



NAACP LEGAL DEFENSE AND  
EDUCATIONAL FUND, INC.

REPORT  
ON THE NOMINATION OF  
JUDGE JOHN G. ROBERTS, JR.  
TO THE SUPREME COURT  
OF THE UNITED STATES

August 31, 2005

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## INTRODUCTION

The U.S. Supreme Court, for better or worse, has always been crucial to the progress of African Americans. From *Dred Scott* to *Plessy*, from *Brown* to *Grutter*, the Supreme Court has defined the status of and the opportunities available to African Americans in a way that perhaps is unduplicated with respect to any other people in the United States. During the last two decades the Supreme Court has decided almost every major civil rights case involving issues of race by razor thin margins. The stakes in this appointment could not be higher.

The NAACP Legal Defense and Educational Fund, Inc. (“LDF” or “the Legal Defense Fund”) is the nation’s oldest civil rights public interest law firm. Initially established in 1940 as the legal arm of the National Association for the Advancement of Colored People under the direction of Thurgood Marshall, the Legal Defense Fund has been separate from the N.A.A.C.P. since 1957.

LDF has litigated many of our nation’s most important civil rights cases, from *Brown v. Board of Education* to the Michigan affirmative action cases. Its record in the Supreme Court ranks it, after the U.S. Solicitor General’s office, among the elite of Supreme Court practitioners. LDF has been the legal arm of the civil rights movement in state and federal courts throughout the nation, and it has been legal counsel for African-American civil rights claimants in most of the major racial discrimination cases decided by the Supreme Court.

LDF is a nonpartisan 501 (c)(3) institution. We monitor judicial and other appointments to ensure that nominees are fair, open-minded, and that they are not hostile to constitutional and civil rights that are critical to our nation’s progress in achieving racial justice.

The Legal Defense Fund does not take a position on every Supreme Court nomination. In fact, the presumption is that we will remain neutral; only the most compelling circumstances should lead LDF to break that neutrality. We are mindful of the fact that we appear before the Court frequently, and that our first obligation is to our clients. That obligation informs our decision about whether we take a position on a nomination to the Supreme Court, or to any other court.

We are further mindful of the sometimes disturbing tone and substance of the debates surrounding nominations in recent years, including to the Supreme Court. LDF believes that if and when it takes a position on a nomination, it should be on the

merits of the nominees' record. *Ad hominem* attacks, distortion of the record, superheated rhetoric, and the politics of personal destruction have no legitimate place in the nomination and confirmation process.

There is a legitimate place, however, for principled opposition to a nominee whose record gives rise to a reasoned concern about his or her judicial philosophy or ability to consider all arguments with an open mind. Our review of the available record has led us to conclude that John G. Roberts, Jr. has been hostile to the corpus of civil rights and constitutional law that the Legal Defense Fund and others have worked so painstakingly hard to build. Based on that record, we have regretfully concluded that we must oppose his nomination to the Supreme Court at this time.

## ANALYSIS

Upon Justice Sandra Day O'Connor's announcement of her retirement from the Supreme Court, the NAACP Legal Defense and Educational Fund called upon President Bush to nominate "a candidate for the Supreme Court who is not ideologically rigid and predictable, but who is fair and open-minded, and committed to protecting the advances in civil rights that we as a nation have achieved." That same standard should now apply to the President's nomination to fill the vacancy resulting from the death of Chief Justice William Rehnquist. It is especially important that the Chief Justice reflect such qualities given the Chief Justice's role as leader of the Supreme Court.

The Legal Defense Fund has reviewed publicly available information about Judge John G. Roberts, Jr., now nominated by the President to succeed Chief Justice Rehnquist, to attempt to determine whether the nominee meets this standard. Without more evidence to counter the distinctively negative impression left by Roberts' construction of important constitutional amendments, related Congressional enforcement statutes, executive branch policies, and our nation's civil right laws, and history more broadly, the record as it now stands leads the Legal Defense Fund to the conclusion that it must oppose the nomination of Roberts to the Supreme Court at this time.

Based upon a careful review of thousands of the documents released from the National Archives and the Ronald Reagan Presidential Library, it is now apparent that Roberts played a key role in the retrenchment on civil rights during what can only be called the most destructive period for civil rights enforcement in the second half of the 20<sup>th</sup> century. As of this writing, all relevant documents relating to Roberts' eight years as a lawyer with the Reagan Administration and the administration of President George H.W. Bush have not been disclosed, but the available documents from the Reagan era make clear that Roberts' record on civil rights is deeply troubling.

Nothing from the available record of Roberts' later tenure as Principal Deputy Solicitor General or as a lawyer in private practice outweighs these concerns.<sup>1</sup> Not only has Roberts consistently advocated an objectionably narrow interpretation of civil rights laws in numerous areas but even more disconcertingly, he has urged backsliding or retrenchment in several circumstances. For these reasons, based on the record available at this time, the Legal Defense Fund opposes Roberts' confirmation.

The period in which Roberts worked as Special Assistant to Attorney General William French Smith was marked by a deep hostility to civil rights enforcement. The Justice Department, and the Civil Rights Division in particular, was characterized by a drastic repudiation of civil rights principles that had evolved over the previous four decades.<sup>2</sup> The Department's retreat on civil rights was subject to unprecedented public criticism by civil rights organizations, including the Legal Defense Fund,<sup>3</sup> bar associations,<sup>4</sup> lawyers within the Justice Department,<sup>5</sup> former Civil Rights Division

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<sup>1</sup> Roberts served as Principal Deputy Solicitor General from 1989-93. This position is a political appointment. The position was created during the Reagan Administration in order to provide a second-in-command who could act consistently with the Administration's policy preferences. LINCOLN CAPLAN, *THE TENTH JUSTICE* 62 (1987). In this capacity, Roberts was able to influence the legal positions taken by the Solicitor General's office, particularly in cases in which the office filed *amicus curiae* briefs, and had not already taken a position in the lower courts. Although there is only one Principal Deputy, we have not attributed to Roberts any position taken by the Solicitor General's office in a brief on which his name does not appear. We do believe it is appropriate to assume that Roberts' name on a brief reflects his involvement in a matter. If Roberts disagreed with any part of the position taken by the government, he is, of course, free to provide this information at the U.S. Senate's hearings on his nomination. Without access to the memoranda reflecting Roberts' individual role in cases that have been requested by members of the Judiciary Committee, it is difficult to discern his precise role in each case.

<sup>2</sup> See, e.g., *In the Administration, a Pattern Develops on Conservatives' Agenda*, WASH. POST, Feb. 2, 1982.

<sup>3</sup> See, e.g., LEADERSHIP CONFERENCE ON CIVIL RIGHTS, *WITHOUT JUSTICE, A REPORT ON THE CONDUCT OF THE JUSTICE DEPARTMENT IN CIVIL RIGHTS IN 1981-82* (1982); *U.S. Agencies Vary on Rights Policy*, N.Y. TIMES, Nov. 16, 1981.

<sup>4</sup> See, e.g., WASHINGTON COUNCIL OF LAWYERS, *REAGAN CIVIL RIGHTS: THE FIRST TWENTY MONTHS* (1983).

<sup>5</sup> See, e.g., *A Civil Rights Battle Surfaces*, WASH. POST, Oct. 11, 1982.

heads,<sup>6</sup> law professors,<sup>7</sup> and even courts expressing displeasure over the inconsistency of the Department's legal positions.<sup>8</sup> When three years into his tenure, then-Assistant Attorney General for Civil Rights William Bradford Reynolds was nominated to be Associate Attorney General, his nomination was defeated by a Republican-led Judiciary Committee based on his record of hostility to civil rights.<sup>9</sup>

Roberts came to the Reagan Justice Department as a political appointee, in a policy-making position where he served at the pleasure of the President. By the time Roberts arrived from his clerkship with Justice William Rehnquist in August 1981, Attorney General William French Smith had identified his civil rights priorities: ending reliance on "busing" as a school desegregation remedy, even though it had been sanctioned by the Supreme Court's 1971 decision in *Swann v. Charlotte-Mecklenberg Bd. of Ed.* 402 US 1; and under the guise of ending "quotas", changing employment discrimination policy. Reynolds had just been confirmed to his position as Assistant Attorney General for Civil Rights. Together with Smith, Reynolds and other political appointees, Roberts shaped the Administration's agenda on civil rights. The documents reflect that Roberts continued his focus on civil rights issues when he became Associate White House Counsel in 1982. As the discussion below indicates, Roberts often disagreed with top officials on many issues, at times arguing for an even more narrow application of civil rights laws.

Roberts was not in the shadows during this critical period. Time and again, his name appears on documents urging constriction or criticizing the prevailing interpretation of civil rights amendments, statutes and policies. Based on the relative number of Roberts' documents pertaining to civil rights, this area appears to have been one of his primary responsibilities. Roberts regularly participated in weekly meetings on civil rights attended by Civil Rights Division Chief William Bradford Reynolds and other Division staff. He recommended action (or inaction) in civil rights

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<sup>6</sup> See, e.g., Drew S. Days III, *Turning Back the Clock: the Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309 (1984).

<sup>7</sup> See, e.g., NORMAN C. AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION (1988) [*hereinafter* AMAKER].

<sup>8</sup> See, e.g., *Grove City College v. Bell*, 465 U.S. 555, 562 n.10 (1984) (government's position interpreting Title IX "has not been a model of clarity"); *United States v. City of Birmingham*, 538 F. Supp. 819, 827 n.9 (E.D. Mich. 1982) (noting change in government's position on effects test under Fair Housing Act).

<sup>9</sup> The Senate Judiciary Committee voted down the nomination, 10 to 8. The Washington Post called Reynolds' defeat "a stunning rejection of the chief architect of the Reagan Administration's civil rights policies." *Reynolds' Nomination Voted Down*, WASH. POST, June 28, 1985.

cases. Roberts prepared legal arguments and talking points and drafted speeches, articles, and op-eds on civil rights topics for the Attorney General. There is extensive correspondence between Roberts and Department officials on issues.

Roberts participated significantly in what came to be known as the “Reagan revolution.” After beginning at the Department, Roberts wrote to Second Circuit Judge Henry Friendly, for whom he clerked: “This is an exciting time to be at the Justice Department, when so much that has been taken for granted for so long is being seriously reconsidered.”<sup>10</sup> Roberts also recommended peers for high-level positions who would be “ideal players on th[e] Administration’s team,” specifically noting their skills in countering long-established positions.<sup>11</sup>

In key civil rights areas, Roberts was very active in implementing the Reagan Administration’s retreat. These issues run the civil rights gamut, including voting rights, affirmative action, equal educational opportunity/school desegregation, discrimination by federally funded institutions, fair housing and employment, enforcement of federal statutory rights, and *habeas corpus*. In each area, the record shows that Roberts has been a committed advocate for narrowing civil rights laws, and for minimizing the scope and substance of civil rights enforcement.

## VOTING RIGHTS

For most of the 20<sup>th</sup> century, widespread denial and abridgment of the right to vote on account of race or color seriously weakened political institutions and contradicted the democratic principles expressed in the U.S. Constitution. For African Americans, especially in the states of the former Confederacy, racially discriminatory exclusion from the political process was commonplace from the post-Reconstruction period until the passage of the Voting Rights Act of 1965.

The Legal Defense Fund has been deeply committed to the protection of minority voting rights throughout its history and considers the Supreme Court’s role in interpreting the Voting Rights Act and the Fifteenth Amendment to be of

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<sup>10</sup> Letter from John Roberts to The Honorable Henry J. Friendly (Nov. 4, 1981).

<sup>11</sup> Letter from John Roberts to Kenneth Starr (Oct. 22, 1981). Roberts praised a fellow Rehnquist clerk, whose intellectual power and political style made him “well-suited for dealing with entrenched bureaucrats of opposing views.” He recommended a classmate from the Harvard Law Review “as an articulate spokesman for strongly conservative views, which he was not afraid to express openly despite the hostility of 90% of his audience,” and he suggested the classmate would be “ideally suited for a political role facing a hostile bureaucracy or constituency.” *Id.*

paramount importance. As Justice Matthews wrote in *Yick Wo v. Hopkins*, the right to vote is fundamental because it is “preservative of all rights.”<sup>12</sup>

Based upon our thorough examination of Roberts’ expressed views concerning the Voting Rights Act, the Legal Defense Fund has serious reservations about his commitment to upholding the constitutional and statutory provisions that protect the right to vote.

By a significant degree, voting rights was the civil rights issue on which Roberts was most active during his fifteen months as Special Assistant to Attorney General William French Smith. More than twenty-five memoranda written by Roberts illustrate his key role in formulating and advancing the Administration’s opposition to amending Section 2 of the Voting Rights Act to provide an “effects test.” Collectively, these documents shed light on Roberts’ narrow construction of Section 2 during the critical period leading up to the 1982 amendment of the Act. Moreover, his writings raise an important question at this crossroad for the Supreme Court: Does Roberts continue to adhere to the narrow and aggressively asserted view of Section 2 expressed in his memoranda, even though the parade of horrors that he so strongly cautioned against never materialized?

When Roberts began working at the Justice Department in August 1981, the House of Representatives was considering reauthorization of the Voting Rights Act.<sup>13</sup> The House Judiciary Committee had just reported the bill (H.R. 3112) by a vote of 23 to 1.<sup>14</sup> On October 5, the House passed the bill by an overwhelming margin of 389 to 24.<sup>15</sup>

In addition to reauthorizing the expiring enforcement provisions, the House bill amended Section 2, one of the permanent provisions of the Act designed to effectuate the 15<sup>th</sup> Amendment’s proscription of racial discrimination in voting. The purpose of the amendment to Section 2 was to permit courts to find a violation when state and local officials’ actions had the “effect” or “result” of abridging the right to vote on account of race. One year before, the Supreme Court in *City of Mobile v. Bolden*, 446

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<sup>12</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

<sup>13</sup> The Voting Rights Act was passed in 1965. Certain temporary provisions of the Act were extended by Congress in 1970 and in 1975. These provisions faced expiration in August, 1982.

<sup>14</sup> *Voting Rights Bill Advances in Anger*, WASH. POST, Aug. 1, 1981.

<sup>15</sup> 127 Cong. Rec. 23,205 (1981).



U.S. 55 (1980), vitiated the effects test for voting claims developed by lower courts<sup>16</sup> and ruled that intentional discrimination must be shown to establish any violations. The holding made it considerably more difficult to prove cases and changed the legal landscape.

Specifically addressing concerns raised by some in Congress and the Administration about the consequences of the Section 2 amendment, the House added language to the bill indicating that the amendment to Section 2 did not require proportional representation, and stating that Section 2 would not be violated simply because members of a minority group were not elected “in numbers equal to the group’s proportion of the population.” The House Report also contained the disclaimer that “the proposed amendment does not create a right of proportional representation.”<sup>17</sup>

Two months after the House vote, sixty-one Senators introduced an identical bill, which included the Section 2 amendment to permit a showing of discriminatory effect to provide a basis for liability. The co-sponsors included eight Republican committee chairs and 21 Republican co-sponsors altogether.<sup>18</sup>

The Reagan Administration announced its position against the effects test in November 1981, after the House passed its bill and before the Senate introduced its bill.<sup>19</sup> It was widely reported that the Justice Department, rather than the White House, initiated the opposition. Although key Presidential advisers had recommended

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<sup>16</sup> Prior to this decision, the Supreme Court and circuit courts had decided cases that addressed the question of the requisite proof or showing that plaintiffs in a vote dilution case would need in order to prevail. *See, e.g. White v. Regester*, 412 U.S. 755 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff’d on other grounds sub nom. East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976). These cases were typically framed as constitutional challenges rather than statutory challenges under the Voting Rights Act, but the textual and historical origins of Section 2 meant that those decisions bore directly on the interpretation of the statutory provision as well.

<sup>17</sup> H.R. Rep. 227, 97<sup>th</sup> Cong. 1<sup>st</sup> Sess. 29-30.

<sup>18</sup> *Bipartisan Senate Group Backs Extension of Voting Rights Act*, WASH. POST, Dec. 17, 1981.

<sup>19</sup> *Reagan Takes Flexible View on Voting Rights Extension*, WASH. POST, Nov. 7, 1981. By this time, the Civil Rights Division had responded to President Reagan’s request for a report on the question of amending the Voting Rights Act. Although the report was twelve pages in length, the only reference by the Civil Rights Division to amending Section 2 was a one-sentence recommendation against doing so. Memorandum for the Attorney General by William Bradford Reynolds (Sept. 13, 1981).

support for the House bill, William French Smith “staged an end run on the White House staff” by meeting with President Reagan.<sup>20</sup> According to the Washington Post:

The result of Smith’s conversation with Reagan was presidential support for two weakening amendments to legislation, favored by a bipartisan majority in both houses of Congress. The presidential position disturbed some high White House aides, who accurately predicted that it made Reagan appear as if he were dragging his feet on extension of the Act. It took the Reagan Administration six months to extricate itself from this compromising political position.<sup>21</sup>

It cannot be said that, as a young Special Assistant to the Attorney General, Roberts made the decision to oppose the effects test. What is apparent, however, is that Roberts was a pivotal player in helping the Justice Department prepare, frame, and seek to implement its position, and that he advocated that position aggressively. The documents produced from the National Archives show that Roberts developed much of the legal and political rationale for sustaining the Administration’s position against the effects test at the beginning of, and throughout, the Senate debate.

