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SENATORS MUST LEARN IF ROBERTS HAS OPEN, IMPARTIAL MIND

By Timothy J. Dowling

G.K. Chesterton once observed that "for a landlady considering a lodger, it is important to know his income, but still more important to know his philosophy." The lodger will be less likely to pay the rent if he is a solipsist. Even in the most mundane transactions, philosophy can be highly relevant.

Philosophy is, of course, all the more important in considering whether to confirm a nominee to the highest court in the land. Judge John Roberts' legal philosophy - not simply his view of what the law says but also his view of how the law should be developed - would affect everything he does on the court.

Does Roberts have an open and impartial mind that will apply the law fairly to the facts or a preconceived agenda he wants to impose by judicial fiat? That is the central issue. To discharge its constitutional advise-and-consent obligation, the Senate Judiciary Committee needs to ask probing questions designed to answer that question, lest the hearing degenerate into a inconsequential kabuki dance. From all accounts, the senators seem eager for a meaningful and penetrating exchange.

As someone who defends against legal challenges to environmental safeguards, land use laws, and other community protections, I look forward to an extensive examination of Roberts' legal philosophy, particularly his views on the Takings Clause and the Commerce Clause. Both of these areas offer the promise of illuminating and highly relevant inquiry.

On regulatory takings, Roberts deserves credit for the victory he secured as lead counsel for the government in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). The *Tahoe* court not only upheld the 32-month planning moratorium imposed to protect Lake Tahoe from the ravages of overdevelopment but also dealt a death blow to some of the most extreme theories being pushed by the so-called property rights movement.

Roberts' work in *Tahoe*, however, should not excuse him from having to answer other questions on regulatory takings. For example, the court repeatedly has stated that a regulation works a taking only where it constitutes the "functional equivalent" of an expropriation.

Does Roberts agree that a regulation's economic impact on the landowner must be extremely high before the law constitutes the functional equivalent of an expropriation and thus works a taking? Does he believe that the narrow text and original understanding of the Takings Clause should serve as a significant check on expansive theories of takings liability?

Roberts' 1978 student note for the Harvard Law Review on takings understandably provides little insight into his views on these important issues. Because the public debate on regulatory takings includes radical positions that would undermine a broad swath of environmental protections and other safeguards, the Senate should press hard to determine whether Roberts' views fall within the mainstream.

California's endangered arroyo toad ("bufo californicus") has guaranteed that the Commerce Clause will be the subject of thorough questioning by the Senate. Federal protections for the toad gave rise to *Rancho Viejo v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), a Commerce Clause challenge to those protections as applied to a large-scale housing development that threatened the toad's habitat and continued existence. A

three-judge panel unanimously rejected the challenge because the proposed development plainly would have a substantial effect on interstate commerce.

When the full District of Columbia Circuit denied rehearing (334 F.3d 1158), Roberts wrote a dissent that criticized the panel for focusing on the regulated entity's activity (residential development) as opposed to the specific conduct regulated by the challenged law (harm to the species). Roberts viewed the panel's approach as in tension with Supreme Court precedent and in direct conflict with the analysis of another federal appeals court.

In an often-quoted line that typifies Roberts' sometimes-mordant writing style, he questioned whether Congress' power to regulate interstate commerce extends to "a hapless toad that, for reasons of its own, lives its entire life in California." Roberts noted, however, that he remains open to alternative theories of why Commerce Clause authority extends to the toad and similar intrastate species.

Some have overreacted to the dissent. At the recent annual convention of the American Constitution Society, Harvard Law professor Laurence Tribe suggested that Roberts' views might pose a serious threat to U.S. efforts to address global warming. This criticism appears to be sheer histrionics, given the clear and substantial connections between interstate commercial activity and global warming.

But still, *Rancho Viejo* raises significant issues that should be explored. A dissent from a denial of rehearing is relatively rare and sometimes reflects more than mere disagreement, in fact an affirmative desire to reshape the law.

In Commerce Clause challenges, an activist judge often could define the challenged activity so narrowly as to eliminate any chance of showing the requisite connection to interstate commerce. The Senate should determine how Roberts would analyze these cases generally, how he would define the activity to be examined, and whether his views as set forth in *Rancho Viejo* have changed since the Supreme Court's more-accommodating ruling in the medical-marijuana case, *Gonzales v. Raich*, 125 S.Ct. 2195 (2005).

Roberts' view of stare decisis also is critical. If a prior case was decided wrongly, how would Roberts balance that error against societal expectations and reliance interests that have arisen since the ruling?

Justice Clarence Thomas insisted he would respect precedent, but he has shown singular affection for revisiting long-settled doctrine. Can Roberts demonstrate that his professed commitment to stare decisis is not lip service, yet explain how to keep profoundly unjust results from becoming frozen in the law?

In considering these and other questions, Roberts' paper trail should be viewed together with other relevant evidence, including the testimony of those who have worked with him daily in government service and private practice. The message from those who know Roberts well, including those who disagree with his politics and expect to disagree with many of his rulings, is that he will give every litigant a fair hearing and will approach each case with an open mind. They tell us he is not an ideologue but a judge whose love of the law, qua law, will ensure a proper respect for it.

A letter from 150 members of the District of Columbia bar, reflecting a wide range of political views, hails Roberts' "unquestioned integrity and fair-mindedness." Former colleagues at the solicitor general's office insist that, during his four years of service as a political appointee, Roberts "was attentive and respectful of all views" and "had the deepest respect for legal principles and legal precedent."

Just a couple weeks ago, more evidence came in. The former head of the pro bono department at Roberts' former law firm provided this glowing report of his assistance on the landmark gay-rights case, *Romer v. Evans*: "Roberts didn't hesitate. And it's illustrative of his open-mindedness, his fair-mindedness. He did a brilliant job." *Romer* involved a challenge to a Colorado constitutional amendment that prohibited any state or local laws protecting gays from discrimination. The lead lawyer for the gay rights activists on the case, former Colorado Supreme Court Justice Jean Dubofsky, hailed Roberts' contribution as "terrifically helpful" and "absolutely crucial" to the cause.

The salient point here is not so much whether Roberts advanced positions seemingly at odds with a conservative political or legal philosophy or whether his contributions were routine for a partner at a large, collegial law firm. Rather, he approaches his work in a way that inspires progressives and moderates to heap praise on him based on their professional and personal experiences, hardly the reaction one would expect if he were a rigid ideologue. These kudos should be weighed in the balance.

The review of recently released documents from the early portion of Roberts' career undoubtedly will disclose other areas that warrant examination at the Senate hearing, including statements by Roberts on voting rights and civil rights that many find troubling. These documents appear unlikely, however, to contain a disqualifying smoking gun.

Even as a youth, he appears to have chosen his words rather carefully.

For instance, no one has found any incautious suggestion, like those frequently voiced by conservative fringe groups, calling for the impeachment of a particular justice. Nor has anyone unearthed a sinister reference to a political adversary. (It would be a better world if everyone's paper trail was as clean on this score).

In coming weeks, the spotlight will shift to the Senate Judiciary Committee. Roberts' burden at the hearing will be to show that the accolades from his former colleagues accurately reflect a legal philosophy that will yield a reasonable application of the law, not the improper imposition of personal policy preferences from the bench.

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