Department Office of Legal Counsel on the constitutionality of the provision, and that the head of the office, Ted Olson, "found the issues very difficult." Roberts, however, had no such doubts. According to him, the issues were not "particularly difficult" and the Administration should "resist any Congressional effort to demean the recess appointment power by distinguishing between the powers of confirmed and recess-appointed nominees."[321]

Roberts has recently been criticized for his failure to recommend carrying out presidential power under a federal statute. In late 1983, Professor Morris Wolff asked President Reagan to apply a federal law that directs the President to demand and take steps to secure the release of American citizens unjustly imprisoned abroad to Raoul Wallenberg, an honorary U.S. citizen who was believed to be imprisoned by the Soviet Union. Although a State Department lawyer believed that the law did not apply to Wallenberg, Roberts thought that it could and stated that he was "institutionally disposed against adopting a limited reading of a statute conferring power on the President." Nevertheless, Roberts recommended "essentially dodging the question" of applying the law to Wallenberg.[322] Although others have called Roberts' memo "responsible," Professor Wolff recently described it as "appalling" and an "expedient" and "cowardly response."[323]

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[321] Memorandum from John G. Roberts to Fred F. Fielding re inquiry from Legal Services Corporation (Jan. 9, 1984) at 2.

[322] Memorandum from John G. Roberts to Fred F. Fielding re Raoul Walleneberg and the "hostage act" (Jan. 25, 1984) at 3.

[323] See M. Blood, "Roberts urged no push to free hero," *Long Beach Press-Telegram* (Aug. 11, 2005).

On one occasion, Roberts appeared to see a threat to presidential authority where there was none from a joint House-Senate resolution in opposition to torture, an issue quite relevant today. The resolution simply expressed U.S. policy in opposition to torture and requested that the President and other executive branch officials take appropriate action, such as raising the issue at the United Nations and helping formulate international standards against torture. In a memorandum to the White House Counsel, Roberts noted that the resolution already reflected Administration policy and was recommended by OMB, the National Security Council, and the Departments of State, Defense, and Commerce, and therefore did not suggest interposing an objection. Such joint resolutions, of course, do not have the mandatory force of law. Nevertheless, Roberts went out of his way to note that the resolution was "mildly objectionable as an interference in the Executive's conduct of foreign relations."[324]

In his short career as a federal judge, Roberts has had several occasions to consider the extent of presidential authority, and has shown significant deference to such power. In recent years, the Administration of President George W. Bush has engaged in some of the most extensive uses and abuses of executive power in American history. Several legal challenges to the Administration's exercise of power have come before Judge Roberts, who has deferred to the executive in its use of power and its interpretation of law.

For example, in *Hamdan v. Rumsfeld*, No. 04-5393, 2005 U.S. App. LEXIS 14315 (D.C. Cir. 2005), Judge Roberts joined in a 3-0 ruling that upheld the military commissions created by the Bush Administration to try foreign nationals held at Guantanamo Bay for war crimes. The ruling was such a sweeping acceptance of the Administration's position that one journalist wrote that "Roberts signed on to a blank-check grant of power to the Bush Administration to try suspected terrorists without basic due-process protections."[325] (Several legal ethicists have raised questions about the

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[324] Memorandum from John G. Roberts to Fred F. Fielding re H.J.Res. 605 (Oct. 3, 1984).

[325] Emily Bazelon, "Thank You, Mr. President: Last week, John Roberts wrote Bush a blank check," *Slate* (July 26, 2005), available at: <http://slate.com/id/2123055> (visited August 30, 2005).

propriety of Roberts hearing and ruling on a case so important to the Bush Administration at the very time he was actively interviewing with White House officials for a possible Supreme Court nomination.)[326]

Hamdan is a detainee at Guantanamo Bay who was captured in Afghanistan in late November 2001 by Afghan military forces and handed over to the U.S. military. On July 3, 2003, President Bush found that Hamdan had engaged in terrorist acts against the U.S., making him subject to trial by military commission, and the government charged him accordingly. Hamdan, who has been held at Guantanamo Bay since 2002, filed a habeas corpus petition in federal court contesting the legality of the military commissions. As described by one journalist, the commissions are not

> like the courts-martial that are used for prisoners of war. [They go] by rules that cut back the rights of defendants even more drastically than the tribunal that the United States has helped establish in Iraq to try Saddam Hussein has. Hamdan has no right to be present at his trial. Unsworn statements, rather than live testimony, can be presented as evidence against him. The presumption of innocence can be taken away from him at any time; so can his right not to testify to avoid self-incrimination. If Hamdan is convicted, he can be sentenced to death.[327]

Since the U.S. began using the naval base at Guantanamo Bay as a detention facility for suspected al Qaeda and Taliban members, serious questions have been raised regarding the treatment of detainees there. Reportedly, hundreds of detainees have been held at the facility for three years or more, and, of that number, only a limited number

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[326] Stephen Gillers, David J. Luban, and Steven Lubet, "Improper Advances: Talking Dream Jobs with the Judge Out of Court," *Slate*, August 17, 2005, http://www.slate.com/id/2124603/. Recently, another Guantanamo prisoner has sought to intervene in the *Hamdan* case to ask the D.C. Circuit to "throw out" and reconsider the ruling because of the conflict involving Roberts. See J. Bravin, "Lawyers for Saudi Prisoner Ask Court to Throw Out Roberts Ruling," *Wall Street Journal* (Aug. 30, 2005) at A4.

[327] Emily Bazelon, "Thank You, Mr. President: Last week, John Roberts wrote Bush a blank check," *Slate* (July 26, 2005), available at: <http://slate.com/id/2123055> (visited Aug. 30, 2005).

have been formally charged. Several civil and human rights groups filed briefs in Hamdan's case, arguing that the facility's conditions, in addition to the interrogation techniques employed there, could result in coerced confessions and false statements that could be used in the military commissions. On November 8, 2004, the district court granted Hamdan's habeas petition, holding, among other things, that the military commissions were unlawful. 344 F. Supp. 2d 152 (D.D.C. 2004). The court also concluded that the 1949 Geneva Convention is a self-executing treaty that is effective as domestic law and that Hamdan must be given its protection unless and until a "competent tribunal" concludes otherwise.

