Testimony
United States Senate Committee on the Judiciary
Nomination of John G Roberts (Witness List for September 15)
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Mr. Chairman, members of the Committee, I am honored to be invited to testify before your Committee today on the subject of Judge John Roberts and his record on women's economic issues. I have followed and written about these issues for many years.

Currently I am a senior fellow at Hudson Institute, where I direct the Center for Economic Policy. From February 2003 until April 2005 I was chief economist at the U.S. Department of Labor. From 2001 until 2003 I served at the Council of Economic Advisers as chief of staff and special adviser. Previously, I was a resident fellow at the American Enterprise Institute.

Among the thousands of pages of Reagan-era documents released by the White House on Judge Roberts, one issue that has some observers concerned is his attitudes towards women. I believe that Judge Roberts's record is supportive of women, and that the policies he advocated are in women's best interests.

Women made extraordinary progress during President Reagan's presidency. President Reagan's goals of spurring economic growth by lowering taxes and reducing regulation were extremely popular, and he was reelected with over 60 percent of the vote in 1984. He received a mandate to lower individual taxes even further, and with the Tax Reform Act of 1986 the top rate fell to 28 percent. This caused the marginal income tax rate for the median family to fall from 24 percent in 1980 to 15 percent at the end of his presidency. For those at twice the median income, the marginal tax rate fell from 43 to 28 percent.

As taxes were reduced and regulations were made more efficient, the economy expanded. Women were some of the main beneficiaries of that economic growth. In the 1980s women moved into the workforce in increasing numbers, with the percent of adult women participating in the labor force rising from 51 to 58 percent. At the same time, unemployment rates for women fell from 6.4 to 4.9 percent. Women's salaries relative to men's grew faster than in any decade in U.S. history.

In education, women made vast strides. By 1990 women were earning over half of all BA and MA degrees. The percent of MBAs awarded to women grew from 22 to 34 percent. More women became doctors, and the percent of medical degrees awarded to women increased by over 10 percentage points, from 23 to 34 percent. The percentage of female dentistry graduates increased even faster, by almost 20 percentage points, from 13 to 31 percent. By 1990 women were earning 42 percent of law degrees, up from 30 percent in 1980.

Now, in 2005, the United States leads the industrialized world in job creation, and unemployment rates for both adult men and women, at 4.9 percent in August, are among the lowest. In contrast,

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unemployment rates for women in most other countries are far higher. Last July, the latest month for which comparable data are available, while American women had an unemployment rate of 5.2 percent, unemployment rates for women in the Eurozone were 10.1 percent; in France, 10.7 percent; in Germany, 10.2 percent; and in Spain, 12.4 percent. Only Japan and the UK had lower rates than the United States, and their economies are characterized by slower rates of GDP growth.

Even though women were so successful in the 1980s, some are concerned about Judge Roberts's views on comparable worth. Some believe, with the best of intentions, that if comparable worth had been implemented women would have made even more progress. That concern is misplaced: comparable worth is a thoroughly discredited economic concept.

Comparable worth does not mean equal pay for equal work, which is already law, and which is the principle that President Reagan and Judge Roberts supported. Instead, comparable worth signifies equal pay for entirely different jobs based on categories of employees determined by government officials. Comparable worth's supporters claim that it is unfair that some predominantly male occupations—such as sewer workers—are paid more than some predominantly female ones—such as clerical specialists.

As Judge Roberts correctly wrote, this amounts to "nothing less than central planning of the economy." For better or for worse, our economic system rewards American workers on the basis of how much the public values their service and is actually willing to pay for their service, not based on how much officials say it is worth.

Some support comparable worth because, 40 years after the Equal Pay Act, average full-time female workers' wages are about 80 percent of men's. However, this so-called wage gap is not necessarily due to discrimination. Within each job category, men and women with the same skills and experience are paid about the same for equal work, as required by law. Individuals who believe that they are being paid less than colleagues for the same work can and do sue.

Decisions about field of study, occupation, and time in the workforce can lead to lower compensation, both for men and women. Those who choose college majors in the humanities rather than in the sciences tend to earn less. Many women choose humanities majors, and will for that reason make less than both me and women who choose to major in computer science. On the other hand, those women who choose computer science and engineering have higher incomes than both men and women who major in the humanities.

Men and women who take time out of the workforce to look after children, and in order to do so choose jobs with fewer hours or more flexible schedules, frequently have lower incomes than those who stay in the workforce continuously and work longer hours. Some choose not to return to paid work, preferring to be homemakers. Employers naturally compensate workers who have taken time out of the work force less than workers who remain constantly in the work force, increasing their skills and their value to the employer. A choice of more time out of the workforce with less money rather than more time in the workforce with more income is not a social problem. A society that provides women with these choices, as does ours, is something to applaud.

One way to reduce the so-called wage gap further would be adopt comparable worth--mandate that occupations employing primarily men are paid the same as those with a majority of female workers. Some jobs command more than others because people are willing to pay more for them.