Even before the Administration announced its position, Roberts began working on the issue by corresponding with state Attorneys General in September 1981.<sup>22</sup> Roberts briefed the Attorney General on the effects test at the time of his meeting with President Reagan. He suggested that the Administration should oppose the House bill even though he recognized that it was aimed at practices that limited black citizens’ ability to wield political influence: “This would make challenges to a broad range of voting practices much easier, and give courts far broader license to interfere with voting practices across the country. *In particular, such widely accepted practices as at-large voting would be subject to attack, since it is fairly easy to demonstrate that such practices have the effect of diluting black voting strength.* For Congress and the President to invite such judicial remaking of the political system through an effects test is sharply inconsistent with the thrust of your Federal Legal Council speech.”<sup>23</sup>

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<sup>20</sup> *Smith Called “Embarrassment” But Unlikely to Lose His Job*, WASH. POST, May 21, 1982; *Reagan Signs Voting Rights Act Extension*, WASH. POST, June 30, 1982; *Reagan Takes Flexible View on Voting Rights Extension*, WASH. POST, Nov. 7, 1981.

<sup>21</sup> *Smith Called “Embarrassment”* *supra* note 20.

<sup>22</sup> Memorandum from Kenneth Starr to John Roberts (Sept. 2, 1981).

<sup>23</sup> Memorandum from John Roberts to the Attorney General (Nov. 6, 1981) (emphasis added).

Lending support to the belief that the Justice Department originated opposition to the effects test and then sold it to an unwilling White House, Roberts authored impassioned talking points urging the Attorney General to enlist the White House:

This meeting presents an opportunity to solidify the Administration's position once and for all, to head off any retrenchment efforts, and to enlist the active support of the White House personnel for our position. I recommend taking a very positive and aggressive stance.

It is important that people in the White House *understand* the President's position on the Voting Rights Act and *actively work* to see it realized. The position . . . is not simply the Department's view but is the position of the Administration and our President, who deserves his staff's full and active support on this issue.

An effects test for Section 2 could also lead to a quota system in electoral politics, as the President himself recognized. The so-called "savings clause" in the House bill would not remove this danger. Just as we oppose quotas in employment and education, so too we oppose them in elections.

Do not be fooled by the House vote or the 61 Senate co-sponsors of the House bill into believing that the President cannot win on this issue. Many members of the House did not know they were doing more than simply extending the Act, and several of the 61 Senators had already indicated that they only intended to support simple extension. Once the Senators are educated on the differences . . . solid support will emerge for the President's position.<sup>24</sup>

Roberts provided much of the written argument for the Administration's lobbying against the effects test. At the Attorney General's request, Roberts provided an analysis for circulation to the Senate. After Reynolds objected to submitting written statements to the Hill "for fear that the statement would end up in the press and be subject to attack," Roberts wrote: "My own view is that *something* must be done to educate the Senators on the seriousness of this problem, and that written

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<sup>24</sup> Memorandum from John Roberts to the Attorney General (Jan. 26, 1982) (emphasis in original).

statements should be avoided *only* if a thorough campaign of meetings is undertaken.”<sup>25</sup>

Roberts’ analysis – “Why Section 2 of the Voting Rights Act Should be Retained Unchanged” – is extremely troubling. First, Roberts asserted that the House bill would alter Section 2 “dramatically” by incorporating the effects test.<sup>26</sup> This assertion ignored case law before the *Bolden* decision permitting vote dilution claims to be proven by indirect evidence of discriminatory intent, *see White v. Regester*, 412 U.S. 755 (1973), or simply by showing discriminatory effects. *See Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff’d on other grounds sub nom. East Carroll Parish Sch. Bd.*, 424 U.S. 636 (1976).

Second, Roberts asserted that the House bill would “in essence, establish a ‘right’ in racial and language minorities to electoral representation proportional to their population in the community.”<sup>27</sup> This was directly contrary to carefully negotiated language in the bill that expressly set forth that such a right was not established. Roberts also wrote that Justice Stewart in his *Bolden* opinion “correctly noted . . . incorporation of an effects test in § 2 would establish essentially *a quota system for electoral politics* by creating a right to proportional racial representation on elected governmental bodies.”<sup>28</sup> Yet Justice Stewart never referred to quotas.<sup>29</sup>

Third, Roberts claimed in his analysis that intent was not difficult to prove.<sup>30</sup> The Senate Judiciary Committee Report, however, concluded, consistent with the practical experience of voting rights counsel, that the intent test placed “an inordinately difficult burden” on voting rights plaintiffs because of the difficulty in proving intent.<sup>31</sup>

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<sup>25</sup> Memorandum from John Roberts to the Attorney General (Dec. 22, 1981) (emphasis in original).

<sup>26</sup> *Id.* (Attachment at 2).

<sup>27</sup> Memorandum from John Roberts to the Attorney General (Dec. 22, 1981) (Attachment at 2).

<sup>28</sup> *Id.* (emphasis in original).

<sup>29</sup> *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

<sup>30</sup> Memorandum from John Roberts to the Attorney General (Dec. 22, 1981) (Attachment at 2).

<sup>31</sup> As an example, the Report cited *Kirksey v. City of Jackson*, 663 F.2d 659 (5th Cir. 1981), which refused to consider voters’ motivations for supporting at-large elections and referred to officials’ ability to articulate nondiscriminatory reasons. S. Rep. No. 97-417, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess. 36-37 (1982).

Fourth, Roberts’ view that the Voting Rights Act was on the same footing as other federal civil rights statutes where proof of intent “is the rule, not the exception” again ignored not only the pre-*Bolden* trend in the law — across civil rights areas — that discrimination may be shown through a discriminatory impact on protected classes,<sup>32</sup> but also the well-documented history of entrenched and sophisticated voting discrimination that gave rise to the Act.

Fifth, his preference for moving familiar discriminatory practices, such as at-large election structures, beyond the reach of the Voting Rights Act’s clear, strong, and justifiable equality mandate would have badly undercut the statute’s intent, effectiveness, and ultimately the meaningful integration of minority communities into the political process.

Finally, Roberts invoked federalism principles in arguing against an effects test: “[V]iolations of Section 2 should not be made too easy to prove, since they provide a basis for the most intrusive interference imaginable by federal courts into state and local processes.”<sup>33</sup> He criticized the Alabama federal judge who ordered at-large county commission elections to be replaced by single-member districts: “It would be difficult to conceive of a more drastic alteration of local governmental affairs, and under our federal system such an intrusion should not be too readily permitted.”<sup>34</sup>

Of course, one cannot meaningfully assess the advisability of what Roberts viewed as “drastic alteration[s]” in a vacuum. In many jurisdictions, as a result of persistent racial bloc voting, at-large election systems had for many years served to submerge and trump minority voting preferences. Under those electoral arrangements, even substantial concentrations of minority voters could never elect candidates of their choosing. The result – in an already highly racially polarized environment – was that minority voices were effectively locked out of the legislative process at many levels of government. Put simply, these arrangements perpetuated “whites only” legislative bodies.

The remedy of single-member districts, which had long been the rule for Congressional elections, represented a democracy correction, and not a distortion. The notion that the political mechanisms used to perpetuate the nation’s traditions of

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<sup>32</sup> *E.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (recognizing discriminatory effect under Title VII).

<sup>33</sup> Memorandum from John Roberts to the Attorney General (Dec. 22, 1981) (Attachment at 3).

<sup>34</sup> *Id.*

racial discrimination were largely beyond the reach of federal courts to correct, was lamentable in 1982, and contrary to the Voting Rights Act of 1965 passed seventeen years earlier to enforce the Fifteenth Amendment.

Nonetheless, Roberts outlined arguments against the effects test in advance of the Attorney General's testimony before the Senate. He provided Kenneth Starr, then Counselor to the Attorney General, with "appropriate points to stress."<sup>35</sup> Roberts provided questions and answers for the Attorney General, arguing that Section 2's departure from the requirements of the Fifteenth Amendment "would represent a radical change in the law, severing the statute from its constitutional moorings, and creating grave uncertainty in its application."<sup>36</sup> Arguing for maintenance of the *status quo* without regard to discriminatory effects, Roberts issued dire warnings about problems that never actually materialized after the effects test was added to the legislation: "There is the very real danger that elections across the nation, at every level of government, would be disrupted by litigation and thrown into court. Results and district boundaries would be in suspense while courts struggled with the new law. It would be years before the vital electoral process regained stability."<sup>37</sup>

Roberts stated that the basic theory behind the conclusion that Section 2 incorporates an intent test is that Section 2 mirrors Fifteenth Amendment protections. He wrote, however, that "[t]he situation is complicated by lower court decisions prior to *Mobile v. Bolden*, which indicated that proof of intent was not necessary."<sup>38</sup> Characterizing the state of the Congressional record, Roberts noted that the House had concluded in its report that the *Zimmer* court and other lower courts "correctly identified" that the effects test controlled vote dilution cases "and that *Mobile v. Bolden*, which overturned these lower court precedents, was erroneous." Notwithstanding the evidence that several courts had used an effects standard<sup>39</sup> and

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<sup>35</sup> Memorandum from John Roberts to Kenneth Starr (Jan. 5, 1982).

<sup>36</sup> Memorandum from John Roberts to the Attorney General (Jan. 21, 1982) (Attachment at 3).

<sup>37</sup> *Id.*

<sup>38</sup> Memorandum from John Roberts to the Attorney General (Jan. 22, 1982).

<sup>39</sup> See *e.g. Hendrix v. McKinney*, 460 F. Supp. 626, 631 (M.D. Ala. 1978) (finding that even in absence of evidence of discriminatory intent, judgment would be granted for plaintiff voters based on application of *Zimmer* factors); *Thomasville Branch of the NAACP v. Thomas County*, 571 F.2d 257, 258-59 (5th Cir. 1978) (holding that evidence of discriminatory intent need not be introduced for a voter dilution claim and remanding for application of *Zimmer* factors); *Turner v. McKeithen*, 490 F.2d 191,195 (5th Cir. 1975) (finding unconstitutional vote dilution where there was evidence of continuing 'effects' of prior discrimination); *Robinson v. Commissioners Court, Anderson County*, 505 F.2d

the Congressional recognition that it was in fact the *Bolden* ruling itself that represented a significant change of course regarding the standard for minority vote dilution cases (meaning that the Congressional bill could fairly be characterized as restorative), Roberts essentially advised the Attorney General to obfuscate. “I recommend that [if asked about the lower court decisions] you simply restate the reasoning of *Mobile v. Bolden*, and then argue that many lower court decisions may not be inconsistent with *Mobile v. Bolden*.”<sup>40</sup>

Roberts actively engaged in the public relations campaign against the effects test. One draft op-ed prepared by Roberts read: “No evil has been pointed to which justifies this dramatic amendment. . . . A system of proportional representation is inconsistent with the democratic traditions of our pluralistic society. The House bill is based on and would foster the abhorrent notion that blacks can only be represented by blacks and whites can only be represented by whites. I can imagine nothing which would do more to polarize society along racial lines.”<sup>41</sup> Advocating for an op-ed counter-offensive, Roberts urged his colleagues: “I tend to think it is more important to get *something* out somewhere soon than to fiddle much more with exactly what that something is going to be. The frequent writings in this area by our adversaries have gone unanswered for too long.”<sup>42</sup> After President Reagan’s opposition to the effects test elicited a critical op-ed by Vernon Jordan, Roberts drafted a reply.<sup>43</sup> Roberts also

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674,678 n.3 (5th Cir. 1974) (redistricting plan may be found constitutionally impermissible where it “designedly or otherwise” operates to minimize or cancel out the voting strength of minorities); *Moore v. Leflore County Board of Election Commissioners*, 502 F.2d 621, 624 (5th Cir. 1974) (“The measure of the plan’s validity is equality of opportunity, and the crucial inquiry is whether the plan leaves black citizens at liberty to participate in the electoral process on the same plane with white citizens.”) (citations omitted). *See also United States v. Post*, 297 F. Supp. 46, 51 (W.D. La. 1969) (proof of discriminatory intent not required in vote denial claim under 15<sup>th</sup> Amendment and Sections 2 and 11 of the VRA). Moreover, the application of the “effects test” in these cases by no means mandated a ruling in favor of plaintiffs thus underscoring that the standard did not make Section 2 claims “too easy to prove” as Roberts had suggested. *See, e.g. Kendrick v. Walder*, 527 F.2d 44 (7th Cir. 1975); *Bradas v. Rapides Parish Policy Jury*, 508 F.2d 1109 (5th Cir. 1975); *Gilbert v. Sterrett*, 509 F.2d 1389 (5th Cir.), *cert. denied*, 423 U.S. 951 (1975); *Paige v. Gray*, 437 F. Supp. 137 (M.D. Al. 1977).

<sup>40</sup> Memorandum from John Roberts to the Attorney General (Jan. 22, 1982).

<sup>41</sup> Memorandum from John Roberts to the Attorney General (Feb. 1, 1982).

<sup>42</sup> Memorandum from John Roberts to William Bradford Reynolds (Feb. 8, 1982) (emphasis in original).

<sup>43</sup> Memorandum from John Roberts to the Attorney General (Nov. 17, 1981).

drafted a response to a Washington Post editorial supporting the effects test;<sup>44</sup> a letter to the editor was published adopting much of Roberts' language.<sup>45</sup>

Roberts initiated other activity opposing the effects test. He suggested to the Attorney General that "if the decision is to press forward with our Voting Rights Act position," he should share talking points prepared for President Reagan on his trip to Alabama with Senator Heflin, a "critical vote" on the Judiciary Committee.<sup>46</sup>

Although Roberts was involved in drafting compromise language, none of the proposals that he crafted eliminated the requirement of proving intentional discrimination. When the Attorney General requested a "fallback" position, Roberts suggested including the Department's position on the law, namely that intent can be shown through indirect evidence, including evidence of effects.<sup>47</sup> He wrote, "some finessing will be necessary, since Section 2 does not by its terms require proof of purpose and any effort to introduce the concept directly will hardly be viewed as a compromise."<sup>48</sup> At the Attorney General's request, Roberts also submitted proposed amendments for Senator Howard Baker.<sup>49</sup> The first retained the intent test, noting that circumstantial evidence could help prove intent. The second seemingly adopted an effects test, but provided that an election system only resulted in denial of voting rights when "used invidiously" to cancel out minority voting strength, which, as his other memoranda show, he understood to amount to a backdoor intent test.<sup>50</sup>

It was Senator Robert Dole's compromise – which included the effects test – that ultimately prevailed. Section 2 would prohibit any voting practice "which *results* in a denial or abridgement or the right of any citizen of the United States to vote on account of race or color [or language minority status]."<sup>51</sup> A violation would occur if "based on the totality of the circumstances," minority voters demonstrated that they

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<sup>44</sup> Memorandum from John Roberts to the Attorney General (Jan. 26, 1982); Memorandum from John Roberts to William Bradford Reynolds (Jan. 26, 1982).

<sup>45</sup> *Letter to Editor from William Bradford Reynolds*, WASH. POST, Feb. 11, 1982.

<sup>46</sup> Memorandum from John Roberts to the Attorney General (Mar. 12, 1982).

<sup>47</sup> Memorandum from John Roberts to William Bradford Reynolds (Feb. 16, 1982).

<sup>48</sup> *Id.*

<sup>49</sup> Memorandum from John Roberts to the Attorney General (Mar. 24, 1982).

<sup>50</sup> Memorandum from John Roberts to the Attorney General (Jan. 26, 1982) ("[I]nvidiously clearly indicates purposeful discrimination").

<sup>51</sup> 42 U.S.C. § 1973(a) (emphasis added).



have “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>52</sup> The bill specifically included language indicating there was no right to proportional representation.<sup>53</sup>

There is evidence to suggest that even after Senator Dole began promoting his compromise, Roberts and his colleagues continued to campaign against an effects test. Roberts helped to draft a response challenging an editorial that supported the Dole compromise.<sup>54</sup> The draft op-ed stated “there is no reason to change the permanent, nationwide provisions of the Voting Rights Act from an intent test to a results test.”<sup>55</sup> Roberts drafted a “Dear Senator” letter shedding “new light on the debate concerning the Voting Rights Act.”<sup>56</sup> The district judge in *Bolden* had ruled on remand that the plaintiffs had proven discriminatory intent. Roberts indicated this demonstrated that the reason for changing Section 2 – that intent was too difficult to prove – had no basis in fact. This opinion about the ease of meeting the burden of proof under an intent standard made no mention of the three historians retained by the plaintiffs in the case and the Department of Justice (which had intervened), who were required to search the historical record back to the beginning of the 1800’s for several months in order to help satisfy the costly and exacting intent standard.<sup>57</sup>

On May 4, 1982, the Senate Judiciary Committee adopted the Dole compromise (S.1992), in a 14-4 vote.<sup>58</sup> According to the Washington Post, the Justice Department was “still agitating” for the intent test up until the Committee vote.<sup>59</sup> The Administration’s final support for the compromise was attributed to not wanting to alienate African-American voters in the face of inevitable Senate support for the compromise.<sup>60</sup> On June 18, the Senate voted for the compromise, by a veto-proof 85-

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<sup>52</sup> *Id.* at § 1973(b).