On appeal, a three-judge panel of the D.C. Circuit, including Judge Roberts, reversed, accepting the position of the Bush Administration that the military commissions were lawful and authorized by Congress based primarily on the general congressional authorization to use force against terrorists. In addition, the Court of Appeals disagreed with the district court that the Geneva Convention was self-executing, agreeing with the Bush Administration that its provisions were not enforceable in court.

Two of the judges, including Roberts, held that the treaties do not apply to suspected members of al Qaeda, accepting the Administration's argument that the President's decision that the Geneva Convention applies to Taliban detainees, but not to al Qaeda detainees, is non-reviewable. On that point, the majority said that "the President's decision to treat our conflict with the Taliban separately from our conflict with al Qaeda is the sort of political-military decision constitutionally committed to him. To the extent there is ambiguity about the meaning of [Geneva Convention] Common Article 3 as applied to al Qaeda and its members, the President's reasonable view of the provision must therefore prevail." 2005 U.S. App. LEXIS 14315 at *24 (internal citation omitted).[328]

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[328] Judge Williams, who otherwise concurred "in all aspects of the court's opinion," would have held that the Geneva Convention does apply "to the United States' conduct toward al Qaeda personnel captured in the conflict in Afghanistan." 2005 U.S. App. LEXIS 14315, at *30. However, Judge Williams agreed with the majority that the Geneva Convention "is not enforceable in courts of the United States . . . ." Id.

Georgetown University law professor Neal Katyal and Navy Lt. Commander Charles D. Swift, who are counsel in the case, explained that the ruling of the Court of Appeals "is contrary to 200 years of constitutional law. [The] ruling places absolute trust in the president, unchecked by the Constitution, statutes of Congress and long-standing treaties ratified by the Senate of the United States."[329]

In another case, *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), cert. denied, 125 S. Ct. 1928 (2005), Judge Roberts alone among his colleagues on a three-judge panel sided with the Bush Administration, this time in its efforts to retroactively deprive the federal courts of jurisdiction to hear claims brought against Iraq by American soldiers held and tortured as POWs there during the Gulf War. In *Acree*, seventeen American soldiers who had been held as prisoners of war and tortured by Iraq during the Gulf War sued the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein under the terrorism exception to the Foreign Sovereign Immunities Act (FSIA). Under the FSIA, foreign states are immune to suits for money damages. The terrorism exception applies to damages claims for personal injury or death caused by torture or other acts of terrorism.

The district court entered a default judgment against the defendants after they failed to appear and awarded compensatory and punitive damages to the plaintiffs totaling more than $959 million. The Bush Administration moved to intervene to contest the district court's subject matter jurisdiction, arguing that the Emergency Wartime Supplemental Appropriations Act (EWSAA) "made the terrorism exception of the FSIA inapplicable to Iraq and thereby stripped the District Court of its jurisdiction" over the suit. 370 F.3d at 43. The district court denied the motion as untimely and the Administration appealed.

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[329] Robert Burns, "Court: U.S. Can Resume Detainee Tribunals," *Washington Post* (July 16, 2005).

All three members of the D.C. Circuit panel, which included Judge Roberts, agreed that the district court had erred in denying the motion to intervene. All three judges also agreed that the plaintiffs could not pursue their claims. However, Judge Roberts alone would have gone further and adopted the position of the Bush Administration that the federal courts did not even have jurisdiction to hear the plaintiffs' claims for damages resulting from torture and other acts that occurred when Iraq was designated as a terrorist state. On the jurisdictional question, Judges Harry Edwards and David Tatel disagreed with Judge Roberts and rejected the Administration's argument.

Although the majority considered the jurisdictional issue "an exceedingly close question," id. at 51, it concluded that there is nothing in the language of the EWSAA or in its legislative history "to suggest that Congress intended by this statute to alter the jurisdiction of the federal courts under the FSIA." Id. at 57. In addition, the majority noted that the position of the government and Judge Roberts would lead to the "perplexing result" of restoring Iraq's immunity "even for acts that occurred while Iraq was still considered a sponsor of terrorism." Id. at 56 (emphasis added). The majority explained that "[t]his perplexing result appears even more bizarre when the sunset provisions" of the relevant portion of the EWSAA are taken into account. Id. According to the majority, if the government were correct in its interpretation of the ESWAA, the federal courts would be deprived of jurisdiction only during the period from May 7, 2003 (the date of a Presidential Determination carrying out the authority of the EWSAA) until September 30, 2004 "over a suit against Iraq based on events that occurred while Iraq was designated as a state sponsor of terrorism." Id. at 57. The majority found "little sense" in such an interpretation of the EWSAA. Id.[330]

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[330] In another case involving FSIA, Roberts argued in an *amicus* brief filed as Principal Deputy Solicitor General in the Bush I Administration that the FSIA did not permit a lawsuit against Saudi Arabian authorities by an American who had been recruited and hired by Saudi Arabian authorities but then was unlawfully imprisoned and tortured there. The Court upheld Roberts' position in a 5-4 vote in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). See Brief for the United States as *amicus curiae* supporting petitioners, *Saudi Arabia v. Nelson*, No. 91-522, 1991 U.S. Briefs 522 (July 31, 1992). Senate Judiciary Committee Democrats have requested access to Department of Justice records in *Nelson*, but the Administration has so far refused.

