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David Strauss
Harry N. Wyatt Professor of Law , University of Chicago Law School

STATEMENT OF
DAVID A. STRAUSS
HARRY N. WYATT PROFESSOR OF LAW, THE UNIVERSITY OF CHICAGO LAW SCHOOL
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARINGS ON THE NOMINATION OF JOHN G. ROBERTS TO BE CHIEF JUSTICE OF THE UNITED STATES
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Mr. Chairman and Members of the Committee:
Thank you very much for the opportunity to appear before you in these hearings on the nomination of Judge John Roberts to be Chief Justice of the United States. My name is David Strauss. I teach constitutional law at the University of Chicago, where I have been on the faculty since 1985. Before I joined the faculty at Chicago, I was a lawyer in the Office of the Solicitor General, from 1981 to 1985.
A generation ago, in 1971, when President Nixon announced the appointment of William Rehnquist to the Supreme Court, the President characterized his philosophy as that of a "judicial conservative." Both President Nixon and Justice Rehnquist, in remarks they made at the time, gave a clear idea of what they believed a judicial conservative to be.
The hallmark of judicial conservatives, at that time, was the belief that most controversial issues should not be resolved by judges but should be left to the elected branches of government; and that the judgments of the elected branches should receive the greatest deference from the Court. In his statement introducing Justice Rehnquist, President Nixon identified, as a model of a judicial conservative and what he called a "constitutionalist," the Justice that Justice Rehnquist was replacing—Justice John Marshall Harlan, who had been the most consistent dissenter from the Warren Court's controversial decisions. Justice Harlan's opinions emphasized two themes: deference to the elected branches of government, and the importance of adhering to precedent.
That is what judicial conservatives believed a generation ago. Now, however, judicial conservatism means something else—in fact, something almost diametrically opposite to what it meant in 1971. Increasingly, the hallmark of judicial conservatism is a distrust of the elected branches—particularly a distrust of the federal government and, more specifically, distrust directed toward the Congress of the United States. That view of Congress has been accompanied by a dramatic change in the approach to precedent. Today many self-styled judicial conservatives are quick to assert their eagerness to overturn precedents, even centuries-old precedents.
This change in the nature of judicial conservatism is vividly illustrated by the contrast between what President Nixon said about the Supreme Court when he nominated Justice Rehnquist, on the one hand, and, on the other hand, the ambitions that President George W. Bush—who has nominated Judge Roberts to be Justice Rehnquist's successor—has for the Court. President Bush's ideal justices, as he has identified them, do not include Justice Harlan. Instead, President Bush has singled out Justices Antonin Scalia and Clarence Thomas as his models for judicial appointments.
The brand of judicial conservatism practiced by Justices Scalia and Thomas is far removed from that

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of Justice Harlan. The current Supreme Court has been more hostile to legislation enacted by the Congress than any Court in our history, save for the soundly repudiated Court of the pre-New Deal era. And among the current justices, Justices Scalia and Thomas have been the most hostile; Justice Thomas, it is fair to say, is more hostile to the exercise of federal legislative power than any other Supreme Court Justice appointed in the last 75 years.

At the same time, Justices Scalia and Thomas, President Bush's professed models for a Supreme Court appointment, have left no doubt about their willingness to overturn precedent, even long-standing precedent, in order to restore what they believe to be the true meaning of the Constitution. It is hard to imagine a position more antithetical to the conservatism of Justice Harlan.

This evolution in the nature of judicial conservatism is, in my view, one of the most important developments in American constitutional law in the last generation. This development throws into sharp relief what is at stake in these hearings, and more generally in the appointment of new justices to the Supreme Court.

If President Bush is to be taken at his word, he is seeking something very different from what President Nixon sought when he nominated Justice Rehnquist. President Bush is not seeking justices who will be modest and restrained, who will be acutely sensitive to the limited role that courts should play in a democracy. He is seeking justices—whether or not he has found one in Judge Roberts—who will energetically seek to block the exercise of federal legislative power on the basis, not of established precedents, but of their own conceptions of what the Constitution says. And he is seeking justices—again, whether or not he has found one in Judge Roberts—who will show little hesitation in radically changing legal principles even if those principles have a long history of having been accepted by the American people.

Many of the decisions reached by the current Court in recent years help illustrate what is at stake in the appointment of Supreme Court Justices, at this point in our history. In most of these cases, the Supreme Court was closely divided. Many of the principles on which these decisions are based—principles limiting the power of the elected branches, particularly Congress, and principles that draw long-standing precedents into question—are not yet firmly established. Whether they become firmly established will depend in large part on the people who fill Chief Justice Rehnquist's seat and Justice O'Connor's seat.

1. Congress's power under the Commerce Clause. From the mid-1930s to the mid-1990s, the Court did not hold a single Act of Congress unconstitutional on the ground that it exceeded Congress's power to regulate commerce among the states. But in 1995, the current Supreme Court invalidated the Gun-Free School Zones Act, in United States v. Lopez, 514 U.S. 549 (1995); then, in 2000, the Court struck down an even more significant piece of federal legislation, the Violence Against Women Act, in United States v. Morrison, 529 U.S. 598 (2000).

