

Judge Roberts: A Case for Opposition



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An Introduction to Judge Roberts

With thousands of documents yet to be released, we already know Judge Roberts:

- does not recognize a constitutional right to privacy, a right that underpins *Lawrence v. Texas*
- is likely to uphold legislation such as the “Marriage Protection Act” denying GLBT people a remedy for discrimination.
- does not respect Congress’s power to enact laws such as hate crimes or the Employment Non-Discrimination Act.
- would likely erode the wall between church and state.
- has advocated for narrow readings of the Equal Protection Clause, Due Process Clause, and civil rights statutes.

After extensive review of Judge John Roberts’ record, it is clear that the Human Rights Campaign must formally oppose his nomination to the United States Supreme Court.

On July 19, when the President announced that Roberts was his chosen successor for Justice Sandra Day O’Connor, we communicated our grave concerns based upon research conducted in anticipation of a Supreme Court vacancy. Our concerns included Roberts’ record on privacy, separation of church and state, and Congress’s power to enact legislation.

Since the nomination, a great deal of information has become available that deepens our concern that Roberts would not protect the rights and liberties of GLBT Americans. Documents from Roberts’ tenure as a Reagan Administration lawyer paint a picture of his judicial philosophy and political inclinations. His philosophy is hostile to rigorous enforcement of basic rights. When acting as a policy advisor, he has been an outspoken opponent of measures to protect civil rights.

We are mindful of Roberts’ contribution to plaintiffs’ attorneys in the *Romer v. Evans* case. While notable, this work was limited (and in fact Roberts’ role was to provide a conservative point of view in a practice court session), and it does not answer the question of how he would rule in a case like *Romer*. His record strongly suggests that he would have voted with the three dissenters—Rehnquist, Scalia, and Thomas. Replacing Justice Sandra Day O’Connor, who voted with the majority to uphold GLBT rights, his confirmation would shift the court to the right and away from equality.

Much of Roberts’ known record dates from his years as a government attorney in a conservative administration. Although Roberts might argue that his actions in that capacity were simply service to a conservative client, our review of his writings sheds light on his own legal philosophy — one that more closely resembles the Court’s far right wing than the swing voters. A review of his advice to the Administration as a policy maker also indicates that Roberts took anti-civil rights stances of his own accord, not at the prompting of (and sometimes in opposition to) his colleagues and supervisors.

Finally, the Administration has refused to release thousands of documents that would shed more light on his positions and judicial philosophy. It is highly possible that the full record would prove more troubling. No nominee is entitled to a presumption of confirmation. Since we (and the Senate) have been denied access to Judge Roberts' complete record, we cannot take a leap of faith and assume that what has been concealed differs from what we have seen. The evidence that we have now, even in advance of confirmation hearings, overwhelmingly indicates that Judge Roberts would vote with the Court's right wing, and that the President has fulfilled his promise to appoint a justice in the model of Scalia and Thomas.

Un-enumerated Rights

Mainstream legal theory supports the concept of “un-enumerated” rights in the Constitution. This theory holds that a word (gay, or privacy for instance) need not be explicitly mentioned in the Constitution to be protected by it. The Ninth Amendment makes this explicit.¹ The right to privacy, the right to marriage, and the right of parents to make decisions in childrearing are all examples of un-enumerated rights. *Lawrence v. Texas* relies upon the proposition of un-enumerated rights.

Review of his record indicates that Judge Roberts does not recognize un-enumerated rights, and embraces the theory of judicial restraint that would prevent him, as a judge, from enforcing such rights where a legislature has infringed upon them.

As a Reagan Administration attorney, Roberts wrote that courts have intruded “into areas properly and constitutionally belonging to the other branches or to the states.”² Although he declined to name specific cases that so intruded, he wrote that courts had assumed functions belonging to the states through “so-called ‘fundamental rights’” analysis.³

Although “judicial restraint” might sound, in the abstract, to be a worthy principle, it amounts to an abandonment of personal liberties to the whims of legislatures. It does nothing to guarantee our Founders’ vision of protecting minorities from the tyranny of the majority.

¹ The Ninth Amendment Provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

² “Draft Article on Judicial Restraint,” from Holdings of the National Archives and Records Admin. Record Group 60. Accession #60-89-372. Box 30 of 190 Folder: John G. Roberts Misc.

³ *See id.*

A Due Process Right to Privacy

Roberts' record contains strong indications that he does not recognize a constitutional right to privacy – a subset of the un-enumerated rights described above.

