# John G. Roberts and Supreme Court Civil Rights

*Sanaz Talaifar*

## Introduction

Cheers and fears regarding John Roberts's conservatism have been rampant since before his appointment hearings. It is easy to see why one could draw the conclusion that he would shift the Supreme Court in a conservative direction just based on his background. He was appointed by George W. Bush (a president opposed to affirmative action), worked in the Reagan Administration under the Attorney General, and clerked for William Rehnquist. A *New York Times* article alleging that Roberts had "produced a torrent of memorandums explaining why the Reagan administration was right to oppose new provisions in the Voting Rights Act that had just passed the House" was part of the vein of discourse arguing that his appointment would curb civil rights achievements. Perhaps not surprisingly, according to the Brennan Center for Justice, 160 law professors urged the Senate not to approve Roberts's appointment, writing that he "[h]olds a limited view of Congress's authority to enact key worker, civil rights and environmental protections and a similarly narrow view of the vital role our courts and our government play in safeguarding individual rights, especially civil and women's rights."

But how conservative is the now Chief Justice on civil rights really? Even the narrative of his background is not completely without liberal anomalies. For example, he provided free assistance to a gay rights group seeking to overturn a Colorado statute that would have barred laws and regulations preventing discrimination against gay people, a statute which the Supreme Court eventually found unconstitutional in *Romer v. Evans* (1996).[1] And in his confirmation hearings, Roberts told Senator Kennedy that he approved of Sandra Day O'Connor's 2003 opinion upholding affirmative action and that he found nothing constitutionally suspect about the Civil Rights Act.

Nevertheless, the Roberts Court has shifted further to the right than the Rehnquist Court or Burger Court according to statistics from

the Supreme Court Database. (The database codes rulings that are in favor of employers and prosecutors as conservative while those ruling in favor of people claiming discrimination and criminal defendants as liberal). And though the Court has not been found to be more judicially active (as measured in this data set by the number of precedents reversed and laws found unconstitutional), its activism is in favor of conservative rulings. Anecdotally, John Paul Stevens said in an April 2010 interview that all 11 justices, including himself, who had come onto the bench since 1975 were more conservative than the judge that he or she replaced.

But these are findings regarding the Roberts Court, not John Roberts himself. In fact, according to the same database, John Roberts is slightly more liberal than William Rehnquist (if Rehnquist's years as associate justice are also considered). I will argue that John Roberts is certainly a conservative justice who has voted, not without exception, against the protection of discrete and insular minorities in employment, voting, and education. But he is not the primary driver behind the Court's rightward shift. Neither his voting record nor his opinion assignments to other justices are as conservative as people feared they might be. He is no Scalia or Thomas. His decisions in some cases have also been circumscribed by popular opinion and Congress. On several issues, he and his Court have avoided deciding contentious constitutional civil rights issues. Though Roberts's decisions are conservative, it is important to show how his conservatism is tempered in order to not misattribute the Court's rightward shift to him. In fact, it is the conservative Alito's replacement of the more moderate Sandra Day O'Connor which has tipped case outcomes rightward (though that is another essay), not extreme conservatism on the part of the Chief Justice.

To understand John Roberts's stance on civil rights is to understand how our civil rights have shifted in the law since his appointment in 2005, how these decisions came about and affect society, and how they might foreshadow future rulings. Though the Chief Justice does wield only one of nine votes on the Court, he has the power to set the tone for the Court and decide who writes the decisions. Furthermore, issues surrounding race are clearly still relevant today. As one piece of evidence amidst many, "Blacks and Latinos comprise 80% of the student population in extreme-poverty schools and 63% of the student population in high-poverty schools".[2]

