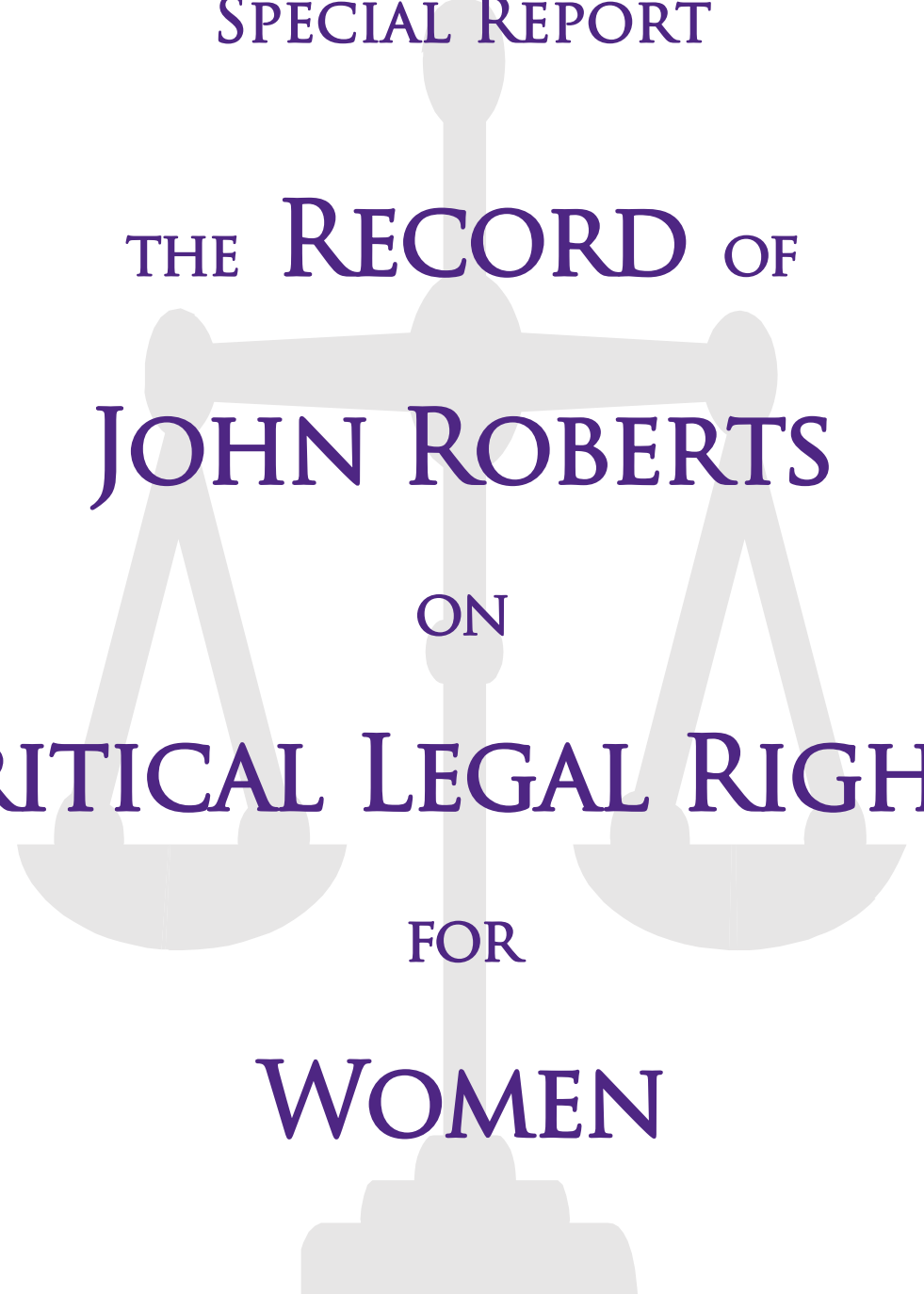


NATIONAL WOMEN'S LAW CENTER
SPECIAL REPORT



THE RECORD OF
JOHN ROBERTS
ON
CRITICAL LEGAL RIGHTS
FOR
WOMEN

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THE RECORD OF JOHN ROBERTS ON CRITICAL LEGAL RIGHTS FOR WOMEN

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THE RECORD OF JOHN ROBERTS ON CRITICAL LEGAL RIGHTS FOR WOMEN

EXECUTIVE SUMMARY

A. Overview of the Roberts Record on Core Legal Rights for Women

John Roberts's career is marked by his work to undermine constitutional and statutory rights that are of central importance for women. As he wrote in 1981 in a letter to the Circuit Court judge for whom he had clerked after law school, "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."¹ The record released to date bears out his role in aggressively seeking not just to "reconsider" but to unravel established legal protections, including core protections for women. He has done so in three areas of law that are especially central to women's legal rights:

- *Roberts questioned the very existence of the constitutional right to privacy and, as Deputy Solicitor General, co-authored a brief directly challenging the validity of Roe v. Wade.* The constitutional right to privacy is the bulwark against government intrusions into many aspects of daily life, from the regulation of birth control to the government's access to medical files and data on what people read or buy. It is also the underpinning for the right to choose established in *Roe v. Wade*. Yet:
 - In memoranda Roberts wrote in the 1980's, he questioned the very existence of the constitutional right to privacy, in one memo referring to it as the "so-called" right to privacy and commenting with apparent approval on an argument that "such an amorphous right is not to be found in the Constitution."
 - A brief Roberts co-wrote as Deputy Solicitor General, and filed in the Supreme Court, said that *Roe v. Wade* was wrongly decided and should be overruled and that it had no support in the text, structure or history of the Constitution.
 - In his 2003 confirmation proceedings for the D.C. Circuit, despite repeated questioning, Roberts would not answer whether the views in that brief were his own, or whether he believes in and supports a constitutional right to privacy.
 - While Deputy Solicitor General he played the lead role in the government's participation in a Supreme Court case on the side of Operation Rescue, arguing that massive blockades to prevent women from entering health clinics where they might secure an abortion was not illegal discrimination against women.

¹ Citations for all source materials referred to in this Executive Summary are included in the body of this report.

- *Roberts worked to undermine constitutional and statutory protections against sex discrimination.* It has been settled by Supreme Court precedents since the 1970’s that under the Equal Protection Clause of the Fourteenth Amendment to the Constitution, a law or government policy that discriminates on the basis of sex is subject to “heightened scrutiny” – which means it will be struck down unless the government can supply an “exceedingly persuasive justification” for it, a burden met by showing at least that it is substantially related to the achievement of important governmental objectives. The continued strength of this principle is critical to ensuring that laws and policies based on outmoded stereotypes and overgeneralizations about the roles of women and men in society will not be sustained. Strong statutory protections against discrimination, such as Title IX (barring sex discrimination in education) and Title VII (barring sex discrimination on the job) are equally critical. So are affirmative action policies to ensure that women have the chance to succeed on the job, in school and in business. Yet:
 - In memoranda Roberts wrote in the 1980’s, he objected to and ignored heightened scrutiny for government practices discriminating against women. In one memorandum, based in part on his objection to heightened scrutiny, he opposed Justice Department intervention in a sex discrimination case that others in the Reagan Administration (and ultimately, the court) found compelling.
 - In these and other memoranda he wrote, and in a brief he filed when he was in private practice, Roberts repeatedly pressed for narrow and damaging interpretations of statutory protections against sex discrimination, including Title IX. As Deputy Solicitor General, he also argued that no victim of intentional sex discrimination, including sexual harassment, should be allowed to sue for money damages under Title IX.
 - In memoranda and briefs, he also argued for narrow readings of Title VII, and in memoranda he insisted that the pay gap for women is not based even in part on discrimination.
 - He repeatedly opposed affirmative action, in memoranda as well as in briefs he co-authored as Deputy Solicitor General and in private practice.

- *Roberts advanced positions reflecting a narrow view of Congress’s power to protect the public welfare and he repeatedly advocated strict limitations on citizens’ access to the federal courts to enforce their rights.* Congress’s power to legislate under the Constitution’s Commerce Clause and other provisions is critical to ensuring that issues of national importance can be addressed for the country as a whole – issues such as discrimination, violence against women, safe schools and safe access to health clinics. Moreover, federal protections are not meaningful unless citizens have access to the federal courts to enforce them – and the right to sue for benefits under programs like Medicaid, or for child support enforcement, is especially important to low-income women. Yet:
 - Roberts repeatedly objected to federal remedies, even in the face of evidence that state remedies were inadequate, and as an appellate judge he

wrote an opinion suggesting he has a very narrow view of Congress's power to protect the public under the Commerce Clause.

- In memoranda and in briefs filed as Deputy Solicitor General, he aggressively argued to restrict the ability of citizens to enforce federal statutory rights under Section 1983, a federal law that allows suits for the deprivation of rights secured by the Constitution or federal laws (including rights to Medicaid and other benefits). In a brief as Deputy Solicitor General and in a law review article, he supported strict limits on the standing of citizens to sue in federal court to challenge government policies.

B. The Pivotal O'Connor Seat

In recent years, cases involving each of these areas of critical importance to women often have been decided in the Supreme Court by narrow margins and often by just one vote. And it is Justice Sandra Day O'Connor, whom Judge Roberts has been named to replace, who in many cases has cast the decisive, "swing" vote. The Justice who takes her seat thus could change the Court's direction on these issues. Moreover, while Justice O'Connor has not always ruled to support legal rights of importance to women, she frequently has played a pivotal role in preserving and strengthening women's rights.

For example, the Court's decisive opinion in 1992 reaffirming the essential holding of *Roe v. Wade* was co-authored by Justice O'Connor, and she was in the 5-4 majority in a 2000 ruling striking down a law that made some abortions illegal without ensuring that women's health would be protected. She cast the deciding vote in a 1982 case reaffirming and reinforcing that the Constitution requires heightened scrutiny of laws that discriminate based on sex. Two important cases protecting students' rights under Title IX were also decided by 5-4, with Justice O'Connor in the majority – involving sexual harassment of students and retaliation against those who complain of unequal treatment for female students. Justice O'Connor wrote the Court's landmark 5-4 decision upholding the right of public universities to use affirmative action in their admissions policies to promote diversity, allowing affirmative action on the basis of sex as well as race.

In these areas and others, Justice O'Connor's successor will have the opportunity to reaffirm and build on past gains for women – or to shift course and weaken core legal protections.

C. Patterns in the Roberts Record

Roberts worked to limit federal rights and remedies of critical importance to women. Although Roberts's writings sometimes couch his philosophy in terms of support for "judicial restraint," his record shows that, in reality, the common thread is not restraint but sharp curtailment of federal rights and remedies. These are the views he has pressed: that the courts should not recognize established fundamental rights, like the constitutional right to privacy, or apply heightened review of government policies and practices that discriminate on the basis of sex; that courts should interpret federal statutory protections for women's rights and other civil rights narrowly despite Congressional intent to the

contrary; that federal remedies are unavailable even where state remedies are inadequate; that Congress's power to protect the public welfare should be interpreted narrowly; and that the ability of citizens to sue in federal court to enforce federal rights should be severely restricted. Indeed, Roberts supported the constitutionality of proposals to completely strip federal appellate courts of jurisdiction over cases involving the constitutionality of laws on abortion and certain anti-discrimination issues – an extreme position that the Reagan Administration, in which Roberts then served, did not adopt.

Roberts failed to recognize the existence of sex discrimination and the real-world impact of his legal arguments to eliminate remedies for it. Roberts's support for limiting federal rights and remedies of critical importance to women has led him, time and again, to disregard the nature and severity of sex discrimination and to shut his eyes to the consequences of his legal arguments or to contrary judicial precedents.

- *He repeatedly ignored the facts.* In a memorandum concerning a Reagan Administration inventory of efforts in all 50 states to address sex discrimination, sent to him by then-Transportation Secretary Elizabeth Dole, he wrote of “perceived problems of gender discrimination” as if there were no *actual* gender discrimination. In another memorandum, he wrote of “the canard that women are discriminated against because they receive \$0.59 to every \$1.00 earned by men,” despite ample evidence that the pay gap for women was (and is) indeed based in part on discrimination. In 1985, he endorsed the statement that “Today, women and men are freed of former stereotypes and may enter any field of work they choose.” In recommending against Justice Department involvement in a case challenging sex discrimination in a state prison system, he wrote that equal treatment for women in the particular programs he identified would cost the state too much money, an assertion that was without basis, as shown by the state's decision not even to appeal the lower court's finding of discrimination in these programs.
- *He repeatedly failed to acknowledge the harmful impact on women of his arguments for limited remedies against sex discrimination.* In a case involving a teacher's sexual abuse of a high school student, he argued that Title IX did not allow for recovery of damages under any circumstances, although this position would have left girls like that student with no Title IX remedies whatsoever. He argued for an interpretation of Title IX that would have exempted intercollegiate athletics programs from its non-discrimination requirement and produced other indefensible results, such as no Title IX coverage for sexual harassment that took place in a building constructed without the help of federal funds but Title IX coverage for harassment that took place in another building on the same campus. Arguing against a federal remedy for women who were barred from access to health clinics by massive Operation Rescue blockades, he said such women could simply “repair to state court” – even though state laws and remedies had proven inadequate and the presiding federal judge had warned that eliminating federal protections could lead to bloodshed.

- *He flouted judicial precedents.* Roberts repeatedly wrote in 1981 and 1982 that sex discrimination does not call for “heightened scrutiny” under the Equal Protection Clause, even though heightened scrutiny of government policies that discriminate on the basis of sex had been explicitly adopted by the Supreme Court in 1976 as the standard required by the Constitution. He also dismissed a Supreme Court precedent upholding affirmative action, decided only two years earlier, asserting that only four members of the majority in that case remained on the Court and therefore it was not necessary to “accept it as the guiding principle in this area.”

D. Conclusion

John Roberts’s record, reviewed as a whole, reflects an approach to the law that limits and narrows women’s core constitutional and statutory protections in three critical areas: the constitutional right to privacy; constitutional and statutory protections against sex discrimination; and the power of Congress to protect the public safety and welfare along with citizens’ access to the federal courts to enforce their rights. Women across the country rely on these core protections and would suffer serious setbacks if they were limited and weakened.

