Roberts at 10:

Turning Back the Clock on Protections for Racial Equality

By David H. Gans

I. Overview

Chief Justices typically have a signature issue that dominates their tenure on the Supreme Court. Chief Justice Earl Warren's was ending Jim Crow, Warren Burger's was scaling back the protections of criminal procedure rulings such as *Miranda v. Arizona*[1] and *Mapp v. Ohio*,[2] and William Rehnquist's was reinvigorating federalism and establishing new limits on the power of Congress. John Roberts's signature issue – at least so far – is striking down or limiting policies and legal protections designed to foster equality and redress our nation's history of racial discrimination. This snapshot—the latest in our yearlong examination of Roberts's first decade as Chief Justice—examines Chief Justice Roberts's jurisprudence on race.[3]

For the last two decades, conservatives on the Supreme Court have been waging a war on affirmative action and other race-conscious remedies. In their view, the Equal Protection Clause of the Fourteenth Amendment requires the government to be colorblind, forbidding not only Jim Crow segregation, but also affirmative action programs that seek to overcome the legacy of that segregation. Since joining the Supreme Court in 2005, Chief Justice Roberts has become the leading voice for these views, famously stating that the Fourteenth Amendment requires colorblindness by the government and that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[4]

Roberts has proclaimed that any racial discrimination is too much, but as Chief Justice, he has repeatedly voted to strike down or limit basic federal civil rights protections designed to enforce the Constitution's promise of equality for all persons regardless of race. Roberts wrote the opinion in *Shelby County v. Holder*,[5] a 5-4 ruling that held unconstitutional one of the most important and successful provisions of the Voting Rights Act, ignoring the fact that the Constitution gives Congress the power to enact measures to protect the right to vote free from racial discrimination. In other 5-4 cases, Roberts has joined majority opinions that limited the

[1] 384 U.S. 436 (1966).
[2] 367 U.S. 643 (1961).
[3] The cases discussed in this snapshot cut across a number of different areas of law, including the meaning of the constitutional guarantee of equal protection, the scope of Congress's power to enforce the guarantees of the Fourteenth and Fifteenth Amendments, and the interpretation of federal civil rights statutes designed to enforce constitutional guarantees of racial equality. What unites them is Chief Justice Roberts's effort to turn back the clock on protections for civil rights and limit the authority of government to redress our nation's long and shameful history of racial discrimination.
[4] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).
[5] 133 S. Ct. 2612 (2013).

scope of protections against racial discrimination.[6] And in notable 5-4 cases that *expanded* civil rights protections, Roberts has dissented.[7] This is not to say that the Chief Justice has never voted to uphold claims of racial discrimination by minority plaintiffs.[8] But the thrust of his jurisprudence is clear: Roberts has consistently voted to strike down laws that use race to help foster equality, while giving a narrow reading to Congress's power to enforce the Reconstruction Amendments and to foundational civil rights statutes enacted pursuant to those Amendments.

Roberts's efforts to turn back the clock on protections for racial equality is apparent not only from the substance of his opinions, but also in the Court's case selection process. In most areas of the law, the Justices get involved only when there is conflict among lower courts, or when a federal statute has been declared unconstitutional. But that has not been the pattern in the Roberts's Court's race cases. In almost all of the biggest decisions of the Roberts Court in this area, the Justices have granted review when the lower courts, following settled Supreme Court precedent, were in complete agreement. In short, this is an area in which, year after year, the Roberts Court has repeatedly taken cases in order to make new law.

This Term is no exception. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*,[9] the Justices have agreed to decide whether the Fair Housing Act, like other federal civil rights laws, allows civil rights plaintiffs to challenge government action that is fair in form, but discriminatory in operation. All eleven Circuit Courts of Appeals that have considered the question have held that it does, but, despite this unanimity, the Supreme Court has granted review. Indeed, the *Inclusive Communities* case is the third case in three years in which the Court has granted review to resolve the question.[10] Clearly, this is a question the Justices – or at least four of them – very badly want to decide.

