New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com
VOLUME 234—NO. 45 FRIDAY, SEPTEMBER 2, 2005
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PERSPECTIVE

Roberts Took Narrow View Of Court's Power to Decide

BY NEIL THOMAS PROTO

In 1884, Oliver Wendell Holmes said "that, as life is action and passion, it is required of a man that he should share the passion and action of his time at peril of being judged not to have lived." Holmes, a veteran of the Civil War, author of "The Common Law" and a Harvard Law School teacher, was 43 years old. Before President Roosevelt nominated him to the U.S. Supreme Court in 1902, Holmes also experienced the realities of judging the fate of lives and property as a member of the Massachusetts judiciary.

Holmes could easily have been describing the meaning of the experience that imbued the "People's Lawyer," Louis Brandeis, or the tempered courage of Thurgood Marshall or the integrity of Sandra Day O'Connor to thwart gender discrimination. That "action and passion" affected their view of the law's purpose.

Judge John Roberts' professional career is well-known: he is a Washington insider—within a smaller group of former Supreme Court clerks and Solicitors General—and a highly skilled and valued tactician and appellate advocate. The narrowness of that experience is affirmed by the admonition that in all such cases he was representing "clients" or "the Administration" and was unaccountable or disconnected from the law's practical and daily effects on people elsewhere. His values, we are told, do not come from this experience in the life of the law.

Another way to examine his experience is through the one law review article John Roberts wrote, which was published in April 1993 in the Duke Law Journal. He was in private practice, constrained, perhaps, only by his need for commercial availability. The article concerned the Constitutional requirement, found in Article III, of "standing to sue." That requirement—that the Court's jurisdiction is limited to "all Cases" or "Controversies"—is central to judicial access: who—if anyone—gets to invoke the court's power of reason and the long view to decide the great issues of the day. Without standing, the availability of health insurance to the poor or elderly, abortion, environmental protection, corporate wrongdoing, or the protection of those whose religion, language, skin color or views are not popular falls prey to momentary political power in Congress, vagaries in the market forces, unchecked executive decisions or, as Justice Brandeis characterized it, "the insidious encroachment by men of zeal, well meaning but without understanding."

Deep division exists on and off the Court over how standing is determined. Judge Roberts's view is that ephemerally-exercised political judgments—not the text in Article III—are the essential prism through which he views his judicial role. The Senate needs to master the reasons for the division in order to properly weigh Judge Roberts's experience.

"With respect to standing [to sue] as Roberts wrote about it in 1993, the Senate will be deciding whether to affirm the role of non-elected officials making ephemeral political judgments and whether Judge Roberts brings to the Court the experience in the life of the law that prepares him for such a task."

Relying on Chief Justice John Marshall's opinion in *Marbury v. Madison* (1803), Justice William O. Douglas wrote in *Flast v. Cohen* (1968), that the "judiciary is an indispensable part of the operation of our federal system." In *Marbury*, Marshall—a contemporary of the framers' explicit unease with elected representatives—was confronted by the argument the Court must defer to the elected branches. His response: "The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intentions of [the framer's], to say, that in using it, the constitution should not be looked into?…This is too extravagant to be maintained." Any abdication of that duty "would be giving to the legislature a practical and real omnipotence…[and would reduce] to nothing…a written constitution."

Douglas's adherence to a strict construction of the text and to John Marshall's first-hand knowledge perhaps also reflected Douglas's own rural Northwest upbringing or his teaching at Yale Law School or his service as Chairman of the Securities and Exchange Commission. He later wrote, in "Points of Rebellion," that "Corporate interests have been largely taken care of by highly qualified lawyers…that define the 'aggrieved' persons who have standing…. But the voices of the mass of people go unheard; and the

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administrative agencies have their own way." It was in *Flast v. Cohen* that the Court, including Justice Douglas, embraced the affirmative duty to decide reflected in the "all Cases…or Controversy" text of Article III.

In *Flast*, the Court had decided that a taxpayer had standing to challenge federal funds disbursed to religious schools in violation of the First Amendment. All nine justices (including Justice John Harlan, in the only dissent) began their analysis within the precise text of Article III to determine that when a "case" or "controversy" existed, they had an affirmative duty to decide the merits of the issue raised. All nine also agreed, as the majority expressed it, that "whether a particular person is a proper party to maintain the action does not…raise separation of powers problems related to improper interference in areas committed to [the elected] branches…. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated." The Court's obligation is to determine standing only with respect to its own duty in Article III.

Adherence to the text's duty to decide and John Marshall's guidance governed the Warren and early Burger courts. They found standing in *Association of Data Processing v. Camp* (1970) (corporate association had standing to challenge banks for violating federal law), *Barlow v. Collings* (1970) (tenant farmers had standing to challenge the Agriculture Department for violating the upland cotton program), *United States v. Student Challenging Regulatory Agency Procedures* (1973) (law students had standing to challenge the Interstate Commerce Commission for violating environmental law) and *Roe v. Wade* (1973) (a woman, although not pregnant throughout the judicial process, had standing to challenge an abortion law).