## Employment

The Court has heard more civil rights cases related to employment discrimination than related to any other issue, and Roberts's opinions on it have been somewhat of a mixed bag. In most cases, he has voted in a way that would seem to diminish anti-discrimination employment rights. In *Domino's Pizza, Inc. v. McDonalds* (2006), he voted with the unanimous decision ruling that someone who suffers personal injuries from the termination of a contract (to which he was not a party) but that he alleges was terminated because of his race cannot not sue under 42 U.S.C. Section 1981. Furthermore, he assigned the opinion to Justice Scalia, who would probably write an opinion limiting as much as possible who can sue for discrimination under this law. In the blockbuster case *Ledbetter v. Goodyear Tire & Rubber Co.* (2007), he was part of the 5-4 majority that affirmed the decision that a person could not bring a Title VII suit based on salary discrimination if the discrimination occurred outside the 180-day limitation period. This could have had massive ramifications. Deborah Brake argued that it adopted a narrow and restrictive conception of what constitutes discrimination and that it further diluted the strength of antidiscrimination law, giving Congress less room to legislate under Section 5 of the Fourteenth Amendment and in general contributing to a legal structure that understands discrimination narrowly. But the decision's effect was curtailed when Congress seemed to take Ginsburg's dissenting advice that "the Legislature may act to correct this Court's parsimonious reading of Title VII" and passed the Lilly Ledbetter Fair Pay Act of 2009, the first bill President Obama signed into law.

In *Gómez-Perez v. Potter* (2008), the Court ruled that the Age Discrimination in Employment Act (ADEA) did prohibit employer retaliation against federal employees who file age discrimination complaints. Roberts dissented, writing that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Though this is in response to a statutory case, this is precisely the type of language that was used to prevent Fourteenth Amendment Equal Protection from being extended to groups other than previously enslaved blacks (e.g. *Strauder v. West Virginia* (1880)). His reasoning behind the dissent is that federal employees are already protected by Congress from retaliation through the civil service process and that Congress retaliation protection cannot be assumed any time Congress proscribes discrimination. To further limit the implica-

tions of the majority's ruling in favor of victims of employer retaliation in age discrimination, he assigned Alito to write the majority opinion. Later we will see how Roberts is actually in favor of protection for victims of employer retaliation for filing discrimination complaints, but this was a case where he thought the protection would be redundant given other channels of anti-retaliation protection already in place.

In *AT&T v. Hulteen* (2009) Roberts voted with the 7-2 majority that AT&T's policy calculating employee pension and retirement benefits without including maternity leave was not a violation of the Pregnancy Disability Act (PDA) because the discrimination took place prior to the passage of the act. The Court clearly limited the number of people who would be able to bring suit under the PDA, which had actually been passed in response to another limited court decision in *General Elec. Co. v. Gilbert* (1975) ruling that pregnancy did not constitute sex-based classification.

In *Ricci v. Destefano* (2009), Roberts voted with the usual conservative five justice bloc (including Scalia, Alito, Thomas, and sometimes Kennedy). Kennedy wrote that what might be called reverse or benign discrimination against the racial groups that did well on the firefighter test could only occur if there was a "strong basis in evidence" that there would be "disparate impact liability" if discriminatory action was not take, which was not proven here. This decision was probably tempered by Roberts assigning the opinion to the waffling Kennedy (perhaps to get Kennedy's necessary fifth vote). The opinion slyly avoided answering the question of whether the disparate impact clause of Title VII was compatible with the Equal Protection clause or not, which Scalia noted in his concurrence. Perhaps what is even more interesting is that it shows what kind of scrutiny and doctrine Roberts would like to apply to Equal Protection cases. It is significant that the opinion invokes heightened scrutiny even though the discrimination is not against African Americans. Although one might argue that Hispanics are a discrete and insular minority, Kennedy does not use this language in his decision and, moreover, the unconstitutional discrimination was also against white men, who have certainly not been considered an insular and discrete minority group in the past.

The protection of a group that includes white people from discrimination is reminiscent of Roberts's opinion in Parents Involved, to be discussed later. Is Ricci an example of the move toward colorblind doctrine in the area of employment mirroring the same sort of move in education? *Meacham v. Knolls Atomic Power Laboratory* (2008)

might support the notion that it is not that Roberts is against protecting disadvantaged groups in employment, but rather that he does not equate these groups with the "discrete and insular minorities" that have tended to be racial minorities. In *Meacham*, Roberts voted with the 7-1 majority placing the burden on the employer rather the employee to show that an age discrimination policy was reasonable, making it easier for age discrimination plaintiffs to prove their case. In other words, here Roberts has voted to make employment discrimination easier to prove but not for what has typically been considered a discrete and insular minority group. Again, this protection against ageism here is compatible with Roberts's stance in Gómez-Perez because that was a special case involving federal employees.