To anyone who has followed the career of John Roberts, his effort as Chief Justice to rewrite legal protections and civil rights laws designed to redress our nation's long history of racial discrimination should come as no surprise. As an attorney in the Reagan Administration, Roberts was a fierce foe of affirmative action as well as of efforts to strengthen the Voting Rights Act and other civil rights statutes. In the early 1980s, Roberts wrote that the "effect of

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[6] *See, e.g.*, Bartlett v. Strickland, 556 U.S. 1 (2009) (Voting Rights Act); Vance v. Ball State Univ., 133 S. Ct. 2434 (2013) (Title VII); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013) (same).

[7] *See, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) (Voting Rights Act); Dorsey v. United States, 132 S. Ct. 2321 (2012) (Fair Sentencing Act).

[8] Snyder v. Louisiana, 552 U.S. 442 (2008) (Roberts joined 7-2 opinion finding racial discrimination in exercise of peremptory challenges); CBOCS W., Inc. v. Humphries, 553 U.S. 442 (2008) (Roberts joined 7-2 majority opinion recognizing race-based retaliation claims under Reconstruction-era civil rights law); Lewis v. City of Chicago, 560 U.S. 205 (2010) (Roberts joined unanimous opinion reversing dismissal of disparate impact claim on statute of limitations grounds).

[9] No. 13-1371 (U.S. argued Jan. 21, 2015).

[10] The two earlier cases, *Magner v. Gallagher*, 132 S. Ct. 1306 (2012) (mem.), *cert. dismissed*, and *Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 134 S. Ct. 636 (2013) (mem.), *cert. dismissed*, settled before the Justices had heard oral argument.

race-conscious remedies" was "reverse discrimination."[11] Roberts opposed the use of a results test in the Voting Rights Act, arguing that a focus on discriminatory impact would result in a "drastic alteration of local government affairs,"[12] and characterized the Fair Housing Act as a form of "[g]overnment intrusion" that "quite literally hits much closer to home in this area than in any other civil rights area."[13]

Now as Chief Justice, Roberts has consistently worked to move the law to the right, aiming to get the government out of the business of redressing our nation's long history of racial discrimination. Chief Justice Roberts authored the 5-4 opinion in *Shelby County* striking down a core provision of the Voting Rights Act, but in other areas, the Chief Justice hasn't always been able to bring his conservative colleagues together to rollback protections for equality. Most notably, in *Fisher v. University of Texas*,[14] which was billed as a major test of affirmative action in university admissions, the Justices issued a narrow 7-1 ruling and, most important, did not disturb the principle that universities may use race as one factor among many in choosing a diverse student body. This Term, as the Justices consider whether to discard disparate impact liability in the *Inclusive Communities* case, the big question is whether the Fair Housing Act will be the next casualty of Chief Justice Roberts's effort to gut key civil rights protections that have ensured equal opportunities for millions of Americans.

II. The Attack on Affirmative Action and Other Race-Conscious Remedies

During John Roberts's first Term as Chief Justice, the Supreme Court considered *Parents Involved in Community Schools v. Seattle School Dist.,* together with a companion case from Louisville, Kentucky, a challenge to efforts by local public school districts to prevent racial isolation in their schools. Supreme Court precedent had long recognized the authority of public schools to act on a voluntary basis to promote racial integration,[15] and the lower federal courts were united in upholding policies such as those employed by Seattle and Louisville. Nevertheless, aiming to change the law, the Supreme Court, newly under Roberts's leadership, granted review in June 2006. Reflecting the high stakes and sharp divide over the cases, the Justices conferenced the Louisville case seven times and the Seattle case six times before agreeing to hear them.[16]

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[11] *See* Linda Greenhouse, *A Tale of Two Justices*, 11 GREEN BAG 2d 37, 44 (Autumn 2007) (quoting Seth Stern, *Civil Rights Groups, Democrats Assail Roberts' Record on the Issue*, CONG. Q. TODAY, Sept. 12, 2005).

