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Passing judgment: The scramble to pigeonhole Supreme Court nominee John Roberts misses the point

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President Bush's nomination of John G. Roberts Jr. to the Supreme Court has elicited more partisan noise than honest analysis of actual judicial decision-making.

The US Court of Appeals judge's judicial philosophy is admittedly difficult to nail down, due to his active and varied legal career both in government and in the private sector. Until the last two years, when he wrote opinions as a federal appellate judge, lawyer Roberts helped clients and government agencies shape the legal strategies of their policy positions — positions that were not, necessarily, his own. As such, his *personal* legal-ideological paper trail is relatively short.

What we do know of Roberts, however, hardly offers ground for grim resignation among principled liberals. Rather, he is likely the sort of conservative influenced by real-life exigencies that cry out for deviation from rigid ideology. Not all of the candidates on President Bush's short list were in this category. The execrable Judge Edith Jones, for example, concurred in an opinion that denied a retrial to a defendant whose court-appointed attorney *slept* through parts of a death-penalty trial. By contrast, Roberts looks to be cut from less rigid, more principled cloth.

RIGHT V. WRONG

History shows that, once on the Court, numerous politically right-wing justices have veered from their ultra-conservative credentials. Tough-on-crime prosecutor Earl Warren surprised President Dwight D. Eisenhower, who saw his appointee as chief justice lead a revolution in the rights of accused criminals. Harry Blackmun gave President Nixon apoplexy when he wrote *Roe v. Wade*, as did Lewis Powell Jr. when in the *Bakke* decision (1978) he cast the deciding vote in favor of race-based affirmative action. Three of President Reagan's nominees — Justices

O'Connor, Kennedy, and Souter — have crafted some of the Court's most "liberal" opinions on everything from criminal justice to affirmative action, abortion to anti-sodomy laws.

The primary difficulty with understanding Roberts's legal orientation lies in the slippery terminology — "conservative," "liberal," "strict constructionist," "literalist," "judicial activist," "originalist"— blithely tossed around to describe judicial decision-making, categories simultaneously meaningless and misleading. Judges are dubbed power-hungry enemies of democracy when they provide a check on legislative majorities, and enemies of limited government when they allow legislatures to draft laws with broad effect.

Some judges claim an obligation to read the Constitution literally in accordance with its original meaning. Yet an "originalist" who interprets the Constitution's text to mean precisely what the drafters of the Fourth Amendment meant by proscribing "unreasonable searches and seizures" should have a nervous breakdown trying to figure out whether police may "search" the inside of a home with heat-sensor technology beamed from outside a solid wall. Does this even constitute a "search," much less an "unreasonable" one? The Court, with the support of "originalist" Justices Scalia and Thomas, ruled in 2001 that a thermal search required a court-authorized search warrant. And in another seemingly anomalous position taken by Scalia, he dissented from the majority's lukewarm ruling last summer holding that accused US citizen "enemy combatants" were entitled to a watered-down military hearing that was hardly any protection at all. Charge them and try them in a court of law or else release them, demanded the conservative justice — a dissenting opinion joined by the avowedly liberal John Paul Stevens.

Another recent decision further exposes the failure of traditional labels in civil liberties cases. When the city of New London, Connecticut, sought to evict long-time residents from their homes so a wealthy developer could build a conference center, a hotel complex, condominiums, and an aquarium, a sharply divided (5-4) Court voted to affirm this use of eminent-domain power. The majority theorized that the development would produce more tax revenues than the residential properties and therefore was in the public interest. This commercial-interests-first, individual-liberty-second logic passed constitutional muster because most of the high court's "liberal" members — Justices Stevens, Breyer, Ginsburg, and Souter — massed their clout against most of the "conservatives" — Justices O'Connor, Rehnquist, Scalia, and Thomas — with the latter seeking to uphold the little guy's rights. As Stevens admitted in a recent speech, he thought this particular confiscation unwise and unjust, but he was wary of limiting the power of government to exercise the eminent-domain power which in the long run serves the public interest. But it is very hard to argue that the liberals were the populists in this case, rather than the handmaidens of the oligarchs.

If the eminent-domain case did not expose the limitations of "conservative"-versus-"liberal" labels, then the medical-marijuana case surely did. The votes of liberal justices, invoking the federal government's power to regulate interstate commerce, were essential to the 6-3 vote upholding federal anti-drug warriors' assault on California's statute legalizing the prescription use of marijuana for certain medical conditions. And Justice Scalia, normally an opponent of a broad interpretation of federal power under the commerce clause, allowed his culturally conservative distaste for mind-altering drugs to infect his view. Dispelling the notion that conservatives vote in bloc, medical marijuana's most principled and consistent ally was Justice Thomas, who wrote with moral and legal clarity that "the majority prevents States like California from devising drug policies that they have concluded provide much-needed respite to the seriously ill."