Finally, in *Walmart v. Dukes* (2011), Roberts voted with the 5-4 majority that class action suits could not be brought for gender discrimination because the company has an anti-discrimination policy and that discrimination would have to therefore be proven in each individual case. Significantly, Roberts assigned the opinion to Scalia in a case that will prevent many people from bringing suit against large corporations because lawyers will not be willing to take on the huge task of going to court against these corporations when the payoff will be so minimal (in individual cases versus class action cases). If we stopped here, it would seem as though Roberts is staunchly against laws and policies that protect women, historic discrete and insular minorities, etc. from discrimination in the workplace by making it harder for them to bring suit in Court and reading statutes in a limited, "to-the-letter" way. Further, Ricci might show that he is doing this while simultaneously making it easier for whites to bring suit.

For example, in *Chamber of Commerce v. Whiting* (2010), Roberts wrote for a 5-3 Court. He wrote that the Arizona law requiring states to check the immigration status of job applicants before they are hired was constitutional in that it did not preempt the federal government's immigration laws. Some would view this as a diminishment of job applicants' civil rights in line with the string of cases outlined above. But is this Roberts's hostility towards civil rights or might the decision be explained by a states rights lens? The Roberts Court's emphasis on preemption cases in favor of state sovereignty is seen in another case as well. In *Williamson v. Mazda Motor of America, Inc.* (2010), the Court ruled unanimously that the National Highway Traffic and Safety Administration law (allowing either lap-only seatbelts or lap/shoulder seatbelts) did not preempt California law (which man-

dated all lap/shoulder seatbelts), ruling in favor of the family bringing suit. It seems that the Roberts Court will rule against large corporations and in favor of more restrictive laws if it means voting for state law over federal law.

Despite the fact that, as previously mentioned, based on seven employment cases presented so far, Roberts would seem to be antagonistic towards decisions that would have extended civil rights in the work place (such as allowing retroactive damages payments for pregnancy discrimination, preventing class action suits, etc.), many of his decisions in the realm of employment also show that the caricature of Roberts as a pure conservative in the mold of Scalia or Thomas is not accurate. We have already seen the exception for ageism in Meacham. And in *Arbaugh v. Y&H Corp.* (2006), the court ruled unanimously in favor of the woman filing a sexual harassment complaint against her employer, writing that an inadequate number of employees a company has does not mean that the court cannot hear Title VII claims. Roberts even assigned Ginsburg, one of the most liberal judges on the court, to write the unanimous opinion. This may show that the Roberts or the court in general was more liberal at the very beginning of its tenure, which would be supported by the Supreme Court Database numbers: the Court ruled conservatively 58 percent of the time in its first five years, but 65 percent of the time (the highest number in a year since 1953) in its sixth year. Alternatively, one could argue that this case is dressed as an Equal Protection case, but actually has very little implications for civil rights because it is really a technical subject-matter jurisdiction case. Goodman, Robinson, and Nichols seem to argue that the greatest repercussions of Arbaugh will be for small business, writing that "[t]here is little doubt that Arbaugh will indeed place greater risk management burdens on small businesses." Though they do not directly address the increased opportunity for potential victims to bring suit, they do write that as a result of the case "it must be assumed that Title VII's definition of employer imposes no limitation on federal courts jurisdiction in hearing Title VII violations." I would argue that this ability of the courts to hear Title VII violations even if companies do not meet the numerosity requirement is an expansion of civil rights protection for women.

But Arbaugh is not the only case that would seem to contradict the narrative of curbing rights in the work place. The Court ruled unanimously in favor of Sheila White in *Burlington Northern & Santa Fe Railway v. White* (2006) that there was retaliatory action against

her filing of a sexual harassment suit in violation of Equal Protection. The test that they apply is whether the employer's action would have deterred other employees from filing a complaint, and in this case it would. Further, Breyer, writing for the majority, says that the "anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace"… "nor is it anomalous to read the statute to provide broader protection for retaliation victims than for victims of discrimination." Alito concurs in the decision only, mainly because of this latter reasoning; he says that the criteria for discrimination and retaliation should be the same. It is important to note that Roberts does not join Alito's concurrence, but stands by Breyer's more expansive opinion covering retaliation outside the workplace.