[12] Memo from John G. Roberts to Wm. Bradford Reynolds 15 (Feb. 23, 1982), *available at* http://www.archives.gov/news/john-roberts/accession-60-88-0498/016-voting-rights/folder016.pdf; Richard L. Hasen, *Roberts' Iffy Support for Voting Rights*, L.A. TIMES, Aug. 3, 2005, http://articles.latimes.com/2005/aug/03/opinion/oe-hasen3.

[13] *See* Memo from John G. Roberts to Fred F. Fielding (Jan. 31, 1983), *available at* http://media.washingtonpost.com/wp-srv/politics/documents/fairhousing.pdf.

[14] 133 S. Ct. 2411 (2013).

[15] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

[16] Supreme Court Docket, Meredith v. Jefferson Cnty. Bd. of Educ., 551 U.S. 701 (2007) (No. 05-915), http://www.supremecourt.gov/search.aspx?filename=/docketfiles/05-915.htm; Supreme Court Docket, *Parents*

Bitter divisions among the Justices were very much on display in June 2007, when Chief Justice Roberts announced the plurality opinion striking down the Seattle and Louisville plans. The core of Roberts's opinion was that efforts to use race, even modestly, to help ensure racial integration of schools was no less a violation of the Equal Protection Clause than the Jim Crow segregation invalidated in *Brown v. Board of Education*.[17] According to Roberts, "when it comes to using race to assign children to schools, history will be heard. . . . Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again – even for very different reasons."[18] In Roberts's view, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[19] That phrasing wasn't original to Chief Justice Roberts,[20] but it succinctly laid out the Chief Justice's view that the Fourteenth Amendment strictly forbids the use of race by the government.

Justice Kennedy provided a fifth vote for the judgment striking down the school districts' plans, agreeing that the school districts had failed to justify the use of race under strict scrutiny. But he disagreed sharply with Roberts's colorblind constitutional vision. Justice Kennedy wrote that

> "The plurality's postulate that '[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race' is not sufficient to decide these cases. Fifty years of experience since *Brown* . . . should teach us that the problem before us defies so easy a solution. School districts can seek to reach *Brown*'s objective of equal educational opportunity. . . . To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken."[21]

In this regard, Justice Kennedy had much in common with the dissenters, who argued that the Chief Justice's wooden reading of *Brown* was a "cruel irony"[22] that "undermines *Brown's* promise of integrated primary and secondary education" and of "true racial equality –

Involved in Cmty. Schs., 551 U.S. 701 (No. 05-908), http://www.supremecourt.gov/search.aspx?filename=/docketfiles/05-908.htm.

[17] 347 U.S. 483 (1954).

[18] *Parents Involved in Cmty. Schs.*, 551 U.S. at 746, 747.

[19] *Id.* at 748.

[20] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1222 (9th Cir. 2005) (en banc) (Bea, J., dissenting) ("The way to end racial discrimination is to stop discriminating by race."), *rev'd and remanded*, 551 U.S. 701 (2007)

[21] *Parents Involved in Cmty. Schs.*, 551 U.S. at 788 (Kennedy, J., concurring) (internal citations omitted).

[22] *Id.* at 798 (Stevens, J., dissenting).

not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools."[23]

In 2009, in *Ricci v. DeStefano*,[24] again granting review in the absence of a disagreement among the Courts of Appeals, the Supreme Court, by a 5-4 vote, held that the City of New Haven had violated Title VII of the Civil Rights Act in refusing to certify the results of exams used to decide promotions for firefighters on the basis that those tests had a disparate impact on African American firefighters. Chief Justice Roberts joined Justice Kennedy's opinion for a five-Justice majority, which concluded that "the City chose not to certify the examination results because of the statistical disparity based on race" and that "this express, race-based decisionmaking violates Title VII's command that employers cannot take adverse employment actions because of an individual's race."[25] Four Justices filed a bitter dissent, arguing that the majority had erred in treating the City's decision to discard a test it found flawed as a form of racial discrimination. "Observance of Title VII's disparate impact provision," Justice Ruth Bader Ginsburg explained, "calls for no racial preference, absolute or otherwise. The very purpose of the provision is to ensure that individuals are hired and promoted based on qualifications manifestly necessary to successful performance of the job in question, qualifications that do not screen out members of any race."[26]