B. "FEDERALISM" AND LIMITS ON CONGRESSIONAL AUTHORITY

In recent years, a narrow majority on the Supreme Court, as well as a number of lower court judges, urged on by a right-wing legal and political movement, have launched a "states' rights/federalism" revolution, cutting back on the authority of Congress to enact and enforce critical laws important to Americans' rights and interests, including laws prohibiting discrimination and protecting the environment. The Court's "federalism" rulings have struck down all or important parts of a number of federal laws by narrowly construing congressional power under the Commerce Clause and Section 5 of the Fourteenth Amendment, and by giving an expansive reading to state sovereign immunity under the Eleventh Amendment.[331]

Long before such rulings began by the Supreme Court in the 1990s, as discussed above, John Roberts in the 1980s employed "federalism"-type rationales in arguing against measures to ensure effective enforcement of voting rights and promote equality for women. After he left government, and became an experienced Supreme Court advocate and commentator in the 1990s, Roberts was asked for expert opinion on the new "federalism" decisions. He chose to praise them.

For example, in 1997, a closely divided Court struck down several congressional laws on "federalism" grounds. These included the Religious Freedom Restoration Act ("RFRA"), which provided for federal protection against state and local conduct substantially burdening religious free exercise, and the part of the Brady Act that called on state and local officials to conduct background checks on handgun purchasers until a national background check system was in place.[332] As a commentator on national television, Roberts disagreed with criticism of these decisions. He stated that there is a "solid majority on the court for the proposition that federalism has to be taken seriously"

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[331] See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (Gun Free School Zones Act); *United States v. Morrison*, 529 U.S. 598 (2000) (Violence Against Women Act); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act); *Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (Americans with Disabilities Act).

[332] See *City of Boerne v. Flores,* 521 U.S. 507 (1997)(RFRA); *Printz v. United States,* 521 U.S. 898 (1997)(Brady Act).

and that by "enforcing these structural limitations" on Congress' authority, "states have their powers and rights" and the "federal government is limited." Despite the fact that the RFRA decision clearly restricted individual rights, Roberts contended that the "end objective, as the framers intended, is to protect individual rights."[333]

In 1999, the Supreme Court issued several more 5-4 "federalism" decisions, most notably the ruling in *Alden v. Maine,* 527 U.S. 706 (1999), that state employees could not enforce violations of the overtime or other provisions of the Fair Labor Standards Act against their employers. On National Public Radio, Roberts called the Court's rulings "a big deal" and a "healthy reminder" that we live under a "federal system" where states as "co-equal sovereigns have their own sovereign powers" including "sovereign immunity."[334] Roberts clearly lamented what he called the view that "the only way we can show we're serious about a problem is if we pass a federal law, whether it's the Violence Against Women Act or anything else."[335] In fact, that very law was under challenge on "federalism" grounds, and was struck down by the same 5-4 majority the next year in *United States v. Morrison,* 529 U.S. 598 (2000).

Around this time, Roberts advocated in an *amicus* brief a particularly narrow view of Congress' authority under the Commerce Clause. The issue in *Jones v. United States*, 529 U.S. 848 (2000), was whether setting fire to an owner-occupied residence that was not used in a commercial activity that had a substantial effect on interstate commerce could qualify for prosecution under the federal arson law. The law specifically requires that the property damaged or destroyed must be used in or in an activity "affecting interstate or foreign commerce," 18 U.S.C.§ 844(i). Roberts accordingly argued that the answer was no, and the Supreme Court agreed. But Roberts' brief went further. He maintained that "Congress' Commerce Clause power arguably does not extend to the type of criminal conduct regulated by Section 844(i) on the ground that it is not

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333 See Transcript of The News Hour with Jim Lehrer (July 2, 1997) at 3.

334 See Transcript of Talk of the Nation (June 24, 1999) at 3.

335 Id. at 10.

'commerce' in the first place."[336] This radical view (advocated by Justice Thomas as Roberts noted) would eliminate the ability of Congress to regulate any criminal or other activity that affects interstate commerce unless the activity itself is commercial, crippling Congress' authority. As a report by the National Senior Citizens Law Center recently concluded, it would likely make unconstitutional "environmental laws, the Civil Rights Act of 1964, the ADA, the Age Discrimination in Employment Act (ADEA), the FMLA, the Freedom of Access to Clinics Act, as well as minimum wage, maximum hour and child labor laws." [337]

Although he has only been on the federal bench for two years, Judge Roberts has already given a strong indication that he subscribes to the ideology of the new "federalism" revolution. In 1983, before that revolution had begun in earnest, Roberts lamented in a White House memorandum that "strict interpretation[] of the interstate commerce clause" is "sound in logic and history" but has been "overtaken by events."[338] In *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003), cert. denied, 541 U.S. 1006 (2004), Roberts issued a troubling dissent on Commerce Clause grounds from the decision by the full D.C. Circuit not to reconsider the ruling by a three-judge panel upholding the constitutionality of the Endangered Species Act as applied in this case.

The lawsuit involved a real estate development company's contention that the application of the Endangered Species Act to its construction project in California was an unconstitutional exercise of federal authority under the Commerce Clause. After the United States Fish and Wildlife Service determined that the company's project "was likely to jeopardize the continued existence of the arroyo southwestern toad," placed on the Endangered Species List by the Secretary of the Interior in 1994, the company filed

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[336] *Amicus* brief in *Jones v. United States*, No. 99-5739, 1999 U.S. Briefs 5739 (Dec. 29, 1999) at *14n.9.

[337] Lauren K. Saunders, The Judicial Threat to Congressional Power (National Senior Citizens Law Center, July 19, 2005) at 5. (http://www.nsclc.org/news/05/07/Kelo_congressproc.pdf) (last visited Aug. 30, 2005)

[338] Memorandum from John G. Roberts to Fred F. Fielding re Continuing Correspondence from Alfred J. Schweppe (Sept. 26, 1983).

suit "[r]ather than accept an alternative plan proposed by the Service." *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1064 (D.C. Cir. 2003).