In 1975, Justice Lewis Powell moved the Court away from a strict construction of the textual requirements and judicial duty. It was a contentious fight. In *Warth v. Seldin*, the court denied standing to low-income minority residents who complained the adjoining town was "excluding persons of low…income" through exclusionary zoning. Justice Powell posited that "prudence limitations" were paramount in determining standing because of "the proper—and properly limited—role of the court in a democratic society." Although he acknowledged "judicial intervention may be necessary to protect individual rights," other institutions "may be more competent to address the questions." Justice Powell incorporated into Article III standing a judicially-conducted political assessment: do we want the case or should it be resolved elsewhere? The dissent, including generally conservative Justice Byron White, believed Powell's denial of standing could be explained "only by an indefensible hostility" to housing integration. Echoing Marbury, the dissent added: "[C]ourts cannot refuse to hear a case on the merits merely because they would prefer not to."

Adherence to the politically-tempered "prudence" approach governed the latter Burger and Rehnquist courts. In *Valley Forge Christian College v. Americans United for Separation of Church and State* (1982), the majority denied standing to a group challenging the conveyance of federal property at no cost to a non-profit religious institution. The majority, the dissent wrote, had engaged in a "dissembling enterprise" by "employ[ing] the rhetoric of 'standing' to deprive a person, whose interest is clearly protected, by the law, of the opportunity to prove that his own rights have been violated."

The Court did the same in *Allen v. Wright* (1984), when it denied standing to parents of black public school children challenging tax exemptions granted to racially discriminatory private schools in communities undergoing desegregation. Citing Judge Robert Bork's court of appeals opinion in *Vander Jagt v. O'Neill* (1983), the majority stated that "the law of Article III standing is built on a single basic idea—the idea of separation of powers." Uncertain where and how the inherently subjective meaning of the "separation of powers" notion should be crafted into the precise text of Article III, the majority, nonetheless, concluded that the correct judicial inquiry must be: "Is the injury…otherwise not appropriate, to be judicially cognizable?" Such an inquiry, Justice Stevens said in dissent, "is nothing more than a poor disguise for the Court's view of the merits of the underlying claims" that "can only encourage undisciplined, ad hoc litigation." As Justice Brennan added: "By relying on generalities concerning our tripartite system of government, the Court is able to conclude that the respondents lack standing…without acknowledging the precise nature of the injuries they have alleged."

In 1988, before his Supreme Court nomination, Justice Antonin Scalia expressed his adherence to the essential need for judicial political decisions. "Standing," he wrote, "is a crucial and inseparable element" of the separation of powers notion. Because, in his view, it is of seemingly incidental importance, he added that, "for want of a better vehicle" the relevant text is in Article III. Rhetoric aside, it is Justice Scalia's confidence in his experience in life and the exercise of future political acumen that underpins his position that he can determine—and the majority of the court should determine—where and by whom a petitioner's claim should be resolved. It also was Justice Scalia's 1992 opinion for the majority in *Lujan v. Defenders of Wildlife* (standing denied to Defenders of Wildlife members to challenge Interior Department funding of overseas activities affecting endangered species) that provided the basis for John Roberts' Duke Journal article.

Without referencing the textual duty to decide in Article III or John Marshall's cotemporaneous knowledge concerning the framer's unease with the elected branches, John Roberts embraced the Powell-Bork-Scalia view. He wrote that standing is a "constitutionally based doctrine designed to implement the Framers' concept of 'the proper—and properly limited—role of the courts in a democratic society'" In his experience as an advisor to others and as an appellate advocate—and apparently believing that no division of views ever existed—he also concluded that, "Standing is an apolitical limitation on judicial power." The cases he cited to support such an obviously flawed historical conclusion begin primarily in 1975—and plainly with only the majority opinion in *Warth v. Seldin*—when, essentially, Roberts began the study of law. To suggest standing is "apolitical" also may reflect the narrow experience of a highly valued and skilled professional operating in a small world of deciding, tactically, how to win or how not to lose. His conclusion also reflects a disquieting failure to understand the real life consequences of a judicial decision denying a party the right to invoke the Court's power because of a lack of standing to sue.

Roberts went further: He acknowledged candidly, albeit perhaps unwittingly, what the standing inquiry had become for many on the Court: "Standing is thus properly regarded as a doctrine of judicial self-restraint." Put differently, it is essentially, a political inquiry by the Justices, to be made ad hoc and without the textual duty to decide "all Cases…or Controversy" that looks first to the merits of the case and then decides which branch of the government—or the market forces—should determine the petitioner's fate.

With respect to standing as Roberts wrote about it in 1993, the Senate will be deciding whether to affirm the role of non-elected officials making ephemeral political judgments of such substantial consequence and whether Judge Roberts brings to the Court the experience in the life of the law that prepares him for such a task. There is hardly an inquiry concerning judicial duty that will tell the nation more about what to expect if Judge Roberts is confirmed.