Ricci undoubtedly moved the law to the right, but its holding was quite narrow, turning on the fact that the City, after administering the test, had "rejected the test results solely because the higher scoring candidates were white," thus "upsetting an employee's legitimate expectation not to be judged on the basis of race."[27] The majority conceded that "Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race."[28] Importantly, it reaffirmed that "Congress has imposed liability on employers for unintentional discrimination in order to rid the workplace of 'practices that are fair in form, but discriminatory in operation.'"[29]

The next case provided Roberts with the chance to strike a major blow against affirmative action, but it was not to be. In 2012, the Court agreed to hear Abigail Fisher's challenge to the University of Texas's policy of using race as one factor among many in choosing a diverse student body. In its 1978 ruling in *Regents of the University of California v. Bakke* and its 2003 ruling in *Grutter v. Bollinger*,[30] the Court had permitted universities to use race in this modest way. Granting review again in the absence of a division among the lower courts, the

[23] *Id.* at 803, 867 (Breyer, J., dissenting).
[24] 557 U.S. 557 (2009).
[25] *Id.* at 579.
[26] *Id.* at 628 (Ginsburg, J., dissenting).
[27] *Id.* at 580, 585.
[28] *Id.* at 585.
[29] *Id.* at 583 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).
[30] 438 U.S. 265 (1978); 539 U.S. 306 (2003).

Justices in *Fisher* set the stage for what looked to be a major ruling curbing the use of race in university admissions.

During oral argument, Chief Justice Roberts and others had been pointed in their questioning of the University's lawyer, suggesting that there was no logical end point to the University's use of race.[31] The Chief Justice, in particular, took aim at the University's claim that it could use race as one factor among many in admitting a critical mass of racial minorities. That standard was too undefined, Roberts suggested, and would make it impossible for judges to perform a proper strict scrutiny analysis.[32] But at the end of the day, Justice Kennedy backed off, and the case was decided on the narrow ground that the appeals court had failed to apply strict scrutiny properly; the case was sent back to the lower courts for "a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications."[33]

According to reporting by Joan Biskupic, after oral argument in *Fisher*, the Justices were divided 5-3 in favor of striking down the University of Texas's policy, and Chief Justice Roberts assigned the writing of the majority opinion to Justice Kennedy, hoping to keep Justice Kennedy in the fold.[34] But after Justice Sonia Sotomayor circulated a blistering dissent taking the majority to task for gutting prior precedent, the initial division fell apart. As Biskupic reports, Justice Kennedy rewrote his majority opinion, and ultimately seven justices, including both Chief Justice Roberts and Justice Sotomayor, signed on to his opinion, which slightly toughened the strict scrutiny analysis while leaving in place longstanding precedent permitting universities to take race into account in selecting a diverse student body.[35] While *Fisher* offered something for everyone, the Court's 7-1 opinion, with Justice Kagan not participating, would not be a vehicle for sharply limiting the use of race in university admissions.

Finally, in 2014, in *Schuette v. Coalition to Defend Affirmative Action*,[36] Chief Justice Roberts joined Justice Kennedy's plurality opinion upholding the constitutionality of a Michigan state constitutional amendment approved by the voters that prohibited affirmative action in public education as well as in a number of other contexts. Rejecting the argument that the amendment constricted the political process, Justice Kennedy found that "[t]here is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters."[37] Chief Justice Roberts filed a concurring opinion, responding to Justice Sotomayor's dissent. Roberts emphasized that reasonable people may think that racial "preferences do more harm than

[31] Transcript of Oral Argument at 47, *Fisher*, 133 S. Ct. 2411 (No. 11-345), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-345.pdf.
[32] *Id.* at 39, 46.
[33] *Fisher*, 133 S. Ct. at 2420.
[34] *See* JOAN BISKUPIC, BREAKING IN: THE RISE OF SONIA SOTOMAYOR AND THE POLITICS OF JUSTICE 200-06 (2014).
[35] *Id.* at 206-09.
[36] 134 S. Ct. 1623 (2014).
[37] *Id.* at 1638.