<sup>53</sup> *Id.*

<sup>54</sup> Memorandum from Ed Schmults to William Bradford Reynolds (Apr. 19, 1982).

<sup>55</sup> *Id.*

<sup>56</sup> Memorandum from John Roberts to the Attorney General (Apr. 16, 1982).

<sup>57</sup> QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965 TO 1990 (Chandler Davidson & Bernard Grofman eds.) 34 (1994).

<sup>58</sup> *Senate Panel Approves Voting Act Compromise*, WASH. POST, May 5, 1982.

<sup>59</sup> *Voting Rights Makes Strange Bedfellows*, WASH. POST, May 9, 1982.

<sup>60</sup> *Administration in Mighty Effort to Avoid Offense on Civil Rights*, WASH. POST, May 6, 1982.

8.<sup>61</sup> President Reagan signed the bill into law on June 29, 1982. Upon signing the renewal, President Reagan explained that “[t]he right to vote is the crown jewel of American liberties . . . and we will not see its luster diminished.”<sup>62</sup>

After the Act passed, Roberts sought to influence its interpretation narrowly. In spite of explicit language in the newly amended Voting Rights Act clearly prohibiting proportional representation requirements, Roberts continued to insist that danger persisted. The Civil Rights Division considered intervening in three voting rights cases challenging reapportionment of Chicago city council districts under the newly-amended Section 2. The Division believed that the redrawing of districts was intentionally discriminatory, and recommended intervention to “more properly focus the private plaintiffs’ allegations.” Suggesting he was not a proponent of the amended Section 2, Roberts agreed: “[I]t is critical that the Department participate in the developing process of giving meaning to the vague terms of the new Section 2, and help courts avoid the outcomes which we argued against and which the proponents of an amended Section 2 assured us were never intended.”<sup>63</sup> The Department did intervene in the case, although its ultimate position on the private plaintiffs’ discriminatory effects claim is not known. *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984).

Despite whatever efforts the Reagan Justice Department may have made to narrow the application of Section 2, the amendment undoubtedly assured increased levels of enfranchisement for countless Americans. According to voting rights expert Frank Parker:

Since 1982 Section 2 has been phenomenally successful in eliminating racially discriminatory barriers to equal minority political participation. It has been used by blacks, Hispanics, and American Indians to challenge discriminatory voting laws. It has been applied in both the North and the South to strike down such voting procedures as discriminatory congressional redistricting and legislative reapportionment plans, at-large county elections, at-large and gerrymandered city council districting schemes in northern and southern cities, at-large state judicial elections, and discriminatory voter

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<sup>61</sup> 128 Cong. Rec. 14,337 (1982).

<sup>62</sup> Voting Rights Act Amendments of 1982 Remarks on Signing H.R. 3112 Into Law by Ronald Reagan (June 29, 1982).

<sup>63</sup> Memorandum from John Roberts to the Attorney General (Sept. 14, 1982).

registration procedures that limit black citizens' opportunities to register to vote.<sup>64</sup>

Almost a decade later, as Deputy Solicitor General, Roberts signed briefs on behalf of the United States in two cases decided by the Supreme Court in 1991, each involving the scope of Section 2 of the Voting Rights Act, as it had been amended in 1982. Although these briefs supported application of the “effects test” in amended Section 2 to the election of state court judges, they do not lead the Legal Defense Fund to conclude that Roberts had changed the views he earlier expressed about the wisdom of amending Section 2 to authorize the “effects test” and thereby to supercede the Supreme Court’s decision in *City of Mobile v. Bolden*.

In one case, *Chisom v. Roemer*, 501 U.S. 380 (1991), the government was a party (having intervened in 1989 in a lawsuit originally brought by private litigants). In the other case, *Houston Lawyers’ Ass’n v. Attorney General of Texas*, 501 U.S. 419 (1991), the government appeared as a “friend of the Court.” In the Supreme Court, the question in both cases was whether elections for state judges were subject to the “results test” of Section 2. (The Court of Appeals for the Fifth Circuit had ruled they were not.)

The private plaintiffs in the case and the United States, in both of its briefs, argued that elections for judges, like elections of other public officials, were covered by Section 2 and its “results test.” For two important reasons, Roberts’ involvement does not signal that his views about the “effects test” had changed. First, the question before the Court was limited to coverage under the Voting Rights Act, not the matter of how a violation of Section would be proved, as the Supreme Court’s opinions in the two cases emphasized.<sup>65</sup> Second, just five years before, the Supreme Court had first interpreted and applied the effects test of Section 2 in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In that decision, the Court rejected arguments made by North Carolina and supported by the United States seeking to limit Section 2. *See Gingles*, 478 U.S. at 52-61. In these circumstances, it would have been nothing short of

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<sup>64</sup> FRANK R. PARKER, *BLACK VOTES COUNT* 179 (1990).

<sup>65</sup> “[T]his case presents us solely with a question of statutory construction . . . [that] involves only the scope of the coverage of § 2 of the Voting Rights Act as amended in 1982. We therefore do not address any question concerning the elements that must be proven to establish a violation of the Act or the remedy that might be appropriate to redress a violation if proved,” *Chisom*, 501 U.S. at 390; “We granted certiorari in these cases . . . for the limited purpose of considering the scope of § 2,” *Houston Lawyers’ Ass’n*, 501 U.S. at 425.

extraordinary for the United States to have attempted to raise concerns it (or Roberts) may still have had about the “results test” in cases involving a much narrower issue.<sup>66</sup>

In the aggregate, the record of Roberts’ involvement with both legislative and litigation matters bearing upon Section 2 of the Voting Rights Act raises serious questions about his understanding of the Congressionally recognized importance of the watershed civil rights statute. As detailed above, that record reveals that he aggressively argued in favor of a narrow construction of Section 2, ignored both the historical and extant circumstances that counseled against his view, and, in partial recognition of the political damage that would likely follow if his position prevailed, sought to cloak the practical impact of those positions. In the absence of countervailing evidence, this record on the nation’s most effective civil rights statute raises profound questions.

### **AFFIRMATIVE ACTION**

One of the most troubling aspects of the Reagan Administration’s retreat in civil rights came in frontal attacks on affirmative action. The Justice Department took the categorical position that it would, under no circumstances, support race-conscious hiring goals and timetables to remedy proven employment discrimination or consider any other numerical or statistical benchmarks designed to facilitate governmental or private monitoring of compliance with laws promoting equal employment opportunity. Instead, the Administration characterized these important civil rights enforcement mechanisms as efforts to provide “non-victims of discrimination preferential treatment based on race, sex, national origin or religion.”<sup>67</sup>

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<sup>66</sup> As Deputy Solicitor General, Roberts also filed briefs in two other cases decided near the same time: *Clark v. Roemer*, 500 U.S. 646 (1991) and *Presley v. Etowah County Commission*, 502 U.S. 491 (1992). However, both of those cases involved *Section 5*, rather than *Section 2*, of the Voting Rights Act. The Supreme Court has emphasized the different legal principles involved in suits brought to enforce these two different parts of the Act:

[W]e have consistently understood these sections to combat different evils and, accordingly, to impose very different duties upon the States, *see Holder v. Hall*, 512 U.S. 874, 883 (1994) (noting how the two sections “differ in structure, purpose and application”)

*Reno v. Bossier Parish School Board*, 520 U.S. 471, 477 (1997).

<sup>67</sup> *The Justice Department Will Not Retreat*, WASH. POST, Oct. 3, 1981.

This approach represented an abandonment of longstanding Justice Department policy which, in appropriate circumstances, sanctioned the use of goals and timetables in a remedial context. Moreover, where systemic and systematic discrimination over a long period of time resulted in a segregated workforce or minority group exclusion from the workforce, the Justice Department, consistent with established case law, had required employers to hire or promote available and qualified minorities. The Reagan Justice Department position, which was to provide a remedy *only* to individual victims of discrimination, ignored the fact that over time it was often impossible to identify individual victims of discrimination, and even where it was possible, often they were no longer available for employment. While damages might be available for individual victims, the workforce segregation would remain intact.<sup>68</sup> The Justice Department's efforts to limit the consideration of race- or sex-based criteria even in devising remedies for proven discrimination and its hostile stance on voluntary efforts to achieve greater desegregation and job opportunities for minorities was contrary to longstanding policies of previous administrations.<sup>69</sup>

Roberts joined the Justice Department just after it embarked upon its campaign against affirmative action. The documents obtained from the National Archives and the Reagan Presidential Library indicate that Roberts played a role in this campaign.

The Justice Department's views on affirmative action in the early 1980s were so extreme that the Department found itself out of sync with the views of other federal agencies in the Reagan administration. One case in point was the Justice Department's position on the Labor Department's enforcement of Executive Order No. 11246, which requires government contractors to engage in affirmative action to ensure equal opportunity in employment of minorities and women.<sup>70</sup> In October 1981, Under Secretary of Labor Malcolm Lovell testified before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor about

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<sup>68</sup> In 1980, the unemployment rate for African Americans was double that of whites, and the percent of African Americans enrolled in college lagged significantly behind that of whites. In fact, a higher percentage of African Americans were high school drop-outs than college graduates. See U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, THE POPULATION 14 TO 24 YEARS OLD BY HIGH SCHOOL GRADUATE STATUS, COLLEGE ENROLLMENT, ATTAINMENT, SEX, RACE, AND HISPANIC ORIGIN: OCTOBER 1967 TO 2002; U.S. CENSUS BUREAU, STATISTICAL BRIEF, BLACKS IN AMERICA – 1992.

<sup>69</sup> See *Reagan's Changes on Rights are Starting to Have Impact*, N.Y. TIMES, Jan. 23, 1982 (noting Justice Department's sharp departure from civil rights policies of predecessor administrations).

<sup>70</sup> Exec. Order No. 11246, 3 C.F.R. 399 (1964-65), *as amended* 3 C.F.R. 684 (1967).

proposed revisions to regulations pertaining to the Department's federal contract compliance programs.<sup>71</sup> Lovell affirmed the position of the Department of Labor and the Office of Federal Contract Compliance Programs (OFCCP) that affirmative action was required under the Executive Order. In testimony before the same Subcommittee, however, William Bradford Reynolds announced that the Justice Department would "no longer insist upon or in any respect support the use of quotas or any other numerical or statistical formula designed to provide to nonvictims of discrimination preferential treatment based on race, sex, national origin or religion."<sup>72</sup>

Subsequently, Roberts became actively engaged in attempting to counter the Labor Department's support of affirmative action. Roberts briefed the Attorney General on the inter-agency conflict, noting that, although the Labor Department's approach was in harmony with regulations under the Executive Order, both the Executive Order and the regulations were inconsistent with the Justice Department's view that Title VII "requires color-blindness and sex-blindness in employment decisions."<sup>73</sup> Of course, the use of such tools had been approved and enforced by every Republican and Democratic administration since President Johnson signed the Executive Order into law in 1965 in the face of persistent discrimination by craft unions in the construction industry.<sup>74</sup> Moreover, by 1981, courts had repeatedly upheld the constitutionality of regulations implementing Executive Order No. 11246.<sup>75</sup> In *United Steel Workers of America v. Weber*, 443 U.S. 193 (1979), the Supreme Court had also upheld employers' voluntary adoption of affirmative action programs.

In a second briefing for the Attorney General, Roberts reaffirmed the Justice Department's position in strong terms: "Under our view of the law it is not enough to say that blacks and women have been historically discriminated against as groups

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<sup>71</sup> Statement of Under Secretary of Labor Malcolm Lovell Before the Subcommittee on Employment Opportunities House Committee on Education and Labor, reprinted in 1981 Daily Lab. Rep. (BNA) No. 194, at F-4 (Oct. 7, 1981).

<sup>72</sup> Statement of Assistant Attorney General William Bradford Reynolds Assistant Attorney General Before the Subcommittee on Employment Opportunities House Committee on Education and Labor, reprinted in 1981 Daily Lab. Rep. (BNA) No. 184, at F-1 (Sept. 23, 1981).

<sup>73</sup> Memorandum from John Roberts to the Attorney General (Oct. 13, 1981).

<sup>74</sup> See, e.g., *Justice Official Says Data Shows Quotas Misused*, N.Y. TIMES, Mar. 29, 1986.

<sup>75</sup> See, e.g., *Contractors Ass'n of Eastern Pennsylvania v. Shultz*, 442 F.2d 159 (3d Cir. 1971); *U.S. v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980); *McLaughlin v. Great Lakes Dredge and Dock Co.*, 1979 U.S. Dist. Lexis 13321 (N.D. Ohio 1979).

and are therefore entitled to special preferences.”<sup>76</sup> Roberts faulted the Department of Labor and the OFCCP for imposing hiring and promotion goals and timetables on contractors who were found to be underutilizing minorities or women based on statistics, rather than other proof of discrimination. Roberts expressed marked hostility to the OFCCP, which was responsible for day-to-day administration and enforcement of the Executive Order and whose support for affirmative action was instrumental in bringing significant numbers of minorities and women into professions that had historically barred entry to such groups.<sup>77</sup> Nevertheless, Roberts viewed the OFFCP and the Labor Department as “unnecessarily compromising the bedrock principle of treating people on the basis of merit without regard to race or sex.”<sup>78</sup>

The ultimate objective, according to Roberts, was to bring the Labor Department and OFFCP “into line with our views stressing color and sex blindness in employment decisions.”<sup>79</sup> He recommended changing the regulations, stating that the Executive Order itself did not mandate the “offensive preferences based on race or sex” required by the regulations. Roberts also suggested a “half-way step”: the regulations could be redrafted to provide that goals and timetables be tempered by hiring or promoting only the most qualified persons. Roberts believed that stressing recruitment efforts would represent a compromise between enforcing color blindness in actual decisions and accepting affirmative action to increase the applicant pool.

Roberts offered deeply troubling responses to potential arguments in support of affirmative action. He still found the regulations objectionable, despite the facts that that they did not require strict quotas but only “preferences,” and that the use of such preferences had been upheld by courts.<sup>80</sup> Roberts recognized that the Justice

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<sup>76</sup> Memorandum from John Roberts to the Attorney General (Dec. 2, 1981).

<sup>77</sup> In fact, a 1983 unpublished Labor Department study concluded that the federal contract compliance program was responsible for a 20% increase in minority employment as compared to an only 12% increase within companies not covered by the type of affirmative action requirements criticized by Roberts. The difference in the hiring of women between federal contractors and non-contractors was even greater with 15.2% growth in employment of women in companies covered by affirmative action requirements, as compared with 2.2% growth in non-covered companies. *Study Says Affirmative Rule Expands Hiring of Minorities*, N.Y. TIMES, June 18, 1983.

<sup>78</sup> Memo, *supra* note 71, at 1.

<sup>79</sup> *Id.*

<sup>80</sup> See, e.g., *Contractors v. Shultz*, 442 F.2d at 177 (“The [affirmative action plan required under Exec. Order No. 11246] is valid Executive action designed to remedy the perceived evil that minority tradesmen have not been included in the labor pool available

Department position would effectively trump the Labor Department's enforcement of the Executive Order but advised against saying so publicly:

Possible argument: If the Labor Department rules in this area are simply the same as the generally applicable rules, there will be no need for an OFCCP at all.

**Answer: that's right.**

**Answer to give publicly: OFCCP will continue to serve a valuable monitoring function, guarding against discrimination by companies dealing with the government....**<sup>81</sup>

The antipathy towards the OFCCP expressed by Roberts was indicative of the Justice Department's overall hostility to affirmative action that would eventually culminate in its 1985 proposal to President Reagan that Executive Order No. 11246's requirements be repealed.<sup>82</sup> This position represented a radical departure from twenty years of established civil rights policy, and was at odds not only with the Labor Department but with the Equal Opportunity Commission, which encouraged federal agencies to use goals and timetables in their affirmative action plans.<sup>83</sup> President Reagan ultimately abandoned the Justice Department's proposed rule change in the face of fierce criticism by civil rights advocates, and intervening Supreme Court decisions that made the Justice Department's ideologically driven position even more clearly untenable.<sup>84</sup>

A related but equally troubling issue concerns Roberts' treatment of the decision in *United Steel Workers of America v. Weber*, 443 U.S. 193 (1979), as he argued to restrict the use of affirmative action. *Weber* affirmed the permissibility of voluntary race-conscious affirmative action plans under Title VII of the Civil Rights Act of 1964 despite criticism by Justice Rehnquist in his dissent that such plans were not truly voluntary but were required under the Labor Department's interpretation of

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for the performance of construction projects in which the federal government has a cost and performance interest").