Though Mary Newman argued in the Harvard Law Review that Burlington's expansive precedent was not upheld in a district court case called *Sykes v. Pennsylvania State Police* (2007) and that this might have important consequences for whether Burlington will actually be a victory for Title VII plaintiffs in practice. I would argue that as far the Roberts Court goes, its commitment to anti-retaliation protection is confirmed in *CBOCS West, Inc. v. Humphries* (2008). In a 7-2 majority including Roberts, Brennan writes that there is a heavy burden to be met for any employer arguing against anti-retaliation claims. This is regardless of the fact that Congress did not include an explicit provision for anti-retalitation in the Civil Rights Act of 1866, section 1981 or its amendment in 1991 on which the claim was based. This was a major point of contention for Thomas with Scalia in dissent (from which Roberts is notably missing). Anti-retaliation measures were protected again in *Crawford v. Nashville* (2009), this time unanimously and under Title VII. Interestingly, again Roberts chooses not to assign the majority decision to one of the more conservative justices and does not join Alito's concurrence (joined by Thomas) in which he "emphasize[s] [his] understanding that the Court's holding does not and should not extend beyond employees who testify in internal investigations or engage in analogous purposive conduct." This shows that Roberts was not concerned with limiting possible anti-retaliation discrimination claims. The discussion of John Roberts's case decisions here shows that he tends to be against the extension of civil rights in the realm of employment with exceptions for anti-retaliation and ageism.

## Voting

Civil rights leader and Democratic House Representative John Lewis commented during John Roberts's nomination hearings: "in 1965, Judge Roberts was only 10 years old. He may be a brilliant lawyer, but I wonder whether he can really understand the depth of what it took to get the Voting Rights Act passed" (Washington Post). Two cases have been decided by the Roberts Court involving voting rights that could show whether this characterization is true. In *League of Latin American Citizens (LLAC) v. Perry* (2006), the Court ruled that Texas's new redistricting plan was a violation of the Voting Rights Act because it denied Latino voters the ability to elect a candidate of their choice. Though Roberts dissented, it was not due to hostility towards the Voting Rights Act. In fact, in his dissent Roberts applied strict scrutiny as the majority did but simply saw the evidence showing that the new redistricting plan was actually more representative of the Latino vote than the previous one and was therefore not a case of vote dilution. He cites the same precedents as the majority (most importantly *Thornburg v. Gingles* (1986)) for deciding whether vote dilution has taken place. This would seem to show that Roberts is actually concerned with protecting minority rights. But interestingly, Roberts also cites *Shaw v. Reno* (1993) in which a minority representation plan was struck down, and he emphasizes that based on Shaw "states retain broad discretion in drawing districts to comply with the mandate of §2." What those like Lewis would find even more alarming, however, is that Roberts writes that he is not sure whether any standard for examining unconstitutional political gerrymanders exists or whether these are even issues that the courts should be deciding, but he seems to take the easy way out by saying that is not the issue being argued here. While this would not seem to augur well for advocates of judicially enforced protection of minority voting rights, it is important to note that Roberts did not go as far as Scalia and Thomas's dissent to say that there is no justiciable case.

It is really in *Northwest Austin Municipal Utility District Number One (NAMUDO) v. Holder* (2009) that Roberts's views on the constitutionality of the Voting Rights Act could be tested. Though the act had a long history of precedents validating its constitutionality, NAMUDO argued among other things that because Texas has become so heterogeneous, section 5 of the act was no longer necessary. As a result, the Roberts Court had the opportunity to rule in favor