good" and that "[t]o disagree with the dissent's views on the costs and benefits of racial preferences is not to 'wish away, rather than confront' racial inequality."[38]

Chief Justice Roberts may still have the opportunity to do away with laws and policies that allow the use of race to help foster equality and ensure much needed diversity in universities. On remand from the Supreme Court, the Fifth Circuit once again dismissed Abigail Fisher's case, finding strict scrutiny satisfied,[39] and her attorneys have again sought Supreme Court review.[40] But it is striking that almost a decade after declaring that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race," Chief Justice Roberts has only succeeded in tinkering around the margins of the basic law in this area. *Bakke* and *Grutter* are still very much intact precedents. After nearly a decade as Chief Justice, Roberts is still searching for a fifth vote to strike a decisive blow against affirmative action and other race-conscious policies. By contrast, Roberts has been much more successful in his efforts to roll back civil rights laws. The next section examines those cases.

III. Rewriting Civil Rights Law

While Chief Justice Roberts has argued for absolute colorblindness as a constitutional rule in affirmative action cases, he has waged a campaign to limit basic civil rights protections that help enforce our Constitution's promise of equality. During the Reagan Administration, Roberts was a persistent critic of key federal civil rights laws, such as the Voting Rights Act and the Fair Housing Act, designed to ensure equal opportunities for all Americans regardless of race. As Chief Justice, Roberts has repeatedly voted to limit important civil rights protections.

When John Roberts testified before the Senate Judiciary Committee at his Supreme Court confirmation hearing in September 2005, he was already laying the groundwork to gut the Voting Rights Act. Roberts testified that the "existing Voting Rights Act" had been upheld as constitutional, but cautioned that other constitutional questions "would be raised if the Voting Rights Act were extended," and specifically took pains to avoid answering those questions.[41] "[S]ince those questions might well come before the Court, I do need to exercise caution on that."[42]

Early in his tenure as Chief Justice, Roberts began to answer those questions. In 2009, observing that "[t]hings have changed in the South," Roberts wrote in *Northwest Austin Municipal Utility District Number One v. Holder*[43] that the Voting Rights Act, as extended by

[38] *Id.* at 1639 (Roberts, C.J., concurring) (quoting *id.* at 1676 (Sotomayor, J., dissenting)).
[39] Fisher v. Univ. of Tex. at Austin, 758 F.3d 633 (5th Cir. 2014).
[40] Petition for a Writ of Certiorari, *Fisher v. Univ. of Tex. at Austin*, No. 14-981 (U.S. Feb. 10, 2015), *available at* http://lyldenlawnews.com/wp-content/uploads/2015/02/Fisher-II-cert-petition-2-10-15.pdf.
[41] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 169 (2005), *available at* http://www.gpo.gov/fdsys/pkg/GPO-CHRG-ROBERTS/content-detail.html.
[42] *Id*.
[43] 557 U.S. 193, 202 (2009).

Congress in 2006 in a lopsided bipartisan vote, posed serious constitutional problems, but avoided deciding the constitutionality of the 2006 renewal of the Act. Four years later, in *Shelby County v. Holder*, Roberts wrote the 5-4 majority opinion striking down Congress's 2006 renewal of the Voting Rights Act's preclearance requirement.[44] As in *Parents Involved*, *Ricci*, and *Fisher*, the Court weighed in despite the lack of any disagreement among the lower courts. This was an area in which Roberts and his conservative colleagues wanted to rewrite the law.