THE RECORD OF JOHN ROBERTS ON CRITICAL LEGAL RIGHTS FOR WOMEN

I. INTRODUCTION

A. The Roberts Record on Critical Legal Rights for Women

John Roberts's career is marked by his work to undermine constitutional and statutory rights that are of central importance for women. The record released to date reveals this work in three areas of law:

- *The constitutional right to privacy and the right to choose.* In memoranda Roberts wrote in the 1980's, he questioned the very existence of the constitutional right to privacy, in one memo referring to it as the "so-called" right to privacy and commenting with apparent approval on an argument that "such an amorphous right is not to be found in the Constitution."² A brief Roberts co-wrote as Deputy Solicitor General and filed in the Supreme Court said that *Roe v. Wade* was wrongly decided and should be overruled, and that it had no support in the text, structure or history of the Constitution.³ In his 2003 confirmation proceedings for the D.C. Circuit, despite repeated questioning he would not answer whether the views in that brief were his own, or whether he believes in and supports a constitutional right to privacy.⁴ While Deputy Solicitor General he also played the lead role in the government's participation in a Supreme Court case on the side of Operation Rescue, arguing that massive blockades to prevent women from entering health clinics where they might secure an abortion was not illegal discrimination against women.⁵
- *Constitutional and statutory protections against sex discrimination.* In memoranda he wrote in the 1980's, Roberts objected to and ignored the requirement of the Equal Protection Clause of the Fourteenth Amendment to the Constitution that laws discriminating on the basis of sex are subject to heightened scrutiny.⁶ In one memorandum, based in part on his objection to heightened scrutiny, he opposed Justice Department intervention in a sex discrimination case that others in the Reagan Administration (and ultimately, the court) found compelling.⁷ In these and other memoranda he wrote, and in a brief he filed while in private practice, Roberts repeatedly pressed for narrow and damaging interpretations of Title IX of the Education Amendments of 1972, which bars sex discrimination by educational institutions that receive federal funds. As Deputy Solicitor General, he also argued that no victim of intentional sex discrimination, including sexual harassment, should be allowed to sue for money damages under Title IX.⁸ In memoranda and briefs, he argued for narrow readings of Title VII of the Civil Rights Act of 1964, which bars sex discrimination in the

² See *infra* note 51 and accompanying text.

³ See *infra* note 62 and accompanying text.

⁴ See *infra* notes 57 and 65 and accompanying text.

⁵ See *infra* notes 74-79 and accompanying text.

⁶ See *infra* notes 91-99 and accompanying text.

⁷ See *infra* notes 100-108 and accompanying text.

⁸ See *infra* notes 131-133 and accompanying text.

workplace,⁹ and in memoranda he insisted that the pay gap for women is not based even in part on discrimination.¹⁰ He opposed affirmative action, in memoranda as well as in briefs he co-authored as Deputy Solicitor General and in private practice.¹¹

- *The power of Congress to protect the public safety and welfare, and citizens' access to the federal courts to enforce their rights.* Roberts repeatedly objected to federal remedies, even in the face of evidence that state remedies were inadequate,¹² and as an appellate judge he wrote an opinion showing openness to a narrow view of Congress's power to protect the public under the Commerce Clause.¹³ In memoranda and in briefs filed as Deputy Solicitor General, he aggressively argued to restrict the ability of citizens to enforce federal statutory rights under Section 1983, a federal law that allows suits for the deprivation of rights secured by the Constitution or federal laws (including rights to Medicaid and other benefits, which are especially important for low-income women).¹⁴ In a brief he wrote as Deputy Solicitor General and in a law review article, he supported strict limits on the standing of citizens to sue in federal court to challenge government policies.¹⁵

B. The Stakes for Women

In recent years, cases involving each of these areas of critical importance to women often have been decided in the Supreme Court by narrow margins and often by just one vote. And it is Justice Sandra Day O'Connor, whom Judge Roberts has been named to replace, who in many cases has cast the decisive, "swing" vote. The Justice who takes her seat thus could change the Court's direction on these issues. Moreover, while Justice O'Connor has not always ruled to support legal rights of importance to women, she frequently has played a pivotal role in preserving and strengthening women's rights. For example:

- Justice O'Connor was a co-author of the decisive "joint opinion" in *Planned Parenthood v. Casey*, in 1992 reaffirming the essential holding of *Roe v. Wade*, protecting a woman's right to choose.¹⁶ She was also in the 5-4 majority in a 2000 ruling striking down a law that made some abortions illegal without ensuring that women's health would be protected.¹⁷ She was essential in preventing the Court from reversing *Roe v. Wade* in effect, as well as in name.
- Justice O'Connor wrote the opinion and cast the deciding vote in *Mississippi University for Women v. Hogan*, making clear that the Constitution's Equal Protection Clause provides strong protection against sex discrimination in government policies and programs, reaffirming and reinforcing "heightened scrutiny" for sex discrimination. Justice O'Connor emphasized the Court's prior decisions holding that a law

⁹ See *infra* notes 139-147 and accompanying text.

¹⁰ See *infra* notes 148-154 and accompanying text.

¹¹ See *infra* notes 159-184 and accompanying text.

¹² See *infra* note 78 and accompanying text.

¹³ See *infra* notes 190-191 and accompanying text.

¹⁴ See *infra* notes 192-217 and accompanying text.

¹⁵ See *infra* notes 218-224 and accompanying text.

¹⁶ 505 U.S. 833 (1992).

¹⁷ *Stenberg v. Carhart*, 530 U.S. 914 (2000).

discriminating on the basis of sex requires “an exceedingly persuasive justification,” and the Court ruled 5-4 that this standard was not met by a state university that excluded men from admission to its nursing school based on gender stereotypes.¹⁸ These principles led the Court, in later cases, to strike down the exclusion of all women from juries through peremptory challenges¹⁹ and the exclusion of all women from a state-run university on the ground that women were not tough enough to succeed.²⁰

- Justice O’Connor wrote the majority opinion, and cast the deciding vote, in each of two important Title IX cases decided by 5-4 votes in which the Center represented the plaintiffs – *Davis v. Monroe County Board of Education*,²¹ holding that Title IX protects students from sexual harassment by other students where school authorities have failed to act, and *Jackson v. Birmingham Board of Education*,²² holding that Title IX protects teachers and coaches from retaliation if they complain about unequal treatment for female students.
- Federal law prohibiting sex discrimination in the workplace bears Justice O’Connor’s imprint as well. In one case, her opinion ensured effective protection under Title VII for women subjected to sexual harassment on the job. She wrote, “Title VII comes into play before the harassing conduct leads to a nervous breakdown.”²³
- Justice O’Connor wrote the Court’s opinion in *Grutter v. Bollinger*, the landmark 5-4 decision upholding the right of public universities to use affirmative action in their admissions policies to promote diversity, allowing affirmative action on the basis of sex as well as race, which is especially important in areas where women remain dramatically under-represented, such as science, engineering and technology.²⁴
- In an important case concerning whether a federal civil rights law guaranteeing the equal protection of the law provides remedies for women subjected to blockades barring their access to health care clinics, Justice O’Connor wrote that the law should be given “a sweep as broad as [its] language” and that it did apply.²⁵ In that case, she was in dissent – but her opinion, once again, reflected an understanding of the importance of federal protections against discrimination on the basis of sex.

In each of these areas and others, Justice O’Connor’s successor will have the opportunity to reaffirm and build on past gains for women – or to shift course and weaken core legal protections she helped establish. Thus, while any nomination to the Supreme Court is of great importance, the stakes are especially high in filling the O’Connor seat.

¹⁸ *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982).

¹⁹ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

²⁰ *United States v. Virginia*, 518 U.S. 515 (1996).

²¹ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

²² *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. ___, 125 S. Ct. 1497 (2005).

²³ *Harris v. Forklift Sys.*, 510 U.S. 17, 22 (1993).

²⁴ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

²⁵ *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 346 (1993) (O’Connor, J., dissenting) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

II. JOHN ROBERTS'S RECORD ON ISSUES OF IMPORTANCE TO WOMEN

A. OVERVIEW

The Center's review of Judge Roberts's record included a comprehensive examination of publicly-available memoranda he wrote while serving in the Justice Department and the White House during the Reagan Administration; his briefs and arguments as Principal Deputy Solicitor General in the George H.W. Bush Administration; briefs he filed while in private practice; his published judicial opinions on the D.C. Circuit; his other published writings and available public statements; and his testimony in the Senate confirmation hearing on his nomination to the D.C. Circuit in 2003.²⁶ Many of the memoranda he wrote and public statements he made were explicit expressions of his own opinions. And as Deputy Solicitor General, although the arguments Roberts made were on behalf of the United States government, he was not a low-level, career attorney assigned to carry out administration policy; rather, he was in a position to help *decide* policy. He was second-in-command to the Solicitor General, and as Roberts himself acknowledged in a 2002 panel discussion, the Solicitor General determined Executive Branch positions before the Supreme Court.²⁷ Moreover, Roberts's position was a political appointment, and he thus chose – and was chosen – to serve an administration whose policies he generally supported and could be trusted to support.²⁸ Finally, on the issues examined by the Center, the positions Roberts espoused in the Solicitor General's office, as well as in briefs he filed while in private practice, were generally consistent with those he expressed in his personal capacity in earlier memoranda, in the media, or in other forums.²⁹

With respect to Roberts's role as Deputy Solicitor General, it is also important to underscore the importance of the decisions made by that office about what cases the United States enters as *amicus* ("friend of the court") and what side it takes in those cases. The involvement of the United States as *amicus*, which is not required, can have a tremendous impact on the outcome of a case. Indeed, John Roberts himself acknowledged, in an article he wrote in 1993 (just as he was leaving his post in the Solicitor General's office), that the *amicus* briefs of

²⁶ Some potentially relevant documents have been withheld from public inspection and therefore were not part of the Center's review. These include approximately 4,000 documents withheld by the Ronald Reagan Presidential Library as well as records from the Solicitor General's office in the U.S. Department of Justice relating to cases on which Judge Roberts worked.

²⁷ Comments of John G. Roberts, in *Rex E. Lee Conference on the Office of the Solicitor General of the United States*, 2003 BYU L. REV. 2, 73 (2003).

²⁸ Indeed, the position Roberts held is known informally as the "political deputy" position in the Solicitor General's office, a position that was created during the Reagan Administration after the Solicitor General had to recuse himself from a highly controversial case (in which the Administration was arguing, over the objections of career attorneys, in support of a tax exemption for Bob Jones University despite its racially discriminatory policies), and the Administration was left with no politically trustworthy official in the office to supervise the case. See Tony Mauro, *An Argumentative Career*, 25 LEGAL TIMES 43, Nov. 4, 2002.

²⁹ One example, discussed below, is his advocacy for narrowing Title IX's applicability, scope and remedies – a pattern that carries throughout Roberts's memoranda in the Reagan Administration (in two different positions), his position as Deputy Solicitor General, and a brief he filed in private practice. See *infra* notes 110-138 and accompanying notes. Of course, even more evidence of the extent to which the positions Roberts took on behalf of the United States in the Solicitor General's office reflected his own views might be found in internal memoranda prepared in that office during his tenure there, but the Administration has declined to produce these memoranda to the public.

the Solicitor General can play a significant role in shaping what the Supreme Court does.³⁰ In the same article, he cited studies showing that the side the U.S. government supports as *amicus* prevails about 75% of the time, which is more often than when the government is a party to the case. And, as he also noted, the decision of the U.S. to weigh in as *amicus* in a case is one of “priorities.”³¹ Thus, the positions the Solicitor General’s office took in the Supreme Court, under Roberts’s leadership – such as in *Bray v. Alexandria Women’s Health Clinic*³² (involving blockades of women’s health clinics) and *Franklin v. Gwinnett County Public Schools*³³ (involving remedies for sexual harassment under Title IX), two cases discussed in this report – are particularly significant indicators not only of his views on important legal issues but of his priorities as well.

In reviewing the Roberts record, certain patterns emerge. Two of these are worthy of note before turning to an analysis of his record in each of the specific areas of law that are of special importance to women.

Roberts Repeatedly Worked to Limit Federal Rights and Remedies of Critical Importance to Women

Throughout his career, John Roberts worked to undermine important constitutional and statutory rights that are of central importance for women. As he wrote in 1981 in a letter to a Circuit Court judge for whom he had clerked after law school, “This is an exciting time to be at the Justice Department. So much that has been taken for granted for so long is being seriously reconsidered.”³⁴ The record released to date bears out his role in aggressively seeking not just to “reconsider” but to unravel established legal protections, including core protections for women.

Although Roberts’s writings sometimes couch his philosophy in terms of support for “judicial restraint,”³⁵ his record shows that, in reality, the common thread is not restraint but sharp curtailment of federal rights and remedies. These are the views he has pressed: that the courts should not recognize established fundamental rights, like the constitutional right to privacy, or apply heightened review of government policies and practices that discriminate on the basis of sex; that courts should interpret federal statutory protections for women’s rights and other civil rights narrowly despite Congressional intent to the contrary; that federal remedies are unavailable even where state remedies are inadequate; that Congress’s power to protect the public welfare should be interpreted narrowly; and that the ability of citizens to sue in federal court to enforce federal rights should be severely restricted. Indeed, Roberts supported the constitutionality of proposals to completely strip federal appellate courts of jurisdiction over cases involving the constitutionality of laws on abortion and certain anti-discrimination issues –

³⁰ John G. Roberts, Jr., *Rule of Law: The New Solicitor General and the Power of the Amicus*, WALL ST. J., May 5, 1993, at A23.

³¹ *Id.*

³² 506 U.S. 263 (1993).

³³ 503 U.S. 60 (1992).

³⁴ Letter from John Roberts, Special Assistant to the Attorney General, to the Honorable Henry J. Friendly, Judge, United States Court of Appeals for the Second Circuit 1 (Nov. 4, 1981).

³⁵ See Memorandum from John Roberts, Special Assistant to the Attorney General, to Kenneth W. Starr, Counselor to the Attorney General, re “Judicial Restraint Drafts,” attaching short and long draft articles on judicial restraint (Nov. 24, 1981) [hereinafter Judicial Restraint Drafts].

an extreme position that the Reagan Administration, in which Roberts then served, did not adopt.³⁶

Roberts Failed to Recognize the Existence of Sex Discrimination and the Real-World Impact of His Legal Arguments to Eliminate Remedies For It

Roberts's support for limiting federal rights and remedies of critical importance to women has led him, time and again, to disregard the nature and severity of sex discrimination and to shut his eyes to the consequences of his legal arguments or to contrary judicial precedents.

He repeatedly ignored the facts. In a memorandum concerning a Reagan Administration inventory of efforts in all 50 states to address sex discrimination, sent to him by then-Transportation Secretary Elizabeth Dole, he wrote of "perceived problems of gender discrimination" as if there were no *actual* gender discrimination.³⁷ In another memorandum, he wrote of "the canard that women are discriminated against because they receive \$0.59 to every \$1.00 earned by men. . ."³⁸ despite ample evidence that the pay gap for women was (and is) indeed based in part on discrimination."³⁹ In 1985, he endorsed the statement that "Today, women and men are freed of former stereotypes and may enter any field of work they choose."⁴⁰ In recommending against Justice Department involvement in a case challenging sex discrimination in a state prison system, he wrote that equal treatment for women in the particular programs he identified would cost the state too much money, an assertion that was without basis, as shown by the state's decision not even to appeal the lower court's findings of discrimination in these programs.⁴¹

*He repeatedly failed to acknowledge the harmful impact on women of his arguments for limited remedies against sex discrimination.*⁴² He argued that Title IX did not allow for recovery

³⁶ See Memorandum from John Roberts, Associate Counsel to the President, to Fred F. Fielding, Counsel to the President, re "Senator Helms' Bill—a Legislative Restriction on the Appellate Power of U.S. Supreme Court" 1 (June 21, 1985) ("You may recall that I disagreed with [the Attorney General's 1982 conclusion that bills divesting the Supreme Court of jurisdiction were unconstitutional] on legal grounds, but agreed that the court-stripping bills were bad policy") [hereinafter Senator Helms' Bill Memo]; Memorandum from John Roberts, Associate Counsel to the President, to Fred Fielding, Counsel to the President, re "S. 47, 'Voluntary School Prayer Act of 1985'" 1 (May 6, 1985) [hereinafter S. 47 Memo].