of NAMUDO and strike down the act, but chose not to do so in an 8-1 decision, with Roberts writing for the majority. But this was not an explicit win for advocates of the Voting Rights Act or necessarily evidence that Roberts is a proponent of the act. The Court does some maneuvering to extend the definition of "subdivisions" which can be exempt from section 5 to include NAMUDO and sends the case back to lower courts to decide, thereby taking care of this particularities of this district without "reach[ing] the constitutionality of section 5." The Court not only avoids affirming the constitutionality of one of the most seminal pieces of legislation to end discrimination by Roberts's own admission but even suggests that it might be unconstitutional. Couched in much distracting dicta (perhaps purposefully placed), Roberts writes that the preclearance issue raises significant doubts about the constitutionality of the act and that Congress should reexamine it. The opinion is restrained in that to get the majority Roberts did not directly argue against the constitutionality of the act, but he does make a kind of threat. He writes that though the Court can decide the case by other means and has therefore done so here, that still "the Court will not shrink from its duty 'as the bulwark of a limited Constitution against legislative encroachments.'" His doubts about the constitutionality of the act seemingly stem from his view that the problems the act was meant to address have largely been solved, from his concern for "federalism costs" or "authorize[d] federal intrusions into sensitive areas of state and local policymaking," and from the fact that the act does not treat all states equally. Interestingly, these are some of the same states' rights issues that Roberts voted to defend in the previous section's employment discrimination and preemption cases. Roberts did not go as far as Thomas's concurring opinion, however, that the Court should have addressed the constitutionality of section 5 to find that it goes beyond Congress's power to enforce the 15th Amendment.

This decision may have been due to the public outcry that would have occurred with the striking down of the Voting Rights Act, as the case was being watched closely.[3] As Friedman goes on to argue, Congress had just reauthorized the law unanimously in the Senate and with an overwhelming majority in the House, both of which were in Democrats' control, and the first African American had been elected to the presidency. If the Court had declared the Voting Rights Act unconstitutional, they might have faced something more formidable than public outrage: perhaps a retaliatory law like the Lilly Ledbetter Fair Pay Act, which, significantly, Congress passed in the same year as the

NAMUDO case. LLAC and NAMUDO both show that Roberts will apply the Voting Rights Act but that he does so with increasing skepticism as to the constitutionality of the law because of its infringement on state sovereignty. It remains to be seen if in future cases Roberts will go further and join Thomas in his condemnation of the Voting Rights Act.

## Education

The Roberts Court has only ruled on one case that involves discrimination in education. That case is *Parents Involved in Community Schools v. Seattle School District No. 1* with the companion *Meredith v. Jefferson County Board of Education* (2007) case, and its ruling flies in the face of the preference he has shown for local control in employment and voting discrimination cases. Roberts wrote the 5-4 decision with the same five-justice coalition as in *Ledbetter* and *Walmart*, although here it was a plurality because Kennedy did not join the opinion, thereby limiting the precedential power of Roberts's opinion. The Court declared Seattle's voluntary public high school admission process unconstitutional because of its use of race in school assignment tiebreakers. Essentially, Roberts wrote that the program was 1) not justified because Seattle had never had a dual race system (though he writes in the companion case that the racial tiebreakers are not justified even if there was past discrimination), 2) that achieving diversity went beyond achieving racial diversity, 3) that the racial tiebreakers used were not the kind of individualized and holistic review of candidates allowed by Grutter v. Bollinger (2003) which was for higher education, and 4) that the pedagogical contribution of racial diversity is not valid enough to justify racial discrimination (here against non-minorities). Roberts seems to be applying heightened scrutiny not to prevent discrimination against discrete and insular minorities but to prevent discrimination based on race as a whole, echoed two years later in Ricci. If anything smacks of a move toward color blind doctrine (first advocated by Harlan in his dissent in *Plessy v. Ferguson* (1896)), this is it.

But Roberts does not endorse the color blind doctrine outright. Does this mean that he has misgivings about it? Or does it mean that he hedged his opinion mainly in order to get Kennedy's crucial vote? The latter seems very probable. The fact that Kennedy does not join the part of Roberts's opinion arguing that racial balancing is not a state

interest shows that he is less extreme than Roberts on the issue of what is excluded from being "a compelling state interest." Roberts quotes, *Milliken v. Bradley* (1974) in his opinion, a case which did not overturn Swann's outlined recommendations for how to integrate school systems but did limit it from extending into districts where there was no de jure segregation. Interestingly, like *Parents Involved*, *Milliken* may also have been hedged by the Nixon appointees in order to get Stewart to join their opinion for the crucial fifth vote. Roberts's use of Milliken is even more significant since it ruled that segregation by choice and not by state action did not have constitutional implications. Once again, this citation seems to indicate that Roberts is not concerned with the judiciary's role in promoting racial diversity.

