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Roberts, misjudged

By Abigail Thernstrom

CIVIL RIGHTS GROUPS are trying their best to get Americans exercised about Supreme Court nominee John Roberts - or rather, about views he expressed more than 20 years ago as a young lawyer in the office of then-Atty. Gen. William French Smith.

Of particular interest are the memos he wrote on the revision of the Voting Rights Act in 1982. A key part of the statute is up for reauthorization, and congressional action will probably be followed by litigation. Litigation means a potential Supreme Court case - in which a Justice Roberts might cast a crucial vote.

In the early 1980s, Roberts had a "rather cramped view" of the Voting Rights Act, Sen. Edward M. Kennedy (D-Mass.) has charged. The description is being echoed by civil rights groups and voices in the media. But it's hard to see the charge becoming a political winner: Roberts' beliefs two decades ago are precisely those of most Americans today, polling data suggest.

Most of the Voting Rights Act is permanent; a few provisions are temporary. Those temporary sections were passed on an emergency basis and they have been repeatedly extended. When they came up for renewal in 1982, the act was changed to give blacks and Latinos more leverage in challenging certain methods of election that allegedly reduced minority political power.

The debate over that change is eye-glazingly complicated. But the bottom line is this: Until the 1982 change, plaintiffs could only attack decades-old methods of voting by resting their claims on the Constitution. And that meant, said the Supreme Court in 1980, that they had to show discriminatory intent.

For instance, civil rights groups were eager to get rid of long-standing citywide voting for political offices and substitute district representation - with an eye to the districts' racial composition - to ensure minority elected officials. But having to follow the Supreme Court's ruling, civil rights groups argued, required explicit evidence of discriminatory intent behind an electoral structure , which was too difficult to show.

The solution, they successfully argued, was to have Congress rewrite the Voting Rights Act so that demonstrating a discriminatory *result* would suffice to invalidate an election method.

SO HOW does this relate to Roberts? According to one civil rights group, the Alliance for Justice, "Judge Roberts participated in the Reagan administration's efforts to defeat widely supported congressional efforts to extend voting rights protections." It's a rather

humorous reading of the facts - not to mention a too-simple rendition of Roberts' position.

The Reagan administration, knowing that any critique of "voting rights" was politically dangerous, tried its best to hide from the debate. By the time it weighed in, congressional consideration of the matter had already been underway for seven months and it was too late to even frame the issues.

Behind the scenes, Roberts *was* frustrated. On Dec. 22, 1981, he wrote a memo noting that "Brad Reynolds [assistant attorney general for civil rights] has expressed some reservations about circulating any written statement on this question to the Hill, for fear Š [it] would be subject to attack.

"My own view," Roberts went on, "is that something must be done to educate the senators on the seriousness of this problemŠ." The problem was in the implications of a "results" test for discrimination.

In a Feb. 23, 1982, memo, he predicted that the test would create a minority entitlement "to electoral representation proportional to their population in the community." As one witness at the subsequent Senate hearings put it, when result replaces intent, a "fair shake" becomes a "fair share."

But as Sen. Orrin G. Hatch (R-Utah) asked at the time, "Are individuals elected to office to represent individual citizens or Š ethnic and racial blocs of voters?"

The latter, the courts came to say. Black and Latino voters soon acquired a right to egregiously race-driven majority-minority districts - to representation on the basis of group membership.

To this day, as Roberts' opponents are making clear, the words "voting rights" serve to insulate this outcome from debate. And yet, when courts insist on racially gerrymandered voting districts to ensure minority office-holding, the electoral system creates "racially defined wards" and accentuates "race-based allegiances and divisions," as a skeptic from the 1982 hearings noted. But in fact, electoral systems should play quite a different role, encouraging political bonds across racial and ethnic lines.

In overwhelming numbers, Americans today understand the point Roberts tried to make. Asked in a 2001 survey whether "race should be a factor" in drawing congressional districts, 90% of whites, 83% of Latinos and 70% of blacks said no.

They believe, as Roberts wrote, that "before the law Š we do not Š stand as black or white, Gentile or Jew, Hispanic or Anglo, but only as Americans entitled to equal justice."
Is that a sentiment the civil rights community really wants to challenge?

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