³⁷ Memorandum from John G. Roberts, Associate Counsel to the President, to Fred F. Fielding, Counsel to the President, re "Draft 'Status of the States' 1982 Year End Report" 1 (Jan. 17, 1983).

³⁸ Memorandum from John G. Roberts, Associate Counsel to the President, to Fred F. Fielding, Counsel to the President, re "Clearance for Publication of Remarks Made by Eliza Paschall Before Board Meeting of National Federation of Republican Women" 1 (Oct. 4, 1984) [hereinafter Paschall Remarks Memo].

³⁹ Memorandum from John G. Roberts, Associate Counsel to the President, to Fred F. Fielding, Counsel to the President, re "Nancy Risque Request for Guidance on Letter from Congresswomen Snowe, Schneider, Johnson Regarding Recent Court Decision in Washington on Comparable Worth and Discrimination Against Women," 1 (Feb. 20, 1984) [hereinafter Congresswomen Memo]. See *infra* note 148 and accompanying text.

⁴⁰ Draft Responses at 2, attached to Memorandum from John G. Roberts, Associate Counsel to the President, and Deborah K. Owen, to Fred F. Fielding, Counsel to the President, re "Domestic Briefing Materials for Press Conference," 1 (Sept. 13, 1985).

⁴¹ The state did not appeal the district court's core order requiring it to provide equal vocational programs for men and women prisoners. *Canterino v. Wilson*, 875 F.2d 862 (6th Cir. 1989) (noting that the appeal of the district court decision, which was affirmed, focused on only one narrow aspect of the district court's ruling relating to whether the prison system must hire part-time attorneys to counteract the longstanding discrimination in the legal facilities).

⁴² In a number of memos, Roberts also employed a tone suggesting he did not take questions involving the advancement of women very seriously. In one memorandum, about a woman who was being considered as a

of damages for any intentional discrimination, although this position would have left victims of sexual harassment like the high school girl in that case – whose teacher had sexually abused her – with no Title IX remedies whatsoever.⁴³ He argued for an interpretation of Title IX that would have exempted intercollegiate athletics programs from its non-discrimination requirement⁴⁴ and produced other indefensible results, such as no Title IX coverage for sexual harassment if it took place in a building constructed without the help of federal funds, but Title IX coverage for harassment that took place in another building on the same campus.⁴⁵ Arguing against a federal remedy for women barred from entry to health clinics by massive Operation Rescue blockades, he said such women could simply “repair to state court” – even though state law and remedies had proven inadequate and the presiding federal judge had warned that eliminating federal protections could lead to bloodshed.⁴⁶

He flouted judicial precedents. Roberts repeatedly wrote in 1981 and 1982 that sex discrimination does not call for “heightened scrutiny” under the Equal Protection Clause, even though heightened scrutiny of government policies that discriminate on the basis of sex had been explicitly adopted by the Supreme Court in 1976 as the standard required by the Constitution.⁴⁷ He also dismissed a Supreme Court precedent upholding affirmative action, decided only two year earlier, asserting that only four members of the majority in that case remained on the Court and therefore it was not necessary to “accept it as the guiding principle in this area.”⁴⁸

Each of these examples of concerns raised by the Roberts record is discussed in more detail below in the relevant section of this report.

B. ROBERTS’S RECORD ON LEGAL ISSUES OF IMPORTANCE TO WOMEN

1. Roberts Questioned the Constitutional Right to Privacy and as Deputy Solicitor General Co-Authored a Brief Directly Challenging the Validity of *Roe v. Wade*

a. Roberts Questioned the Very Existence of the Constitutional Right to Privacy

A long line of Supreme Court cases has upheld the constitutional right to privacy, including *Griswold v. Connecticut*, which held that the privacy right includes the right of married

nominee for a “Clairol Rising Star Award” because as an assistant law school dean she had encouraged many former homemakers to enter law school and become lawyers, Roberts commented, “Some might question whether encouraging homemakers to become lawyers contributes to the common good.” Memorandum from John G. Roberts, Associate Counsel to the President, to Fred F. Fielding, Counsel to the President, re “Clairol Loving Care Scholarship Program Rising Star Award,” 1 (July 31, 1985). While this may have been intended as a self-deprecating remark about lawyers, it nonetheless suggests a lack of appreciation of the challenges and difficulties faced by women seeking to move from a traditional homemaker role into the legal profession. And in a handwritten 1985 memo, Roberts disparagingly referred to the Task Force on Legal Equity for Women, established by President Reagan, as the “Ladies’ Task Force.” Memorandum from John Roberts, Special Assistant to the Attorney General, to Kenneth W. Starr, Counselor to the Attorney General, 1 (Aug. 4, 1982) (handwritten memorandum with attached typed memorandum re “Task Force on Legal Equity for Women”).

⁴³ See *infra* notes 131-133 and accompanying text.

⁴⁴ See *infra* notes 119-120 and accompanying text.

⁴⁵ See *infra* notes 124-130 and accompanying text.

⁴⁶ See *infra* notes 74-86 and accompanying text.

⁴⁷ See *infra* notes 91-99 and accompanying text.

⁴⁸ See *infra* note 173 and accompanying text.

couples to use contraception,⁴⁹ and *Roe v. Wade*, which held that the privacy right includes the right to terminate a pregnancy.⁵⁰ This right to privacy not only serves as the underpinning of the decisions involving whether to bear children, but also protects many other aspects of Americans' daily lives. Without a constitutional right to privacy, for example, the government would be allowed to intrude into personal medical files or data on what people read or buy.

John Roberts questioned the very existence of the constitutional right to privacy. In a 1981 memo to the Attorney General summarizing with apparent approval a lecture that had been forwarded to him, Roberts said that the author had devoted a section of his lecture “to the so-called ‘right to privacy’” and that the author was “arguing as we have that such an amorphous right is not to be found in the Constitution.”⁵¹ As special assistant to the Attorney General, Roberts also wrote a draft article to be published in the Attorney General’s name (and in fact later published in the *ABA Journal*⁵²) criticizing courts’ recognition of fundamental rights. (The article also argued against heightened constitutional scrutiny for sex discrimination, as discussed below.⁵³) Regarding the right to privacy, Roberts wrote in his draft: “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, arbitrarily elevate it over other constitutional rights and powers by attaching the label ‘fundamental,’ and then resort to it as, in the words of one of Justice Black’s dissents, ‘a loose, flexible, uncontrolled standard for holding laws unconstitutional.’”⁵⁴ The dissent Roberts cited was in *Griswold v. Connecticut*, the 1965 Supreme Court case recognizing that the constitutional right to privacy does not allow a state to ban the use of contraceptives.⁵⁵

Roberts also made comments in a 1997 public television appearance suggesting he places more weight on the right of states to legislate in ways that intrude on personal privacy than on the right of individuals to have their privacy rights protected. Roberts, then a private lawyer and appearing on the program as an expert on the Supreme Court, was discussing the Supreme Court cases that had just held that state bans on assisted suicide did not violate the liberty interest protected by the Constitution. In his discussion of the rights at stake, Roberts did not mention the right to personal privacy or liberty but instead said, “The right that was protected in the assisted suicide cases was the right of the people through their legislatures to articulate their own views on the policies that should apply in those cases of terminating life and not to have the court interfering in those policy decisions.”⁵⁶ This focus on the “right” of legislatures to address matters of personal privacy and autonomy could suggest a willingness to give great deference to such legislative enactments and to view judicial protection of individual rights (whether in the area of abortion, contraception, end-of-life issues, or other matters) as unwarranted “interference” by the courts.

⁴⁹ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁵⁰ *Roe v. Wade*, 410 U. S. 113 (1973).

⁵¹ Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General, re “Erwin Griswold Correspondence” 1 (Dec. 11, 1981).

⁵² William French Smith, *Urging Judicial Restraint*, 68 A.B.A. J. 59 (Jan. 1982).

⁵³ See *infra* notes 95-96 and accompanying text.

⁵⁴ *Judicial Restraint Drafts*, *supra* note 35, at 5.

⁵⁵ *Griswold*, 381 U.S. 479.

⁵⁶ *NewsHour with Jim Lehrer: The Supreme Court Session* (PBS television broadcast, July 3, 1997), transcript available at http://www.pbs.org/newshour/bb/law/july-dec97/session_7-2.html (last visited Aug. 26, 2005).

In his 2003 confirmation proceedings for the D.C. Circuit, Roberts would not answer the question whether he believes in and supports a constitutional right to privacy, or give his understanding of the constitutional right to privacy.⁵⁷

b. As Deputy Solicitor General, Roberts Co-Authored a Brief That Directly Challenged the Validity of *Roe v. Wade*

The next Justice to join the Supreme Court could provide a fifth vote to overturn a core principle of *Roe v. Wade* – that the government may not jeopardize a woman’s health when limiting her access to abortion.⁵⁸ In addition, the number of Justices ready to overturn *Roe* in its entirety could climb from the current three⁵⁹ to four – just one additional retirement away from the reversal of *Roe* altogether and a return to the days when abortion could be criminalized by the federal government or individual states. A case to be argued in the Court this fall, *Ayotte v. Planned Parenthood of Northern New England*, presents an immediate danger that women could lose essential rights under *Roe v. Wade*.⁶⁰ (For a fuller discussion of how the right to choose is in immediate danger, see: http://www.nwlc.org/pdf/RightToChooseInDanger_August2005.pdf.)

John Roberts’s record provides concrete reasons for concern that he will supply the decisive vote to eviscerate core protections of *Roe* and an additional vote in favor of reversing *Roe* outright. In 1990, as Principal Deputy Solicitor General in the George H.W. Bush Administration, under Solicitor General Kenneth Starr, Roberts co-authored a brief in *Rust v. Sullivan*, a case that involved an abortion-counseling gag rule in federally funded family planning programs.⁶¹ The brief Roberts co-authored argued not only that the gag rule was valid under the First Amendment (as the Court ultimately held) but that *Roe v. Wade* “was wrongly decided and should be overruled” and that the Court’s conclusions in *Roe* that there is a fundamental right to abortion “find no support in the text, structure or history of the Constitution.”⁶² It was not necessary even to raise the validity of *Roe* to defend the gag rule.

As noted above, the views Roberts presented in the position of the political Deputy Solicitor General can reasonably be presumed to have been consistent with his own. Moreover, news accounts have described Roberts, at the time of the *Rust* brief, as someone who (with Solicitor General Starr) led a “small team of conservative lawyers who were determined to overturn *Roe vs. Wade*.”⁶³ And Jay Sekulow, a conservative activist and counsel to Operation Rescue, who has worked with Roberts for years and has argued before the Supreme Court with

⁵⁷ Responses of John G. Roberts, Jr. to Written Questions from Senator Dianne Feinstein at 1-3 (Feb. 5, 2003).

⁵⁸ *Planned Parenthood v. Casey*, 505 U.S. 833, 880 (1992) (“[T]he essential holding of *Roe* forbids a State to interfere with a woman’s choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health [citing *Roe*].”) (emphasis added).

⁵⁹ Justices Scalia and Thomas and Chief Justice Rehnquist have said that *Roe v. Wade* should be overturned altogether. See *Planned Parenthood v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part, and joined by Scalia, J., Thomas, J., and White, J.) (“We believe that *Roe* was wrongly decided, and that it can and should be overruled. . . .”).

⁶⁰ ___ U.S. ___, 125 S. Ct. 2294 (2005) (*cert. granted*).

⁶¹ 500 U.S. 173 (1991).

⁶² Brief for the Respondent at 13, *Rust v. Sullivan*, 500 U.S. 173 (1991) (Nos. 89-1391 and 89-1392).

⁶³ Richard A. Serrano et al., *Roberts Was Ready at Every Turn; High Court Nominee’s Fortunes Called Result of Being Well-Prepared, Focused*, L.A. TIMES, July 25, 2005, at A1.

him, has stated with respect to Roberts’s brief asking the Court to overrule *Roe* that he “knew that Judge Roberts’s heart was in it” and that Roberts “doesn’t argue just to argue.”⁶⁴

In his 2003 confirmation proceedings for the D.C. Circuit, Roberts was asked repeatedly about the brief in the *Rust* case and his own views on *Roe v. Wade*. He repeatedly answered that it is not proper to infer a lawyer’s personal views from the position taken on behalf of a client, that *Roe* is “settled law,” and that if confirmed as a Circuit Court judge he would be bound to follow it. But, notably, he would not answer whether the views in the *Rust* brief were or are his views, *i.e.*, whether he believed then or believes now that *Roe* should be overturned.⁶⁵ Moreover, his assurances about following settled law as a prospective lower court nominee, who must follow the Supreme Court’s precedent in *Roe*, give little assurance in the case of a Supreme Court nominee, since Supreme Court justices have the power to unsettle – indeed, completely jettison – “settled law.”

Internal government documents authored by Roberts give additional glimpses of an antagonistic view toward *Roe v. Wade*. In a memorandum Roberts wrote when he was special assistant to the Attorney General, he commented, with apparent approval, that participants at a conference at the American Enterprise Institute “recognized a serious problem in the current exercise of judicial power, epitomized . . . in the Supreme Court by what is broadly perceived to be the unprincipled jurisprudence of *Roe v. Wade*.”⁶⁶ On a 1982 memorandum written by another Justice Department official, Roberts added a handwritten note suggesting he did not agree with the comment that the Supreme Court was moving to the right: Roberts underlined the name of Justice Harry Blackmun, the author of *Roe*, and drew an arrow connecting it to the word “abortion.”⁶⁷

Documents from Roberts’s time in the White House Counsel’s office are also relevant. In 1985, Roberts reviewed a proposed Presidential telegram to be sent to a Los Angeles

⁶⁴ David D. Kirkpatrick, *A Year of Work to Sell Roberts to Conservatives*, N.Y. TIMES, July 22, 2005, at A14.

⁶⁵ *Confirmation Hearings on Federal Appointments, Part 3: Hearings Before the Senate Comm. on the Judiciary*, 108th Cong. 55-56, 72 (Apr. 30, 2003) (questions of Senator Durbin); see also Responses of John G. Roberts, Jr. to Written Questions from Senator Dianne Feinstein 1-3 (Feb. 3, 2003); Responses of John G. Roberts, Jr. to Follow-Up Questions from Senator Joseph R. Biden, Jr., at 3-4, 7 (Feb. 3, 2003); Responses of John G. Roberts, Jr. to Follow-Up Questions from Senator Edward M. Kennedy, at 4 (Feb. 3, 2003).