<sup>81</sup> Memorandum from John Roberts to the Attorney General (Dec. 2, 1981) (emphasis added).

<sup>82</sup> *See Goals for Hiring to Stay in Place*, N.Y. TIMES, Aug. 25, 1986.

<sup>83</sup> *U.S. Agencies Vary on Rights Policy*, N.Y. TIMES, Nov. 16, 1981.

<sup>84</sup> *See Goals*, *supra* note 82; *Local 28 Sheet Metal Workers, Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986); *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986).



the Executive Order. In promoting the Justice Department's position on affirmative action, however, Roberts dismissed *Weber* by noting that the decision "has only *four* supporters on the current Supreme Court."<sup>85</sup> (At this point, Justice Stewart had retired from the Supreme Court.) Roberts made a similar argument when briefing White House Communications Director David Gergen after President Reagan indicated support for voluntary affirmative action: "Justice Stevens and Powell did not participate in the *Weber* case, and Justice Stewart was one of the five members of the Court comprising the majority, so a majority of the sitting Justices are not on record as agreeing with the analysis in *Weber*."<sup>86</sup> Roberts recognized that *Weber* involved a private program, rather than "government pressure," but he acknowledged "[w]e have difficulties with its reasoning, and do not accept it as the guiding principle in this area."<sup>87</sup>

Roberts also revealed troubling views on affirmative action in comments on the U.S. Commission on Civil Rights' report, "Affirmative Action in the 1980s: Dismantling the Process of Discrimination." The report was released by outgoing Commission Chair Arthur Flemming, whom President Reagan had recently fired.<sup>88</sup> The report was the result of two years of work by the Commission that included research and consultation with lawyers, government officials, social scientists, and management and labor representatives. The report first documented the extent to which race, sex, and national origin discrimination remained pervasive and entrenched. As described by the Commission,

Today's discriminatory processes originated in our history of inequality, which was based on philosophies of white and male supremacy. These processes became self-sustaining as the prejudiced attitudes and behaviors of individuals were built into the operations of organizations and their supporting social structures (such as education, employment, housing, and government). These built-in mechanisms reinforce existing discrimination and breed new unfair practices and damaging stereotypes. Such discrimination then perpetuates the inequalities that set the processes in motion in the first place. . . . Although the resulting

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<sup>85</sup> Memorandum from John Roberts to the Attorney General (Dec. 2, 1981).

<sup>86</sup> Memorandum from John Roberts to David Gergen (Dec. 18, 1981).

<sup>87</sup> Memorandum from John Roberts to the Attorney General (Dec. 2, 1981).

<sup>88</sup> *Civil Rights Leaders Rally Around the Affirmative Action Flag*, WASH. POST, Dec. 9, 1981.

patterns may not be overtly racist, sexist, or bigoted, they subordinate, exclude, segregate, and deny equal opportunity almost as effectively as overt discrimination does.<sup>89</sup>

The Commission's report argued that race- and sex-conscious affirmative action programs are often the only effective means of eliminating the persistent effects of racial prejudice and oppression. The report also made the case for the use of statistical measures of race and gender representation in diagnosing the nature and extent of structural discrimination, and in assessing the progress of affirmative action plans designed to remedy such discrimination, and it pointed to civil rights law supporting the so-called "problem-remedy approach" advanced by the Commission. The report concluded by addressing some of the major concerns of opponents and proponents of affirmative action, and included an appendix with guidelines for effective affirmative action plans.

In a memorandum to the Attorney General, Roberts derisively characterized the Commission's report as 'self-serving,' and called its logic "perfectly circular: the evidence of structural discrimination consists of disparate results, so it is only cured when 'correct' results are achieved through affirmative action quotas."<sup>90</sup> In response to the report's lament that resistance to affirmative action causes some programs to fail, Roberts observed, "[t]here is no recognition of the obvious reason for failure: the affirmative action program required the recruiting of inadequately prepared candidates."<sup>91</sup> He recommended that the Attorney General not read the report at all.<sup>92</sup>

There is no indication that Roberts' strongly negative opinion of race-conscious affirmative action programs, reflected in these documents, have changed since his days in the Reagan Justice Department. As Acting Solicitor General, Roberts signed a brief filed on behalf of the government in *Metro Broad. v. FCC*, 497 U.S. 547 (1990).<sup>93</sup> The brief was unusual because the Solicitor General elected to oppose the Federal Communications Commission's affirmative action program for

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<sup>89</sup> U.S. COMM'N ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN THE 1980S: DISMANTLING THE PROCESS OF DISCRIMINATION 2 (1981).

<sup>90</sup> Memorandum from John Roberts to the Attorney General (Dec. 22, 1981).

<sup>91</sup> *Id.*

<sup>92</sup> *See id.*

<sup>93</sup>As a former member of the United States Court of Appeals for the District of Columbia, Solicitor General Kenneth Starr routinely removed himself from all cases involving the D.C. Circuit.

awarding new broadcast licenses, rather than defending the challenged federal program. The brief argued that the federal agency's policy of awarding credit to racial minorities in licensing proceedings in order to increase minority participation in broadcasting was not justified by a legitimate government purpose.<sup>94</sup> The Supreme Court rejected the government's arguments, finding that the F.C.C. program was constitutional and achieved the important government objective of broadcast diversity. In its ruling, the Court noted that prior to the enactment of the policy at issue, minorities constituted one-fifth of the population yet owned no television stations, and owned only ten of the approximately 7,500 radio stations in the country.<sup>95</sup>

During his later career in private practice, Roberts filed briefs vigorously opposing affirmative action. For example, he filed an *amicus* brief on behalf of the Associated General Contractors of America in *Adarand Constructors, Inc. v Peña*, 515 U.S. 200 (1995), arguing that strict scrutiny should be applied to all government racial classifications in light of "the extreme danger to society from the use of racial preferences. . . ."<sup>96</sup> Roberts also filed an *amicus* brief on behalf of the Associated General Contractors of America in *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001), arguing that Congress failed to make an evidentiary showing sufficient to establish a compelling need for the affirmative action programs at issue in *Adarand v. Peña*, in spite of evidence amassed by Congress after the Supreme Court's ruling in the earlier case.<sup>97</sup> Roberts also challenged some of the same programs at issue in the *Adarand* cases in an *amicus* brief filed on behalf of the Associated General Contractors of America in *Rothe v. Dep't of Defense*, 194 F. 3d 622 (5th Cir. 1999), a case before the Fifth Circuit that was subsequently transferred to the Federal Circuit.<sup>98</sup> The affirmative action program at issue in *Rothe* enhanced the bids of businesses owned by socially and economically disadvantaged individuals on some procurement contracts of the Department of Defense. The Associated General Contractors' brief described the program as a "racial spoils system" and argued that the district court below gave undue deference to congressional evidence that the

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<sup>94</sup> See Brief for United States as *Amicus Curiae*, *Metro Broadcasting* (No 89-453), available at 1989 WL 1126975.

<sup>95</sup> *Metro Broadcasting*, 497 U.S. at 553.

<sup>96</sup> See Brief *Amicus Curiae* of the Associated General Contractors of America, Inc. at 6, *Adarand v. Peña* (No. 93-1841), available at LEXSEE 1993 U.S. Briefs 1841.

<sup>97</sup> See Brief *Amicus Curiae* for the Associated General Contractors of America, Inc., *Adarand v. Mineta* (No. 00-730), available at 2001 WL 649830.

<sup>98</sup> See Brief *Amicus Curiae* of the Associated General Contractors of America, Inc., *Rothe* (No. 99-50436), available at 1999 WL 33623709, \*4.

program was supported by a compelling interest. The Federal Circuit remanded the case, ordering the district court to review the policy under a more exacting standard of scrutiny.<sup>99</sup>

Although in *Rice v. Cayetano*, 528 U.S. 495 (2002), Roberts represented Hawaii and defended a provision of Hawaii's Constitution that permitted only descendants of the aboriginal people of the Hawaiian Islands to vote for trustees of the Office of Hawaiian Affairs, an entity established to administer programs for the benefit of native Hawaiians, as defined by statute, Roberts' brief and oral argument did not rely on affirmative action precedents. Indeed, the brief specifically eschewed any connection between the issues in the case and historic racial discrimination within the United States, stating that "this case does not present an opportunity to end racial strife in this country. Nor does it fit in line with the Court's precedents confronting discrimination against African-Americans, or efforts to redress that discrimination."<sup>100</sup> Instead, Roberts argued, albeit unsuccessfully,<sup>101</sup> that the case should be treated like those involving other aboriginal peoples of the United States, that the challenged provision was not race-based, and that the unique legal and political status of aboriginal peoples created a special trust relationship with the United States as recognized by federal law.<sup>102</sup> Thus, Roberts' representation of Hawaii in this matter does not by itself demonstrate any significant change in his views on affirmative action. Whatever motivated his representation of Hawaii, there is no evidence suggesting that his views on affirmative action as applied to African Americans has changed.

Finally, the one decision in which Roberts participated as an appellate court judge that touches upon affirmative action also marks no clear change of views. In that case, *Sioux Valley Rural Television, Inc. v. FCC*, 349 F.2d 667 (D.C. Cir. 2003), the FCC withdrew a system of awarding additional bidding credits to minority- and women-owned small businesses and replaced it with retroactive equal bidding credits for all small businesses. A disappointed bidder that could not qualify as a small

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<sup>99</sup> *Rothe v. Dep't of Defense*, 262 F.3d 1306 (Fed. Cir. 2001).

<sup>100</sup> Brief for Respondent, *Rice v. Cayetano* (No. 98-818), available at 1999 WL 557073, \*2.

<sup>101</sup> The voting provision was stricken as a violation of the Fifteenth Amendment to the Constitution. *Rice v. Cayetano*, 528 U.S. 495 (2002).

<sup>102</sup> Roberts stated at the beginning of his oral argument: "Petitioner was not denied the right to vote on account of his race. He was not permitted to vote for Office of Hawaiian Affairs trustee because he is not a beneficiary of the trusts they administer." Transcript of Oral Argument, *Rice v. Cayetano* (No. 98-818), available at 1999 WL 955376, \*20 (Oct. 6, 1999).

business challenged the new rule as motivated by impermissible racial and gender preference in light of that history. Judge Roberts authored the opinion for a unanimous panel rejecting those claims, relying both upon earlier rejection by the D.C. Circuit of an identical challenge to another FCC auction<sup>103</sup> and on the fact that the new rule was explainable on race-neutral grounds including fairness to the participants who had relied on the existence of the previous bidding credit.<sup>104</sup> Notably, however, Judge Roberts did refer to the rescinded rule as “unconstitutional discrimination.”<sup>105</sup>

Roberts’ hostility to affirmative action remedies is one of the defining aspects of his civil rights record. He immediately positioned himself on the leading edge of the Reagan administration’s assault on affirmative action and retrenchment campaign. Significantly, in stark contrast to the searching practical assessment that drove Justice O’Connor’s recent opinion in *Grutter*, in which the Supreme Court upheld certain affirmative action remedies in higher education, the color blindness espoused by Roberts unfortunately extends to the continuing effects of the discrimination that affirmative action is designed to address.

As detailed above, Roberts’ affirmative action record also offers perhaps the best example of what appears to have been his unfortunate willingness to cloak the impact of the controversial policy positions that he favored. During his service in the Executive Branch, Roberts worked aggressively to limit the reach of then-recent Supreme Court affirmative action precedents under Title VII. This example poses substantial questions about whether Roberts would similarly seize any available opportunity to revisit the comprehensively briefed and recently decided affirmative action case of *Grutter* in which not only scores of educational institutions, but also corporate America, and the United States military urged the Supreme Court to permit the use of affirmative action. The evidence that Roberts’ strongly negative views of affirmative action persist – and that those views situate him comfortably with those who seek to root out any and all forms of affirmative action remedies, a view beyond the majority of the Rehnquist Court – must not be ignored.

## **EQUAL EDUCATIONAL OPPORTUNITY**

No legal standard has been more important to the struggle for freedom from racial discrimination in the classroom than the right to “equal protection” under the law — established in 1868 with the adoption of the Fourteenth Amendment in the

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<sup>103</sup> *Id.* at 675.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 676.

immediate aftermath of the Civil War. Notwithstanding state and local oversight of education issues, for the last fifty years the executive branch under every Presidential administration from Dwight D. Eisenhower to George W. Bush has played a substantial role in determining whether educational opportunities would be enhanced or diminished for African Americans and other racial minorities. Throughout this period, equal access to, and the funding and performance of, schools has been at the forefront of the nation's ongoing effort to remove the vestiges of racial discrimination from one of the areas where they have been the most pronounced and corrosive. Roberts' views on reconciling the equal protection guarantees of the Fourteenth Amendment with state and local governmental entities' role in operating public schools, colleges and universities demonstrate his resistance to existing interpretations of federal law governing public education.

As Special Assistant at the Justice Department, John Roberts helped develop a program under the banner of fighting "judicial activism" that was targeted most pointedly to restricting the reach of the Fourteenth Amendment's equal protection and due process clauses. In articles Roberts drafted for the Attorney General, he summed up the program: "We will thus urge judicial restraint at every stage of the lawsuit – determining whether it may be brought, addressing the merits, and directing relief."<sup>106</sup> In arguing that judicial restraint was needed to stop courts from engaging in policy making instead of interpreting and applying the law, Roberts stated that judges have "elevat[ed their] policy preferences over the considered judgment of elected representatives under the guise of [the] 'due process' or 'equal protection [clauses of the Fourteenth Amendment].'"<sup>107</sup> He argued – contrary to the history of broad interpretation of civil rights laws – for a narrow judicial interpretation of these rights: "courts [should] intervene under the potent yet indeterminate bases of due process or equal protection only when clearly necessary."<sup>108</sup>

Roberts disagreed with other Justice Department officials about the extent to which federal courts could be limited in fashioning remedies in school desegregation cases. In a memorandum written to White House Counsel Fred Fielding, Roberts criticized a proposed Justice Department analysis of an anti-busing bill, the Public School Civil Rights Act of 1983.<sup>109</sup> The Department's analysis was based on an earlier analysis from Attorney General William French Smith to House Judiciary

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<sup>106</sup> Memorandum from John Roberts to Kenneth Starr (Feb. 22, 1982) (attached draft magazine article at 14).

<sup>107</sup> *Id.* at 6.

<sup>108</sup> *Id.* at 9; *see also* Memorandum from John Roberts to Kenneth Starr (Nov. 24, 1981) (attachments).

<sup>109</sup> Memorandum from John Roberts to Fred Fielding (Feb. 15, 1984).

Chair Peter Rodino, concerning a similar bill.<sup>110</sup> That letter was preceded by a sharp disagreement between Roberts and Theodore Olson, the Assistant Attorney General over the Office of Legal Counsel (OLC). In his memorandum to Fielding, Roberts remarked: “I spent several months in my previous incarnation disputing Ted Olson’s approach to these issues; the May 6 Attorney General letter signaled Olson’s victory in the extended internal debate.”<sup>111</sup>

Olson concluded that Congress possessed the power to prohibit federal busing orders only if effective alternative remedies for unconstitutional segregation existed.<sup>112</sup> He interpreted school desegregation cases to hold that busing may in some circumstances be constitutionally required and, therefore, Congress could not flatly prohibit busing. Roberts disagreed. He believed that the cases held merely that busing was *permissible*. He stated that, if Congress were to conclude that busing was not an effective remedy, it could therefore could prohibit federal courts from ordering busing.<sup>113</sup>

At the Justice Department, Roberts also addressed the constitutionality of legislation that would strip the federal courts of jurisdiction over certain constitutional claims. Again, there was substantial debate within the Department.<sup>114</sup> Roberts authored a lengthy memorandum, strongly arguing that Congress can remove federal jurisdiction over particular constitutional rights.<sup>115</sup> The memorandum itself and the cover note from Kenneth Starr indicate Roberts had been requested to draft an “advocacy piece,” making the “strongest case” in favor of Congress’ power to curb “judicial excesses.”<sup>116</sup> That the memorandum may have reflected Roberts’ personal

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<sup>110</sup> *Id.*, citing letter from William French Smith to Chairman Peter Rodino (May 6, 1982).

<sup>111</sup> Memorandum from John Roberts to Fred Fielding (Feb. 15, 1984).

<sup>112</sup> Memorandum from John Roberts to Fred Fielding (Feb. 15, 1984).