The district court dismissed the company's complaint, and a panel of the D.C. Circuit (not including Judge Roberts) unanimously upheld the dismissal (323 F.3d 1062), following prior D.C. Circuit precedent upholding congressional authority under the Endangered Species Act. The panel's ruling not only followed D.C. Circuit precedent, but was also consistent with a recent ruling of the Fourth Circuit in *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), cert. denied, 531 U.S. 1145 (2001). The opinion in that case, upholding the authority of Congress to protect endangered species on private lands, was written by Judge J. Harvie Wilkinson, a conservative Republican-appointee.

By a vote of 7-2, with only Judges Roberts and Sentelle dissenting, the D.C. Circuit in *Rancho Viejo* denied a petition for rehearing en banc of the panel's ruling. All the other judges on the court, including very conservative, Republican-appointed judges, voted to deny rehearing. In his dissent from the denial of rehearing, although Judge Roberts indicated that there might be grounds to uphold the application of the Endangered Species Act in this case, he also stated that "[t]he panel's approach in this case leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating 'Commerce . . . among the several States.'" 334 F.3d at 1158. Roberts' dissent thus strongly suggested that he thought Congress lacked the power under the Commerce Clause to protect the endangered species in this case and therefore that it would be unconstitutional to apply the Act here. Moreover, by focusing on the purely intrastate domicile of the particular endangered species, Roberts indicated that he may well subscribe to an extremely constricted interpretation of the Commerce Clause recently rejected by a narrow majority of the Supreme Court in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005). In *Raich*, the Court majority held that Congress' authority under the Commerce Clause includes the power to prohibit purely local cultivation and use of marijuana for medical purposes even in compliance with state law.

In short, by his vote to rehear *Rancho Viejo* and thus potentially reverse the district court, coupled with the content of his dissent, Roberts gave a strong indication that he is among the ranks of such right-wing "federalist" judges as Michael Luttig (who dissented in *Gibbs*) who construe the Constitution to severely limit the authority of Congress to protect environmental quality as well as the rights and interests of ordinary Americans.

CONCLUSION

As evidenced by his own record, John Roberts does not satisfy the important criteria for confirmation that should be applied to every nominee seeking a lifetime position on the highest Court in our country. Far from demonstrating a commitment to social justice progress, Roberts has been an obstacle. Time and again, he has taken positions and urged judicial rulings harmful to the rights and interests of ordinary Americans. Roberts' record demonstrates that his confirmation to the Supreme Court would undermine Americans' rights and freedoms and limit the role of the federal courts in upholding them.

The confirmation of John Roberts to replace Justice Sandra Day O'Connor would bring dramatic change, move the Supreme Court significantly to the right, and shift the balance of the Court to the great and lasting detriment of Americans and the constitutional principles and legal safeguards that protect their families and communities. We urge Senators to vote against Roberts' confirmation.

APPENDIX A

Key 5-4 rulings in which Sandra Day O'Connor was decisive

Sandra Day O'Connor has been the deciding fifth vote in many important Supreme Court decisions affecting civil rights, environmental protection, personal privacy, reproductive freedom and reproductive health, religious liberty, consumer protection and much more. If she is replaced by someone far to her right – more in the mold of Clarence Thomas and Antonin Scalia – the consequences could be devastating. These are among the key 5-4 decisions in danger of being overturned:

Civil rights: affirmative action and discrimination based on sex, race, and disability

Jackson v. Birmingham Bd. Of Educ. (2005) ruled that federal law protects against retaliation against someone for complaining about illegal sex discrimination in federally assisted education programs.

Tennessee v. Lane (2004) upheld the constitutionality of Title II of the Americans with Disabilities Act and required that courtrooms be physically accessible to the disabled.

Grutter v. Bollinger (2003) affirmed the right of state colleges and universities to use affirmative action in their admissions policies to increase educational opportunities for minorities and promote racial diversity on campus.

Davis v. Monroe County Bd. of Educ. (1999) ruled that it is a violation of federal law for school districts to be deliberately indifferent towards severe and pervasive student-on-student sexual harassment.

Brentwood Academy v. Tennessee Secondary School Athletic Association (2001) affirmed that civil rights laws apply to associations regulating interscholastic sports.

Morse v. Republican Party of Virginia (1996) said key anti-discrimination provisions of the Voting Rights Act apply to political conventions that choose party candidates.

Hunt v. Cromartie (2001) affirmed the right of state legislators to take race into account to secure minority voting rights in redistricting.

Environmental protection

Alaska Department of Environmental Conservation v. EPA (2004) said the Environmental Protection Agency could step in and take action to reduce air pollution under the Clean Air Act when a state conservation agency fails to act.

Reproductive rights and privacy

Stenberg v. Carhart (2000) overturned a state law that would have had the effect of banning abortion as early as the 12th week of pregnancy and that lacked any exception to protect a woman's health.

Consumer protection and corporate power

Rush Prudential HMO, Inc. v. Moran (2002) upheld state laws giving people the right to a second doctor's opinion if their HMOs tried to deny them treatment.

Access to justice

Zadvydas v. Davis (2001) told the government it could not indefinitely detain an immigrant who was under final order of removal even if no other country would accept that person and that access to federal courts is available to combat improper, indefinite detention.

Brown v. Legal Foundation of Washington (2003) maintained a key source of funding for legal assistance for the poor.

Hibbs v. Winn (2004) subjected discriminatory and unconstitutional state tax laws to review by the federal judiciary.

Religious liberty and church-state separation

McCreary County v. ACLU of Kentucky (2005) upheld the principle of government neutrality towards religion and ruled unconstitutional Ten Commandments displays in several courthouses

Lee v. Weisman (1992) continued the tradition of government neutrality toward religion, holding that government-sponsored prayer is unconstitutional at public school graduations.