Many jobs are dirty and dangerous, such as oil drilling, construction work, mining, and roofing. Other highly paid occupations have long inflexible hours, such as truckers, plumbers, and electricians. According to data from the Bureau of Labor Statistics, these jobs are primarily performed by men. Women are not excluded from these or other jobs, but often select professions with a more pleasant environment and potentially more flexible schedules, such as teaching and office work. Many of these jobs pay less.

Proponents of wage guidelines, such as the National Committee on Pay Equity, cite approvingly on their websites examples of where comparable worth has been used. One example cited was in Hawaii in 1995, where nurses, mostly female, were given $11,500 annual raises to bring their salaries in line

with those of adult corrections workers, mostly male. But working conditions in prisons are far more dangerous and unpleasant than the atmosphere in hospitals. Another example cited was in Oregon, where female clerical specialists were given raises of over $7,000 a year to bring them in line with male senior sewer workers. Everyone, given a choice of working in an office or a sewer at the same salary, would choose the office. You have to pay people more to work with and in sewers.
Comparable worth has never been imposed on the private sector in the United States. The Sixth, Seventh, Ninth, and Tenth Circuits have all rejected comparable worth. Regardless of which party controlled Congress or the White House, Congress has never passed comparable worth legislation. Only a few state and local governments have chosen to implement wage guidelines on their public-sector workers. Most state and local governments have not adopted wage guidelines because they make no economic sense. Moreover, those governments that have adopted it incur additional costs. The extra funding for increased women's salaries comes from taxpayers and does not cause the governmental entity to go out of business. Requiring private businesses to adopt comparable worth would be far more detrimental in terms of firms either going out of business or relocating overseas. Women's progress in the 1980s would have been hampered by comparable worth. Comparable worth would have worked against women, because artificially high wages would have prevented them from being hired. When wages get too high, employers cut back on numbers of workers. Comparable worth assumes that workers cannot ever succeed in certain fields on their own.
Some observers have criticized Judge Roberts because they disagree with memoranda he wrote on Title IX and college athletics in the early 1980s. In particular, Judge Roberts wrote in 1982 that Title IX only applied to specific programs receiving Federal aid within an educational institution, and not to all the programs in that educational institution.
However, this was what Title IX required at the time, as corroborated by the Supreme Court in 1984 in Grove City College v Bell. The Supreme Court ruled that, under Title IX, only the program that actually received Federal funds, rather than the entire college or university, need comply with Title IX. As I describe in my book, The Feminist Dilemma: When Success Is Not Enough,
"The six to three opinion effectively prevented the Office of Civil Rights of the Department of Education from investigating a college athletic department for Title IX violations unless that department was the direct recipient of Federal funds, which most were not."

In writing about Title IX, Judge Roberts argued persuasively that the executive branch and regulatory agencies should comply with Congress's direction. He correctly wrote in a 1982 memo that "Congress elected to make the anti-discrimination provisions of Title IX program-specific, and the arguments properly rejected by the district court - - which we would repeat if we appealed - -would essentially nullify this limitation. The women's groups pressuring us to appeal would have regulatory agencies usurp power denied them by Congress to achieve an anti-discrimination goal."

A few years later Congress changed this law by passing the Civil Rights Restoration Act of 1987. The new law required that all programs had to comply with Title IX if the institution received any Federal money. Had this law been in place in 1982, Judge Roberts's memo would have been different. Judge Roberts was in a position where he was required to report on jurisprudence at the time, not in the future.
Wage guidelines and the wording of anti-discrimination laws are not a decision for judges, but for members of the Congress of the United States. It is members of Congress who decide on the laws and give the executive branch the authority to design and implement regulations. Therefore it would be up to you, Senators, to evaluate the costs and benefits of the issues discussed above. Should he be confirmed as Chief Justice, Judge Roberts's role would be to interpret laws and adjudicate disputes concerning laws you were to pass. Hence, his views on a wide range of issues have no effect on whether these ever become the law of the land.
All Americans, men and women, have made enormous progress because our country is governed by

the rule of law—laws that this august body writes. Fifty years ago, it was lawful to pay men and women different salaries for identical work. Today it is not lawful because of anti-discrimination laws, laws that Judge Roberts supported. Fifty years ago, it was lawful to have different job categories and different promotion criteria for men and women. Jobs were actually advertised in the newspaper with one salary for men and another for women. Today, such discrimination is rightfully unlawful. Laws were changed to protect women, not because individuals in the executive branch or the judiciary rewrote the laws, but because Congress rewrote the laws. In turn, the executive branch and judiciary implemented and interpreted the laws as written by Congress.

I have seen nothing in Judge Roberts's writings with respect to issues affecting women other than reverence and fealty for the law. That fealty to the law gives all Americans, including women, confidence that America will be governed by the rule of law. That is how we progressed in the past, and how we will continue to progress in the future.

Thank you for giving me the opportunity to appear before you today. I would be glad to answer any questions.