⁶⁶ Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General, re “Proposals to Divest the Supreme Court of Appellate Jurisdiction: An Analysis in Light of Recent Developments” 1 (undated). In this memorandum, Roberts said that he was carrying out an assignment to marshal the arguments in favor of the constitutionality of legislation that would divest the appellate courts of jurisdiction to hear certain types of controversies, including abortion issues. Memorandum from Kenneth W. Starr, Counselor to the Attorney General, to Theodore B. Olson, Assistant Attorney General (Oct. 30, no year given). Subsequent memoranda make clear that Roberts himself held the view that the legislation was constitutional. Senator Helms’ Bill, *supra* note 36, at 1 (“You may recall that I disagreed with [the Attorney General’s 1982 conclusion that bills divesting the Supreme Court of jurisdiction were unconstitutional] on legal grounds, but agreed that the court-stripping bills were bad policy.”); S. 47 Memo, *supra* note 36, at 1.

⁶⁷ Memorandum from Theodore B. Olson, Assistant Attorney General, to the Attorney General, re “Policy Implications of Legislation Withdrawing Supreme Court Appellate Jurisdiction over Classes of Constitutional Cases” 8 (Apr. 12, 1982). In this memorandum, then-Assistant Attorney General Theodore B. Olson listed arguments for and against court-stripping legislation. Roberts’s handwritten notes appear on the section of the memorandum outlining arguments against the legislation, and indicate Roberts’s disagreement with some of those arguments.

memorial service for aborted fetuses discovered at a medical laboratory in 1982.⁶⁸ Aside from a minor change,⁶⁹ Roberts had no objection to the text, which compared the aborted fetuses to the dead at Gettysburg and criticized *Roe* and its companion decision, *Doe v. Bolton*.⁷⁰ Roberts also had no objection to the President's sending of a message to the memorial service. He noted that because of the President's position that fetuses are human beings, a memorial service "would seem an entirely appropriate means of calling attention to the abortion tragedy."⁷¹ Similarly, Roberts had no objections to talking points drafted for President Reagan for use in a telephone call to an anti-abortion rally in 1985.⁷² The talking points called *Roe* and *Doe* a "tragedy" and praised the anti-abortion movement.⁷³

While Deputy Solicitor General, Roberts played the lead role in the Justice Department's participation in *Bray v. Alexandria Women's Health Clinic* on the side of Operation Rescue, an anti-abortion organization that has used massive blockades and other extreme tactics to intimidate and physically prevent women from entering clinics that provide abortions.⁷⁴ Roberts co-authored the government's brief and argued twice before the Court,⁷⁵ and he also defended the government's position in the media.⁷⁶ The position advanced by Roberts was that using massive blockades to forcibly bar entry to women's health clinics and prevent women from exercising their constitutional right to choose was not discrimination against women and therefore was not covered by an 1871 federal civil rights law, even if sex discrimination as a general matter was covered.⁷⁷ The government was not a party to the case and did not need to file as *amicus* at all, let alone on Operation Rescue's side and *against* the application of federal law. (In fact, there is no indication on the public record that the Supreme Court asked for the United States government's views in the case.) Yet the position Roberts advanced gave an extremely narrow reading to the federal law and ignored the fact that state and local authorities had been overwhelmed by the blockades and unable to keep the peace.⁷⁸ A majority of the Court ultimately agreed with the government's position, but over strong dissents – including one by

⁶⁸ Memorandum from John G. Roberts, Associate Counsel to the President, to Fred F. Fielding, Counsel to the President, re "California Pro Life Medical Association Event, October 6," at 1 (Oct. 4, 1985) [hereinafter Pro Life Memo].

⁶⁹ Roberts had a small objection to the telegram's characterization of *Roe* and *Doe*, 410 U.S. 179 (1973), which he said was legally inaccurate (he suggested changing "made void *all* our laws protecting the lives of infants developing in their mothers' wombs" to "made void *many of our laws*"). *Id.* (emphasis added).

⁷⁰ See Telegram from Ronald Reagan, President of the United States, to Philip B. Dreisbach, M.D., Secretary, California Pro Life Medical Association 1 (Oct. 3, 1985).

⁷¹ Pro Life Memo, *supra* note 68, at 2.

⁷² Memorandum from John G. Roberts, Associate Counsel to the President, to Fred F. Fielding, Counsel to the President, re "Talking Points Regarding Phone Call to Americans Against Abortion Rally" 1 (June 7, 1985).

⁷³ See Suggested Talking Points for Meeting With Americans Against Abortion Rally, Los Angeles, California 1-4 (undated).

⁷⁴ *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 313 (1993) (Stevens, J., dissenting).

⁷⁵ See Brief for the United States as Amicus Curiae Supporting Petitioners, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (No. 90-985); Transcript of Oral Argument, *Bray*, 506 U.S. 263 (No. 90-985), 1991 WL 637112 (Oct. 16, 1991); Transcript of Oral Argument, *Bray*, 506 U.S. 263 (No. 90-985), 1992 WL 687912 (Oct. 6, 1992).

⁷⁶ See *The MacNeil/Lehrer NewsHour: Abortion Protest; Divided Nation; Makeover with a Mission* (PBS television broadcast, Aug. 7, 1991).

⁷⁷ Brief for the United States as Amicus Curiae Supporting Petitioners, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (No. 90-985).

⁷⁸ *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 311 (1993) (Stevens, J., dissenting). See also FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT OF 1993, S. REP. NO. 103-117, at 19-21 (1993) (explaining inadequacies of state and local law enforcement).

Justice O'Connor, who said the 1871 law should be given "a sweep as broad as [its] language" in accordance with the Court's past precedents.⁷⁹ Congress swiftly filled the resulting gap in federal law by enacting the Freedom of Access to Clinic Entrances Act of 1994 (FACE) by lopsided margins.⁸⁰ After the passage of FACE, the violence and blockades largely (but not completely) subsided, although even with essential federal assistance threats of violence remain a problem.⁸¹

At the same time the *Bray* case was pending, the Justice Department took the additional step of filing a brief in another Operation Rescue case, in Wichita, attaching Roberts's brief in *Bray* and asking the federal district judge to lift an injunction that had been issued under authority of the same 1871 federal civil rights law.⁸² The injunction had enabled approximately 100 federal marshals to come in and restore order during a massive clinic blockade.⁸³ Although Roberts's name was not on the Wichita brief – which is unremarkable because the Solicitor General's Office would not ordinarily be on such a brief in a lower court – it was reported at the time that Roberts said he participated in the government's decision to intervene in Wichita.⁸⁴ The federal judge in Wichita not only refused to lift the injunction despite the government's request that he do so, but also said on national television, "If these marshals are removed . . . there will be bloodshed, and it's just ludicrous to believe that somehow our government puts an imprimatur and agrees to that."⁸⁵ Roberts defended the government's action in the same broadcast. He said that the idea that there would be mayhem and violence was "absurd," insisted that federal law did not apply, and asserted that the victims of the blockades could simply "repair to state court."⁸⁶ He never explained why he dismissed the concerns expressed by the judge who had heard the evidence first hand.

Although Roberts explicitly said in the litigation and media appearances that he was not defending Operation Rescue's tactics,⁸⁷ he nonetheless worked to put the weight of the U.S.

⁷⁹ *Bray*, 506 U.S. at 346 (O'Connor, J., dissenting) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

⁸⁰ Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248. The Act passed the Senate by a vote of 69 to 30 and the House by a vote of 241 to 174. Bill Summary & Status for the 103rd Cong., S. 636, available at Thomas, <http://thomas.loc.gov>.

⁸¹ GEN. ACCOUNTING OFFICE, REPORT TO THE RANKING MINORITY MEMBER, SUBCOMMITTEE ON CRIME, COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ABORTION CLINICS: INFORMATION ON THE EFFECTIVENESS OF THE FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT 8-10 (1998); Nat'l Abortion Federation, NAF Violence and Disruption Statistics: Incidents of Violence & Disruption Against Abortion Providers in the U.S. & Canada (through July 2005), available at http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/violence_statistics.pdf.

⁸² Brief of the United States of America as Amicus Curiae in Support of Defendants' Motion for Stay Pending Appeal, *Women's Health Care Services v. Operation Rescue*, 773 F. Supp. 258 (D. Kan. 1991) (No. 91-1303-K).

⁸³ FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT OF 1993, S. REP. NO. 103-117, at 9 (1993).

⁸⁴ Aaron Epstein and Angelia Herrin, *Thornburgh Okd Abortion-Case Intervention*, PHIL. INQUIRER, Aug. 8, 1991 ("Roberts, who said he participated in the decision to intervene in Wichita, said that 'politics had nothing to do with it.'"). Another account said that the Wichita brief was filed under Roberts's direction. Alan Bjerga, *Roberts Faces Scrutiny of Role in Wichita Case*, WICHITA EAGLE, Aug. 11, 2005.

⁸⁵ *The MacNeil/Lehrer NewsHour: Abortion Protest; Divided Nation; Makeover with a Mission* (PBS television broadcast, Aug. 7, 1991).

⁸⁶ *Id.*

⁸⁷ In his argument before the Supreme Court, Roberts said, "The United States appears in this case not to defend petitioners' tortious conduct . . ." Transcript of Oral Argument, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (No. 90-985), 1992 WL 687912, at *11 (Oct. 6, 1992). On a television broadcast, Roberts said, "What we did not do is take the position supporting the activities of the Operation Rescue protestors." *The MacNeil/Lehrer NewsHour: Abortion Protest; Divided Nation; Makeover with a Mission* (PBS television broadcast,

government in favor of a narrow reading of a federal law that was protecting women’s safe exercise of the right to choose, and disregarded the harmful impact of eliminating federal remedies in these circumstances. The Justice Department could have stayed out of *Bray* and the Wichita case altogether. Or it could have weighed in to *support* the application of federal law and federal remedies⁸⁸ – but instead, with John Roberts’s active participation, it chose to do just the opposite.

The enthusiastic support that Roberts has garnered from anti-abortion leaders suggests that they have come to the conclusion that if he is confirmed to the Supreme Court, he will fail to protect the constitutional right to privacy, will weaken the right to choose, and ultimately will vote to reverse *Roe* altogether. The president of Operation Rescue said he was “thrilled” with the nomination.⁸⁹ Jay Sekulow, who is chief counsel of a conservative legal organization founded by Pat Robertson and Operation Rescue’s lawyer, and who noted that he has known Roberts for 17 years and has argued in the Supreme Court with him, said of the nomination, “I think this is a tremendous pick.”⁹⁰

2. Roberts Worked to Undermine Constitutional and Statutory Protections Against Sex Discrimination

a. Roberts Objected To and Ignored the Heightened Scrutiny of Sex Discrimination That is Required Under the Equal Protection Clause of the Fourteenth Amendment to the Constitution

In *Craig v. Boren* in 1976, the Supreme Court made clear that under the Equal Protection Clause of the Constitution’s Fourteenth Amendment, a law or government policy that discriminates on the basis of sex cannot be upheld unless it can withstand heightened judicial scrutiny – that is, it must serve important governmental objectives and must be substantially related to achievement of those objectives. It is not enough for the government to offer a “rational basis” for the gender classification.⁹¹ Expounding on the heightened scrutiny standard in cases following soon after *Craig*, the Court explained that a law that discriminates based on sex will be struck down unless the government can supply an “exceedingly persuasive

Aug. 7, 1991). Moreover, a draft letter he prepared while working in the Reagan White House, to be sent to a member of Congress concerning the possibility of a Presidential pardon for convicted clinic bombers, said that President Reagan unequivocally condemned acts of violence against abortion clinics and that “neither the cause that these misguided individuals mistakenly believed they were serving, nor the target of their violence” would be considered to mitigate their offenses. Letter from Richard A. Hauser, Deputy Counsel to the President, to the Honorable Romano L. Mazzoli, Member, House of Representative (Feb. 10, 1986), *attached to* Memorandum from John G. Roberts, Associate Counsel to the President, to Nancy J. Risque, Deputy Assistant to the President for Legislative Affairs, re “Mazzoli Letter on Pardons for Abortion Clinic Bombers” (Feb. 10, 1986).

⁸⁸ In fact, in April 1993, during the Clinton Administration, when the Wichita injunction went up on appeal to the Tenth Circuit, the Justice Department filed a brief asking that the injunction be upheld. Even though the Supreme Court had decided the *Bray* case by then, the Justice Department argued that there was still room under the law to maintain the injunction in Wichita – both on a ground the Supreme Court majority had not addressed in *Bray* and based on evidence that was different from the record in *Bray*, which showed that in Wichita, Operation Rescue was targeting all women (and not men), and not just those seeking abortion. Memorandum Brief for the United States as Amicus Curiae at 6, 11, *Women’s Health Care Serv. v. Operation Rescue*, 24 F.3d 107 (10th Cir. 1994) (No. 91-3250).

⁸⁹ *Morning Edition: Bush Picks Appellate Judge to Fill O’Connor Vacancy* (NPR radio broadcast, July 20, 2005).

⁹⁰ David D. Kirkpatrick, *Groups Gird for the Battle Over What Can Be Asked*, N.Y. TIMES, July 20, 2005.

⁹¹ 429 U.S. 190, 197 (1976).

justification” for it.⁹² Earlier, under the “rational basis” test, virtually all laws that discriminated against women were upheld, no matter how harmful, and no matter how much they were based on outmoded stereotypes.⁹³ For example, a law prohibiting women from working as bartenders unless they were the wives or daughters of male bar owners was upheld.⁹⁴ Since heightened scrutiny was adopted as the standard, numerous laws that discriminate on the basis of sex – against women or men – have been struck down.

Yet memoranda prepared by John Roberts in the early 1980s, when he was special assistant to the Attorney General, reveal that he objected to, and was willing simply to ignore, this settled principle. In the fall of 1981, a draft article he wrote for publication by the Attorney General⁹⁵ argued that special constitutional protection should not be given to any classification other than race. Roberts’s draft said, “Extension of heightened scrutiny [beyond race] to other ‘insular and discrete’ groups . . . represents an unjustified intrusion into legislative affairs.”⁹⁶ He never mentioned that heightened scrutiny for sex discrimination was the law of the land.

In another memo, Roberts argued that legislation discriminating on the basis of sex would not violate the Equal Protection Clause because gender is not “a suspect criterion calling for heightened judicial review” and the legislation “would therefore be tested under more relaxed equal protection standards.”⁹⁷ To support that view he cited *Rostker v. Goldberg*,⁹⁸ but in *Rostker*, the Supreme Court said nothing of the sort: while the Court upheld the application of the military draft registration to men and not women, it specifically acknowledged that it was applying heightened scrutiny to sex discrimination.⁹⁹ Here, Roberts’s objection to heightened scrutiny apparently led him to misread the very Supreme Court precedent he was citing.