In striking down a core part of the Voting Rights Act, Roberts concluded that the Act had been a victim of its own success. As he observed in *Shelby County*, "50 years later, things have changed dramatically."[45] Characterizing the preclearance requirement of the Voting Rights Act as "'extraordinary legislation otherwise unfamiliar to our federal system,'"[46] Roberts's majority opinion held that the preclearance requirement was unconstitutional without an updated coverage formula. The Fifteenth Amendment, Roberts wrote, did not justify the Act, since that "Amendment is not designed to punish for the past; its purpose is to ensure a better future."[47] In a blistering dissent, Justice Ginsburg took the majority to task for turning a blind eye to the Constitution, which "vests broad power in Congress to protect the right to vote, and in particular to combat racial discrimination in voting," and to Congress's own record, which demonstrated that "preclearance was still having a substantial real-world effect, having stopped hundreds of discriminatory voting changes in the covered jurisdictions since the last reauthorization."[48] As Ginsburg remarked, "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[49]

While *Shelby County* is undoubtedly the biggest civil rights ruling of Chief Justice Roberts's first nine years on the Court, it is not the only one that has placed new obstacles in the path of civil rights plaintiffs. Roberts has also joined majority opinions in a number of closely divided 5-4 cases significantly narrowing the reach of federal civil rights laws. In 2009, in *Bartlett v. Strickland*, Roberts joined Justice Kennedy's plurality opinion, which held that the Voting Rights Act's nationwide prohibition against discriminatory results does not protect cross-over districts in which minority voters, together with other voters, have the opportunity to elect their preferred candidate of choice. Recognizing cross-over districts, the plurality wrote, would grant "special protection to a minority group's right to form political coalitions" and would enmesh courts in complicated questions about the role of race in politics, "requir[ing] courts to make inquiries based on racial classifications and race-based predictions."[50] The

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[44] For our earlier snapshot discussing these cases, see David H. Gans, *Roberts at 10: Campaign Finance and Voting Rights: Easier to Donate, Harder to Vote*, CONSTITUTIONAL ACCOUNTABILITY CTR. (Nov. 11, 2014), http://theusconstitution.org/sites/default/files/briefs/Roberts-at-10-Easier-to-Donate-Harder-to-Vote.pdf.
[45] *Shelby Cnty.*, 133 S. Ct. at 2625.
[46] *Id.* at 2624, 2628 (quoting *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 211).
[47] *Id.* at 2629.
[48] *Id*. at 2638, 2651 (Ginsburg, J., dissenting).
[49] *Id.* at 2650 (Ginsburg, J., dissenting).
[50] *Strickland*, 556 U.S. at 15, 18.

dissenters argued that the plurality's rejection of crossover districts turned the Voting Rights Act on its head and "severely undermin[ed] the statute's estimable aim."[51] "States will be required . . . to pack black voters into additional majority-minority districts, contracting the number of districts where racial minorities are having success in transcending racial divisions in securing their preferred representation."[52]

In 2013, Chief Justice Roberts joined Justice Kennedy's majority opinion in *University of Texas Southwestern Medical Center v. Nassar*, which imposed a higher standard of causation on civil rights plaintiffs seeking to prove that they had faced retaliation for complaining about workplace discrimination. Anything else than a strict but-for standard of causation, the majority argued, could "contribute to the filing of frivolous claims" and "raise the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent."[53] On the same day, Chief Justice Roberts also joined Justice Samuel Alito's opinion in *Vance v. Ball State University*, which adopted a narrow legal definition of a "supervisor" and made it harder for minorities and women to sue their employers for workplace harassment. Justice Ginsburg issued vehement dissents in both cases, stating that the majority's reasoning "lacks sensitivity to the realities of life at work," "appears driven by a zeal to reduce the number of retaliation claims filed against employers," and "disserves the objective of Title VII to prevent discrimination from infecting the Nation's workplaces."[54] She called on Congress "to restore the robust protections against workplace harassment the Court weakens today."[55]

The next front on Roberts's campaign to limit civil rights laws is disparate impact liability. For decades, disparate impact liability has been a critical tool to ensuring that the Constitution's promise of equality extends to all persons regardless of race. First recognized by the Supreme Court in 1971, the right to bring suit to challenge laws that have an unjustified disparate impact on minority groups has been recognized as a critical protection of equality of opportunity under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Voting Rights Act.[56] Despite these decades of precedent and the unanimous view of the federal Courts of Appeal, the Roberts Court has granted review – on three separate occasions – to decide whether the Fair Housing Act, like other federal civil rights laws, provides for disparate impact liability.