<sup>113</sup> *Id.*

<sup>114</sup> An OLC memorandum from Olson set out arguments on both sides. Memorandum from Theodore Olson to the Attorney General (Apr. 12, 1982). On May 6, 1982, Attorney General Smith sent a letter to Strom Thurmond concluding that the proposal to eliminate federal jurisdiction over school prayer claims was unconstitutional. Letter from William French Smith to Chairman Strom Thurmond (May 6, 1982).

<sup>115</sup> Memorandum by John Roberts, “Proposals to Divest the Supreme Court of Appellate Jurisdiction: An Analysis in Light of Recent Developments.” The date is October 30, with no year. It is likely 1981; it does not refer to the Thurmond letter stating the legislation was unconstitutional.

<sup>116</sup> *Id.* at 2; cover note.

views is supported by Roberts' handwritten note in the margin of the April 12, 1982 OLC memo: "real courage would be to read the Constitution as it should be read and not to kowtow to the Tribes, Lewises, and Brinks."<sup>117</sup>

Roberts contended that whenever Congress disagrees with a Supreme Court decision construing the Constitution, Congress can in effect overturn that decision simply by stripping the federal courts of jurisdiction over the subject matter in question. On this view, Congress could have effectively nullified *Brown v. Board of Education* by adopting a law in 1955 ending federal jurisdiction over school desegregation cases. The May 1982 letter from Attorney General William French Smith to Chairman Thurmond concluded, to the contrary, that such legislation would be unconstitutional because it would conflict with the core function of the Supreme Court.

Roberts made other problematic arguments. He asserted that court stripping could be defended on the ground that Congress "is not attempting to dictate any particular result."<sup>118</sup> But elsewhere Roberts acknowledged that the purpose of court stripping was to respond to Supreme Court decisions ("judicial excesses")<sup>119</sup> that Congress does not like ("expression of congressional discontent")<sup>120</sup> by altering the results. Moreover, Roberts wrote that Congress could determine that "in certain cases, such as abortion and school desegregation cases, the guarantees of due process and equal protection are more appropriately enforced by state courts."<sup>121</sup> Although Roberts acknowledged that Congress could not enact a court stripping law that discriminated on the basis of race, he argued that Congress could exclude all school desegregation cases from federal courts. Such a law, he insisted, would classify "on the basis of the type of case involved," not race.<sup>122</sup> "The classification ... affects both black and white litigants."<sup>123</sup> But, as Roberts surely knew, state-imposed school segregation was adopted to discriminate against racial minorities. There were no white plaintiffs suing for admission to *de jure* African-American schools.

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<sup>117</sup> Memorandum from Theodore Olson to the Attorney General at 9 (Apr. 12, 1982).

<sup>118</sup> Memorandum by John Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction: An Analysis in Light of Recent Developments," at 19.

<sup>119</sup> *Id.* at 19.

<sup>120</sup> *Id.* at 22.

<sup>121</sup> *Id.* at 25.

<sup>122</sup> *Id.* at 24.

<sup>123</sup> *Id.*



Several years later, as Principal Deputy Solicitor General, Roberts was involved in three significant school desegregation cases. All three involved systems marked by longstanding racial segregation imposed by law followed by a period of years during which varying degrees of desegregation measures were undertaken, a continuing presence of racial segregation, a significant resource and/or achievement gap between African American and white students, and a request by school officials to be relieved of obligations to further address the racial segregation or the attendant educational disadvantage. In each, the brief Roberts signed onto advanced the retreat from *Brown v. Board of Education*.

*Bd. of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991), was the first major school desegregation case before the Supreme Court in a decade. The case involved the circumstances under which a formerly *de jure* school system could be released from its obligations to dismantle that system and to remedy the effects of racial segregation.<sup>124</sup> In 1963, the trial court had found that the school board's creation of neighborhood schools intensified the patterns of residential segregation, with whites moving from areas where African Americans were concentrated and the board allowing whites to transfer to schools in predominately white areas.<sup>125</sup> By 1972, the trial court concluded the board "totally defaulted" on proposing an acceptable desegregation plan, and ordered significant transportation of students to desegregate the system.<sup>126</sup> That plan was in effect until 1984, when the board again adopted a neighborhood school attendance plan, re-creating the same 10 virtually all-black schools that existed before the court-ordered desegregation plan. In 1987, the trial court concluded that the board had complied with the 1972 plan in good faith, that the 1984 plan had not been adopted with discriminatory intent, and that the system had become "unitary," freeing it from all desegregation obligations.<sup>127</sup>

The Tenth Circuit reversed, holding that the trial court applied the wrong legal standard and that, given the significant number of one-race schools recreated under the neighborhood plan, the circumstances had not changed enough to justify dissolving the decree. The Tenth Circuit held that the school district had an "affirmative duty . . . not to take any action that would impede the process of

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<sup>124</sup> *Dowell*, 498 U.S. at 237.

<sup>125</sup> *Dowell v. Sch. Bd. of Oklahoma City*, 219 F. Supp. 427, 431-34 (W.D. Okla. 1963).

<sup>126</sup> *Dowell*, 338 F. Supp. 1256, 1271 (W.D. Okla.); 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972).

<sup>127</sup> *Dowell*, 677 F. Supp. 1503, 1526 (W.D. Okla. 1987).

disestablishing the dual system and its effects.”<sup>128</sup> It remanded the case for modification of the existing decree in view of changed circumstances the school district had identified regarding increased transportation burdens on African-American children. The Court concluded that, based on the record, “other measures that are feasible remain available to the Board.”<sup>129</sup>

In the Supreme Court, the plaintiffs proposed various standards for assessing “unitariness,”<sup>130</sup> and argued that the school district should not be released where “the reimposition of neighborhood schools on racially segregated housing caused by state action, including acts of the school district, has resulted in a school system in which the vestiges of the prior segregated system have not been eliminated ‘root and branch.’”<sup>131</sup>

Prior to *Dowell*, it was well established that a school system found to have been unconstitutionally segregated by law has an affirmative obligation to dismantle that system and to eliminate the vestiges of it “root and branch.” *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 437-38 (1968). The test of whether that duty has been met is not one of determining whether an “intent” to discriminate exists, but rather, whether the effects of a prior discriminatory system persists. *Green* required every facet of school operation to be assessed and identified six key factors – student assignment, faculty assignment, staff assignment, facilities, transportation, and extra-curricular activities. Under the *Green* analysis, the school system, not the the victims of the unconstitutional system, is responsible for eliminating the vestiges of discrimination.

While acknowledging the need to assess whether vestiges of a dual system had been eliminated, the Solicitor General’s *amicus* brief signed by Roberts focused primarily on the subjective intent of school officials, and urged the adoption of a less demanding standard for determining whether a system should be declared unitary, focusing instead on whether school officials acted in good faith and abandoned acts

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<sup>128</sup> *Dowell*, 890 F.2d 1483, 1504 (10th Cir. 1989) (quoting *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979)).

<sup>129</sup> *Id.* at 1505.

<sup>130</sup> “Unitariness” denotes a point when a racially dual system has been dismantled, the vestiges have been eliminated, and the system is no longer obligated to take remedial measures.

<sup>131</sup> Brief for Respondents, *Bd. of Educ. of Oklahoma City Public Sch. v. Dowell* (No. 89-1080), available at 1990 WL 10022502.

of intentional discrimination.<sup>132</sup> The brief also inserted into the vestiges analysis a component of “practicability,” thus setting the stage for courts to accept a panoply of excuses as to why nothing can be done about the vestiges.<sup>133</sup> Furthermore, the brief discounted the causal link between residential and educational segregation. Describing residential segregation as a “ripple effect” of school segregation and “inherently intractable,” the brief urged the Court – contrary to the evidence about the nature of residential segregation – to adopt a “strong presumption” that this vestige was “attenuated” to the extent that individual intervention was no longer warranted if the six *Green* factors have been properly addressed.<sup>134</sup>

The Supreme Court adopted much of the brief’s approach with an emphasis on the temporary nature of the remedy instead of on providing the victims a full measure of relief. *Dowell*, 489 U.S. at 247. It incorporated the proposed “good faith” and “practicability” components into the test of unitariness.<sup>135</sup> While it did not adopt the “strong presumption” of attenuation regarding the residential segregation that Roberts’ brief proposed, in a footnote on remand, it directed the district court, using the new “practicability” standard, to assess anew whether the current residential segregation was the result of private decisionmaking, “too attenuated to be a vestige of former school segregation,”<sup>136</sup> thereby setting the frame to de-link the residential and school segregation.

Shortly after *Dowell*, the Supreme Court heard *Freeman v. Pitts*, a school desegregation case from DeKalb County, Georgia.<sup>137</sup> The case arose from the school system’s petition for a final dismissal of its order to desegregate. Despite more than a decade of litigation to desegregate the DeKalb County Schools, decisions by the school system, coupled with rapid demographic changes in the county, exacerbated rather than reduced the degree of racial isolation in the schools.

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<sup>132</sup> Brief for the United States as *Amicus Curiae*, *Bd. of Educ. of Oklahoma City Public Sch. v. Dowell*, No. 89-1080, available at 1990 WL 10022500, at \*14.

<sup>133</sup> *Id.* at \*15.

<sup>134</sup> *Id.* at \*28.

<sup>135</sup> *Bd. of Educ. of Oklahoma City v. Dowell*, 498 U.S. 237, 249-50 (1991).

<sup>136</sup> *Id.* at 250 n. 2.

<sup>137</sup> *Freeman v. Pitts*, 503 U.S. 467 (1992).

By the time of trial in 1986, a fully segregated school system was operating.<sup>138</sup> The district court found that the school system was unitary in student assignments, transportation, facilities, and extra-curricular activities and, ordered no further relief in those areas. The court did not dismiss the case, however, finding that vestiges remained in the areas of teacher and principal assignments, resource allocation, and quality of education.<sup>139</sup> The court ruled that residential segregation was an inevitable result of suburbanization unrelated to the school system's unconstitutional conduct, and thus the system had achieved the maximum practical desegregation with respect to student assignment. No party urged extensive busing, but plaintiffs requested more relief in student assignment through the consideration of measures such as magnet schools, grade restructuring and subdistricting. The Eleventh Circuit reversed, holding that the system could not be released in this piecemeal fashion and that, until the district had obtained unitary status in the entire system, it had to address continuing segregation in student assignment, even if that meant adopting extensive remedial measures.<sup>140</sup>

In the Supreme Court, the Solicitor General filed an *amicus* brief signed by Roberts, supporting the school system's effort to avoid further desegregation obligations. Changing the terminology used for decades in desegregation cases, it argued for using the term "remnants" instead of "vestiges" for those aspects of prior segregation and discrimination to be remedied, and defined "remnants" as factors that "must not only have been caused by the dual school system, but themselves have been a part of the dual school system."<sup>141</sup> The brief emphasized that, once a finding of unitary status was made with respect to a particular "remnant," even if court supervision continued because other aspects of the system were still segregated, a court could not order additional relief regarding that "remnant" absent proof by plaintiffs of purposeful discrimination.<sup>142</sup> As a practical matter, this made it much more difficult for plaintiffs to remedy discrimination once a system was declared "unitary" in any respect.

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<sup>138</sup> Five of the 22 high schools were more than 90% black and five were more than 80% white. Faculty and staff assignments were racially identifiable. The system spent \$341 more per year per student in majority white schools than those in majority black schools. *Id.* at 15-18.

<sup>139</sup> *Freeman v. Pitts*, 503 U.S. at 474.

<sup>140</sup> *Freeman v. Pitts*, 887 F.2d 1438 (11<sup>th</sup> Cir. 1989).

<sup>141</sup> Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Freeman v. Pitts* (No. 89-1920), available at LEXSEE 1989 U.S. Briefs 1920, 4, 6.

<sup>142</sup> *Id.* at 10.

The Supreme Court reversed the Eleventh Circuit and approved the incremental approach to unitary findings and the withdrawal of court supervision.<sup>143</sup> Notably, the Court did not accept the position advanced in the Solicitor General's brief that the unitary analysis must be limited to the *Green* factors. Justice Blackmun, joined by Justices Stevens and O'Connor, concurred in the judgment, finding that it was not enough for the school system to say that the segregation was caused by demographic change. Rather, the district must prove that it did not contribute to the segregation either by contributing to the demographic change or by contributing directly to the racial stratification.<sup>144</sup>

In the third instance, the Justice Department and a group of African-American citizens filed lawsuits challenging the continuing segregation of Mississippi's higher education system. These cases, *United States v. Fordice* and *Ayers v. Fordice*, were major desegregation cases linking contemporary segregation of Mississippi's public colleges and universities to the uninterrupted and extensive efforts of Mississippi to maintain a racially segregated system of higher education beginning shortly after the end of the Civil War. Racial segregation in Mississippi's schools was required by statute in 1878 and by the Mississippi Constitution of 1890.<sup>145</sup> Opportunities in historically black colleges and universities (HBCUs) were extremely limited, while the five historically white colleges and universities (HWCUs) provided extensive offerings at all levels; only a small amount of higher education funding was allocated for African Americans; and African Americans were forced to leave the state for graduate and professional study.<sup>146</sup> Massive resistance to *Brown v. Bd. of Educ.*'s mandated to end racial segregation in public education, including colleges and universities, culminated with President Kennedy's enforcement of a federal court order admitting James Meredith to the University of Mississippi in 1962. In 1969, the Office for Civil Rights of the U.S. Department of Health, Education and Welfare notified Mississippi it was operating a segregated system of higher education in violation of the law and asked for a desegregation plan: Mississippi did not respond. When the State finally submitted such a plan, the Office for Civil Rights found it inadequate, noting it failed to detail "actions which will eliminate the effects of past racial segregation."<sup>147</sup>

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<sup>143</sup> *Freeman v. Pitts*, 503 U.S. at 489.

<sup>144</sup> *Freeman v. Pitts*, 503 U.S. at 509-18 (footnotes and citations omitted).

<sup>145</sup> See Brief of the NAACP Legal Defense Fund, et al., as *Amici Curiae* in Support of Petitioners, *Ayers v. Fordice*, (Nos. 90-6588 and 90-1205), available at LEXSEE 1990 U.S. Briefs 6588, 5-6.

<sup>146</sup> *Id.* at 11-12 (citing the Brewton Report of the Board of Trustees).

<sup>147</sup> *Id.* at 19 (citation omitted).

By the time of trial in 1987, Mississippi was sending 86% of its white students to three overwhelmingly “comprehensive” HWCUs that on every substantive measure were better supported than the HBCUs, attended by 71% of the state’s African American students. The district court, however, found Mississippi had satisfied its obligations under the Fourteenth Amendment by discontinuing prior discriminatory practices and adopting and implementing good-faith, race-neutral practices.<sup>148</sup> The Fifth Circuit affirmed.<sup>149</sup> On appeal to the Supreme Court, the private plaintiffs and supporting *amici* urged the Court to reject the “race-neutral” test and to continue to impose an affirmative duty to dismantle the dual system and eliminate its vestiges root and branch.<sup>150</sup>

The Solicitor General filed a brief as a party in the case, signed by Roberts, which supported more limited obligations and remedial requirements for the state and a more difficult burden for plaintiffs challenging racial discrimination in higher education. Like the brief filed in *Pitts*, the Solicitor General’s *Fordice* brief advocated using the term “remnants” instead of “vestiges” and again focused on limiting the state’s responsibility for remedying the egregious history, and legacy of racial discrimination in its public college and university system.<sup>151</sup>

The Solicitor General’s brief expressly recognized that, in the context of higher education where students select their institutions, “the mere continued existence of single-race institutions ‘does not make out a constitutional violation.’”<sup>152</sup> Thus, there was no doubt that the government fully expected that colleges comprised heavily of one race would continue to exist. After this recognition, however, the brief affirmatively argued against enhancing the HBCUs:

Nor do we discern an independent obligation flowing from the Constitution to correct disparities between what was provided historically black schools – in terms of

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<sup>148</sup>*Ayers v. Allain*, 674 F. Supp.1523 (N.D. Miss. 1987).

<sup>149</sup>*Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990).

<sup>150</sup> Brief of Petitioners, *Ayers & U.S. v. Fordice* (Nos. 90-6588 and 90-1205), available at 1991 WL 538728, \*43-50; *Amicus* Brief of the NAACP Legal Defense Fund, et al., *supra* note 145 at 27-55.

<sup>151</sup> Brief for the United States, *Ayers & U.S. v. Fordice* (No. 90-6588), available at 1991 WL 527603, at \*26-27 & n.27.

<sup>152</sup> *Id.* at \*31.

funding, programs, facilities, and so forth – and what was provided historically white schools. . . .<sup>153</sup>

This argument caused a public uproar since it virtually invited an approach that placed the burden of desegregation upon the HBCUs<sup>154</sup> and encouraged states to either neglect or close, but not enhance, these institutions. This was a rather perverse result when the only institutions consistently showing a commitment to addressing the educational deficits visited upon African-American citizens of Mississippi were the HBCUs.