In addition, Roberts applied his incorrect and damaging reading of the Equal Protection Clause in an effort to keep the Justice Department from intervening on the side of women challenging discrimination in a state prison system. In February 1982, the Civil Rights Division,

⁹² *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979)); *see also* *United States v. Virginia*, 518 U.S. 515 (1996) (referring to the Court’s “skeptical scrutiny” and the “demanding” burden of justification on the State).

⁹³ The first time any such law was struck down under the Equal Protection Clause was in a 1971 case argued by Ruther Bader Ginsburg, *Reed v. Reed*, 404 U.S. 71 (1971), which held that an Idaho statute, providing that men would be preferred over women to serve as administrators to estates, violated the Equal Protection clause. After a 1973 case left unresolved the question of what the nature of the scrutiny should be (*see* *Frontiero v. Richardson*, 411 U.S. 677 (1973)), a new “middle tier” of heightened scrutiny was adopted in *Craig*, between rational basis review and the “strict scrutiny” that is applied to racial classifications. *Craig*, 429 U.S. at 197.

⁹⁴ *Goessaert v. Cleary*, 335 U.S. 464 (1948).

⁹⁵ *See supra* note 52 and accompanying text.

⁹⁶ *Judicial Restraint Drafts, supra* note 35, at 5.

⁹⁷ Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General and others, re “Proposals to Divest the Supreme Court of Appellate Jurisdiction: An Analysis in Light of Recent Developments” 23-24 (undated). The legislation in question would have divested all federal courts of jurisdiction to review claims of sex bias in the selective service system. This is the memorandum referred to *supra* note 66, in which Roberts carried out an assignment to marshal the arguments in favor of the constitutionality of court-stripping legislation. While the memo does not reveal on its face whether Roberts agreed with all the arguments he made, later memoranda make clear that he did personally agree with the conclusion that that the legislation was constitutional. *See supra* note 66 and accompanying text. Moreover, there is no reason to conclude that the quoted statement on heightened review of sex discrimination was not his own.

⁹⁸ 453 U.S. 57 (1981).

⁹⁹ *Id.* at 69-70.

headed by William Bradford Reynolds – who was later rejected by the Republican-controlled Senate Judiciary Committee for confirmation to Associate Attorney General in large part because of his narrow approach to civil rights enforcement¹⁰⁰ – recommended that the Justice Department intervene on the side of the plaintiffs in a suit called *Canterino v. Wilson*.¹⁰¹ The suit, brought under both the Equal Protection Clause and Title IX,¹⁰² challenged the Kentucky prison system’s failure to offer female inmates the vocational training and work opportunities it made available to male inmates, among other inequities. Roberts, however, wrote a memorandum to the Attorney General recommending *against* intervention, in part because “the equal protection claim will be based on semi-suspect treatment of gender classifications, and you have publicly opposed such approaches outside the area of race.”¹⁰³ In short, Roberts took the view that the Justice Department could and should refrain from enforcing the law in order to avoid applying established Supreme Court precedent protecting against sex discrimination. His recommendation was not adopted, the Department did intervene,¹⁰⁴ and the plaintiffs won.¹⁰⁵

Roberts also attempted to justify his recommendation against intervention in the *Canterino* case on the ground that the discriminatory treatment of women was defensible because of “tight state prison budgets.”¹⁰⁶ Here, Roberts disregarded not only the law but also the facts. The Supreme Court had held before Roberts drafted his memo, and continued to hold thereafter, that, under heightened scrutiny (the applicable standard), limited resources cannot justify discrimination.¹⁰⁷ Moreover, after the district court in *Canterino* ruled in the plaintiffs’ favor, the state did not even appeal the vocational training aspects of the case, thereby undercutting Roberts’s view of the costs of eliminating the discrimination against women in that program.¹⁰⁸

Roberts opposed not only interpreting the Constitution to protect women’s rights, but also amending it to add an Equal Rights Amendment. In the fall of 1983, as an associate counsel in

¹⁰⁰ 131 Cong. Rec. D00000-02 (daily ed. June 27, 1985); see also *Nomination of William Bradford Reynolds to be Associate Attorney General of the United States, Hearings Before the Senate Judiciary Committee*, 99th Cong. (June 4, 5, and 18, 1985).

¹⁰¹ Memorandum from Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, to the Attorney General, re “Proposed Intervention in *Canterino v. Wilson* (Decision Needed On Expedited Basis)” 2 (Feb. 5, 1982).

¹⁰² The Title IX implications of this case are discussed in the next section of this report.

¹⁰³ Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General, re “Proposed Intervention [sic] in *Canterino v. Wilson*” 1 (Feb. 12, 1982) [hereinafter *Canterino* Memo].

¹⁰⁴ *Canterino v. Wilson*, 538 F. Supp. 62, 64-65 (W.D. Ky. 1982).

¹⁰⁵ *Canterino v. Wilson*, 546 F. Supp. 174 (W.D. Ky. 1982).

¹⁰⁶ *Canterino* Memo, *supra* note 103, at 1.

¹⁰⁷ See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969), *overruled on other grounds* by *Edelman v. Jordan*, 415 U.S. 651 (1974); see also *Plyler v. Doe*, 457 U.S. 202, 227 (1982) (“a concern for the preservation of resources, standing alone, can hardly justify the classification used in allocating those resources”); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (“a concern for fiscal integrity” is not a compelling justification for a “questioned classification”). The district court in *Canterino* also flatly rejected the State of Kentucky’s arguments that its small size and budget required it to provide inferior programs for women prisoners. 546 F. Supp. 174, 211 (W.D. Ky. 1982).

¹⁰⁸ Although the district court found that the State of Kentucky’s vocational programs discriminated on the basis of sex in a number of areas relating to prison conditions, including “privileges and opportunities for work, vocational education, training, and community release programs,” 546 F. Supp. at 217, the appeal of the district court decision, which was affirmed, focused on only one narrow aspect of the ruling relating to whether the prison system must hire part-time attorneys to counteract the longstanding discrimination in the legal facilities, see *Canterino v. Wilson*, 875 F.2d 862 (6th Cir. 1989).

the White House, he wrote that an ERA “would *ipso facto* override the prerogatives of the States and vest the federal judiciary with broader powers. . . .”¹⁰⁹

b. Roberts Repeatedly Pressed For Narrow and Damaging Interpretations of Statutory Protections Against Sex Discrimination

i. Title IX and Parallel Laws Prohibiting Discrimination by Institutions Receiving Federal Financial Assistance

In his Reagan Administration positions and his briefs as Deputy Solicitor General, as well as his advocacy in private practice, Roberts urged narrow interpretations of Title IX that would have dramatically undermined equal opportunity for women in education. In some cases, the interpretations he advanced did just that until Congress stepped in. His arguments for limiting Title IX not only eliminated protections for students against sex discrimination, including sexual harassment, but also applied to laws parallel to Title IX that prohibit other forms of discrimination by recipients of federal funds, including Title VI of the Civil Rights Act of 1964 (prohibiting discrimination on the basis of race, color or national origin)¹¹⁰; Section 504 of the Rehabilitation Act of 1973 (prohibiting discrimination against people with disabilities)¹¹¹; and Section 303 of the Age Discrimination Act of 1975 (prohibiting discrimination on the basis of age).¹¹²

As noted above, in the *Canterino* case – which was brought under both the Equal Protection Clause and Title IX – Roberts argued against Justice Department intervention in part on the ground that a tight state budget excused the sex discrimination.¹¹³ This position was no more defensible under Title IX than it was under the Equal Protection Clause.¹¹⁴

In 1981, Roberts recommended that the Attorney General accept a Department of Education proposal to amend longstanding regulations so that post-secondary educational institutions would no longer be covered by Title IX, Title VI, and Section 504, where the schools

¹⁰⁹ Memorandum from John G. Roberts, Associate Counsel to the President, to Fred F. Fielding, Counsel to the President, re “New Constitutional Amendment Proposed by the ‘Los Angeles Professional Republican Women, Federated’” 1 (Sept. 26, 1983). *See also* Memorandum from John G. Roberts, Associate Counsel to the President to Fred F. Fielding, Counsel to the President, re “Draft ‘Status of the States’ 1982 Year End Report” 1 (Jan. 17, 1983) (“[M]any of the reported proposals and efforts are themselves highly objectionable . . . The passage or proposal of state ERA’s is also often cited.”) While the language in these memos does not make it entirely clear whether the views expressed are Roberts’s or the Administration’s, Roberts certainly does not express any disagreement with them.

¹¹⁰ 42 U.S.C. § 2000d (2003).

¹¹¹ 29 U.S.C. § 794 (2003).

¹¹² 42 U.S.C. § 6102 (2003).

¹¹³ *Canterino* Memo, *supra* note 103, at 1.

¹¹⁴ If cost alone could justify violations of sex discrimination, very few acts of discrimination would be prohibited. Thus, the Supreme Court rejected such a defense in Title VII cases. *See, e.g.,* *City of Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 716-17 (1978) (noting that there is no “cost-justification” defense under Title VII). And other courts have come to the same conclusion in Title IX cases. *See, e.g.,* *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 297 (2nd Cir. 2004) (“Hiring a new coach and finding more officials may cost money, but the fact that money needs to be spent to comply with Title IX is obviously not a defense to the statute.”).

received federal aid only in the form of federally financed loans and grants to their students.¹¹⁵ The proposal would have thoroughly undermined the application of Title IX and the parallel civil rights statutes by allowing schools to receive a significant form of federal aid without incurring any non-discrimination obligations whatsoever. Roberts's arguments were rejected by the Administration,¹¹⁶ and later by a unanimous Supreme Court.¹¹⁷ Yet Roberts wrote in 1985 that despite this holding, the position held "intuitive appeal" for him and he recommended that the Administration not support a proposal to overturn that Court ruling legislatively only because that position would be politically impractical.¹¹⁸

In 1982, Roberts argued that Title IX was meant to cover only those specific school programs that receive earmarked federal funds – not the institution as a whole if any part of it received federal funds. Among other things, this interpretation would have virtually eliminated the application of Title IX to intercollegiate athletics. Moreover, it was at odds with the views of all past administrations on Title IX coverage, as well as coverage of other civil rights laws. Nonetheless, in a memo to the Attorney General, he argued that the Department of Education should not appeal a district court's ruling supporting his argument – a ruling that prevented the Department from investigating allegations of sex discrimination in athletics at the University of Richmond.¹¹⁹ Ignoring the longstanding administrative interpretation of the law and the harmful consequences of his position, Roberts dismissively wrote, "Under Title IX[,] federal investigators cannot rummage wily-nily through institutions, but can only go as far as the federal funds go."¹²⁰

Members of the Administration recognized the destructive effect of this position on women and girls. As Secretary of Education Terrell Bell put it in a memo to Ed Meese, Counselor to the President, a decision to expand the program-specific interpretation from the *University of Richmond* case to the entire nation would be 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."¹²¹ Notwithstanding the consequences, the Administration adopted the radical change, the *University of Richmond* decision was not appealed,¹²² and a few years later a majority of the Supreme Court adopted the Administration's position in *Grove City College v. Bell*.¹²³

¹¹⁵ Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General, re "Department of Education Proposal to Amend Definition of 'Federal Financial Assistance'" 1 (Dec. 8, 1981).

¹¹⁶ Memorandum from John G. Roberts, Associate Counsel to the President, to Fred F. Fielding, Counsel to the President, re "Correspondence from T.H. Bell on Grove City Legislation" 1 (July 24, 1985) [hereinafter *Grove City Memo*].

¹¹⁷ *Grove City College v. Bell*, 465 U.S. 555, 564 (1984).

¹¹⁸ *Grove City Memo*, *supra* note 116, at 1.

¹¹⁹ Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General, re "University of Richmond v. Bell" 1 (Aug. 31, 1982).

¹²⁰ *Id.* at 1-2.

¹²¹ Memorandum from T.H. Bell, Secretary of Education, to the Honorable Edwin Meese, III, Counselor to the President, re "Observations and Comments on University of Richmond v. Bell" 2 (Dec. 21, 1982).

¹²² The Administration decided not to appeal the district court decision in *University of Richmond* despite urging by Clarence Pendleton, who was appointed by President Reagan to lead the U.S. Civil Rights Commission. See Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General, re "Meeting with Clarence Pendleton, Chairman, U.S. Civil Rights Commission, Thursday September 16, 10:00 a.m." 1 (Sept. 15, 1982).

¹²³ *Grove City College*, 465 U.S. at 599 (Brennan, J., concurring in part and dissenting in part).

Then the predicted consequences materialized. The legislative history of bills introduced in Congress to reverse the *Grove City* decision documents the damaging effects of this narrowing of Title IX. In just one year after the decision, the government had halted investigations in over 60 cases.¹²⁴ In one case, the Department of Education dropped a sexual harassment claim against Northeastern University because, although the University received large amounts of federal aid, the particular dormitory where the alleged harassment took place was not built or renovated with federal funds.¹²⁵ Similarly, two Title VI complaints alleging race discrimination at a high school were dropped because the discrimination did not take place in a building built with federal funds or in a program that received federal money directly.¹²⁶

Yet in the face of what he acknowledged was a “prompt outcry for remedial legislation,”¹²⁷ Roberts asserted in a 1985 memorandum, written as an attorney in the White House Counsel’s office, that the remedial legislation – the Civil Rights Restoration Act (CRRA) – would “radically expand the civil rights laws to areas of private conduct never before considered covered.”¹²⁸ In a similar vein, he described the White House as being “engaged in a struggle to prevent the dramatic expansion of civil rights coverage proposed by some under the guise of overturning *Grove City*.”¹²⁹ Far from being “radical” or a “dramatic expansion of civil rights,” however, the CRRA restored the broad coverage that Congress had always intended. Congress ultimately enacted the CRRA, by large majorities in both Houses, over the Administration’s veto in 1988.¹³⁰ It has been in effect ever since and is critical to effective enforcement of the civil rights laws today.

In another example of a cramped and harmful view of Title IX, as Deputy Solicitor General, Roberts co-authored an *amicus* brief in *Franklin v. Gwinnett County Public Schools* arguing that no victim of intentional sex discrimination, including sexual harassment, should be allowed to sue for money damages under Title IX.¹³¹ *Franklin* involved allegations that a high school girl was sexually abused by her teacher (who was also her coach) for years; the teacher allegedly interrupted class and took her to his private office where he subjected her to coercive intercourse.¹³² The arguments made by Roberts in this case were particularly troubling because, in many cases, such as this one, damages are the *only* form of relief available for students who are injured by discrimination perpetrated by their schools. Because students are enrolled only for a limited time, they may graduate by the time a court ultimately issues an order banning future discrimination or requiring policy changes. And damages may be the only way that students can

¹²⁴ 131 CONG. REC. S2150 (daily ed. Feb. 7, 1985) (statement of Sen. Kennedy).