If categories such as "liberal" and "conservative" are not often useful in predicting how a judge might decide a case, what *does* distinguish a worthy candidate from an unworthy one? The most important information to obtain about a Supreme Court nominee may be whether the candidate is a *decent* person with human instincts, or a rigid ideologue who, faced with two possible principled outcomes, is not moved to the outcome that reduces human suffering or palpable unfairness. Is the candidate sufficiently *flexible* to allow the realities of modern life to influence the application of principle where there is legitimate wiggle room? As one of the nation's highest arbiters of justice, will the nominee likely grow increasingly considerate of the complexity of the issues and plights of people put before him?

READING ROBERTS

How might a Justice Roberts deal with such crucial areas as the role of existing precedents in such current civil-liberties areas as abortion and gay rights? Roberts is currently an intermediate appellate judge strictly bound by Supreme Court precedents. If elevated, however, he would have *power to change* precedents, even though traditional conservative principles dictate following precedent except where clearly erroneous. If Roberts is a principled traditional conservative, one cannot with assurance predict that he would vote to overrule *Roe v. Wade* rather than follow it as a flawed but still viable precedent.

Roberts's admittedly meager record, especially on abortion, has at times been mercilessly taken out of context. Liberal critics point to Roberts's suggestion that the Solicitor General's office take the position in a brief to the high court that *Roe v. Wade* was wrongly decided and should be reversed. Yet Roberts took that position as a lawyer for the avowedly anti-choice Reagan administration. A lawyer's job is to craft the best argument in support of his *client's* position, not his own. More recently, during his confirmation hearing to the Court of Appeals for the D.C. Circuit, Roberts remarked that he deemed *Roe* the law of the land, for the decision had become

deeply rooted, by then, as precedent. In this way, Roberts revealed that though he may be unwilling to expand the reach of *Roe,* he could well refuse to overturn its core ruling.

Even more revealing is an experience Roberts had while a partner in the Washington law firm Hogan & Hartson. As part of the *pro bono* (that is, free) work he performed as a member of the firm, Roberts helped prepare lawyers for Supreme Court oral arguments in probably the most consequential gay-rights case to reach the high court yet, *Romer v. Evans.* At issue was the constitutionality of a voter-approved Colorado constitutional provision that would have denied gay people as a group the coverage of state and local civil-rights laws. If, for example, laws were enacted to provide for equality in the rental of housing, municipalities would be forbidden from adding sexual orientation as a protected classification. Had this state constitutional provision survived, any state constitution could be amended to invalidate all gay-rights statutes and regulations.

The lawyers opposing the anti-gay amendment sought Roberts's expert advice in preparing for oral argument of this complex constitutional challenge. Roberts's coaching in moot court almost certainly helped gay-rights attorneys win an unexpectedly healthy 6-3 victory. As one of the court's leading conservatives — Justice Kennedy — wrote for the majority, the Colorado constitutional provision "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else" and thereby "deems a class of persons a stranger to its laws." This is not a case where Roberts's participation can be attributed to professional obligation to advance his client's position, since the gay-rights group was *not* his client. Critics suggest that Roberts assisted out of intellectual interest. But one cannot honestly say that a hard-core, ideologically rigid, culturally conservative, or homophobic lawyers would have volunteered for this task. (Can one imagine, for example, Justice Scalia doing so while a law professor?)

REACHING A VERDICT

Perhaps the most relevant question, considering the larger issues of representative government at stake, is: what were Roberts's most vociferous critics expecting from a Bush White House nomination? Someone with Earl Warren's understanding of how the criminal-justice system can be unfair, cruel, and slipshod? Hugo Black's absolutist's respect for the First Amendment's free-speech guarantee? Maybe William Brennan's sensitivity to government's failure to accord fair procedures to citizens? Or Thurgood Marshall's concern for the plight of the disadvantaged? Are we not better off with a nominee who might be, but probably is not, a wolf in sheep's clothing, rather than an Edith Jones, a wolf in wolf's clothing? Are we not better off taking a chance that John Roberts is a jurist predisposed to formalism but also a decent man who has the capacity to grow into the job as other decent conservatives have over the years?