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U.S. Senate Judiciary Committee

Hearings on the Nomination of John Roberts to be Chief Justice of the Supreme Court

September 15, 2005

How Justices of the Supreme Court interpret the Constitution and federal and state laws is not merely a question of judicial philosophy – of whether they seek out the "original intent" of the Framers or lawmakers, defer to legislatures and agencies, or meticulously follow Court precedents. It also depends on their values – their understanding where the nation is at a point in historic time and how it needs to progress. If it were nothing more than judicial competence and philosophy of interpretation – if moral values weren't directly at stake here – the President's short list for Chief Justice might have included Harvard's Lawrence Tribe and other eminent scholars and jurists who presumably share a view of America different from that of John Roberts. Roberts was nominated by the President because he shares the President's values. It is the President's prerogative to make such a nomination, of course, but it also the Senate's prerogative to examine those values and to accept or reject a nominee based on them.

Social or religious values have been given much emphasis in these proceedings. I want to suggest that economic values are also at stake. It may seem strange to talk about the economy in moral terms but that's only because we often don't recognize that moral choices are involved.

A central moral problem for the American economy today is that, although it has been growing at a good clip and corporate profits rising nicely, most American paychecks have been going nowhere. Last year, the Census Bureau tells us, the economy grew a solid 3.8 percent. Yet median household income barely grew at all. That's the fifth straight year of stagnant household earnings, the longest on record. Meanwhile, another 1.1 million Americans fell into poverty, bringing the ranks of the poor to 37 million. And an additional 800,000 workers found themselves without health insurance. Only the top 5 percent of households enjoyed real income gains. These trends are not new. They began thirty years ago but are now reaching the point where they threaten the social fabric. Not since the Gilded Age of the 1890s has this nation experienced anything like the inequality of income, wealth, and opportunity we are witnessing today.

A central moral choice, then, is whether America should seek to reverse this trend. Those who view our society as a group of self-seeking individuals for whom government's major purpose is to protect their property and ensure their freedom of contract would probably say no. Those who view us as a national community of with responsibilities to promote the well-being of one

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another would likely say yes. Is the well-being of our society the sum of our individual goods, or is there a common good that must be addressed? The answer will shape the American economy and society of the twenty-first century.

Over the next decades, the Supreme Court will play important role in helping us make this choice. Under the guise of many doctrines and rationales – interpretations of the takings and due process clause of the Fifth Amendment, the equal protection clause of the Fourteenth Amendment, the Commerce Clause, the doctrine of federal preemption, the doctrine involving improper delegations of legislative or judicial powers to regulatory agencies, and so on – the Court will favor either property or community, depending on the economic values of a majority of the Justices.

The balance in the Court is quite close. In one recently decided case,[2] for example, a majority of the Court said government can take private property from one owner, compensate him at fair market value, and then turn the property over to someone else – but only if the transaction is part of an economic development plan for the community and it doesn't benefit a particular class of identifiable individuals. In other words, it can't be a political payoff or money grab. This reasoning raises value-laden questions, with which the next Chief Justice and the future Court will have to grapple: What constitutes valid economic development, and how can you tell whether certain people are getting a disproportionate benefit from it? The answers will depend largely on how the Justices balance property and community.

On the other hand, several years ago a closely-divided Court found that a ruling by the California Coastal Commission that conditioned a building permit on the owner granting public access to the ocean was an unconstitutional "taking" because it didn't substantially further the public purposes of California's coastal land-use law.[3] In this instance, the Court ruled in favor of property and against community but left unanswered the larger question of how the Court should determine the public purposes of particular laws and whether regulations substantially furthers them. These questions are also likely to arise more frequently. The Court will be called on to determine the constitutionality of many regulations under the takings clause, since regulations almost inevitably affect the value of property being regulated.

As inequality continues to widen, the Court's choice between property and community will have larger consequences. Americans are segregating by income into cities and towns that are ever more uniformly rich, middle class, or poor. Hence, questions will be raised about equitable provision of public services. Do our poor and working-class children have the right, under the Equal Protection Clause, to as good an education as the children of our wealthier citizens? A future Court that says yes presumably would deem unconstitutional much of our present system of primary and secondary education, in which spending per child largely is based largely on local property taxes that vary enormously depending on whether the locale is rich or poor.

The wages and benefits of women and minorities continue to lag substantially behind those of white men in our society. And blacks and Latinos comprise a substantial portion of the nation's

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[2] Kelo v City of New London, announced June 23, 2005.
[3] Nollan v California Coastal Commission, 483 US 825 (1987).

poor. As overall inequality widens, inequities based on gender, race and ethnicity are becoming more visible. The link between poverty and race was never more evident than it was weeks ago in the hurricane-ravaged tragedy of New Orleans and its surrounds. A future Supreme Court will almost certainly be faced with issues of equal protection for women and minorities in public safety, public health, employment, law enforcement, housing, and health care. How it balances the values of property and community will affect the moral cohesion of the nation.

The same balance underlies how the Court decides whether rules and regulations are authorized by law. Many such laws reflect the nation's intent to protect people who cannot protect themselves on their own, and to establish minimally decent living standards for all. The National Labor Relations Act of 1935 established the right to bargain collectively, the Social Security Act of 1935 provided us with a guaranteed pension in old age and unemployment insurance if we lost our job, and the Fair Labor Standards Act of 1938 established a national minimum wage. The Civil Rights Act of 1964 protects us against discrimination based on race or gender and the Age Discrimination in Employment Act of 1967, against discrimination because of our age. The Medicare Act of 1965 provides health care to older Americans, and the Occupational Safety and Health Act of 1970 protects our health and safety at work. The Clean Air Act of 1970 protects the air we breath, and the Clean Water Act of 1977 protects the water we drink. The Employee Retirement and Income Security Act of 1974 protects our pensions. The Americans with Disabilities Act of 1990 provides accommodation for disabled workers, and the Family and Medical Leave Act of 1993 allows employees to take time off for a home or health emergency.