The deference that the Court showed for sixty years before Lopez and Morrison was based on the sound principle that in a nation like ours, in which the web of interstate connections is almost unfathomably complex, it is for Congress—not the courts—to decide whether a particular kind of activity has enough of a connection to interstate commerce to justify federal regulation. The decisions in Lopez and Morrison repudiated that principle and asserted a judicial prerogative against the capacity of Congress to make such judgments. Of course, the repudiation is not complete; it could not possibly be. In more recent decisions, the Court has sometimes deferred to a congressional judgment that might seem subject to attack under Lopez and Morrison. See, e.g., Gonzales v. Raich, 125 S. Ct. 295 (2005); Pierce County v. Guillen, 537 U.S. 129 (2003).

But this important issue remains very much in the balance, and the next few appointments to the Supreme Court are likely to determine how it is resolved. The issue is, to repeat, whether the Congress or the courts will make the crucial judgments about the role that the federal government should play in an extraordinarily interdependent economy and society like that of the twenty-first century United States. For several decades, the nearly unanimous view of Supreme Court justices, including conservative justices, was that such judgments belonged to the Congress. The conservative

judges whom President Bush holds up as models believe that it belongs to the courts.
2. Congress's power under the Fourteenth Amendment. Since the Civil War, one of the cornerstones of our constitutional order has been that Congress has the power to ensure that state governments do not violate the rights secured by the Thirteenth, Fourteenth, and Fifteenth Amendments. In a series of decisions, the current Supreme Court—again with the enthusiastic concurrence of the Justices whom President Bush has identified as models of judicial conservatism—has significantly limited this power.
In particular, the Court has vigorously second-guessed Congress's conclusions about when federal legislation is needed to remedy unconstitutional action by state governments. The Court has discarded Congress's conclusions about the need for remedial action in one area after another— the free exercise of religion (City of Boerne v. Flores, 521 U.S. 507 (1997)), discrimination against women (United States v. Morrison, supra), age discrimination (Kimel v. Florida Board of Regents, 528 U.S. 62 (2000)), discrimination on the basis of disability (Board of Trustees v. Garrett, 531 U.S. 356 (2001)), and the protection of property rights (Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999)).
A decision by the Congress that legislation is needed to enforce individuals' constitutional rights against the states—based, as it is, on a textually specific and historically validated power of Congress, and involving complex factual judgments—would seem to be especially unsuited for second-guessing by judges. Traditional judicial conservatives, who were acutely sensitive to the institutional limits of courts, would have been especially loath to substitute their own judgment on these matters. But the willingness to second-guess those judgments has been central feature of the new form of judicial conservatism that is practiced today.
Again, the law in this area remains unsettled. More recent decisions have upheld exercises of congressional power under the Fourteenth Amendment. Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003); Tennessee v. Lane, 124 S. Ct. 1978 (2004). But the Court in those cases was closely divided, and Justices Scalia and Thomas were in dissent—urging that legislation enacted by Congress be declared unconstitutional and, in Justice Scalia's case, that the power of Congress to enforce individual rights be narrowed to an unprecedented degree. See Tennessee v. Lane, 124 S. Ct. at 2008-13 (dissenting opinion). In this area, as well, the power of Congress remains in the balance. This and future appointments will determine the extent to which Congress will retain the historic and vital power to protect the individual rights that the Constitution guarantees.
3. The regulation of commercial advertising. Well after the Supreme Court began to enforce the First Amendment vigorously to protect political dissent, the Court adhered to the doctrine that commercial advertising was not protected speech. In 1976, the Court overturned that doctrine and held for the first time that commercial advertising was entitled to a measure of First Amendment protection. Justice Rehnquist—then still a relative newcomer on the Court—dissented; he insisted the commercial advertising raised much different issues from the traditionally protected forms of speech, and that legislatures—not courts—were in the best position to determine the degree to which advertising should be regulated. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).
In its 1976 decision, the Court was careful to spell out the ways in which commercial advertising presented distinctive issues and to emphasize the need to allow relatively extensive regulation of that form of speech. Beginning in the 1990s, however, the Court began to expand the protection of commercial expression, essentially wielding the First Amendment as a means of economic deregulation. For example, the Court severely limited the power of the states to regulate tobacco advertising. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001). The Court also cut back on the power of the federal government to regulate the advertising of drugs. Thompson v. Western States Medical Center, 535 U.S. 357 (2002).
These decisions potentially eliminate any power in either Congress or the state legislatures to regulate nondeceptive advertising. They even draw into question consumer protection laws designed to

prevent deceptive advertising. The new conservatives, notably Justice Thomas, have been the strongest advocates of narrowing the power of elected legislatures to address the problems caused by harmful or deceptive advertising. Here, again, an area on which Congress and the state legislatures are likely to be in the best position to decide what will promote the welfare of the American people is, increasingly, becoming the province of the judges. And it is the supposedly conservative justices who are most aggressive in asserting the power of the Court.