Money, politics and government accountability

McConnell v. Federal Election Commission (2003) upheld most of the landmark McCain-Feingold campaign finance law, including its ban on political parties' use of unlimited soft money contributions.

Federal Election Commission v. Colorado Republican Federal Campaign Committee (2001) upheld laws that limit political party expenditures that are coordinated with a candidate and seek to evade campaign contribution limits.

APPENDIX B

Senators Denied Access to Full Roberts Record

Almost 3000 documents have been withheld from public disclosure by the Ronald Reagan Presidential Library and National Archives, mostly on alleged personal privacy grounds, with virtually no effort to release segregable portions or to justify the withholding.

In addition, the Bush White House has said that it will block senators from seeing key documents from Supreme Court nominee John Roberts' time as the political deputy to Solicitor General Ken Starr in the White House during the Bush "41" administration.

The White House continues to argue that the Solicitor General documents are protected by attorney-client privilege, despite the fact that, as documented below, former Senator Fred Thompson – the man selected by the Bush White House to shepherd the Roberts nomination – himself rejected a similar argument when he was in the Senate. In addition, as set forth below, there is ample precedent for the release of such documents to the Senate in connection with past nominations to the Supreme Court, the Attorney General's office, and the federal appellate courts.

As Senate Judiciary Committee Democrats noted in their documents request to Attorney General Alberto Gonzales:

> During John Roberts' term as Deputy Solicitor General, the Solicitor General's Office was involved in hundreds of landmark cases affecting the rights of all Americans. Democratic members of the Senate Judiciary Committee have requested information on Judge Roberts' involvement in just 16 of the hundreds of cases the Solicitor General's office litigated while Judge Roberts served in a policy-making role in the office. Each of these cases raises important issues about civil rights, and fundamental Constitutional principles. Americans deserve to know more about his views on these issues before the Senate decides whether to confirm him to the nation's most powerful court.

The senators' carefully targeted request focuses on only 16 cases, less than one-fifth of the 81 cases in which he signed briefs.

<u>This is how the senators described the cases for which they are seeking documents:</u>

Board of Education of Oklahoma City v. Dowell, 498 U.S. 237 (1991), was an important school desegregation case in which John Roberts filed an *amicus* brief opposing efforts of African American families to pursue claims that their local schools would become re-segregated.

In ***Bray v. Alexandria Women's Health Clinic***, 506 U.S. 263 (1993), John Roberts filed an amicus brief and participated in oral argument requesting that the Court hold that the obstruction of family planning clinics by anti-abortion activists did not harm women because of their gender in violation of federal law.

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992), was a landmark case rejecting John Roberts' arguments to limit relief under Title IX for students who suffer even the most severe gender harassment. If accepted, his arguments would also have undermined other important civil rights prohibiting discrimination with federally funded programs, including Title VI of the 1964 Civil Rights Act (prohibiting race and ethnic discrimination), Section 504 of the Rehabilitation Act (prohibiting disability discrimination), and the Age Discrimination Act of 1975) all which contain language nearly identical to that in Title IX.

In ***Freeman v. Pitts***, 503 U.S. 467 (1992), John Roberts filed a brief urging the Supreme Court to reverse a Court of Appeals ruling that required a Georgia school district to make further efforts to fully de-segregate its public schools.

In ***Herrera v. Collins***, 506 U.S. 390 (1993), the Solicitor General's office filed a brief arguing that a Texas man could not seek relief in federal court based on his claim that new evidence showed he was actually innocent of the crime for which he had been sentenced to death.

Lee v. Weisman, 505 U.S. 577 (1992) involved the question of whether a prayer by clergy selected by the public school at a graduation ceremony violates the principle that the government should not favor a particular religion.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), the Solicitor General's Office filed a brief arguing that the state had taken petitioner's property within the meaning of the Fifth Amendment when it passed building regulations which had the result of forbidding petitioner from building a permanent structure on his property, and that the state therefore must compensate him. John Roberts was not on the briefs.

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), is an important environmental case in which the Solicitor General argued to deny a citizen standing to challenge environmental harm. John Roberts was not on the briefs.

In ***Lujan v. National Wildlife Federation***, 497 U.S. 871 (1990), John Roberts argued as acting Solicitor General urging the Court to narrow citizens' ability to challenge unlawful land use decisions as harmful to the environment. John Roberts was on the brief and participated in oral argument.

In ***Metro Broadcasting, Inc. v. Federal Communications Commission***, 497 U.S. 547 (1990), as acting Solicitor General, John Roberts filed a brief contrary to the position taken by the FCC, in which he unsuccessfully attacked the FCC's affirmative action program with regard to applications for new broadcast licenses.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), is a landmark case holding that the constitutional right to privacy regarding reproductive decisions prevents the state from requiring women to notify their husbands before deciding to have an abortion. The Solicitor General's office filed a brief in the case that urged the Court to overturn *Roe v. Wade*. John Roberts was not on the brief.

Rust v. Sullivan, 500 U.S. 173 (1991), upheld the validity of an abortion "gag rule" regulation under the First Amendment, and did not directly involve *Roe v. Wade*. The Solicitor General's brief in the case, which Roberts co-authored, not only argued to uphold the regulations, but also went further to urge the Court to reverse *Roe.*

Saudi Arabia v. Nelson, 507 U.S. 349 (1993). Solicitor General's Office filed an amicus brief arguing that the Saudi Arabian government should be immune from a lawsuit by an American who claimed he was recruited to work for the kingdom and then imprisoned and tortured. Roberts was on the brief.

Suter v. Artist M, 503 U.S. 347 (1992). In an important case concerning when a citizen's right to sue can be implied from a statute, the Solicitor General's office filed an amicus brief urging the Court to interpret an Adoption Assistance statute narrowly so as to preclude abused children from suing the states for failing to take reasonable actions to ensure that foster children are reunified with their natural families where possible. John Roberts was on the brief and participated in oral argument.