Each of these laws represented at the time of its enactment America's moral conviction about how we should treat one another as members of the same society – thereby offsetting inequities in wealth and power. And as such inequities have widened, each set of protections has become that much more critical. Each has and can be enlarged or whittled down by a Supreme Court, intent either on strengthening our national community or protecting property.

As Secretary of Labor, it was my job to implement the Family and Medical Leave Act. We came up with what I considered common-sense regulations that reflected the unequal power of employers and employees. Among them was a rule that even if an employer didn't tell employees they were eligible for it, eligible employees could take the 12 weeks of unpaid leave anyway. In a 5-4 decision, the Supreme Court struck down that rule, saying it was inconsistent with the Act and, besides, it discouraged employers from providing more generous leave.[4] I've read the case several times, and I must say the logic escapes me. I don't believe it was a matter of pure logic. It was a matter of values, and in this instance, property won over community.

Antitrust laws also regulate the balance of economic power in our society, as do laws and rules affecting the financing of political campaigns. As wealth becomes more concentrated in fewer hands, both will become increasingly salient. As America continues to merge with the global economy, immigration laws and constitutional claims involving the rights of immigrants, both documented and undocumented, will arise with greater frequency. Hence, Justices will be grappling with the very meaning of a national community.

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[4] Ragsdale et al. vs. Wolverine World Wide Inc, 122 S Ct. 1155 (2000).

The moral economic values of a single Justice can therefore affect the lives of millions of Americans. One example is Justice Owen Roberts – no relation, I believe, to the current nominee – who in March of 1937 decided to join with four justices in upholding the minimum wage law of the state of Washington.[5] Up until then, Roberts had been on the other side – joining his four other brethren in striking down laws setting minimum wages and maximum hours, barring child labor, protecting workers from unsafe conditions, and establishing codes for worker standards in various industries. They had defended their opinions in property terms: To them, due process was mostly about freedom to contract, liberty was a matter of accumulating personal wealth and doing whatever one wished with it, and the Commerce Clause sharply limited the reach of the federal government. But after Roberts' switch, these justifications mostly vanished from Supreme Court majority opinions.

It's commonly believed that Owen Roberts switched sides because of Franklin D. Roosevelt's threat to "pack" the Court by expanding its membership unless it upheld New Deal legislation. But in fact, Roberts' switch happened before any of the Justices knew of Roosevelt's plan.[6] The more likely explanation is that Justice Roberts switched because the realities of the Depression finally caught up with him. Community values were simply more compelling than property values. As the Court's new majority put it in the opinion Roberts joined:

> "[T]he liberty safeguarded [in the Constitution] is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people.... The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community ... .We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land."

The challenge now facing America is different from what we faced in the 1930s, of course. But the rapidly-widening inequalities of wealth, income, and opportunity confronting us pose no less a risk to the social fabric and moral integrity of the nation. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land.

For all these reasons, the moral values John Roberts brings to bear on the economy are crucial for determining his fitness to be the next Chief Justice of the Supreme Court, as will be the economic values of nominees for other Supreme Court vacancies. What are Roberts' economic values? The record is thin. We do know that in 2003, shortly after joining the U.S. Court of Appeals for the District of Columbia circuit, he voted to rehear Rancho Viejo vs. Norton, which a three-judge panel had decided under the Endangered Species Act. The panel found that the federal government could, consistent with the commerce clause, regulate a housing project that

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[5] West Coast Hotel vs. Parish, 300 U.S. 379 (1937).

[6] See, for example, Barry Cushman, Constitutional Revolution, New York: Oxford University Press, 1998.

would otherwise encroach on the endangered arroyo southwestern toad. In Roberts' unsuccessful opinion urging reconsideration en banc, he noted that the decision "seems inconsistent" with the Supreme Court's approach in other recent cases in which the Court held that the Commerce Clause did not authorize such broad federal reach.

We also know that as Special Assistant to the Attorney General in the Reagan Justice Department, Roberts argued that affirmative action was bound to fail because it required the "recruiting of inadequately prepared candidates." He also complained to the Attorney General that the Department of Labor and its Office of Federal Contract Compliance were promoting "offensive preferences" based on race and gender, and questioned the executive order on which the Office of Contract Compliance was based. (Memorandum from John Roberts to the Attorney General re Meeting with Secretary Donovan on affirmative action, December 2, 1981.) He criticized a Supreme Court decision barring states from eliminating public education for children of undocumented immigrants.(Memorandum from Carolyn B. Kuhl and John Roberts to the Attorney General re Plyler v. Doe- The Texas Illegal Aliens Case, June 15, 1982.) And he supported a narrow "program specific" interpretation of Title IX of the Civil Rights Act of 1964. (Memorandum from John Roberts to the Attorney General regarding University of Richmond v. Bell, August 31, 1982.) Later, while in the White House, Roberts sought to slow progress on combating discrimination in housing, arguing that the administration should "go slowly" on proposed fair housing legislation, claiming that such legislation represented "government intrusion." (Memorandum from John Roberts to Fred Fielding re Fair Housing, January 31, 1983.) He also indicated it was time to "reconsider the existence" of independent regulatory agencies, such as the FCC and the FTC, and instead place such power exclusively in the President's hands.

Viewed as a whole, the record suggests that Roberts is likely to place a higher value on property than on community, and is likely to view the Commerce Clause as hobbling the effective reach of the federal law and regulation. As such, John Roberts may have more in common with his namesake before Justice Roberts switched sides in 1937 than after that historic switch.