4. Church-state relations. Questions of the relationship between the government and religion—in particular, questions about both material aid from the government to religion and the symbolic endorsement of religious views by the government—have produced some of the most closely-divided Supreme Court decisions in recent years. It is easy to find decisions that draw extremely fine lines between permissible and impermissible aid to religion. Last Term's decisions on the public display of the Ten Commandments are a vivid example.

The principal lesson of these cases, in my view, is that this is an area singularly unsuited to absolutes and simplistic formulas. The question of the relationship between government power and religion has been one of the most divisive in human history. In a nation characterized, as ours is, by a great intensity and diversity of religious belief, it would be very surprising if there were any simple solutions in this area. In that sense, the somewhat wavering, highly fact-specific decisions of the Supreme Court on government aid to religion should not surprise us.

Perhaps the most remarkable development in this sensitive area has been the position taken by Justice Thomas. Justice Thomas has urged that the Establishment Clause of the First Amendment—which has been interpreted to limit the extent to which government may aid religion—simply does not apply to the states. His position would reverse decades of precedent and allow forms of state aid to religion—including the formal establishment of an official state religion—that have been considered off-limits for a century and a half. It is difficult to imagine a position that would be more at odds with the views of traditional judicial conservatives.

5. The right of privacy. The constitutional right to privacy is the basis not just for the Supreme Court's decision in Roe v. Wade, but for many other important decisions as well. The Supreme Court has held, on the basis of this right, that states may not make it a crime for married couples to use contraceptives, in Griswold v. Connecticut, 381 U.S. 479 (1965), or for homosexuals to engage in intimate relations, in Lawrence v. Texas, 539 U.S. 558 (2003). The Court has also suggested that there are constitutional limits on the government's power to find out information about private matters, such as an individual's medical history. See Whalen v. Roe, 429 U.S. 589, 599 (1977).

This constitutional right of privacy has its origin in an opinion written by Justice Harlan. In Poe v. Ullman, 367 U.S. 497, 539-55 (1961) (dissenting opinion), Justice Harlan specifically recognized, and defended, a right to privacy in intimate relationships that, he acknowledged, was not explicitly enumerated in the Constitution. Here again, there is a stark contrast between judicial conservatives like Justice Harlan and the kinds of conservatives that President Bush has said he admires.

Justices Scalia and Thomas have disparaged not just the right to privacy recognized in many precedents, decided over decades, but the very concept of unenumerated rights. Under the approach they have taken, an individual trying to resist the prying eyes of the government, or the government's intrusion into one's intimate relationships, must point to specific language in a particular constitutional provision or to a long-standing and specific practice. Justice Harlan's view of the unenumerated right of privacy was based on a generous and nuanced reading of the traditions of the American people—what used to be regarded as the approach of a judicial conservative. The new kind of judicial conservative, who would severely narrow or even eliminate the constitutional right to privacy, takes a different approach.

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I hope I have been able to convey some sense of what I believe is at stake in the judicial confirmation process at this point in the Supreme Court's history. For the first time since the Great Depression, the Court is seriously challenging the power of the Congress to address problems that Congress believes

to be of national concern. The Court may be poised on the brink of a dramatic change in the constitutional law governing the relationship of church and state. The right to privacy, not only in abortion cases but in many other, less high-profile but crucially important areas, is under sustained attack. All of these areas of the law are, as of now, unsettled; the law could move in any direction. The appointees who come before this Committee will determine the direction in which it will move.

It has not been my purpose, in these remarks, to pass judgment on Judge Roberts, whose extraordinary professional qualifications speak for themselves. I do not know whether, in nominating Judge Roberts, President Bush has carried through on his ambition to try to remake the Supreme Court in the image of Justices Scalia and Thomas. Some of the memoranda Judge Roberts wrote earlier in his career suggest that he would find the views of those Justices congenial. But Judge Roberts has explained that he expressed those earlier views in a different context, and certainly the public statements Judge Roberts has made since his nomination, and in testimony before this Committee, have emphasized the values of traditional judicial conservatives like Justice Harlan—judicial modesty and self-restraint and a due regard for precedent.

But whatever judgment the Committee reaches on Judge Roberts, President Bush will have at least one, and perhaps more, additional opportunities to reshape the Supreme Court. His next appointee will replace not Chief Justice Rehnquist—who, for much of his tenure, voted with Justices Scalia and Thomas on the issues I have discussed—but Justice O'Connor, who took an approach to the Constitution that more closely resembled Justice Harlan's. That appointment, in particular, might dramatically change the balance on the Court.

We can expect President Bush to appoint a judicial conservative. The crucial question is what kind of judicial conservative he will appoint: one who believes in deference to the elected branches of government and in adherence to precedent, or one who is willing to sweep aside the judgments of the Congress and of the state legislatures, and to overturn long-standing precedent, in the pursuit of his or her own vision of what the Constitution requires. In all the important areas I have described—and perhaps others as well—the choice between those starkly contrasting visions of judicial conservatism may determine what kind of nation Americans live in for decades to come.

I would be happy to answer any questions the Committee might have.