¹²⁵ MARCIA D. GREENBERGER & C.A. BEIER, FEDERAL FUNDING OF DISCRIMINATION: THE IMPACT OF GROVE CITY COLLEGE V. BELL,” REPORT BY THE NATIONAL WOMEN’S LAW CENTER 17, reprinted in *Civil Rights Restoration Act of 1987: Hearing on S. 557 Before the Senate Comm. on Labor and Human Resources*, 100th Cong. 258, 277 (1987).

¹²⁶ *Id.* at 267-68.

¹²⁷ *Grove City Memo*, *supra* note 116, at 1.

¹²⁸ *Id.*

¹²⁹ Memorandum from John G. Roberts, Associate Counsel to the President, to Fred F. Fielding, Counsel to the President, re “Grove City – Civil Rights Legislation” 1 (Apr. 12, 1985).

¹³⁰ Civil Rights Restoration Act of 1987, Pub. Law 100-259, 102 Stat. 28 (1988); President’s Message to the Senate on Civil Rights Legislation, 24 WEEKLY COMP. PRES. DOC. 353 (Mar. 16, 1988).

¹³¹ Brief for the United States as Amicus Curiae Supporting Respondents, *Franklin v. Gwinnett County Sch. Dist.*, 503 U.S. 60 (1992) (No. 90-918).

¹³² *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 63 (1992).

be compensated for the harm they suffer. The entire Supreme Court rejected Roberts’s approach, finding that victims of intentional violations of Title IX can recover money damages.¹³³

Finally, as a private lawyer, Roberts represented the National Collegiate Athletic Association (NCAA) in *NCAA v. Smith*,¹³⁴ arguing that the organization, which effectively controls intercollegiate athletics, is not covered by Title IX.¹³⁵ On his Senate Judiciary Committee Questionnaire, Roberts listed this case as one of his ten most significant cases.¹³⁶ While the Court accepted Roberts’s argument that the NCAA’s receipt of dues from universities covered by Title IX was not alone sufficient to subject NCAA to Title IX coverage, it did not address his more far-reaching argument¹³⁷ that the NCAA could not be covered for any other reason, such as its effective control over intercollegiate athletics programs of institutions that are themselves covered by Title IX’s non-discrimination requirement.¹³⁸

ii. Employment Discrimination Under Title VII of the Civil Rights Act

Roberts also sought to limit protections under Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of sex, race, national origin, or religion.

In 1981, in a Justice Department investigation of race and sex discrimination in hiring and promotion of teachers and principals by a school district in Georgia, the discrimination was so clear that then-Assistant Attorney General for Civil Rights William Bradford Reynolds stated that the investigation “disclosed no credible defense.”¹³⁹ Reynolds recommended offering the school district a settlement agreement that included back pay and priority offers of hiring and promotion for qualified blacks and women whose applications were discriminatorily rejected or who would have applied but for the school system’s discriminatory policies.¹⁴⁰ Roberts, however, objected to the proposed relief in that case and a similar one, contending that a school board could have a “blanket policy of rejecting all blacks simply because they were black,” without “giv[ing] rise to a claim for relief under Title VII” unless the rejected applicants were “more qualified” than the applicants who were hired and the non-applicants deterred from applying “would have been hired, but for prohibited discrimination.”¹⁴¹

Roberts’s language suggests he believed that individuals who could not meet this standard should not be allowed to sue *at all* – a position in conflict with controlling Supreme

¹³³ *Id.* at 75-76.

¹³⁴ 525 U.S. 459 (1999).

¹³⁵ Brief for Petitioner, *NCAA v. Smith*, 525 U.S. 459 (1999) (No. 98-84).

¹³⁶ Questionnaire of John Glover Roberts, U.S. Senate Comm. on the Judiciary 49 (2005).

¹³⁷ Brief for Petitioner at 22-25, *NCAA v. Smith*, 525 U.S. 459 (1999) (No. 98-84).

¹³⁸ *NCAA*, 525 U.S. at 470.

¹³⁹ Memorandum from William Bradford Reynolds, Assistant Attorney General, to the Deputy Attorney General, re “Proposed Employment Discrimination Suit Against The Board of Education of Gwinnett County Georgia” 2 (Oct. 21, 1981).

¹⁴⁰ *Id.* See also Letter from William Bradford Reynolds, Assistant Attorney General, to J.L. Edmundson, Esquire 3 (Oct. 21, 1981).

¹⁴¹ Memorandum from John Roberts, Special Assistant to the Attorney General, to William Bradford Reynolds, Assistant Attorney General, and Chuck Cooper, Special Assistant to the Attorney General, re “Employment Discrimination Suits Against Clayton and Gwinnett Counties” 2 (Oct. 26, 1981) [hereinafter Clayton and Gwinnett Memo].

Court precedent.¹⁴² But even if Roberts were addressing only the availability of individualized remedies for discrimination, his analysis ignored the Supreme Court’s firmly established approach to pattern and practice cases, which dictated that “every . . . minority group applicant for a . . . position is presumptively entitled to relief”¹⁴³ once a systemic pattern of discrimination has been shown, and placed the burden of proof on the employer to overcome that presumption by showing that that the individual was not in fact a victim of its discriminatory policy.¹⁴⁴ Nothing in the law required the individual seeking relief to prove that he or she would have been hired absent the discrimination, and nothing in the law required applicants to show better qualifications than those selected in order to be eligible for relief. Roberts’s analysis thus placed burdens on those harmed by blatantly discriminatory policies that were unjustified under the law.¹⁴⁵

In a memo Roberts wrote while serving as a special assistant to the Attorney General in 1982, he expressed concern that the Solicitor General’s office, in agreement with the Equal Employment Opportunity Commission (EEOC), had taken legal positions in the Supreme Court that would have expanded civil rights protections. Complaining that these positions were “totally inconsistent” with the Justice Department’s “philosophical opposition” to challenging policies with a discriminatory impact (as opposed to intentional discrimination), and with other Department positions, Roberts concluded, “Fortunately, the Solicitor General’s office and EEOC lost in these cases. . . .”¹⁴⁶ In a 1983 memo Roberts wrote while serving in the White House Counsel’s office, discussing how to handle a letter to the President complaining about the EEOC, Roberts wrote, “We should ignore . . . the assertion that the EEOC is ‘un-American,’ the truth of the matter notwithstanding.”¹⁴⁷ The EEOC is the federal agency created by the Civil Rights Act of 1964 to investigate and resolve claims of workplace discrimination.

Additional memos from the early 1980’s show Roberts to have been highly dismissive of the gap between men’s and women’s wages and a harsh critic of efforts to address the problem under Title VII through a legal theory called comparable worth (or pay equity). The wage gap was an undeniable reality at the time, and although it has narrowed since then, it still is.¹⁴⁸

¹⁴² *Teamsters v. U.S.*, 431 U.S. 324 (1977).

¹⁴³ *Teamsters*, 431 U.S. at 362 (once “. . . Government had proved a systemwide pattern and practice of racial and ethnic discrimination on the part of the company . . . , every . . . minority group applicant for a . . . position . . . [is] presumptively entitled to relief, subject to a showing by the company that its earlier refusal to place the applicant in a . . . job was not based on its policy of discrimination”) (citations omitted).

¹⁴⁴ The Supreme Court imposed one additional hurdle for non-applicants – that they meet the burden of showing that they were qualified for the job and would have applied but for the discriminatory policy. *Teamsters*, 431 U.S. at 364-67. But for applicants and non-applicants alike, the Supreme Court made clear that it was ultimately the employer’s burden to show that qualified individuals would not have been hired even absent the discriminatory policy.

¹⁴⁵ Roberts claimed that *Teamsters* could be distinguished as to its treatment of non-applicants because it involved a discrete group of plaintiffs already employed by the defendant and not the public at large, and because it did not involve a demand for back pay. Clayton and Gwinnett Memo, *supra* note 141, at 2, 3. But nothing in the Court’s approach to burdens of proof in *Teamsters* was limited by the nature of the class in that case or to the type of relief being sought there.

¹⁴⁶ Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General, re “Solicitor General Briefs in EEOC Cases” 1-2 (June 16, 1982).

¹⁴⁷ Memorandum from John G. Roberts, Associate Counsel to the President, to Fred F. Fielding, Counsel to the President, re “Correspondence from [redacted] His EEOC Case” 1 (June 7, 1983).

¹⁴⁸ Census Bureau data show that in 1981 women earned \$.59 for every dollar earned by men. National Women’s Law Center calculation based on U.S. Census Bureau, U.S. Dep’t of Commerce, Historical Income Tables, Table P-

Moreover, numerous studies have shown that, even as the gap has narrowed, it persists even when such variables as experience and education are held constant, leaving a gap that can be explained only by discrimination.¹⁴⁹ “Comparable worth” analysis calls on employers to evaluate the jobs in their workplace to determine whether, as is often the case, those jobs predominantly held by women are underpaid (*i.e.*, paid less than jobs held predominantly by men that are comparable in the skill, effort, responsibility and working conditions they entail) and if so, to develop a plan to raise the wages of the jobs found to be underpaid. This approach is one that many public employers have used to help close the pay gap for women.

While serving in the White House Counsel’s office, however, Roberts utterly dismissed the extent to which the wage gap is based on discrimination, and he attacked the concept of comparable worth in the strongest possible language. In one memo, he referred to “the canard that women are discriminated against because they receive \$0.59 to every \$1.00 earned by men.”¹⁵⁰ In another memo, Roberts commented on a district court decision finding in favor of a comparable worth claim under Title VII: “It is difficult to exaggerate the perniciousness of the ‘comparable worth’ theory. It mandates nothing less than central planning of the economy by judges. Under the theory judges, not the marketplace, decide how much a particular job is worth, and restructure wage systems to reflect their determination.”¹⁵¹ A few days later, Roberts commented on a letter sent to the White House Deputy Chief of Staff by three women, then members of the House of Representatives (Olympia Snowe, Nancy Johnson and Claudine Schneider), in which they laid out the problem of lower pay for female-dominated occupations, expressed support for the district court ruling for the plaintiffs under Title VII, and asked the Administration not to get involved in the case.¹⁵² Roberts wrote, “I honestly find it troubling that three Republican representatives are so quick to embrace such a radical redistributive concept. Their slogan may as well be ‘From each according to his ability, to each according to her gender.’”¹⁵³ In that memo, he also criticized the Congresswomen’s letter for “ignoring” what he believed to be the factors that explain the “apparent” wage gap (such as seniority or women

38: Full-Time, Year-Round Workers (All Races) by Median Earnings and Sex: 1960 to 2001, *available at* <http://www.census.gov/hhes/income/histinc/p38.html> (last revised May 2004). The wage gap remained virtually constant from 1955 through the 1970s, then began to decrease in the 1980s, and the most recent figures, for 2003, showed women earning, on average, \$0.76 for every \$1.00 earned by men. *Compare* FRANCINE D. BLAU & MARIANNE A. FERBER, *THE ECONOMICS OF WOMEN, MEN, AND WORK* 133 (2d ed. 1992), *with* U.S. Census Bureau, U.S. Dep’t of Commerce, *Income, Poverty, and Health Insurance in the United States: 2003, Current Population Reports, Consumer Income, P60-226, Table 1: Money Income and Earnings Summary Measures by Selected Characteristics: 2002 and 2003*, at 5 (Aug. 2004), *available at* <http://www.census.gov/prod/2004pubs/p60-226.pdf> (last visited Aug. 30, 2005).

¹⁴⁹ *See, e.g.*, COUNCIL OF ECON. ADVISERS, *EXPLAINING TRENDS IN THE GENDER WAGE GAP* 1 (1998), *available at* <http://clinton4.nara.gov/WH/EOP/CEA/html/gendergap.html> (last visited Aug. 30, 2005); LINDA LEVINE, CONG. RESEARCH SERV., *THE GENDER WAGE GAP AND PAY EQUITY: IS COMPARABLE WORTH THE NEXT STEP?* 12 (1998) (“Although the unexplained portion of the gender pay gap has diminished, it does not mean that labor market discrimination has been vanquished. All other things being equal, women’s wages remain lower than those of men.”). *See also* U.S. GEN. ACCOUNTING OFFICE, *REPORT TO CONGRESSIONAL REQUESTERS, WOMEN’S EARNINGS: WORK PATTERNS PARTIALLY EXPLAIN DIFFERENCE BETWEEN MEN’S AND WOMEN’S EARNINGS* 2 (2003) (even after holding a broad range of work-related and demographic variables constant, women made about 20% less than men in 2000), *available at* <http://www.gao.gov/cgi-bin/getrpt?GAO-04-35> (last visited Aug. 30, 2005).

¹⁵⁰ Paschall Remarks Memo, *supra* note 38, at 1.

¹⁵¹ Memorandum from John G. Roberts, Associate Counsel to the President, to Fred F. Fielding, Counsel to the President, re “AFSCME v. Washington: Comparable Worth Case” 1 (Feb. 3, 1984).

¹⁵² Letter from Olympia J. Snowe, Claudine Schneider & Nancy Johnson, Members of Congress, to Michael K. Deaver, Assistant to the President and Deputy Chief of Staff 1-2 (Jan. 26, 1984).

¹⁵³ Congresswomen Memo, *supra* note 39, at 1.

taking more leave), refusing to acknowledge that discrimination could play any role in pay disparities.¹⁵⁴

Finally, as Deputy Solicitor General, Roberts co-authored an *amicus* brief for the government in *UAW v. Johnson Controls, Inc.* (1991).¹⁵⁵ In that case, the company had a “fetal protection policy” that barred women who were pregnant or capable of bearing children, and not men or other women, from jobs that exposed them to high levels of lead. Women actually underwent sterilization in order to keep their jobs.¹⁵⁶ Roberts’s brief was filed in support of the union that challenged the company’s policy, but it did not explicitly argue that the policy was invalid. Instead, it argued that it was possible for a company to have a policy barring only women from these jobs without violating Title VII, and that the case should be remanded to the lower courts to evaluate the company’s policy under a different legal standard than the one the Court of Appeals had used.¹⁵⁷ The Supreme Court agreed that the lower court had applied the wrong legal standard (it had applied disparate impact analysis, rather than disparate treatment), but held that *no* sex-based fetal protection policy could be upheld under the correct standard.¹⁵⁸ If the Court had accepted Roberts’s argument, it would have been possible for companies to deny job opportunities to women on the basis of their reproductive capacity.

iii. Affirmative Action to Remedy Discrimination and Promote Diversity

Roberts has a long record of opposition to affirmative action. In 1981, as special assistant to the Attorney General in the Reagan Administration, Roberts criticized a report on affirmative action written by the U.S. Commission on Civil Rights. Roberts quoted the report’s observation that “[n]either individual prejudices nor random chance can fully explain the persistent national patterns of inequality and underrepresentation,” and disparaged the report’s conclusion that race- and gender-conscious affirmative action is the only effective remedy for structural discrimination.¹⁵⁹ He criticized “[t]he logic of the report” as “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.”¹⁶⁰ Roberts’s criticism of the proposition that discrimination can be inferred from “disparate results” was contrary to Supreme Court precedent establishing that statistical disparities *are* evidence of discrimination,¹⁶¹ and that affirmative action is an appropriate remedy for addressing discrimination.¹⁶² The memo concludes by telling the Attorney General, “The report is attached, although I do not recommend reading it.”¹⁶³

¹⁵⁴ *Id.*

¹⁵⁵ 499 U.S. 187 (1991).