Roberts has written that while privacy is something most of us feel entitled to have, it is not a “right” in the constitutional sense:

“Courts cannot, under the guise of constitutional review, re-strike balances struck by the legislature or substitute their own policy choices for those of elected officials. Two devices which invite courts to do just that are “fundamental rights” and “suspect class” review. It is of course difficult to criticize “fundamental rights” in the abstract. All of us, for example, may heartily endorse a “right to privacy.” That does not, however, mean that courts should discern such an abstraction in the Constitution.”⁴

As a government attorney, Roberts also co-authored a brief arguing that *Roe v. Wade* was “wrongly decided and should be overruled.” He said that the Court’s conclusion that there is a right to abortion “finds no support in the text, structure, or history of the Constitution.”

His brief in a case regarding access to clinics (in which he argued that anti-choice activism is not discriminatory toward women, even though only women seek abortions) re-stated that neither privacy nor abortion are constitutional rights—even though the case at issue did not directly implicate this constitutional question.

In yet another writing, Roberts denigrated the “so-called right to privacy.”⁵

We are aware that Roberts indicated, in his appeals-court confirmation hearings, that he understood that *Roe v. Wade* is well-settled precedent. This does not indicate that Roberts would uphold *Roe* if elevated to the Court. Although court of appeals judges are bound to follow the Supreme Court’s precedent, justices of the Supreme Court may re-visit cases that they believe are wrongly decided. *Lawrence v. Texas* in fact re-visited—and reversed—a Supreme Court case decided 17 years earlier.

The focus on *Roe* is important in light of the very strong constitutional link history between gay, lesbian, bisexual and transgender rights and reproductive rights. *Lawrence* mentioned both *Roe* and *Griswold v. Connecticut*, the case the held unconstitutional Connecticut’s criminal ban on providing contraceptives or contraception counseling to married couples. A judge’s record and philosophy on the right to privacy as recognized in *Roe* is directly tied to how he or she would rule on GLBT rights.

⁴ See Footnote 5, supra.

⁵ Memorandum from John G. Roberts to Attorney General dated December 11, 1981.

The Separation of Church and State

Although fair-minded people of faith always have been, and continue to be, champions of civil rights movements in this country, religion has also been—unfortunately and erroneously—put forth as a justification to discriminate against minorities, including the GLBT community. New initiatives permitting “faith-based” groups to use federal funds further threaten to establish government-sponsored religious discrimination.

Roberts’ record on church-state issues is troubling. As a government attorney, Roberts drafted a brief in support of school-sponsored prayer at graduation ceremonies. In private practice, he defended a county law that exempted religious schools from the zoning process that applied to other institutions.⁶

In a recently-released document about a 1985 school prayer case, Roberts urges a narrow reading of the case, which struck down an Alabama “moment of silence” policy. Roberts guessed that Justice Rehnquist’s dissent was originally drafted as a majority opinion, but that he lost Justice O’Connor’s vote because he was too ambitious in trying “to revolutionize Establishment Clause jurisprudence.” Roberts seems to approve of the effort to revolutionize (i.e., undermine) Establishment Clause jurisprudence, writing: “which is not to say that the effort was misguided.”⁷

Also worth noting is the possibility that Roberts questions whether the Bill of Rights is enforceable against the states.⁸ In a letter to Attorney General Smith about a speech by Harvard Dean Griswold, Roberts describes the speech’s content as consistent with Smith’s “judicial restraint” speeches (mostly drafted by Roberts). The letter makes reference to Griswold’s criticism of the “incorporation” doctrine, which applies the Bill of Rights to the states. Although it is unclear whether Roberts himself questions the incorporation doctrine or was merely noting that Griswold’s opinion was consistent with Smith’s, the tone of the letter generally suggests that Roberts shared Griswold’s views.

The *only* justice who questions whether the bill of rights has been “incorporated” into the Due Process Clause, and is thus binding on the states, is Justice Thomas. In his June dissent from a case disallowing Kentucky’s display of the Ten Commandments, Justice Thomas reiterated his support for this radical proposition.⁹ Even Justices Rehnquist and Scalia declined to endorse this view. Roberts should be questioned about whether he shares Thomas’s view.

⁶ See *Renzi v. Connelly School of the Holy Child et al.*, 61 F. Supp. 2d 440 (1999).