The controversy was reported in the press.<sup>155</sup> African-American educators called upon President Bush and the Solicitor General to resolve the issue. As a result, the government’s reply brief, on which Roberts’ name does not appear, did something rarely done by retracting its argument. The retraction was reported in the press: “Acting on orders from President Bush, the Justice Department has changed its position in a Supreme Court desegregation case because Black-college advocates persuaded Bush that the Justice stance would be disastrous to Black colleges.”<sup>156</sup> In its reply, the government stated that “[t]he time has now come to eliminate those disparities and thereby unfetter the choice of persons who can hereafter choose freely among the state’s institutions of higher learning. . . . Suggestions to the contrary in our opening brief . . . no longer reflect the position of the United States.”<sup>157</sup> In contrast to the opening brief, the reply asserted that the desegregation process “must take into account the important role” of HBCUs and should not unfairly place the burdens of desegregation on victims of the dual system.<sup>158</sup>

In its decision, the Supreme Court announced a standard for desegregating higher education consistent with that proposed by the Solicitor General – that states

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<sup>153</sup> *Id.* at \*32.

<sup>154</sup> This is contrary to the longstanding approach to desegregation. *Adams v. Richardson*, 480 F.2d 1159, 1165 (D.C. Cir. 1973) (*en banc*); *Adams v. Califano*, 430 F. Supp. 118, 120 (D.D.C. 1977) (“The process of desegregation must not place a greater burden on Black institutions or Black students’ opportunity to receive a quality public higher education.”)

<sup>155</sup> *Black Educators Oppose U.S. Position on Remedy*, WASH. POST, Oct. 7, 1991.

<sup>156</sup> *Justice Department Changes Position in Landmark Desegregation Case to Be Heard By Supreme Court*, BLACK ISSUES IN HIGHER EDUCATION, Oct. 24, 1991.

<sup>157</sup> Reply Brief for the United States, *Ayers & United States v. Fordice* (Nos. 90-1205, 90-6588), 1991 WL 538730 at \*16.

<sup>158</sup> *Id.* at 16-17.

must eliminate only those aspects that were “part of,” as distinguished from those “caused by” the system: “If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects . . . and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.”<sup>159</sup> In addition, challenges to a policy or practice with current discriminatory effect, but that is not “traceable” as part of the dual system, would require plaintiffs to prove a new violation requiring a showing of discriminatory intent.<sup>160</sup> As applied to Mississippi, the Court raised doubts about the admissions standards, program duplication, mission statements and the decision to operate eight institutions, vacated the appellate court decision, and remanded the case for further consideration. Regarding the HBCUs, the Court’s opinion resorted to fairly obtuse language, along the lines of the argument advanced in the government’s opening brief, critical of increasing funding for HBCUs on the theory that it will make separate “more equal.”<sup>161</sup>

As outlined above, the positions espoused by Roberts in these important school desegregation cases raise serious questions concerning his view of the power of the federal judiciary to remedy racial discrimination in public education. Similarly, Roberts’ consistent unwillingness to hold government officials accountable for remedying educational discrimination that they have caused and continued, raises questions about his interpretation of the Equal Protection Clause of the Fourteenth Amendment as to whether it will afford sufficient protection of the rights of racial minorities in the United States.

### **DISCRIMINATION BY FEDERALLY-FUNDED INSTITUTIONS**

The federal government’s influence often follows its financial resources.<sup>162</sup> The principle also has provided an opportunity for the federal government to increase compliance with equal protection principles by conditioning receipt of funds to institutions upon it. It is Roberts’ record in this important area of civil rights enforcement that is addressed in this section.

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<sup>159</sup> *United States v. Fordice*, 505 U.S. 717, 731 (1992).

<sup>160</sup> *Id.* at n.6.

<sup>161</sup> *Id.* at 743.

<sup>162</sup> Congress’ authority to place conditions on the distribution of federal grants to further federal interests has been established in cases such as *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding Congress’ power under the Spending Clause to enact legislation requiring that a percentage of highway funds be withheld from any state where persons under 21 could legally purchase alcoholic beverages).



While at the Justice Department, Roberts supported restrictions on the application of federal laws banning institutions that receive federal funds from discriminating. Although most of the instances involved claims under Title IX of the Education Amendments of 1972,<sup>163</sup> which bans gender discrimination by federally-funded institutions, Roberts' rationale would have similarly limited the scope of laws banning other forms of discrimination by federally-funded institutions, such as Title VI of the Civil Rights Act of 1964,<sup>164</sup> prohibiting race discrimination; Section 504 of the Rehabilitation Act of 1973,<sup>165</sup> prohibiting discrimination against persons with disabilities; and the Age Discrimination Act of 1975,<sup>166</sup> prohibiting discrimination based on age.

One of the hallmarks of the Reagan Administration's curtailment of civil rights enforcement came in its efforts, both administratively and through litigation, to narrow the scope of laws banning discrimination by institutions receiving federal assistance. The first means for imposing such restrictions was to argue on behalf of "program-specificity;" that is, to require that discrimination prohibitions applied only to the particular program within the institution receiving the federal funding, rather than the entire institution. The second concerned the nature of federal funding that would trigger coverage under these laws; the argument was that student financial assistance did not qualify. The record reflects that Roberts advocated restrictions of both types.

Roberts argued against the Department of Justice's appeal of a lower court ruling in *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982), which prohibited a U.S. Department of Education investigation into gender discrimination in a university's athletic program on the ground that the program itself received no direct federal financial assistance. In the district court, the Justice Department's Civil Rights Division unsuccessfully argued that Title IX applied to the entire institution if any part received direct or indirect federal assistance.<sup>167</sup>

Roberts made his position against appeal known in a memorandum to Attorney General William French Smith. Roberts indicated that he strongly agreed with the recommendation by William Bradford Reynolds not to appeal the case.<sup>168</sup> Roberts

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<sup>163</sup> 20 U.S.C. §§ 1681 *et seq.*

<sup>164</sup> 42 U.S.C. § 2000d.

<sup>165</sup> 29 U.S.C. § 794.

<sup>166</sup> 42 U.S.C. § 6102.

<sup>167</sup> *University of Richmond*, 543 F. Supp. at 323.

<sup>168</sup> Memorandum from John Roberts to the Attorney General (Aug. 31, 1982).

wrote: “Under Title IX, federal investigators cannot rummage willy-nilly 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 were properly rejected by the district court.”<sup>169</sup>

Clarence Pendleton, President Reagan’s own newly appointed chair of the U.S. Commission on Civil Rights, disagreed with the position taken by Roberts. In a letter to the Attorney General, Pendleton expressed grave concern over the district court’s ruling. “The theories adopted in this ruling contradict the interpretation of civil rights laws and departmental enforcement authority embodied in existing regulations” and “would decimate civil rights protections in education.”<sup>170</sup> Additionally, two chiefs of sections within the Civil Rights Division urged William Bradford Reynolds to file the appeal, saying the decision “profoundly restricts the authority of [Education] and other federal agencies to investigate discrimination complaints.”<sup>171</sup> Nevertheless, the Department chose not to appeal the case.

The decision not to appeal was extremely significant. Until this time, previous administrations had broadly interpreted these statutes.<sup>172</sup> The decision not to appeal the *University of Richmond* decision has been described as the first opportunity seized by the Justice Department to press for narrower construction of civil rights laws prohibiting discrimination by federally-funded institutions.<sup>173</sup> Even the Secretary of the Department of Education, T.H. Bell, acknowledged: “If the decision is to apply the Richmond [and other case] 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.”<sup>174</sup>

Roberts also supported the Department of Education’s controversial, and ultimately ill-fated, proposal to narrow the definition of “federal financial assistance,” which triggered coverage of institutions under Title VI, Title IX, and Section 504. The Education Department had submitted proposed regulations to the Justice Department for approval which would have excluded grants and loans awarded to students from the definition of federal aid. This change would have excluded from

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<sup>169</sup> *Id.*

<sup>170</sup> Letter from Clarence Pendleton to Attorney General William French Smith (Aug. 10, 1982).

<sup>171</sup> *A Civil Rights Battle Surfaces*, WASH. POST, Oct. 11, 1982.

<sup>172</sup> AMAKER, at 65-7; *A Civil Rights Battle Surfaces*, WASH. POST, Oct. 11, 1982.

<sup>173</sup> AMAKER, at 67.

<sup>174</sup> Memorandum from T.H. Bell to Edwin Meese, III (Dec. 21, 1982).

coverage under the civil rights laws approximately 1,000 colleges and technical schools.<sup>175</sup>

In a memorandum to the Attorney General, Roberts acknowledged that the primary argument against the proposed regulations was that they would overturn longstanding administrative interpretation of the statutes.<sup>176</sup> Roberts stated: “This argument will carry weight with some courts, but it is certainly not strong enough to prevent us from arguing the contrary.”<sup>177</sup> He stated that the leading decision supporting the current regulations “is only that of a district judge” and “has been given far greater prominence than it deserves by the proponents of the current regulations.”<sup>178</sup> Roberts concluded that the legislative history did not clearly ban the proposed regulations, and he recommended their adoption.<sup>179</sup> The Justice Department, however, did not accept Roberts’ advice and, instead, determined that excluding grants from the definition of “federal financial assistance” could not be defended legally.<sup>180</sup> According to Roberts’ own description of the events, the proposed regulations were not approved because “[t]he Civil Rights Division concluded that the legislative history does not support excluding grants to students . . . from the definition of federal financial assistance.”<sup>181</sup>

Three years later – in the White House Counsel’s office – Roberts again advocated narrowing the reach of Title IX and other civil rights statutes enacted under the Spending Clause. Earlier that year, the Administration had argued before the Supreme Court, in *Grove City College v. Bell*, that coverage of the statutes extended only to the specific program receiving federal assistance. At the same time, the Administration supported a definition of “federal financial assistance” that included any federal student aid other than guaranteed student loans, the position with which Roberts had disagreed when evaluating the Department of Education’s proposed restrictions. The Court ruled in the Administration’s favor on both counts. 465 U.S. 555 (1984).

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<sup>175</sup> *Education Secretary Loses a Round*, WASH. POST, Jan. 15, 1982.

<sup>176</sup> Memorandum from John Roberts to the Attorney General (Dec. 8, 1981).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*, citing *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff’d per curiam*, 529 F.2d 2d 514 (4th Cir. 1975).

<sup>179</sup> Memorandum from John Roberts to the Attorney General (Dec. 8, 1981).

<sup>180</sup> *Education Secretary Loses a Round*, WASH. POST, Jan. 15, 1982; AMAKER, at 66.

<sup>181</sup> Memorandum from Kenneth Starr to William Bradford Reynolds (Mar. 8, 1982), attaching background paper prepared by John Roberts.

Following the *Grove City* decision, legislative efforts were initiated to overturn the ruling on program-specificity to ensure that entire institutions would be covered by the discrimination bans. Roberts wrote a memorandum to White House Counsel Fred Fielding describing the proposed legislation.<sup>182</sup> Calling the Civil Rights Restoration Act of 1985 a “broad bill,” Roberts claimed it “would not only overturn the program specificity of *Grove City College*, but radically expand the civil rights laws to areas of private conduct never before considered covered.”<sup>183</sup> This particular bill supported application of the laws to all institutions.<sup>184</sup> He indicated the Administration’s support of an alternative bill providing that federal aid to any program of any *educational institution* would trigger coverage of the entire institution.<sup>185</sup> Ultimately, the Civil Rights Restoration Act of 1987 was passed over President Reagan’s veto.<sup>186</sup> The legislation applied to all institutions, not just educational institutions. The Senate vote was 73 to 24; the House vote was 292 to 133.<sup>187</sup>

In the same White House memorandum, Roberts revealed his inclination to overturn that portion of the *Grove City* decision providing coverage based on federal student aid, with which he had earlier disagreed.

Now that the program specificity aspect of the *Grove City College* decision appears doomed, some . . . are arguing that the student aid ruling should be revisited and overturned as well. There is a good deal of intuitive appeal to the argument. Triggering 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.<sup>188</sup>

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<sup>182</sup> Letter from John Roberts to Fred Fielding (July 24, 1985).

<sup>183</sup> *Id.*

<sup>184</sup> The Civil Rights Restoration Act of 1985 applied to both government and private institutions that received federal funds. *AMAKER*, at 72.

<sup>185</sup> Letter from John Roberts to Fred Fielding (July 24, 1985).

<sup>186</sup> Public Law 100-259.

<sup>187</sup> 134 Cong. Rec. 4669 (1988) (Senate); 134 Cong. Rec. 4791 (1988) (House).

<sup>188</sup> *Id.*

Roberts then recommended that the issue not be reopened. His rationale, however, was not based on substance, but politics: “Reversing our position on that issue at this point would precipitate a firestorm of criticism, with little if any chance of success.”<sup>189</sup>

In addition to advocating restrictions on the scope of these laws, Roberts resisted the Justice Department’s very enforcement of the law. Civil Rights Chief William Bradford Reynolds had sought to intervene in *Canterino v. Wilson*, which challenged disparities under Title IX in vocational training programs for male and female prisoners. In recommending intervention, Reynolds cited a “very strong record that the Kentucky prison system discriminates against female inmates in the vocational training and work opportunities made available to them.”<sup>190</sup> He noted that “the discrimination at issue is particularly counter-productive, in that it deprives female prisoners of the preparation for productive and useful work lives they need in order not to return to criminal activities.”<sup>191</sup> Despite this record and Reynolds’ recommendation, Roberts argued against intervention on the grounds that equalizing the treatment would cost too much and private plaintiffs were already bringing suit.<sup>192</sup> Roberts also argued that intervention was inconsistent with the Department’s judicial restraint efforts. He stated that the equal protection claim would be based on “semi-suspect treatment” of gender classifications, which, he noted, the department had opposed outside of the area of race.<sup>193</sup> Roberts, however, neglected to mention Supreme Court rulings providing for heightened scrutiny for gender claims.<sup>194</sup> The Civil Rights Division intervened and won the case. *See Canterino v. Wilson*, 546 F. Supp. 174 (W.D. Ky. 1982), *aff’d*, 875 F.2d 862 (6th Cir. 1989).

During his tenure at the Justice Department, Roberts also supported repeal of a Title IX regulation which prohibited sex discrimination in the application of appearance codes, 34 C.F.R. § 106.31(b)(5). In a memorandum to the Attorney General, Roberts concurred with William Bradford Reynolds in approving the repeal. He thought that Department of Education Secretary T.H. Bell reached an “eminently

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<sup>189</sup> *Id.*

<sup>190</sup> Memorandum from William Bradford Reynolds to the Attorney General (Feb. 5, 1982).

<sup>191</sup> *Id.*

<sup>192</sup> Memorandum from John Roberts to the Attorney General (Feb. 12, 1982).

<sup>193</sup> *Id.*

<sup>194</sup> *See, e.g., Craig v. Boren*, 429 U.S. 190 (1976).

sound conclusion” that appearance codes were “more suitable for local rather than federal regulation.”<sup>195</sup>

We know of no evidence that later in Roberts’ career he rejected his earlier views on the narrow construction of these federal civil rights laws. As Deputy Solicitor General in the first Bush Administration, Roberts filed an *amicus* brief before the Supreme Court supporting limits on the remedies available under Title IX (and by extension, Title VI and Section 504).<sup>196</sup> In *Franklin v. Gwinnett County School District*, Roberts argued that Congress did not intend to authorize damage awards under Title IX.<sup>197</sup> The Supreme Court rejected Roberts’ position in a 9-0 ruling. 503 U.S. 60 (1992). Later, in private practice, Roberts represented the National Collegiate Athletics Association in the Supreme Court and argued that dues payments by members receiving federal funds were not sufficient to subject the Association to Title IX coverage.<sup>198</sup> The Supreme Court agreed. *See National Collegiate Athletic Ass’n v. Smith*, 525 U.S. 459 (1999).

As described above, a focus on limiting the reach of federal power at virtually any cost was acceptable to Roberts even where the constraints that he urged could allow discrimination to continue.

## FAIR HOUSING & EMPLOYMENT

While Roberts revealed his views on fair housing on few occasions, his comments are troubling and consistent with his narrow interpretation of general civil rights principles reflected in other writings from the same time period.

Several proposals for strengthening the Fair Housing Act of 1968 were introduced in Congress during Roberts’ tenure in the Reagan Administration. In 1980, Congress almost passed a bill, H.R. 5200, which would have significantly improved the enforcement provisions of the Act.<sup>199</sup> In following years, similar legislation was opposed by the Reagan Administration, which responded with its own

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<sup>195</sup> Memorandum from John Roberts to the Attorney General (July 1, 1982).

<sup>196</sup> *See* Brief for the United States as *Amicus Curiae* Supporting Respondents, *Franklin v. Gwinnett County* (No 90-918), *available at* 1991 WL 11009216.