¹⁵⁶ *Id.* at 192.

¹⁵⁷ See generally Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioners, *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (No. 89-1215).

¹⁵⁸ *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

¹⁵⁹ Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General, re “U.S. Civil Rights Commission Statement on Affirmative Action” 1 (Dec. 22, 1981) [hereinafter Civil Rights Commission Memo].

¹⁶⁰ *Id.*

¹⁶¹ *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977).

¹⁶² See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

¹⁶³ Civil Rights Commission Memo, *supra* note 159, at 2.

In a 1982 memo that Roberts co-authored with Carolyn Kuhl, they list “issues concerning the Department of Justice raised by conservative sources,” and make recommendations for possible future action on these issues. One comment Roberts and Kuhl make is that “it makes eminent sense to pursue legislation to guarantee that [the Department of Justice’s policy against affirmative action in employment] cannot be easily undone.”¹⁶⁴

During the same period, Roberts also argued in favor of limiting the affirmative action policies that apply to employment practices of federal contractors under Executive Order 11246. The Department of Labor, through its Office of Federal Contract Compliance Programs (OFCCP), required (and still requires) certain federal contractors, as a condition of doing business with the federal government, to adopt goals and timetables for addressing the under-representation of women and minorities in their workforces. In two 1981 memoranda to the Attorney General, Roberts called the OFCCP requirements “offensive preferences”¹⁶⁵ and asserted that they conflicted with the Department of Justice’s position on affirmative action, which he said “require[d] color-blindness and sex-blindness in employment decisions”¹⁶⁶ and oppose[d] affirmative action in the absence of specific proof of discrimination.¹⁶⁷ In fact, OFCCP’s implementing regulations have always made clear that they do not impose rigid and inflexible requirements but merely require hiring and promotion targets and good faith efforts to meet them.¹⁶⁸ Roberts, however, advocated ultimately bringing the OFCCP program into line with the Justice Department’s position, and in the meantime, “as a half-way step,” urging OFCCP to revise its regulations to focus on recruitment rather than hiring and promotion.¹⁶⁹ His recommendations would have seriously weakened this important program.

In one of these memoranda,¹⁷⁰ Roberts argued that the Justice Department’s objections to affirmative action, rather than OFCCP’s support of it, were correct even though the Justice Department position had been rejected by the Supreme Court in *United Steelworkers v. Weber* in 1979.¹⁷¹ In *Weber*, the Court held that affirmative action programs aimed at eliminating remaining patterns of racial segregation did not violate Title VII.¹⁷² Roberts not only disagreed with the Court’s reasoning, but disregarded precedent by saying that the Court’s decision “has only four supporters on the current Supreme Court” and that as a result, “[w]e do not accept it as the guiding principle in this area” (emphasis in original).¹⁷³

As Deputy Solicitor General and in private practice, Roberts argued that particular affirmative action programs violated the Constitution. In *Metro Broadcasting, Inc. v. F.C.C.*,¹⁷⁴ he argued in an *amicus* brief as Acting Solicitor General that the Federal Communications

¹⁶⁴ Memorandum from Carolyn B. Kuhl & John Roberts to the Attorney General re “Areas in Which Various Conservative Groups Have Suggested That the Department [of Justice] Take Action” 3 (March 15, 1982).

¹⁶⁵ Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General re “Meeting with Secretary Donovan on Affirmative Action” 1 (Dec. 2, 1981) [hereinafter Donovan Memo].

¹⁶⁶ Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General re “Conflict Between DOL and DOJ Testimony on Affirmative Action,” 1 (Oct. 13, 1981).

¹⁶⁷ Donovan Memo, *supra* note 165, at 1.

¹⁶⁸ 43 Fed. Reg. 49,249 (Oct. 20, 1978) (codified at 41 CFR 60-2.16(e) (2005)).

¹⁶⁹ Donovan Memo, *supra* note 165, at 2.

¹⁷⁰ *Id.* at 1.

¹⁷¹ 443 U.S. 193 (1979).

¹⁷² *Id.*

¹⁷³ Donovan Memo, *supra* note 165, at 2.

¹⁷⁴ *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

Commission’s affirmative action policy for minority applicants for radio and television station licenses was unconstitutional because a strict scrutiny standard applied and (among other things) the policy’s stated purpose – promoting diversity of broadcast programming – was not a “compelling government interest” as required under the strict scrutiny standard.¹⁷⁵ The Court rejected this argument, applying intermediate scrutiny¹⁷⁶ – although it adopted strict scrutiny in a later case.¹⁷⁷ Moreover, the Court subsequently held that diversity is a compelling state interest for university admissions programs.¹⁷⁸ In private practice, Roberts filed *amicus* briefs on behalf of his client, the Associated General Contractors of America, in several cases challenging Department of Transportation and Department of Defense affirmative action programs for women- and minority-owned contractors.¹⁷⁹

Three things in Roberts’s record may be cited in response to these concerns about his legal views on affirmative action, but none of them gives any real reassurance. First, in private practice, Roberts represented the State of Hawaii in the Supreme Court in *Rice v. Cayetano*,¹⁸⁰ unsuccessfully arguing to uphold a Hawaiian statute that allowed only native Hawaiians to vote for certain public trustees. Even though Roberts later characterized his arguments in this case as being “in favor of affirmative action,”¹⁸¹ his brief actually argued that the statute made classifications that were not on the basis of race at all.¹⁸² Also in private practice, according to a news report, he worked on, but did not sign, an *amicus* brief filed by his law firm on behalf of the American Council on Education and other higher education organizations in support of the University of Michigan in *Grutter v. Bollinger*,¹⁸³ the landmark case decided in 2003 in which the Supreme Court upheld an affirmative action program at the University of Michigan law

¹⁷⁵ See Brief for the United States as Amicus Curiae Supporting Petitioner, *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1993) (No. 89-453).

¹⁷⁶ *Metro Broadcasting, Inc.*, 497 U.S. at 563-64.

¹⁷⁷ See *Adarand Contractors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

¹⁷⁸ *Grutter v. Bollinger*, 539 U.S. 244 (2003).

¹⁷⁹ See *Rothe Dev. Corp. v. United States Dep’t of Defense*, 262 F.3d 1306 (Fed. Cir. 2001) (listing Roberts as attorney for *amicus curiae*); Brief Amicus Curiae for the Associated General Contractors of America, Inc. in Support of Petitioner, *Adarand Contractors, Inc. v. Mineta*, 534 U.S. 103 (2001) (No. 00-730); Brief Amicus Curiae for the Associated General Contractors of America, Inc. in Support of Petition for a Writ of Certiorari, *Adarand Contractors, Inc. v. Slater, sub nom. Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001) (No. 00-730); Brief Amicus Curiae for the Associated General Contractors of America, Inc. in Support of Petitioner, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (No. 93-1841). In addition, in a media appearance discussing the *Adarand* case, Roberts misstated the Supreme Court’s ruling as a blanket rejection of affirmative action when it was not. The Court ruled that strict scrutiny applied to race-based affirmative action programs, but Justice O’Connor’s opinion for the court carefully noted that such review would not be “strict in theory but fatal in fact,” and that the government would not be absolutely disqualified from acting to remedy racial discrimination or its lingering effects. 515 U.S. 200 at 237. In fact, the Court did not strike down the affirmative action program at issue in the case, but instead remanded the case to the lower courts. In a 1995 television appearance, however, Roberts described the Court’s decision as holding an unequivocal ruling that “we don’t give preferences – we don’t give benefits on the basis of race. That violates equal protection.” *OnLine Newshour, In John Roberts’ Own Words* (PBS television broadcast, Aug. 11, 2005), transcript available at www.pbs.org/newshour/bb/law/july-dec05/roberts_8-11.html.

¹⁸⁰ 528 U.S. 495 (2000).

¹⁸¹ Responses of John G. Roberts, Jr. to Supplemental Questions from Senator Richard J. Durbin at 2 (May 6, 2003).

¹⁸² See generally Brief for Respondent, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818). The Court rejected his arguments and found that the Hawaiian statute abridged voting rights on the basis of race, in violation of the Fifteenth Amendment.

¹⁸³ Sara Lipka, *Bush Nominee for High Court Knows Colleges*, CHRON. OF HIGHER EDUC., July 29, 2005.

school.¹⁸⁴ He did not list this assistance as a *pro bono* activity on his Judiciary Committee Questionnaire, however, and it appears he spent relatively little time on the matter.

Finally, Judge Roberts wrote an opinion on the D.C. Circuit in *Sioux Valley Rural Television, Inc. v. FCC* rejecting a constitutional challenge to a Federal Communications Commission (FCC) policy that gave bidding credits for broadcast licenses to certain small businesses.¹⁸⁵ Under an earlier FCC policy, women- and minority-owned businesses had received bidding credits in the auction of certain licenses. All of the winning women- and minority-owned businesses also qualified as small businesses (as defined in federal regulations). The FCC then rescinded its policy and replaced it with one under which credits were awarded to the small business owners who had won licenses in the auction, explicitly doing so in order to have a race- and gender-neutral policy, while ensuring that the women- and minority-owned businesses that had received credits under the previous policy would retain the credits. Because the revised FCC policy did not constitute race- or gender-based affirmative action, Judge Roberts's ruling did not address affirmative action. His decision in *Sioux Valley*, then, does little if anything to temper concerns about his views on affirmative action that are presented by his overall record on the issue.

3. Roberts Articulated Positions Reflecting a Narrow View of Congress's Power to Protect the Public Welfare and Aggressively Advocated Strict Limitations on Citizens' Access to Federal Courts to Enforce Their Rights
 - a. Roberts Repeatedly Objected to Federal Remedies, and Articulated Positions That Could Limit Congress's Power

Congress's power to legislate under the Commerce Clause, the Spending Clause, and the Fourteenth Amendment, and to abrogate state sovereign immunity, are critical to ensuring that Congress can address discrimination and protect the public health, safety and welfare, including in areas of particular importance to women. In recent years, the Supreme Court has issued a series of 5-4 decisions cutting back on Congress's power. For example, in its ruling in *United States v. Morrison*, it struck down the civil rights remedy in the Violence Against Women Act as beyond Congress's authority.¹⁸⁶ In some cases, the Court has upheld Congress's authority over vigorous dissents, as in *Nevada v. Hibbs*,¹⁸⁷ the case holding that states may be liable for damages for violations of the Family and Medical Leave Act's protection for employees caring for a sick family member. These issues will continue to come before the Court, including in cases of particular importance to women. For example, Congress's power under the Commerce Clause to enact the Freedom of Access to Clinic Entrances Act (FACE, the law that Congress passed after the Court's decision in the *Bray* case, discussed earlier), has yet to reach the Supreme Court – although all Commerce Clause challenges to FACE in the lower courts have been unsuccessful.

Roberts repeatedly objected to federal remedies, even in the face of evidence that state remedies were inadequate, as reflected in his advocacy in *Bray* and the other clinic blockade case

¹⁸⁴ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹⁸⁵ *Sioux Valley Rural Television, Inc. v. FCC*, 349 F.3d 667 (D.C. Cir. 2003).

¹⁸⁶ 529 U.S. 598 (2000).

¹⁸⁷ 538 U.S. 721 (2003).

in Wichita, discussed earlier. In a 1999 television interview, he said, “[W]e’ve gotten to the point these days where we think the only way we can show we’re serious about a problem is if we pass a federal law, whether it’s the Violence Against Women Act or anything else. The fact of the matter is, conditions are different in different states and state laws can be more relevant. . . . That’s what the federal system is based on.”¹⁸⁸ His reference to the Violence Against Women Act prompted questions at his confirmation hearing for the D.C. Circuit, at which he said he did not mean to be passing judgment on any particular law but reiterated that “every problem doesn’t necessarily need a Federal solution.”¹⁸⁹

On the D.C. Circuit, Judge Roberts wrote one opinion that raises questions about his view of Congress’s power under the Commerce Clause. In a case involving the application of the Endangered Species Act to limitations on a construction project that threatened an endangered species of toad, *Rancho Viejo v. Norton*, a panel of the D.C. Circuit upheld the Act, and rehearing *en banc* (by the full court) was denied.¹⁹⁰ Judge Roberts, however, dissented from the denial of rehearing, and wrote an opinion showing an openness to a very narrow view of Commerce Clause authority.¹⁹¹

b. Roberts Aggressively Advocated Strict Limitations on Citizen Access to Federal Courts to Enforce Federal Rights

i. Enforcement of Federal Statutory Rights Under Section 1983

Since his early days in the Reagan Justice Department, Roberts has aggressively argued for restricting individuals’ ability to enforce federal statutory rights in federal court, advancing

¹⁸⁸ *Talk of the Nation: Analysis: Recent Decisions by the Supreme Court and Their Possible Effects on States’ Rights and the Rights of Citizens* (NPR radio broadcast, June 24, 1999).

¹⁸⁹ *Confirmation Hearing on Federal Appointments, Part III: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. 60 (Apr. 30, 2003).

¹⁹⁰ *Rancho Viejo v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003).

¹⁹¹ *Id.* at 1160 (Roberts, J., dissenting from denial of reh’g *en banc*). In a case involving the Spending Clause of the Constitution, however, Judge Roberts joined a D.C. Circuit ruling upholding Congress’s authority to bar disability discrimination by state authorities (in this case, the District of Columbia). In *Barbour v. Washington Metropolitan Area Transit Authority*, 374 F.3d 1161 (D.C. Cir. 2004), a case brought by a Metro employee alleging disability discrimination, the court held that D.C., by accepting federal transportation funds, had waived its immunity from suit under Section 504 of the federal Rehabilitation Act. The decision cited Supreme Court precedent upholding Congress’s power to enact Title IX and other parallel laws under the Spending Clause. *Id.* at 1169-70. Although he upheld the fundamental Spending Clause authority in *Barbour*, other documents suggest that he would narrowly interpret Congress’ authority under the Spending Clause. In a case outside the civil rights arena, for example, Roberts argued that growing state dependence on federal funds in an “era of budgetary constraints” makes Spending Clause legislation inherently coercive, rendering it “an increasingly hollow fiction that the States can avoid intrusions on their sovereignty in the form of conditions on the receipt of Federal funds simply by declining the funds.” Brief for the National Beer Wholesalers’ Association and 46 Other State Beer, Wine and Distilled Spirits Associations as Amicus Curiae supporting Petitioners at 23, *South Dakota v. Dole*, 483 U.S. 203 (1987) (No. 86-260), 1987 WL 880308 (Jan. 21, 1987). And in addition, even where Roberts has not explicitly questioned Congressional authority to enact civil rights and other statutes, he has narrowly construed the rights they grant, see, e.g., Oral Argument at 56-59, *NCAA v. Smith*, 1999 WL 32847 (Jan. 20, 1999) (No. 98-84) (arguing that Congress lacks authority under the Spending Clause to extend the coverage of Title IX beyond direct recipients of federal funds); Brief for the United States as Amicus Curiae Supporting Respondents at 11, *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) (No. 90-918), 119 WL 11009217 (Sept. 16, 1991). Furthermore, he has attempted to restrict individuals’ access to court to challenge those laws. See, e.g., *infra* notes 192-217 and accompanying text.

arguments that would preclude individuals' enforcement of rights to benefits, such as Medicaid, that are especially important to low-income women.