Voinovich v. Quilter, 507 U.S. 146 (1993), a key Voting Rights Act case in which the Solicitor General filed a brief opposing claims by minority voters in Ohio. John Roberts co-authored the Solicitor General's brief.

***Withrow v. Williams*,** 507 U.S. 680 (1993), was a key case in which the Solicitor General's office urged the Court to severely curtail *Miranda* rights by ruling that federal courts may not entertain *Miranda* claims in habeas corpus petitions filed by state prisoners. John Roberts was on the brief and participated in oral argument.

Precedents for Release of Solicitor General Documents

There are numerous examples of the release to the Senate of internal Solicitor General and similar documents during the consideration of judicial and executive branch nominations. As Senator Patrick Leahy stated on March 18, 2003 during Senate consideration of Miguel Estrada's nomination to the U.S. Court of Appeals for the District of Columbia, "Past administrations have provided such legal memoranda in connection with the nominations of Robert Bork, William Rehnquist, Brad Reynolds, Stephen Trott and Ben Civiletti, and even this Administration did so with a nominee to the environmental Protection Agency."

Examples of documents released to the Senate while considering confirmation of particular nominees include:

Robert H. Bork nomination to be Associate Justice of the Supreme Court

- Memo from Solicitor General to the Attorney General on pocket vetoes (Bork nomination hearing record: S. Hrg. 100-1011, Pr. 1, at page 177).
- Memo to the Solicitor General from the Assistant Attorney General, Civil Rights Division regarding appeal of Omaha school desegregation case. See *Confirmation Hearings on Federal Appointments,* Hearings before the Senate Committee on the Judiciary, Part 5, 107th Cong. 2nd Sess. (August 1, September 18, September 26, and October 7, 2002).
- Memo to the Solicitor General from the Assistant Attorney General, Civil Rights Division recommending filing of amicus brief in Philadelphia school desegregation case. (See *Confirmation Hearings on Federal Appointments,* Hearings before the Senate Committee on the Judiciary, Part 5, 107th Cong. 2nd Sess. (August 1, September 18, September 26, and October 7, 2002).
- Memo to the Solicitor General from the Assistant Attorney General, Civil Rights Division regarding appeal of Demopolis City (Alabama) school desegregation case. See *Confirmation Hearings on Federal Appointments,* Hearings before the Senate Committee on the Judiciary, Part 5, 107th Cong. 2nd Sess. (August 1, September 18, September 26, and October 7, 2002).

William Bradford Reynolds nomination to become Associate Attorney General

- Memo by William Bradford Reynolds, Assistant Attorney General, Civil Rights Division to the Solicitor General in a discrimination case (Reynolds nomination hearing record: S. Hrg. 99-374, at page 983).

Stephen Trott nomination for the Ninth Circuit Court of Appeals

- On June 3, 2002 it was reported that the Department of Justice turned over three memoranda concerning a department decision not to recommend an independent counsel probe (Legal times, June 3, 2002).

Justice William H. Rehnquist nomination for Chief Justice

- The Congressional Research Service (CRS), in its May 31, 2005 report titled "Congressional Oversight of Judges and Justices," indicates that several documents that William Rehnquist authored on controversial subjects when he headed the Office of Legal Counsel were released to the Judiciary Committee.

Further, during consideration of the Estrada nomination on February 27, 2003, Senator Harry Reid entered into the Congressional Record a list of specific, internal Department of Justice attorney memoranda provided during the Bork, Reynolds, and Rehnquist nominations:

- All documents related to school desegregation between 1969 and 1977 relating to Bork in any way (disclosure included, among others, the SG Office memos about

Vorcheimer v. *Philadelphia,* known as ‘‘the Easterbrook memo’’; *United States* v. *Omaha; United States* v. *Demopolis City* (school desegregation in Alabama)

- Documents related to *Halperin* v. K*issinger* (civil suit for 4th Amendment violations for wiretapping)
- Memos about whether to file an amicus brief in *Hishon* v. *King & Spaulding* (gender discrimination at a law firm)
- Memos regarding *Wallace* v. *Jaffree* (school prayer in Alabama)
- Memos about Congressional reapportionment in Louisiana and one-person, one-vote standard
- Memos regarding possible constitutional amendment in 1970 to overturn *Green* v. *New Kent County*, and preserve racial discrimination in Southern schools
- Memo of November 16, 1970 from John Dean
- Memos of William Ruckelshaus of December 19, 1969 and February 6, 1970
- Memos of Robert Mardian of January 18 1971
- Memos of law clerk to Justice Jackson
- Department memos about whether or not to seek Supreme Court review in *Kennedy* v. *Sampson* (pocket veto)
- Memos about *Hills* v. *Gautreaux* (racial discrimination in housing in Chicago)
- Memos about *DeFunis* v. *Odegaard* (affirmative action program at the University of Washington law school)
- Memos about *Morgan* v. *McDonough* (public school desegregation in Boston)
- Memos about *Pasadena* v. *Spengler* (public school desegregation)
- Memos about *Barnes* v. *Kline* (military assistance in El Salvador)
- Memos about *Kennedy* v. *Jones* (pocket veto and the mass transit bill and bill to assist the disabled)
- Documents related to Supreme Court selection process of Nixon and Reagan

Attorney-Client Privilege

The White House has claimed that the documents from Roberts’ time as deputy Solicitor General are protected from release by attorney/client privilege. This claim simply does not hold, since attorney-client documents have been released to Senators in the past, as Senators of President Bush’s own party asserted during Senate debate over Special Counsel Kenneth Starr’s Whitewater investigation during the Clinton administration

In a Senate floor speech delivered on December 20, 1995 (Congressional Record at S18972) Senator Fred Thompson said:

> [A]n invocation of the attorney-client privilege is not binding on Congress. It is well established that in exercising its constitutional investigatory powers, Congress possesses discretionary control over witnesses’ claims of privilege. It is also undisputed that Congress can exercise its discretion completely without regard to the approach that courts might take with respect to that same claim. …The Senate … has rejected invocations of attorney-client privilege on numerous occasions.