<sup>197</sup> *Id.* at 14.

<sup>198</sup> Brief for Petitioner, *NCAA v. Smith* (No. 98-84), *available at* 1998 WL 784591.

<sup>199</sup> H.R. 5200, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1980).

proposals.<sup>200</sup> It was not until 1988 that the Fair Housing Amendments Act was passed.<sup>201</sup> Even before the enforcement provisions were strengthened in 1988, Roberts called the Fair Housing Act an “exceedingly complicated regulatory statute.”<sup>202</sup>

In a 1983 memorandum to White House Counsel Fred Fielding, Roberts recommended a slow pace for fair housing legislation, “as the storm clouds gather over the issue.”<sup>203</sup> Roberts wrote: “The fact that we were burned last year because we did not sail in with new voting rights legislation does not mean we will be hurt this year if we go slow on housing legislation.”<sup>204</sup>

In the same memorandum, Roberts made disparaging comments about relying on an effects test to prove housing discrimination. Roberts wrote: “Government intrusion (through, *e.g.*, an ‘effects test’) quite literally hits much closer to home in this area than in any other civil rights area. The Administration should have its positions in order – and even some proposed reforms ready – but I do not think there is a need to concede all or many of the controversial points (effects test, national administrative remedy) to preclude political damage.”<sup>205</sup> This negative view of the effects test in the housing context was consistent with requirements then imposed by the Justice Department that intentional discrimination must be proven in housing cases, a practice widely recognized as weakening enforcement of fair housing laws.<sup>206</sup>

These comments are similar to those expressed by Roberts in other civil rights areas, casting doubt on the longstanding method of proving discrimination by showing a disparate effect on the protected class, as opposed to evidence of intentional discrimination. In a 1982 memorandum opposing an effects test under the Voting Rights Act, discussed above, Roberts wrote, “Just as we oppose quotas in

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<sup>200</sup> See ROBERT SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION 5-8 (2000).

<sup>201</sup> Pub. L. 100-430, 102 Stat. 1619 (1988).

<sup>202</sup> Memorandum from John Roberts to Fred Fielding (Apr. 9, 1984).

<sup>203</sup> Memorandum from John Roberts to Fred Fielding (Jan. 31, 1983).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> AMAKER at 96; WASHINGTON COUNCIL OF LAWYERS, REAGAN CIVIL RIGHTS: THE FIRST TWENTY MONTHS at 19-20 (1983); Memorandum from Timothy Cook to William French Smith, re: “Resignation from the Department of Justice” at 24 (Oct. 18, 1989), citing *United States v. City of Birmingham*, 538 F. Supp. 819, 827 n.9 (E.D. Mich. 1982) (noting change in Department’s position on effects test).

employment and education, so too we oppose them in elections.”<sup>207</sup> In a memorandum complaining that the Civil Rights Division was excluded from developing Department of Justice positions in employment cases before the Supreme Court, Roberts was critical of a Solicitor General argument “that would have expanded the effects test in employment cases – despite the clear philosophical opposition to the effects test by the Department, most clearly articulated in the voting rights area.”<sup>208</sup> Roberts also criticized reliance by the courts on statistics, which is often how discriminatory impact is proven. Roberts praised an address by Judge Patrick E. Higginbotham as a “thoughtful look at the judicial activism problem and its relation to the increased use of statistics and other scientific analysis.”<sup>209</sup> Roberts wrote: “The basic thesis is that application of scientific methods to judicial decisionmaking may well demonstrate that courts have been engaging in policymaking with no support other than rhetorical flourishes. He uses as an example statistical analysis in the civil rights area. At present courts are content to rest on very rough data and heavy doses of rhetoric, while proper statistical analysis . . . may prove that no violation exists.”<sup>210</sup>

In comments on a White House statement transmitting fair housing legislation to Congress in 1983, Roberts displayed a cramped understanding of the critical role of the federal government in enforcing federal civil rights laws. He addressed a provision in the bill authorizing the Attorney General to sue in individual cases after conciliation efforts had failed.<sup>211</sup> At that time, the Fair Housing Act permitted such suits only in pattern and practice cases. In a statement, the White House noted that: “[The bill] thus places the leadership in enforcement where it belongs, with the Federal Government rather than the individual victim.”<sup>212</sup> Roberts believed there was no support for this statement “in either its factual or normative aspects.”<sup>213</sup> He stated that enforcement of federal rights was most effectively advanced by private suits in many areas including civil rights, and argued that there was no reason to distinguish housing.<sup>214</sup>

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<sup>207</sup> Memorandum from John Roberts to the Attorney General (Jan. 26, 1982).

<sup>208</sup> Memorandum from John Roberts to the Attorney General (June 16, 1982).

<sup>209</sup> Memorandum from John Roberts to the Attorney General (Feb. 18, 1982).

<sup>210</sup> *Id.*

<sup>211</sup> Memorandum from John Roberts to Fred Fielding (June 14, 1983).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*



In the housing context specifically, this position fails to recognize the government's pivotal role in enforcing rights that victims of discrimination might not otherwise pursue due to cost, resources or on the basis that housing discrimination is more transitory, though no less injurious, than other forms of discrimination.

Roberts also objected to the White House statement's justification of penalties on the basis that they were needed "in cases of violation of the fundamental right to be free from discrimination." Roberts wrote that, "[t]here is of course no such right."<sup>215</sup> He suggested that discrimination by itself was not compensable, and recommended inserting "illegal" to modify discrimination.<sup>216</sup>

Roberts' positions on the enforcement of fair housing laws are consistent with those he expressed in the context of other anti-discrimination laws in that he favored reducing the governmental role while at the same time elevating the burdens on plaintiffs who attempted to vindicate their rights.

During his tenure with the Reagan Administration, Roberts also demonstrated a limited understanding of protections provided under anti-discrimination law in the employment context.

Roberts' view of the proposed settlement terms for two cases involving discriminatory hiring policies of school boards in Gwinnett and Clayton Counties reveals a restrictive and incorrect reading of the protections provided minorities under anti-discrimination law. In a memorandum to William Bradford Reynolds, Roberts criticized language used by the Department in letters to the defendant school systems describing the terms of settlement in cases brought by the Justice Department. The proposed settlements included demands for recruitment and hiring goals and back pay.<sup>217</sup> Roberts argued that such relief could not "reasonably be demanded of the defendants" under Title VII, thereby mischaracterizing the nature of relief that the Supreme Court held was available under the statute.

Roberts erroneously argued that unless a plaintiff could prove that he or she was "more qualified" than white applicants who were hired by an employer, he or she would not have a claim for relief under Title VII even where it was established that the employer discriminatorily rejected black applicants.<sup>218</sup> In the seminal case of *Teamsters v. United States*, however, the Supreme Court held that plaintiffs

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Memorandum from John Roberts to William Bradford Reynolds (Oct. 26, 1981).

<sup>218</sup> *Id.* at 2.

attempting to prove a pattern and practice case, as the Department was here, need only show the existence of a discriminatory practice. 431 U.S. 324, 358-59, 369 n.53, (1977). The burden then shifts to the employer to prove that the plaintiffs were not victims of discrimination, for example, by showing that more qualified persons were chosen or that the applicants' qualifications were insufficient; in any event, the burden is on the employer, not the plaintiffs, to make this showing. *Teamsters*, 431 U.S. 369 n.53.

Roberts also narrowly interpreted *Teamsters* (which he described as “a very limited decision”), to preclude relief for nonapplicants who were deterred from applying for jobs because of discriminatory policies. This reading, however, failed to account for the Supreme Court’s lengthy discussion in *Teamsters*, explaining that there should be no “*per se limitation*” on Title VII relief on the grounds that a claimant had not applied for the job in question. *Teamsters*, 431 U.S. at 364-69.

Roberts also mischaracterized or misunderstood the discussion in *Teamsters* of the availability of back pay relief for non-applicant plaintiffs, citing language in the opinion that the assessment of such claims *might be* an “impossible task.” *Id.* at 368 n.52. While *Teamsters* notes that a plaintiff’s incumbent status as an employee “may tend to support a nonapplicant’s claim” that he or she was aware of the availability of the job in question, nothing in the opinion states that such incumbent status is required to grant relief to an individual who was deterred from applying for a job. *Id.* Roberts’ rationale is inconsistent with and fails to consider clear language from *Albemarle Paper v. Moody*, 422 U.S. 405 (1975), holding that back pay should be awarded as a “matter of course” to achieve the objectives of Title VII (i.e. motivating employers to cease discrimination and eradicate its effects, and to make whole those who have suffered by reason of discrimination). *Id.* at 419-20.

## **ENFORCEMENT OF FEDERAL STATUTORY RIGHTS**

Over the course of his career, Roberts has advanced positions that would significantly hamper the ability of individuals to enforce federal statutory rights. This is an important component of Roberts’ overall record on civil rights as the ability to ensure protections afforded by federal laws relating to Medicaid, public housing and other social safeguards is of paramount concern to low-income and minority communities.

While Roberts was Special Assistant at the Justice Department, he criticized an important Supreme Court decision, *Maine v. Thiboutot*, 448 U.S. 1 (1980), which addressed the scope of a civil rights law passed during Reconstruction, 42 U.S.C. § 1983, as a tool for enforcing federal statutory rights.

When state or local officials violate federal law, they cannot automatically be sued. Rather, Congress must have authorized individuals whose rights have been violated to enforce that federal law by bringing a lawsuit. Many federal statutes imposing obligations or prohibitions on state officials do not contain an express cause of action. In the absence of a cause of action, state and local officials could violate federal law with impunity, and victims of those violations could not even sue for an injunction to compel compliance with the law.

Section 1983 provides such a cause of action for any violation of federal “laws” by state or local officials. In *Thiboutot*, the Supreme Court held that “laws” meant *all* federal laws, and not only constitutional claims.<sup>219</sup> The plaintiff in that case had successfully sued state officials for certain benefits under the Social Security Act.<sup>220</sup> In the Supreme Court, the state did not deny that it had violated federal law, but argued instead only there was nothing the plaintiff could do about that violation. The Supreme Court held that Section 1983 provided a means by which the plaintiff could enforce his federal rights.<sup>221</sup>

Roberts’ negative views on *Thiboutot* became known after the Justice Department undertook a review of possible legislative changes to limit statutory claims under Section 1983. Pursuant to that review, the Office of Legal Policy (“OLP”) prepared an analysis of current law and the legislative proposals.<sup>222</sup> The analysis noted “the enormous range of state and local official activity that is now the subject of litigation under Section 1983. Actions range from suits for damages against police officials for alleged police brutality, and against prison officials for alleged mail censorship, to suits against state officials to enjoin judicial proceedings, and to implement welfare regulations.”<sup>223</sup> The analysis attributed the “dramatic increase in litigation” to incorporation of most Bill of Rights guarantees into the due process clause and several Supreme Court decisions removing barriers to litigation under Section 1983.<sup>224</sup>

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<sup>219</sup> *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

<sup>220</sup> *Id.* at 3.

<sup>221</sup> *Id.* at 4.

<sup>222</sup> Draft Memorandum from Jonathan Rose to Edward Schmults (Aug. 6, 1982).

<sup>223</sup> *Id.* at 3.

<sup>224</sup> *Id.* at 4.

In a memorandum commenting on the OLP analysis, Roberts criticized the *Thiboutot* holding, referring to the “damage” created by the decision.<sup>225</sup> He urged the Department to argue that there remained some federal laws that private citizens could never enforce against state and local officials. Roberts’ notes, recorded in the margins of the OLP analysis, indicated “good” next to a passage noting that legislation had been proposed to overturn *Thiboutot*.<sup>226</sup> Consistent with a discernable pattern that can be traced through the available documents, Roberts counseled in favor of a public posture designed to conceal the practical impact of the policy position that he urged. In his memorandum to the OLP, he recommended that legislative changes to Section 1983 “be cast as efforts to ‘clarify’ rather than ‘overturn’ that decision.”<sup>227</sup>

Roberts also questioned the OLP’s interpretation of *Thiboutot*. Roberts wrote that its analysis assumed the decision extended coverage of Section 1983 to “all statutory rights.” According to Roberts, while dicta in *Thiboutot* supported this conclusion, two more recent Supreme Court cases (decided while he clerked for Justice William Rehnquist) “call [that interpretation] into question.”<sup>228</sup> Roberts wrote “NO” in the margins of the OLP analysis where the *Thiboutot* holding was discussed.<sup>229</sup>

These remarks indicate Roberts’ basic disagreement with the holding in *Thiboutot* that private citizens whose federal statutory rights have been violated should be allowed to seek redress. In subsequent years, Roberts had several opportunities to amplify these views. As Associate White House Counsel he wrote that “§1983 abuse really has become the most serious federal court problem.”<sup>230</sup> As Deputy Solicitor General and then in private practice, Roberts was involved in three important cases before the Supreme Court which addressed the enforcement of federal rights under Section 1983. In each instance, Roberts advocated limiting private lawsuits to enforce federal statutes.

As Deputy Solicitor General under President George H.W. Bush, Roberts argued against private enforcement of rights under a Medicaid statute. In *Wilder v.*

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<sup>225</sup> Memorandum from John Roberts to Steve Brogan (Aug. 9, 1982).

<sup>226</sup> Draft Memorandum from Jonathan Rose to Edward Schmults 11 (Aug. 6, 1982).

<sup>227</sup> Memorandum from John Roberts to Steve Brogan (Aug. 9, 1982).

<sup>228</sup> Memorandum from John Roberts to Steve Brogan (Aug. 9, 1982).

<sup>229</sup> Draft Memorandum from Jonathan Rose to Edward Schmults 8, 11 (Aug. 6, 1982).

<sup>230</sup> Memorandum from John Roberts to Fred Fielding (Apr. 28, 1983).

*Virginia Hospital Association*, 496 U.S. 498 (1990), the Court considered the viability of a Section 1983 action by a health-care provider to enforce a provision of the Medicaid Act requiring reasonable reimbursements by the state. Roberts filed an *amicus* brief and argued the case before the Supreme Court, opposing private enforcement. Roberts argued that Congress had not intended to confer an enforceable right to challenge state reimbursement in federal court, noting that such lawsuits would “interfere with state autonomy and discretion.”<sup>231</sup> The Court rejected Roberts’ argument and held that rights created under the Medicaid Act were privately enforceable.<sup>232</sup>

Two years later, again as Deputy Solicitor General, Roberts argued against private enforcement of a child welfare law. In *Suter v. Artist M.*, 504 U.S. 347 (1992), representatives for abused children attempted to sue an Illinois state agency to enforce a provision of the Adoption Assistance and Child Welfare Act requiring reasonable efforts to ensure foster children were reunited with natural families whenever possible. They maintained that the two general exceptions to *Thiboutot* did not apply since the Adoption Act created enforceable rights within the meaning of Section 1983 and Congress had not foreclosed such enforcement in the Act itself.<sup>233</sup>

In an *amicus* brief and oral argument before the Supreme Court, Roberts disagreed. He maintained that the provision of the Adoption Act on which the children relied was “too vague and amorphous to qualify as an enforceable right under Section 1983.”<sup>234</sup> Additionally, he argued that Congress did not intend to create an enforcement right, relying on the federalism principle that domestic relations are traditionally the province of the states and that application of Section 1983 here was “particularly troubling because it launches the federal courts into a field from which they have historically abstained, and in which they have little institutional competence.”<sup>235</sup> In oral argument, Roberts dismissed the position of the National Association of Social Workers and others that objective standards existed to which courts could refer for purposes of enforcing the right: “And now these groups come

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<sup>231</sup> See Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Wilder v. Virginia Hospital Association* (No 88-2043), available at LEXSEE 1988 U.S. Briefs 2043.

<sup>232</sup> *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990).

<sup>233</sup> See Brief of Respondents, *Suter v. Artist M.* (No 90-1488), available at 1991 WL 521632, \*13.

<sup>234</sup> See Brief for United States as *Amicus Curiae* Supporting Petitioners at 10, *Suter v. Artist M.* (No 90-1488), 1991 WL 11009229.