Individuals who are deprived of rights secured by the federal "Constitution and laws" by the government may bring an action in federal court under Section 1983.¹⁹² In a series of cases beginning with *King v. Smith* in 1968,¹⁹³ the Supreme Court relied on Section 1983 to provide the cause of action for violations of federal statutory rights under the federal-state Aid to Families with Dependent Children program as well as violations of constitutional rights. In 1980, the Supreme Court held in *Maine v. Thiboutot* that an action under Section 1983 could be brought for the violation of statutory rights alone; it noted that the plain language of the phrase "and laws" in Section 1983 "broadly encompasses violations of federal statutory . . . law."¹⁹⁴ In a memo Roberts wrote as special assistant to the Attorney General in 1982, he suggested that the Justice Department seek to narrow the scope of *Thiboutot* through judicial interpretation and that "[o]ur legislative proposals could perhaps even be cast as efforts to 'clarify' rather than 'overturn' that decision."¹⁹⁵ The following year, Roberts prepared a response for Fred Fielding, Counsel to the President, to send to Alabama Attorney General Charles Graddick, in response to Graddick's letter expressing concern about the recent growth in federal court litigation.¹⁹⁶ In his memo to Fielding, Roberts wrote: "Justice has been looking into several areas of Section 1983 reform—Section 1983 abuse really has become the most serious federal court problem—but the general sense is that it is impolitic to touch the provision, which authorizes most actions for civil rights violations, until after 1984."¹⁹⁷

Congress did not enact restrictions on Section 1983. But, in briefs Roberts filed in cases over the next two decades, he advanced a series of arguments to effectively reverse *Thiboutot* – and the line of cases back to *King v. Smith* – and curtail individuals' ability to enforce federal statutory rights under Section 1983.

In *Wilder v. Virginia Hosp. Ass'n* (1990), the Supreme Court ruled that individual Medicaid providers could sue under Section 1983 to enforce a provision of the Medicaid statute which requires that state Medicaid plans must provide for payment of medical providers according to rates which the state finds are reasonable and adequate.¹⁹⁸ Applying the tests articulated in *Wright v. City of Roanoke Redevelopment and Housing Auth.* (1987),¹⁹⁹ the Court concluded that this Medicaid provision was enforceable under Section 1983 because providers are its intended beneficiaries; it imposes mandatory obligations on the states; it is not "too vague and amorphous" to be judicially enforceable, even though states have some flexibility to define reasonable rates; and the remedial scheme in the Medicaid statute – the ability of the federal government to withhold approval of state plans or withhold federal funds – did not preclude a

¹⁹² 42 U.S.C. § 1983.

¹⁹³ *King v. Smith*, 392 U.S. 309 (1968).

¹⁹⁴ *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

¹⁹⁵ Memorandum from John Roberts, to Steve Brogan, Office of Legal Policy, re "Development of Legislative Changes to 42 U.S.C. § 1983," at 3 (Aug. 9, 1982).

¹⁹⁶ See Letter from Charles A. Graddick, Attorney General, State of Alabama, to The Honorable Ronald R. Reagan, President of the United States, re "Proposed National Court of Appeals to Assist the Supreme Court with its Caseload" 3 (Mar. 10, 1983).

¹⁹⁷ Memorandum from John G. Roberts, Associate Counsel to the President, to Fred F. Fielding, Counsel to the President, re "Letter to the President from Alabama Attorney General Charles Graddick" 1 (Apr. 28, 1983).

¹⁹⁸ *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990).

¹⁹⁹ *Wright v. City of Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418 (1987).

remedy under Section 1983.²⁰⁰ Roberts, as Deputy Solicitor General, co-authored the U.S. government's *amicus* brief in *Wilder* and argued the case before the Court.²⁰¹ The brief argued, unsuccessfully, that under the test developed by the Court in *Wright*, the right to reasonable compensation under the Medicaid statute was insufficiently specific and definite to be enforceable under Section 1983. In addition, it argued that for a statutory right to be enforceable under Section 1983, the Court must find that Congress clearly intended "to authorize private enforcement of that right in federal court."²⁰² The Court rejected this argument without discussion in *Wilder* – and explicitly rejected it years later, when Roberts raised it in the case of *Gonzaga University v. Doe*,²⁰³ discussed below.

In *Suter v. Artist M* (1990),²⁰⁴ the U.S. government's *amicus* brief, co-authored by Roberts (who also argued the case),²⁰⁵ contended that the provisions in the federal Adoption Assistance and Child Welfare Act requiring that states make reasonable efforts in every case to avoid a child's removal to foster care are not sufficiently specific to be enforceable.²⁰⁶ A majority of the Court agreed.²⁰⁷ But that was not the only argument advanced by Roberts. Notwithstanding the Court's decision in *Wilder*, the brief contends, in a footnote, that it remains an open question whether, under Section 1983, individuals can enforce rights created by funding statutes that require states to provide certain assurances to the federal government and comply with those assurances as a condition of receiving federal funds.²⁰⁸ In addition, Roberts's brief urged the Court to apply an additional test: to hesitate to find that a federal statute creates enforceable rights when that would involve the federal courts in matters such as family law that are "traditionally reserved to the states" and "by their nature not entrusted to the Article III branch."²⁰⁹

The additional barrier to access to the federal courts on issues "traditionally reserved to the states" would have special implications for women. For years, Congress has legislated on various family issues "traditionally reserved to the states" precisely because states were systematically failing to protect vulnerable family members: children and parents in the foster care system, custodial parents owed child support, victims of domestic violence, and poor families in need of monetary, nutritional and medical assistance. Under Roberts's argument, when Congress used its authority to legislate in an area that had been reserved to the states in the

²⁰⁰ *Wilder*, 496 U.S. at 509-10.

²⁰¹ Brief of the United States as Amicus Curiae Supporting Petitioners, *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990) (No. 88-2043); Transcript of Oral Argument, *Baliles v. Virginia Hosp. Ass'n*, *sub nom.* *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990) (No. 88-2043), 1990 U.S. Trans Lexis 161 (U.S. Jan. 9, 1990).

²⁰² Brief of the United States as Amicus Curiae Supporting Petitioners at 13-14, *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990) (No. 88-2043).

²⁰³ *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

²⁰⁴ *Suter v. Artist M.*, 503 U.S. 347 (1992).

²⁰⁵ Transcript of Oral Argument, *Suter v. Artist M.*, 503 U.S. 347 (1992) (No. 90-1488), 1991 U.S. Trans Lexis 234 (U.S. Dec. 2, 1991).

²⁰⁶ Brief for the United States as Amicus Curiae Supporting Petitioners at 10-13, *Suter v. Artist M.*, 503 U.S. 347 (1992) (No. 90-1488).

²⁰⁷ *Suter*, 503 U.S. at 364.

²⁰⁸ Brief for the United States as Amicus Curiae Supporting Petitioners at n.6, *Suter v. Artist M.*, 503 U.S. 347 (1992) (No. 90-1488). In the *Gonzaga* case, as discussed *infra*, Roberts was more explicit in asserting that rights created by spending clause legislation cannot be enforced under §1983.

²⁰⁹ *Id.* at 22-26.

past, and used statutory language sufficiently specific and definite to create individual rights, individual beneficiaries of those rights should not be able to enforce those rights in federal court.

In his brief on behalf of petitioner Gonzaga University in another case brought under Section 1983, *Gonzaga University v. Doe* (2002), Roberts, then in private practice, argued successfully that the Family Educational Rights and Privacy Act (FERPA) did not confer an individual right not to have personal information in an educational record released without consent.²¹⁰ But Roberts's arguments were more far reaching. He also argued that finding enforceable rights under FERPA would increase the courts' involvement in disputes "implicating 'traditional state functions' concerning the 'operation of the nation's schools,'"²¹¹ an argument that also would have implications for the scope of the private right of action under Title IX and other civil rights statutes applying to schools. In addition, Roberts argued again, as he had tried to press on the Court in *Wilder*, that rights under Spending Clause legislation can be enforced under Section 1983 only if Congress unambiguously conferred a right to federal enforcement of a right, as well as clearly creating the right itself, because Spending Clause legislation implicates federalism and separation of powers concerns.²¹² While a majority of the Court in *Gonzaga* tightened the standards for determining whether a federal statute creates individual rights, and agreed that FERPA did not, it rejected the argument made by Roberts that plaintiffs in a Section 1983 case have the further burden of showing that Congress intended to create a private cause of action, noting that Section 1983 supplies a cause of action.²¹³

In his brief in *Gonzaga*, Roberts advanced yet another argument, not addressed by the Court, which would have imposed new limits on individuals' ability to use Section 1983 to enforce statutory rights under Spending Clause legislation. Roberts argued that individuals seeking to enforce their rights under Spending Clause legislation are merely third-party beneficiaries of a contract between the federal government and the states, and third-party beneficiaries generally could not sue to enforce contracts in 1871 when Section 1983 was enacted; therefore, beneficiaries cannot utilize Section 1983 to enforce their rights under federal spending legislation.²¹⁴ Indeed, in his brief, Roberts questioned whether "the conditions in Spending Clause legislation qualify as 'laws' under Section 1983."²¹⁵

Roberts's arguments about the enforceability of provisions of Spending Clause legislation under Section 1983 hardly reflect a restrained approach to interpreting the law. They would require the reversal not only of *Thiboutot*, *Wilder*, and *Wright v. City of Roanoke Redev. & Housing Authority*, in which the Supreme Court has affirmed the use of Section 1983 to enforce federal rights under Spending Clause legislation, but also of a line of cases beginning with *King v. Smith* in 1968,²¹⁶ in which the Supreme Court had allowed individuals to bring an action in federal court under Section 1983 to prevent states from depriving them of their rights to public assistance under federal statutes. They would require rejection of explicit statements by the Court

²¹⁰ Brief for Petitioners, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (No. 01-679).

²¹¹ *Id.* at 28.

²¹² *Id.* at 12-20.

²¹³ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-86 (2002).

²¹⁴ Brief for Petitioners at 39-43, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (No. 01-679). In *Blessing v. Freestone*, 520 U.S. 329 (1997), Justice Scalia, in a concurrence joined by Justice Kennedy, raised this argument but did not rely on it. 520 U.S. at 349-50 (Scalia, J., concurring).

²¹⁵ Brief for Petitioners at 42 n.14, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (No. 01-679).

²¹⁶ *King v. Smith*, 392 U.S. 309 (1968).

in *Blessing v. Freestone* (1997), in which the Court held, in an opinion by Justice O'Connor, that while the specific provision of the federal Child Support Enforcement Act the plaintiffs sought to enforce under Section 1983 was not sufficiently specific and definite to be individually enforceable, other provisions of the Act might create such rights.²¹⁷

Medicaid, public housing, child support enforcement, and public assistance are of special importance to low-income women and their families. Section 1983 has enabled individuals deprived of specific rights conferred by these and other federal statutes to enforce those rights in federal court. By reading the reference to “and law” in Section 1983 virtually out of existence, Roberts would deny women access to federal court to enforce their rights to vital benefits and services.

ii. Standing to Bring Suit in Federal Court

Roberts's record also suggests that he has a narrow view of the “standing” doctrine – that is, the requirement that plaintiffs show they have suffered enough of a concrete injury to bring suit in federal court. In the 1981 draft article he wrote for publication by the Attorney General, Roberts asserted that “strict adherence to standing requirements” are key components of judicial restraint.²¹⁸ He argued that “those suffering only generalized harm should present their grievance to the legislature and seek redress through the political process.”²¹⁹ Moreover, as the lead attorney in the Solicitor General's office, Roberts argued in *Lujan v. National Wildlife Federation* that an environmental organization could not maintain claims that its members would be injured by an Administration decision to allow mining on 4,500 acres of public lands, some of which was used by the group's members for recreational activities.²²⁰ Although there was express statutory authority for such a suit by private parties, the Supreme Court, in a 5-4 decision, accepted Roberts's arguments that the environmental group had no right to file such claims.²²¹ This ruling made it more difficult to demonstrate the injury necessary to satisfy the standing requirement.

Roberts also advanced a narrow view of the injuries necessary to secure access to federal courts in an article published in the *Duke Law Journal* in 1993, *Article III Limits on Statutory Standing*.²²² In this article, Roberts expressed support for the Court's decision (by Justice Scalia) in *Lujan v. Defenders of Wildlife*,²²³ another environmental case, which held that a wildlife organization lacked standing to bring a suit claiming the Administration had violated the Endangered Species Act. Not only did Roberts embrace the Court's finding that the organization had not put forth sufficient evidence of an injury, but he also vigorously argued that Congress was limited in its ability to enact legislation entitling citizens to challenge government

²¹⁷ See *Blessing v. Freestone*, 520 U.S. 329, 345-346 (1997).

²¹⁸ Judicial Restraint Drafts, *supra* note 35, at 4.

²¹⁹ *Id.* Roberts made similar arguments in a memorandum drafted in 1981 on efforts by the Department of Justice “to encourage judicial restraint.” He wrote, “We will urge courts to accept only those cases brought by litigants with a specific injury which can be redressed by the court. Generalized grievances are the subject of policymaking and should be presented to legislatures.” Memorandum from John Roberts, Special Assistant to the Attorney General, to Dean St. Dennis, Office of Public Affairs, re “Judicial Restraint Initiatives” (Dec. 7, 1981).

²²⁰ Brief for the Petitioners, *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) (No. 89-640).

²²¹ *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990).

²²² John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 *DUKE L. J.* 1219 (1993).

²²³ *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

action in federal court. Emphasizing that Congress may exercise its “oversight power” or authority to “cut off funding,” he wrote that “[t]he one thing [Congress] may not do is ask the courts in effect to exercise such oversight responsibility at the behest of any John Q. Public who happens to be interested in the issue.”²²⁴

Roberts’s narrow view of standing and Congressional authority could have significant implications for similar “citizen suits” brought to challenge administrative actions on civil rights or other issues important to women.

III. CONCLUSION

John Roberts’s record, reviewed as a whole, reflects an approach to the law that limits and narrows women’s core constitutional and statutory protections in three critical areas: the constitutional right to privacy; constitutional and statutory protections against sex discrimination; and the power of Congress to protect the public safety and welfare along with citizens’ access to the federal courts to enforce their rights. Women across the country rely on these core protections and would suffer serious setbacks if they were limited and weakened.

²²⁴ Roberts, *supra* note 222, at 1229.