⁷ Memorandum from John Roberts to Fred Fielding re: *Wallace v. Jaffree* dated June 4, 1985. This memorandum provides the only insight that we have into Roberts’ philosophy on *stare decisis*, the principle that the Court should not reverse its own precedents. Here, he seems to indicate that abandoning a prior case (*Lemon v. Kurtzman*) would be acceptable.

⁸ John G. Roberts to Attorney General, Erwin Griswold Correspondence, dated December 11, 1981.

⁹ See *McCreary County et. al. v. ACLU*, 125 S.Ct. 2722 (2005). If this theory became law, a state could declare Pentecostalism a state religion without running afoul of the United States Constitution (though such a law might still violate the state’s own constitution).

Allowing Discriminatory Laws to Stand

Under current constitutional jurisprudence, laws that create separate classifications for GLBT people are subject only to “rational basis” review, meaning that they must be rationally related to a legitimate state interest. Scholars who follow GLBT-rights law have seen encouraging signs, in the form of *Romer* and *Lawrence*, that courts are on their way to applying a more rigorous standard, so-called “rational basis with teeth.”

Judge Roberts has written that rigorously enforcing the Equal Protection Clause for classifications other than race is an unwarranted intrusion into the legislative arena.¹⁰

Furthermore, even if the “rational basis” standard continues to be applied, judicial philosophy can still determine the outcome of a case. For example, in *Romer*, the Court rejected Colorado’s Amendment 2 because it was clear that only animus was behind it. In *Lofton v. Secretary of Dept. of Children and Family Services*,¹¹ the Eleventh Circuit was presented with clear evidence that Florida’s adoption ban was motivated by animus, applied the same “rational basis” test, but nonetheless accepted Florida’s pretextual justifications for the law.

Roberts’ consistent support of deference to state legislatures¹² in constitutional challenges leads us to believe that he will not apply rational basis as rigorously as the Courts in *Romer* and *Lawrence* did.¹³ Many attorneys and legal scholars believe that the key to LGBT equality lies in a complex interplay between the Due Process Clause and the Equal Protection Clause. Roberts adheres to very narrow interpretations of both.

¹⁰ See Draft Article on Judicial Restraint.

¹¹ 358 F.3d 804 (2004), *cert denied*, 125 S.Ct. 869 (2005).

¹² See also *Hedgepath v. WMATA*, 2004 WL 595070 (D.C. Cir. 2004), in which Roberts upheld, under rational basis review, a DC policy of arresting and detaining minors for offenses that would result only in a citation for adult offenders.

¹³ Justice O’Connor voted with the majority (striking down the anti-gay amendment) in *Romer*. She wrote a concurrence in *Lawrence* concluding that the Texas law violated the Equal Protection Clause (the majority opinion was based on the Due Process right to liberty).

Questioning Congressional Authority

Because the GLBT community is particularly vulnerable to hate violence and to employment discrimination, Congress' power to legislate to prevent these social ills is of vital importance to GLBT Americans. The GLBT community is also disproportionately affected by HIV and AIDS, disabilities protected under the Americans with Disabilities Act. Therefore, judicial decisions that limit the scope of the Act¹⁴ are particularly detrimental to the GLBT community.

In *Rancho Viejo v. Norton*,¹⁵ Roberts wrote a dissent from a denial of rehearing in which he argued that Congress's power to enact environmental protection legislation was quite limited. Although the Rehnquist Court has in fact curtailed Congress's Commerce Clause power in recent years, Roberts' *Rancho Viejo* reasoning goes far beyond current Supreme Court precedent. As applied to the Endangered Species Act, this reasoning has been rejected by every U.S. circuit, including his own, that has considered it.¹⁶

¹⁴ See *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001)(holding that Congress had not abrogated states' Eleventh Amendment sovereign immunity by showing pattern of unconstitutional state discrimination against disabled).

¹⁵ 334 F.3d 1158 (D.C. Cir. 2003)(Roberts, J., dissenting from denial of rehearing *en banc*).

¹⁶ The United States Supreme Court rejected the same theory this year, as applied to federal drug laws. See *Gonzales v. Raich*, 2005 U.S. Lexis 4656 (June 6 2005) (holding that application of federal drug laws to people who grew marijuana for their own medical use was a valid exercise of Commerce power, because even though the activity was purely *intrastate*, the regulation valid as part of a scheme of regulating interstate activities).

