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Talk about Affirmative Action
John Roberts could make a big difference on the Court. □□

By Abigail Thernstrom & Stephan Thernstrom

Liberals immediately started to grouse about the civil-rights record of Judge John Roberts — if one can call it a "record." Pretty thin gruel, as they admit. "We have concerns about judge John G. Roberts mainly because we have very little information on his judicial philosophy with respect to the important issues of affirmative action, voting rights, and civil rights," Marc Morial, president of the National Urban League, has said. Nevertheless, on July 22, the *Boston Globe* reported that the nominee "has a history of working to roll back government affirmative action and voting rights programs enacted to help minorities overcome the effects of past discrimination . . . "

That "history" consists of a memo Roberts wrote as a 29-year-old lawyer in the White House counsel's office in which he argued for congressional power to prohibit busing on the ground that it "promotes segregation rather than remedying it, by precipitating white flight." And on another occasion, it's alleged, he provided aid in promoting "the Reagan administration's efforts to limit the circumstances under which minorities could bring voting-rights claims." (The *Boston Globe* again.)

But is the civil-rights community really ready to make a commitment to busing, a civil-rights litmus test, in 2005? It's a poster child for the failed domestic policies of the 1970s. As for the voting-rights charge, the issue in 1982 was not a reduction in voting-rights protections, but rather a proposed expansion, and the White House displayed a clear distaste for the entire fray. If Roberts expressed some doubts about amending the Voting Rights Act to further promote racially gerrymandered districts and segregated politics, well, good for him.

In 1981, Roberts was also on the "wrong" side of the affirmative-action debate. Racially preferential programs, he said, require "the recruiting of inadequately prepared candidates." Here is the core issue for the civil-rights groups, and they're probably right: Roberts will not be their guy.

Justice O'Connor, who wrote the majority opinion in the University of Michigan law-school case, was their gal. In the 2003 University of Michigan law-school case, she embraced "diversity" as a compelling state interest, and got four of her colleagues to sign on to racially preferential admissions that allegedly weighed individual applicant's "talents, experiences, and potential." In fact, individual review was reduced to racial identity as soon as it became clear that the number of black admits was looking low, but in her view (as Justice Souter recognized), the Constitution demanded only dishonesty. With her blessing, the law school simply concealed a race-driven admissions process that involved preferences actually greater than those given to undergraduate applicants — which the Court struck down in a separate ruling.

O'Connor did admit that preferences could not go on forever. But 25 more years, she reassuringly said, would be sufficient. The racial gap in academic achievement was closing, and there was every reason to expect that in another quarter of a century race-conscious admissions would have become unnecessary. Blacks will have caught up academically.

Her complacent optimism was criminally irresponsible. Since the late 1980s, the racial gap had not closed an inch — her claims to the contrary notwithstanding. And there were no good grounds for optimism. That still remains the case despite a bit of good news form the latest National Assessment for Educational Progress (NAEP) report. The civil-rights community that celebrates O'Connor is implicitly turning a blind eye to her casual deception — her indifference to the facts — on an issue that should be at the very center of a true civil-rights strategy. Does the Leadership Council on Civil Rights et al. really think it's noble to camouflage a catastrophic picture of black kids left behind with racial double standards in institutions of higher education?

Much has been made of the latest NAEP figures released in mid-July. Secretary of Education Margaret Spellings seized upon them as "proof positive" that No Child Left Behind (NCLB) is "working." "The gap is closing," she asserted.

NAEP is the nation's report card on education. While states have their own tests, it is the gold standard. Since the early 1970s when the data first became available, the results have consistently drawn an appalling picture of black and Hispanic youngsters in comparison to their white and Asian peers. At age 17, for instance, the typical black or Hispanic student has been scoring less well than at least 80 percent of his white classmates. Hispanic students have been doing somewhat better, but they, too, have been far behind their white and Asian classmates.□ □

NCLB promises to close the racial gap by 2014 — a daunting goal. When we compare the results just announced with those in 1999, indisputably there are grounds for modest cheer, although it's important to note that even more impressive progress had been made before 1988 and it did not last. At the moment, though, in both reading and math, the performance of black students is improving. But it was youngest age group that did the best. In reading, black nine-year-olds gained 14 points since the previous round of testing in 1999, and in math 13 points — the equivalent of a full grade level. For black thirteen-year-olds, the picture is more mixed: They scored 11 points higher in math, but in reading they gained only 6 points. (If their reading scores go up by the next round, perhaps we should credit Harry Potter, not the NCLB.)□ □

More striking and depressing is the lack of any progress in either reading or math on the part of black seventeen-year-olds. On average today, their math and reading levels are no higher than those of whites and Asians in the 8th grade. O'Connor's majority on the Court and her allies in the civil-rights community like racial double standards in admission to institutions of higher education; do they also like the high college-dropout rates of non-Asian minorities, and their low bar-exam passage rates? Both, of course, are the inevitable consequence of inadequate academic skills acquired in the K-12 years.

Harvard law professor Laurence H. Tribe has described O'Connor's style as pragmatic — case-by-case decision-making, governed by no clear principle applicable to future cases. Evidently, that's a plus in his view. He has contrasted that approach to Roberts's much greater interest in consistent legal standards. Let's hope he has Roberts right. The civil-rights community might like the bottom line in the Michigan law-school decision, but O'Connor's results-oriented jurisprudence, which has somehow acquired the label "moderate," has been a tragic disservice to its constituents. If Tribe is right, the president is making a significant change to the Court with the nomination of Judge Roberts, one we should all welcome.

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