If Roberts's questions at oral argument in January in *Inclusive Communities* are any indication, he is one of the Justices looking to eliminate disparate impact liability, at least in the fair housing context. In his questioning, Roberts suggested that the possibility of disparate

[51] *Id.* at 44 (Ginsburg, J., dissenting).
[52] *Id.* at 27 (Souter, J., dissenting).
[53] *Nassar,* 133 S. Ct. at 2531, 2532.
[54] *Id.* at 2547 (Ginsburg, J., dissenting); *Vance*, 133 S. Ct. at 2455 (Ginsburg, J., dissenting).
[55] *Id.* at 2466 (Ginsburg, J., dissenting).
[56] *Griggs*, 401 U.S. 424 (Title VII); Thornburg v. Gingles, 478 U.S. 30 (1986) (Voting Rights Act); Smith v. City of Jackson, Miss., 544 U.S. 228 (2005) (ADEA).

impact liability would force the government to take special account of race, pressing the plaintiffs' lawyer to explain how the state could "avoid a disparate-impact consequence without taking race into account in carrying out the governmental activity."[57] In Roberts's view, under a disparate impact standard, "you have to look at the race until you get whatever you regard as the right target."[58] Roberts also expressed concern that there was no principled way to decide what constitutes a disparate impact, stressing that "[y]ou've got to know what you're shooting at before you can tell if you've missed."[59] Chief Justice Roberts repeatedly asked the Solicitor General whether, under the disparate impact standard, the government would give a preference to housing in low-income areas, where many minorities reside, or to housing in a more affluent area, which could help promote integration.[60] As Roberts observed, "one concern about disparate impact is that it's very difficult to decide what impact is – is good and bad."[61]

But Justice Scalia, together with the Court's liberal Justices, seemed to indicate that the Fair Housing Act, in its text, provided for disparate impact liability. Early in the oral argument, Justice Scalia pointedly observed that "Congress seemingly acknowledged the effects test in later legislation when it said that certain effects will not qualify."[62] Emphasizing the text and nothing but the text, Scalia commented "[w]ell, . . . why doesn't that kill your case? I mean, when we look at a – a provision of law, we look at the entire provision of law, including later amendments. We try to make sense of the law as a whole."[63] In past cases, Justice Scalia has been a harsh critic of disparate impact liability, but his questioning during oral argument in *Inclusive Communities* suggested that his vote was very much in play. If Justice Scalia votes to affirm that the Fair Housing Act permits disparate impact claims, it would certainly be a decisive setback to Chief Justice Roberts's efforts to limit civil rights protections.

IV. Conclusion

When John Roberts was nominated to the Court, there was significant concern about his civil rights record. As a member of the Reagan Justice Department, Roberts had taken aim at basic policies and protections – from affirmative action to disparate impact liability – designed to help ensure equality of opportunity. He's now done the same as Chief Justice. Over the course of his tenure on the Court, Roberts has sought to move the law sharply to the right, always on the lookout for vehicles to make clear that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,"[64] and to cut back on civil rights laws

[57] Transcript of Oral Arg. at 30, *Inclusive Cmtys. Project, Inc.*, No. 13-1371 (U.S. Jan. 21, 2015), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-1371_g4ek.pdf.
[58] *Id.*
[59] *Id.* at 42.
[60] *Id.* at 39-42.
[61] *Id.* at 39.
[62] *Id.* at 9.
[63] *Id.* at 10.
[64] *Parents Involved in Cmty. Schs.*, 551 U.S. at 748.

designed to redress our nation's long history of racial discrimination. Roberts hasn't always been able to bring his conservative colleagues together to rollback protections for equality, but given his jurisprudence to date, this goal appears to remain central to his mission as Chief Justice. When all is said and done, there is little doubt that John Roberts's legacy on matters of race will be one of trying, and, in substantial part, succeeding in, rolling back the clock on protections for equal opportunity.