Senator Thompson continued:

> Under Article I, section 5 of the Constitution, each House determines its own rules. And the rule of this body in connection with attorney-client privilege claims is longstanding and consistent: We balance the legislative need for the information against any possible injury.

That same day, Senator Orrin Hatch, during a Senate floor speech (Congressional Record at S18962), said:

> No statute or Senate or House rule applies the attorney-client privilege to Congress. In fact, both the Senate and the House have explicitly refused to formally include the privilege in their rules.

Senator Hatch further stated:

> This body cannot simply take the President's claim of privilege against Congress at face value. To do so would be to surrender an important constitutional obligation.

History and precedent are on the side of the Senate, in fulfilling its constitutional duty on behalf of the American people, to thoroughly review the complete Roberts record, including review of the Department of Justice documents from his service as Deputy Solicitor General.

APPENDIX C

The Real Ginsburg Precedent vs. Progress for America's Misleading Propaganda

With the Senate Judiciary Committee hearings on the Supreme Court nomination of John Roberts set to begin immediately after Labor Day weekend, right-wing leaders are busily laying the groundwork for Roberts to refuse to answer key substantive questions during his hearings. Over the past month, right-wing pundits have repeatedly made the preposterous argument that it is inappropriate to ask Judge Roberts, or any nominee, specific questions about one's judicial philosophy. More specifically, they are propagating the myth of the "Ginsburg precedent," saying Clinton nominee Ruth Bader Ginsburg rightfully refused to answer questions about her views on controversial issues during her Supreme Court confirmation hearings in 1993, and that Judge Roberts and other future nominees should follow her example.

Progress for America, a right-wing lobbying group that announced it would support any nominee by the Bush administration, recently released a four-minute "Ginsburg Precedent" video that took this myth-making to misleading new lows. By omitting several key facts and relying on an unrepresentative sample of video clips pulled out of context, Progress for America tries to create the wholly false impression that judicial nominees have not been required in the past – and should not be required in the future – to answer substantive questions about legal and constitutional issues.

Distorting Precedent

The Progress for America video argues that nominees should not share their views on "issues likely to come before the Court" in order to avoid "even the appearance of prejudging cases." While the American Bar Association Code of Judicial Conduct does indeed require that judges avoid "the appearance of impropriety" and remain tight-lipped about specific "pending or impending" cases, these restraints by no means preclude a nominee from answering questions that concern judicial philosophy or that simply touch on controversial issues.

Barring such substantive questions altogether would mean effectively preventing senators from evaluating a nominee's approach to the Constitution and laws based on a nominee's answers– certainly unacceptable regarding a nominee to a lifetime position on our nation's highest court. After all, no one credibly contends that a nominee should come to the Court with no preconceptions about the law. As Chief Justice Rehnquist once wrote, "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of a lack of qualification, not lack of bias." Similarly, Justice Scalia wrote in *Minnesota v. White* that "it is virtually impossible to find a judge who does not have preconceptions about the law." Accordingly, he wrote, just as judges' impartiality in future cases is not compromised by previously-made rulings on the same issue, stating their views on legal issues outside of the courtroom, including previously decided cases on a court they seek to join, does not undermine their impartiality. Scores of legal ethicists have agreed and affirmed the right of the Senate to ask nominees about nominees' "beliefs about the Constitution and the role of the courts in interpreting it." [See July 14, 2005 letter at http://media.pfaw.org/stc/Legal-Scholar-Letter_7-14-05.pdf.]

Indeed, even Republican leaders have previously acknowledged the importance of getting answers to questions about a nominee's judicial philosophy before casting a confirmation vote. Senate Judiciary Chairman Arlen Specter (R-PA) wrote in his 2000 book, "In voting on whether or not to confirm a nominee, senators should not have to gamble or guess about a candidate's philosophy, but should be able to judge on the basis of the candidate's expressed views." And Senator Lott (R-MS) said on the Senate floor in 1996, "We should look [at nominees'] philosophy with regard to the judiciary and how they may be ruling. We have a legitimate responsibility to ask these questions… again these are not insignificant. These are big-time, lifetime, high paid jobs that are going to affect our lives, and if we do not know who they are, if we do not ask questions, then we will be shirking our responsibilities." As these senators understood, a meaningful advice and consent process requires that the Senate be able to evaluate a nominee's judicial philosophy before voting whether to confirm him or her to a powerful lifetime seat.

Creative Editing Paints Misleading Portrait of Ginsburg Hearing

Without detailing the standards for appropriate questions, Progress for America suggests that the Ginsburg hearings established the precedent that a nominee can – and should – invoke the purported ethical canons to deflect all sorts of questions. Stringing together a number of video clips of Justice Ginsburg declining to answer questions during her Judiciary Committee hearings, the video creates a distorted picture of Justice Ginsburg's reticence.

First, the clips at the center of the video simply do not accurately reflect the candor and openness with which Justice Ginsburg answered most questions during her hearings. Indeed, Justice Ginsburg provided forthright answers to substantive questions on a broad range of issues, including controversial ones.

For example, Justice Ginsburg candidly answered then-Senator Hank Brown's (R-CO) question about the constitutional underpinnings of the right to choose:

> "[Y]ou asked me about my thinking about equal protection versus individual autonomy. My answer to you is that both are implicated. The decision whether or not to bear a child is central to a woman's life, to her well-being and dignity. It is a decision she must make for herself. When Government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices."