<sup>235</sup> *Id.* at 18.

before this Court and urge this Court to elevate their professional standards to the level of an enforceable federal right.”<sup>236</sup> In an opinion by Chief Justice Rehnquist, the Supreme Court sided with Roberts’ position, holding there was no individual right to enforce the provision of the Adoption Act.<sup>237</sup>

As a private attorney in 2001, Roberts addressed the *Thiboutot* holding that Section 1983 applies to all laws. In representing the petitioners in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), Roberts argued that the Family Educational Rights and Privacy Act was not enforceable under Section 1983 by a student whose personal information was released by a university to unauthorized persons. Roberts suggested, *inter alia*, that the Act – a federal statute enacted pursuant to the Spending Clause – was not a law, but actually a contract between the federal government and states that could not be enforced by persons whom the statutes intended to benefit since third-party beneficiaries could not enforce contracts in 1871 when Section 1983 was enacted.<sup>238</sup> As news reports noted at the time, Roberts’ reliance on contract theory to prohibit individuals from *ever* enforcing Spending Clause statutes was specifically rejected by Solicitor General Theodore Olson, who filed a brief on behalf of the Bush Administration.<sup>239</sup>

In an opinion by Chief Justice Rehnquist, the Supreme Court ruled against private enforcement of the Privacy Act, although it did not declare – as Roberts suggested – that Spending Clause statutes were not laws and therefore unenforceable. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). The Court, however, undercut Section 1983 significantly by holding that federal statutes cannot be enforced unless they have special “rights-creating language,” as opposed to “broader or vaguer ‘benefits’ or ‘interests.’”<sup>240</sup> The case has had a devastating impact on the ability of recipients of

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<sup>236</sup> Transcript of Oral Argument, *Suter v. Artist M.* (No. 90-1488), available at 1991 WL 636551, \*23 (Dec. 2, 1991).

<sup>237</sup> *Suter v. Artist M.*, 503 U.S. 347, 364 (1992).

<sup>238</sup> See Brief for Petitioners *Gonzaga Univ. v. Doe* (No 01-679), available at 2002 WL 332055, \*39, 42 n.14.

<sup>239</sup> See Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Gonzaga Univ. v. Doe* (No 01-679), available at 2002 WL 354729, \*18-20; *Supreme Court Considers Whether a Privacy Law Gives Students the Right to Sue*, N.Y. TIMES, Apr. 25, 2002.

<sup>240</sup> *Gonzaga Univ. v. Doe*, 536 U.S. at 283, 290 (2002).

Medicaid and other federal programs to enforce many provisions of these laws to obtain coverage or benefits.<sup>241</sup>

## HABEAS CORPUS

Since our nation's founding, the Writ of Habeas Corpus has been a crucial bulwark against unlawful imprisonment. Although appellate courts hear many criminal appeals raising significant legal issues, the Supreme Court reviews only a small number of critically important criminal cases each year. These cases require the Court to resolve constitutional questions of first impression. Most of these matters reach the Supreme Court as habeas corpus cases, after all other possibilities of appeal have been exhausted. Roberts has a clear record over the course of his career of attempting to severely narrow the writ of habeas corpus, and advocating for the writ's wholesale elimination, regardless of the importance of the question presented in the individual case.

Roberts revealed support for limitations on habeas corpus soon after beginning his employment as Special Assistant at the Justice Department. In Roberts' letter to Judge Friendly praising the Justice Department's reconsideration of "so much that had been taken for granted so long," Roberts cited habeas corpus as the first example.<sup>242</sup> He wrote: "I do not know what will eventuate – as you noted, what has come to pass as the "Great Writ" is regarded by many lawmakers with no idea of the problem as unalterable perfection. In a subsequent letter to Judge Friendly, Roberts indicated he did not agree entirely with the Department's final proposal on habeas reform, noting that compromises were made "in order to bring our ideas closer to those of our friends in Congress . . . ."<sup>243</sup>

Roberts' most extensive views on the subject are reflected in a 1981 memorandum entitled "Possible Reforms of the Availability of Federal Habeas Corpus." The memorandum posited that federal habeas corpus review of state court judgments was superfluous and "goes far to making a mockery of the entire criminal justice system."<sup>244</sup>

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<sup>241</sup> *Rulings Trim Legal Leeway Given Medicaid Recipients*, N.Y. TIMES, Aug. 15, 2005.

<sup>242</sup> Letter from John Roberts to The Honorable Henry J. Friendly (Nov. 4, 1981).

<sup>243</sup> Letter from John Roberts to The Honorable Henry J. Friendly (Mar. 18, 1982).

<sup>244</sup> Memorandum from John Roberts, "Possible Reforms of the Availability of Federal Habeas Corpus" (Nov. 12, 1981). In a cover note submitting the memorandum to Justice Department officials, Roberts wrote, "Judge Friendly and Justice Rehnquist would never have forgiven me if I'd remained mute."

In the memorandum, Roberts argued for the curtailment, and elimination, of federal habeas review of the claims of state court prisoners for three principal reasons: (1) the ability of prisoners to petition federal courts for review of state judgments long after conviction disrupts the finality of criminal cases; (2) “the endless stream of petitions” of state prisoners taxes the resources of federal courts; and (3) federal court review of the decisions of the states’ highest courts “represents a serious strain on the system of federalism.”<sup>245</sup> In Roberts’ view, these burdens were particularly offensive because the Constitution’s Suspension Clause, which prohibits suspension of the writ of habeas corpus except in cases of rebellion or invasion, does not mandate federal review of state court judgments. According to Roberts, federal habeas review is an “act of legislative grace” unwarranted by the Constitution except for the review of executive detentions.<sup>246</sup>

Roberts proposed reforms to ameliorate the purported problems with federal habeas corpus review.<sup>247</sup> Significantly, Roberts proposed to codify a rule precluding the Supreme Court from reviewing cases in which a federal district court had denied habeas relief, and a Court of Appeals had declined to issue a certificate of probable cause permitting an appeal.<sup>248</sup> This proposal – outright prohibition of Supreme Court review of cases in which a federal appellate court has not granted a certificate of appealability – was never adopted. Had it been, one of the Supreme Court’s most publicized decisions in recent years, *Miller-El v. Cockrell*, 537 U.S. 322 (2003), could never have been decided; in that case eight Justices concurred that the Fifth Circuit Court of Appeals erred in failing to issue a certificate of appealability to review the petitioner’s claim that the prosecution had purposely excluded African Americans from his capital jury.

Although some of Roberts’ proposals to amend habeas review were ultimately adopted by Congress in the Anti-Terrorism and Effective Death Penalty Act (AEDPA), there is reason for serious concern about Roberts’ views on this issue. His position on habeas corpus “reform” is best summed up by his own words: “In light

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<sup>245</sup> *Id.* at 2.

<sup>246</sup> *Id.* at 3.

<sup>247</sup> Two of these — the imposition of a statute of limitations and a ban on successive petitions presenting similar claims — were enacted in 1996 when Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. §§ 2241-55 (2000). *See* 28 U.S.C. §§ 2244(d)(1)(A)-(D) (statute of limitations); 28 U.S.C. § 2244(b)(3) (successive petitions).

<sup>248</sup> Roberts, “Possible Reforms of the Availability of Federal Habeas Corpus,” *supra* note 244, at 6.



of the foregoing problems caused by the current status of habeas corpus law, and the fact that the provision of federal habeas corpus is a matter of legislative grace, the question would seem to be not what tinkering is necessary in the system, but rather, why have federal habeas corpus at all?”<sup>249</sup>

In other work at the Justice Department, Roberts continued to press for the elimination of federal habeas corpus review of state cases.<sup>250</sup> In August 1982, Roberts and other members of the Attorney General’s staff helped to draft a chapter by the Attorney General on habeas corpus reform for a book to be published by the Free Congress Research and Education Foundation, “A Blueprint for Judicial Reform.”<sup>251</sup> The chapter echoes many arguments made by Roberts in his November 1981 memorandum. It begins with a history of habeas corpus to support the argument that the Constitution only requires habeas review in cases of executive detention and should be limited to that purpose.<sup>252</sup> It then addresses the “contemporary problems” with habeas corpus, which, according to the authors, include: that the issues raised by state prisoners in federal habeas petitions are often “technical” and allege procedural irregularities which “cast no real doubt on the defendant’s guilt”; problems of federalism presented when a single federal judge has the power to overturn the judgments of several state courts; the lack of finality of state court convictions wrought by lengthy habeas review; the waste of judicial and prosecutorial resources used in responding to habeas petitions by state prisoners; that prisoners and their lawyers at “‘public interest’ organizations” purportedly maximize delay by waiting until the eve of execution to collaterally attack convictions.<sup>253</sup>

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<sup>249</sup> *Id.* at 4.

<sup>250</sup> In reviewing the opinions of Mississippi District Court Judge Walter Nixon (the purpose of the review was not disclosed), Roberts criticized Judge Nixon for “reaching out to opine on unnecessary matters” in a habeas corpus case, *Kitchens v. State*, 290 F. Supp. 856 (S.D. Miss. 1968). Memorandum from John Roberts to Kenneth Starr (Oct. 1, 1981). Judge Nixon *sua sponte* had asked whether a habeas corpus petitioner was entitled to be represented by counsel and had, according to Roberts, “purported to devise general rules concerning when counsel is required in habeas corpus cases.” *Id.* Roberts wrote that “[s]uch general rules should not be determined in the context of a case in which the issue is raised *sua sponte* and there is no controversy concerning the matter.” *Id.*

<sup>251</sup> See Memorandum from David Karp to Patrick McGuigan (Aug. 20, 1982), submitting “A Blueprint for Judicial Reform” -- *Draft Habeas Corpus Chapter*.

<sup>252</sup> *A Blueprint for Judicial Reform* -- *Draft Habeas Corpus Chapter* at 2-7.

<sup>253</sup> *Id.* at 7-17.

The principal reform proposed in the chapter is the abolition of federal habeas for state prisoners.<sup>254</sup> The authors acknowledged that, during the era of Supreme Court expansion of the scope of federal habeas corpus review of state convictions, “the criminal justice systems of many states were subverted by the effects of state-enforced racial segregation.”<sup>255</sup> However, they argued that institutionalized racism had been ameliorated by the passage of federal civil rights laws and Supreme Court precedent establishing the basic rights of criminal defendants was long-established.<sup>256</sup> However, as the *Miller-El* case demonstrates, while the “Jim Crow” era has passed, federal court review of claims of racial discrimination remains as crucial today as it was during the Jim Crow era.

The “Blueprint” chapter enumerated more limited reforms such as a one-year statute of limitations, barring federal court review where a prisoner has been afforded a “full and fair” state adjudication, and barring review of claims not properly raised in state court proceedings.<sup>257</sup> The subsequent adoption, either judicially or legislatively, of some of these reforms should not obscure Roberts’ ultimate views. The conclusion of the “Blueprint” chapter makes clear that Roberts and his colleagues saw the limited reforms of habeas corpus as a means to their desired end: the complete elimination of federal court review of state convictions. The authors conclude as follows: “[T]he availability [of habeas corpus], in particular, to state criminal convicts to challenge their convictions in federal court may well be an institution whose time has passed.”<sup>258</sup>

Roberts’ suggestion to do away with federal habeas review of state prisoners’ claims altogether is also contrary to well-established and widely affirmed precedent preserving the power of federal courts to remedy constitutional violations in state criminal proceedings when state courts have unreasonably failed to do so. *See Wright v. West*, 505 U.S. 277, 287 (1992) (“We rejected the principle of absolute deference [to state court judgments] in our landmark decision in *Brown v. Allen*, 344 U.S. 443 . . . (1953). There, we held that a state-court judgment of conviction ‘is not *res judicata*’ on federal habeas with respect to federal constitutional claims . . . Instead, we held, a district court must determine whether the state-court adjudication ‘has resulted in a satisfactory conclusion.’”) (internal citations omitted); *Brecht v.*

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<sup>254</sup> *Id.* at 17.

<sup>255</sup> *Id.* at 21.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 22-26.

<sup>258</sup> *Id.* at 27.

*Abrahamson*, 507 U.S. 619, 634 (1993) (“Habeas corpus ‘is designed to guard against extreme malfunctions in the state criminal justice systems[.]’”)

As Associate White House Counsel, Roberts specifically challenged the extent of Supreme Court review of habeas decisions in death penalty cases. He evaluated a proposal by then-Chief Justice Warren Burger for alleviating the Court’s heavy caseload by creating a temporary federal court with jurisdiction to hear cases referred to it by the Supreme Court (typically cases involving conflicts between appellate courts). Roberts indicated that he believed the creation of a new court was “a terrible idea” which would not reduce the Court’s caseload.<sup>259</sup> Roberts opined that with respect to caseload, “[t]he fault lies with the Justices themselves, who unnecessarily take too many cases and issue opinions so confusing that they often do not even resolve the question presented.”<sup>260</sup> Roberts suggested, *inter alia*, that if the Supreme Court wanted to reduce its caseload it should “abdicat[e its] role of fourth or fifth guess in death penalty cases.”<sup>261</sup>

Irrespective of whether a temporary court would adequately address the Supreme Court’s “caseload problem,” Roberts’ minimization of the Supreme Court’s critical role in death penalty cases demonstrates a serious misunderstanding of that Court’s duty to announce, clarify and enforce federal constitutional law. Contrary to Roberts’ intimation, the Supreme Court has selectively accepted death penalty cases exclusively for the purpose of resolving critical questions of federal constitutional law. For example, the Court has reviewed capital cases to resolve such fundamental constitutional questions as whether the Eighth Amendment permits the execution of mentally incompetent persons (*Ford v. Wainwright*<sup>262</sup>); whether due process is violated where state prosecutors withhold critical, exculpatory evidence (*Kyles v. Whitley*<sup>263</sup>; *Banks v. Dretke*<sup>264</sup>); and whether due process is violated where the state prohibits a capitally charged defendant from presenting available mitigating evidence and/or restricts the factfinder’s ability to give effect to such evidence (*Lockett v. Ohio*<sup>265</sup>; *Eddings v. Oklahoma*<sup>266</sup>). Characterizing the Supreme Court’s role in

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<sup>259</sup> See Memorandum from John Roberts to Fred Fielding (Feb. 10, 1983).

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> 477 U.S. 399 (1986).

<sup>263</sup> 514 U.S. 419 (1995).

<sup>264</sup> 540 U.S. 668 (2004).

<sup>265</sup> 438 U.S. 586 (1978).

<sup>266</sup> 455 U.S. 104 (1982).

adjudicating death penalty cases as merely that of a “fourth or fifth guesser” diminishes the essential role the Supreme Court has consistently played in death penalty cases – and, truly, in all cases – and betrays a disturbingly restrictive view of the role of a Supreme Court Justice.

Roberts’ restrictive views of habeas corpus have remained consistent throughout his career. In *Withrow v. Williams*, 507 U.S. 680 (1993), Roberts – as Deputy Solicitor General – authored an *amicus* brief and argued on behalf of the United States. Roberts argued that federal habeas corpus jurisdiction should not extend to claims challenging admission of statements allegedly obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). Roberts contended that “*Miranda*’s safeguards are not constitutional in character, but merely prophylactic,” *Withrow*, 507 U.S. at 690. Therefore, he argued, the Supreme Court’s analysis in *Stone v. Powell*, 428 U.S. 465 (1976) – precluding federal habeas review of Fourth Amendment violations because such claims are not “personal constitutional right[s]” and, instead “serve[] to deter constitutional violations” – should also apply to *Miranda* claims. *Withrow*, 507 U.S. at 689. This view contradicted arguments made to the Court by the Police Foundation.<sup>267</sup>

Ultimately, the Court disagreed with Roberts by deciding that *Stone* should not be extended to preclude federal habeas review of *Miranda* claims. The Court ruled that the concerns animating the decision to exclude Fourth Amendment claims from habeas review simply did not apply to *Miranda* violations: “*Miranda* safeguards ‘a fundamental *trial* right’;” that right does not “serve some value necessarily divorced from the correct ascertainment of guilt” and “eliminating review of *Miranda* claims would not significantly benefit the federal courts in their exercise of habeas jurisdiction, or advance the cause of federalism in any substantial way.” *Withrow*, 507 U.S. at 691-93. The position advanced by Judge Roberts in this case is a further example of his unduly restrictive view of the scope of habeas corpus and his misunderstanding of the critical role of federal courts in addressing constitutional violations.

Although the policy environment for criminal justice issues has allowed many purported reforms that have the effect of limiting avenues for federal habeas review of state convictions, Roberts’ willingness to seriously entertain the elimination of habeas review in state criminal justice matters altogether manifests a deference to the determinations of the criminal justice system that is unwarranted. Such a proposal

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<sup>267</sup> See *Withrow*, 507 U.S. at 698 n.6 (“It should come as no surprise that one of the submissions arguing against the extension of *Stone* in this case comes to us from law enforcement organizations.”) (*citing* Brief for Police Foundation et al. as *Amici Curiae*).

completely disregards the substantial racial justice challenges that criminal cases often present, and is contrary to our nation's best traditions.

## **CONCLUSION**

The concerns set forth in this report arise from Roberts' views as articulated in various ways on a spectrum of civil rights and constitutional issues over a number of years. The passage of time, in and of itself, does not alleviate our concerns about Roberts' views. Some people change their views over the course of time. For others, one can draw a straight line from where they were decades ago to where they are now. Nothing in the available record allows us to conclude that Roberts' views have changed. Indeed, given how deeply held those views were, a change of mind would be extraordinary.

We take no pleasure in arriving at the position we now take, and would welcome clear and convincing evidence that our concerns are unfounded. Nonetheless, based on the available record of Roberts' views and jurisprudential philosophy on civil and constitutional rights, we oppose his nomination at this time.