Roberts's dismissal of Grutter also suggests that he does not regard promoting racial diversity as a valuable endeavor of the courts. In *League of Latin American Citizens*, Roberts wrote "I do not believe it is our role to make judgments about which mixes of minority voters should count for purposes of forming a majority in an electoral district… It is a sordid business, this divvying up by race." Roberts carries this disdain for appropriating mixes in electoral districts to appropriating racial mixes in schools. In perhaps the most famous line of the Parents Involved opinion, he writes "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." To put it even more explicitly, he writes "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'"

The battle over *Brown* continues. Nothing exemplifies this better than the fact that the five opinions in the case referred to *Brown* 90 times. Breyer's 77 page dissent in *Parents Involved* charged Roberts and the plurality with judicial activism for overturning precedent. Though many conservative observers would have lauded Roberts for this decision, this is not an example of what Roberts had declared his goal to be at the Congress appointment hearings: "a modest judge" (which he might have claimed in a case like NAMUDO where he slyly avoided overturning the Voting Rights Act). Some argue that *Parents Involved* is not an isolated case but one which continues what they see as a troubling line of cases encouraging the tide of resegregation, including *Keyes v. School District No. 1* (1972), *Milliken v. Bradley* (1974), *Board of Education v. Dowell* (1991), and *Freeman v. Pitts* (1991).[4] This is the type of decision that would support the idea that the Roberts Court will not hold the line of the Rehnquist Court but

reverse on civil rights, going from bad to worse.[5] Several of Siegel's points explaining why he thinks this is so are present in this case. These include 1) the identity of the justices; Alito for O'Connor is a big change and one wonders whether she would have joined the opinion, 2) Rehnquist was part of results oriented school of conservatives, while Alito and Roberts are concerned with means and keeping in line with a Reagan-esque ideological conservatism; Roberts seems to be acting in line with the positions he wrote in memos while working in the Reagan administration, 3) there is an unwillingness to consider real world consequences and how this will negatively affect racial diversity in schools, and 4) Roberts is more than willing to overrule precedent.

## Conclusion

John Roberts has limited employment discrimination rights (though this may be a product of his preference for state sovereignty) with important exceptions such as in anti-retaliation cases, did not strike down the Voting Rights Act (though this might have been due to outside pressure rather than his personal affection for the statute), and in education struck down an affirmative action policy that seems to be moving the Court towards a colorblind doctrine. It is this latter move that would support the notion of Roberts's hostility to the civil rights of discrete and insular minorities the most, particularly because it cannot be defended by a supposed preference for local rule (since the plan was voluntary/locally imposed). The implications of the ruling are significant because 1,000 of 15,000 school systems currently use plans that consider race in school assignments.[6]

But Roberts's position on education should not cancel out his less extreme and more nuanced stances on other issues, outlined above. Time after time he did not join Scalia or Thomas (e.g. CBOC West), and on numerous occasions he assigned opinions to justices who would write less restrictive opinions with respect to civil rights (e.g. Burlington and Ricci). And just because his hints toward colorblind doctrine reduce preferential rights for racial minorities, this does not mean that he limits civil rights for all groups (e.g. Meacham).

This less extreme conservatism on the part of Roberts can be seen in *Snyder v. Louisiana* (2008), which suggests that it could extend beyond employment discrimination and voting to juries. In *Snyder*, Roberts voted with the 7-2 majority holding that the state's dismissal of all potential black jurors was a violation of Equal Protection, revers-

ing the lower court's decision. Here Roberts had the opportunity to overturn *Batson v. Kentucky* (1986), but chose not to. It is one example of how Roberts is in some cases less conservative than Rehnquist, because Rehnquist was in dissent in the Batson case. More to the point, Roberts did not join Scalia and Thomas in dissent to say that Batson required a lower level of scrutiny.

I am not arguing that Roberts is a liberal justice by any means. But the case history shows that he is not as far right as Thomas and Scalia and that his replacement of Rehnquist is not the force moving the Court to the right. It remains to be seen how far right Justice Alito's replacement of Justice O'Connor will move the Court and to what extent the solidification of the right bloc of the Court will embolden John Roberts's future decisions.

## END NOTES


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