And she gave an in-depth answer to Senator Leahy's (D-VT) question about whether there is a constitutional right to privacy and where it was grounded in the Constitution:

> "There is a constitutional right to privacy composed of at least two distinguishable parts. One is the privacy expressed most vividly in the Fourth Amendment: The government shall not break into my home or my office, without a warrant, based on probable cause; the Government shall leave me alone. The other is the notion of personal autonomy. The Government shall not make my decisions for me. I shall make, as an individual, uncontrolled by my Government, basic decisions that affect my life's course."

On matters of judicial philosophy and constitutional interpretation, Ginsburg was also willing to candidly share her views with senators. For example, she gave this answer to a question from Senator Hatch (R-UT), then-Ranking Member of the Judiciary Committee, about the theory that the only legitimate way for a judge to define the law is to attempt to discern the intent of those who made the law:

> "[T]rying to divine what the Framers intended, I must look at that matter two ways. One is what they might have intended immediately for their day, and the other is their larger expectation that the Constitution would govern, as Cardozo said, not for the passing hour, but for the expanding future. And I know no better illustration of that than to take the words of the great man who wrote the Declaration of Independence. Thomas Jefferson said: "Were our state a pure democracy, there would still be excluded from our deliberations women who, to prevent depravation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men." Nonetheless, I do believe that Thomas Jefferson, were he alive today, would say that women are equal citizens. […] So I see an immediate intent about how an ideal is going to be recognized at a given time and place, but also a larger aspiration as our society improves. I think the Framers were intending to create a more perfect union that would become ever more perfect over time."

These excerpts are but a few of the substantive discussions Justice Ginsburg engaged in during her Judiciary Committee hearings – and are representative of her willingness to share her views on legal issues.

Of course, Justice Ginsburg did not answer every single question posed to her. However, the clips the PFA ad shows are taken out of context and thus fail to acknowledge when Ginsburg was *appropriately* declining to answer questions. For example, the ad shows Ginsburg declining to answer a question about her *personal* views on the death penalty, a question that she rightfully points out is "not relevant to the job for which you are considering me, which is the job of a judge."

In another instance, the ad shows Ginsburg saying, "I can't answer a question like that in the abstract." Colorado Senator Brown (R-CO) had asked her whether the Constitution provides any protection for citizens who inadvertently violate a law they did not know existed. While she couldn't answer this question in the abstract, she went on to explain, "If it were to come before Court in the guise of a specific case where a party said the law is exposing me to a penalty, it is unfair, unjust, it violates due process, I would have the concrete context and the legal arguments that would be made on one side or the other." This answer satisfied Senator Brown, who responded, "I appreciate the nature of your answer and the limitations…."

Two other examples in the PFA ad come from a line of questioning by Senator Leahy (D-VT) about whether the First Amendment's Free Exercise and Establishment Clauses are equal. Here, Justice Ginsburg reasonably explained that one clause is not subordinate to another, that both must be given effect, and that in cases where the two clauses are in tension she must reason from the specific facts of the case. It is a reasonable answer to a reasonable question.

Yet another clip used in the PFA ad – of Ginsburg saying "Were I to rehearse here what I would say and how I would reason on such questions, I would act injudiciously" – comes from the nominee's opening statement and was not a refusal to answer a senator's question at all.

In all, the PFA ad paints a grossly caricatured picture of a tight-lipped Ginsburg. But the misrepresentations do not end here.

A Tale of Two Nominees

The PFA video also ignores two key facts that distinguish the Ginsburg nomination from Roberts' nomination: Ginsburg's judicial paper trail was much longer and more illuminating than Roberts' and she, unlike Roberts, was a consensus candidate.

Before her hearings, the Senate Judiciary Committee had the chance to review hundreds of documents written by Ginsburg, including over 700 opinions she had written over her 13 years as a judge. By contrast, Judge John Roberts' short record as a judge provides little direct information about his judicial philosophy. The incomplete set of documents from Roberts' tenure in the Reagan and Bush 41 Administrations presents an extremely troubling portrait of a right-wing advocate. Answering questions about the kind of justice Roberts would be is made more difficult by the current Bush administration's decision to block senators' access to memos written by Roberts during his tenure as principal deputy solicitor general for the first Bush administration. Stonewalling by the White House increases the burden on Roberts to answer openly and fully senators' questions about his approach to the Constitution.

Also fundamentally distinguishing the Ginsburg nomination from the Roberts nomination is the fact that Ginsburg, unlike Roberts, was a consensus candidate. In an autobiography, Senator Orrin Hatch, who served as Ranking Member of the Judiciary Committee during Ginsburg's 1993 hearings, has written that President Clinton had not even considered nominating Ginsburg until Senator Hatch suggested her. Indeed, says Hatch, he warned President Clinton that Clinton's preferred nominee would face "a great deal of resistance from the Republican side" in the Senate and instead suggested Ginsburg, who, he said, would be "confirmed easily." President Clinton took Senator Hatch's input to heart and nominated Judge Ginsburg. While President Bush publicly went through the motions of seeking input from senators, there is no evidence that he discussed specific candidates he was considering with Democratic senators.

The Progress for America video suggests that Justice Ginsburg's overwhelming 96-3 confirmation vote stemmed from Republican senators' fairness and deference to the President, but, in reality, Ginsburg's broad support was a product of the spirit of bipartisan consultation and compromise in which she was nominated.

The Real Ginsburg Precedent: Clarity on Constitutional Questions

In short, Progress for America's video represents a disingenuous attempt to rewrite history in order to pave the way for John Roberts to dodge key questions during his confirmation hearings. Contrary to what Progress for America suggests, senators must diligently and thoroughly ask – and demand answers to – questions about Roberts' judicial

philosophy in the upcoming Judiciary Committee hearings. If Roberts were to follow the real Ginsburg precedent, he would be willing to give direct answers to important questions about his approach to the Constitution, including his views on whether or not there is a constitutional right to privacy that protects Americans' most intimate decision-making about their lives, families, and health.