Jurisdiction stripping

Although Roberts appears poised to restrict Congress’s authority to enact laws protecting citizens, he also believes it has the authority to render constitutional rights unenforceable by preventing courts from even hearing Americans’ civil rights claims. Our concern that Judge Roberts would not vigorously enforce constitutional protections is reinforced by his writings on so-called “court-stripping” statutes. When Roberts was serving in the Reagan Justice Department, he authored a memorandum setting forth arguments in favor of legislation to strip courts of jurisdiction to hear certain classes of constitutional claims. Although the memorandum makes clear that it is an advocacy piece drafted at the behest of his superiors, a later writing indicates that Roberts apparently agrees that such legislation is constitutional.

In commenting on an analysis in which then Assistant Attorney General Theodore Olson wrote that opposing the bills on constitutional grounds would appear principled and courageous, Roberts wrote that “real courage would be to read the Constitution as it should be read and not kowtow to the Tribes, Lewises, and Brinks!”¹⁷ It appears from this writing that Roberts believed that the Constitution *should be read* to permit Congress to sharply limit the Court’s constitutional function, thereby narrowing litigants’ avenues for relief from unconstitutional legislation.

Support for “court stripping” legislation is particularly relevant to this nomination for two reasons. First, such legislation is once again making its way through Congress. Two court-stripping bills passed the House of Representatives in 2004.¹⁸ The Court may see challenges to similar legislation in the upcoming years, and Judge Roberts’ record raises concerns that he would uphold legislation that would fundamentally alter the system of checks and balances without which constitutional protections are functionally meaningless.

¹⁷ See Theodore Olson, “Policy Implications of Legislation Withdrawing Supreme Court Appellate Jurisdiction over Classes of Constitutional Cases,” April 12, 1982. With handwritten comments by John G. Roberts. Roberts apparently refers to Harvard Law Professor Lawrence Tribe, New York Times columnist Anthony Lewis, and then-ABA President David Brinks, who opposed such bills.

¹⁸ “Marriage Protection Act,” H.R. 3313, passed 233-194 on July 22 2004 (stripping jurisdiction over challenges to the “Defense of Marriage Act”); Pledge Protection Act, H.R. 2028, passed 247-173 September 23, 2004 (stripping jurisdiction over cases involving the Pledge of Allegiance).

Anti-Gay, Right-Wing Groups: United in Support

After America learned that Roberts had provided limited support in *Romer*, anti-gay forces and the White House were quick to minimize Roberts' role in the case, suggesting that he simply played the role of Justice Scalia.

On August 14, 2005, anti-gay groups met in Nashville for what they called "Justice Sunday II." Billed as a call to the faithful to get involved with the judicial nominations process, the event was also a rally for Roberts' confirmation. Almost every speaker at the event employed anti-GLBT rhetoric against what they called "judicial activism" and in support of Roberts, whom they all presume will reverse the Court's direction away from equality. Selected quotations from Justice Sunday II provide a sense of what this nomination represents to our opponents:

Robert Bork: "Once the courts define homosexuality as a constitutional right, there's nothing the states can do about it. Nothing the people can do about it." 8/14/05

Tony Perkins, Family Research Council: "The Supreme Court has sanctioned 'the right to kill unborn children' and opened the door to legalized 'homosexual sodomy.'" 8/14/05

Zell Miller: "[the Court] is ready to discard like an outdated hula hoop the universal institution of marriage between a man and a woman." 8/14/05

An Extremist Emerges

Information that has come forth about Roberts' role as an advisor to the Reagan Administration on legislative matters paints a disturbing picture. From race discrimination in employment to voting rights enforcement to busing, Roberts was always on the right flank of a very conservative administration, arguing for limited protections and against rigorous enforcement of civil rights laws. Though these actions do not necessarily illuminate his legal philosophy, they appear to demonstrate hostility to civil rights legislation and, at the very least, a failure to comprehend the real-world problems that such legislation addresses.

One alarming example is a memorandum written by Roberts in 1984 questioning the concept of equal pay for equal work for women. In response to a letter issued by three U.S. representatives, including now Senator Olympia Snowe, Roberts says he "honestly finds it troubling that three Republican representatives are so quick to embrace such a radical redistributive concept" as comparable pay for comparable worth.

With thousands of Roberts' documents yet to be released, an extremist has already emerged.

Conclusion

As set forth in the analysis sections above, the evidence released thus far overwhelmingly indicates that Judge Roberts would vote with the Court's right wing, and that he would not carry out his responsibility to uphold constitutional rights. It unfortunately appears that the President has fulfilled his promise to appoint a justice in the model of Scalia and Thomas. For all of the reasons stated in this memorandum and its attachments, the Human Rights Campaign opposes John Roberts' nomination to the Supreme Court.