

2015

The Strategic Justice: The Judicial Philosophy of Chief Justice John Roberts

Courtney C. Alonzo

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship



Part of the [Law Commons](#)

Recommended Citation

Alonzo, Courtney C., "The Strategic Justice: The Judicial Philosophy of Chief Justice John Roberts" (2015). *Law School Student Scholarship*. 819.

https://scholarship.shu.edu/student_scholarship/819

THE STRATEGIC JUSTICE:

THE JUDICIAL PHILOSOPHY OF CHIEF JUSTICE JOHN ROBERTS

Courtney H. Alonzo

INTRODUCTION

After nearly ten terms on the bench, Chief Justice John Roberts has reflected minimalism in his opinions, considered the views of his colleagues, and has utilized precedent in interesting ways. Notwithstanding, Roberts has been results-oriented, and even methodical, in reaching particular conclusions. He has exhibited brilliant creativity in circumventing precedent and framing innovative yet conservative approaches to the law. Although he does not easily fit into a particular philosophical category, Roberts has assembled varying methods, resulting in a type of “mosaic” judicial philosophy. Some even call it strategic.¹

In 1993, by the age of 37, the now-Chief Justice John G. Roberts was arguing before the U.S. Supreme Court as the Principal Deputy Solicitor General regarding issues ranging from Eighth Amendment cruel and unusual punishment to Title IX. “Widely considered the best Supreme Court advocate of his generation, Roberts was known before his ascension to the Court as a gifted writer, a skilled strategist, and a brilliant legal mind.”² Unsurprisingly then, since 2003, Roberts has been working from the other side of the

¹ See Paul M. Barrett, *John Roberts, Chief Conservative Strategist*, Businessweek (April 10, 2014), available at <http://www.businessweek.com/articles/2014-04-10/john-roberts-leads-supreme-court-shift-to-the-right>.

² LAURENCE TRIBE AND JOSHUA MATZ, UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION 8 (2014).

podium — first as a judge on the Federal Circuit Court of Appeals, and since 2005, as the Chief Justice of the United States Supreme Court.

Although Roberts resists a label on his judicial philosophy, to some, the Chief is an originalist, a fundamentalist, and perhaps even a perfectionist.³ However, his elementary teacher may have had it right all along, referring to the young John Roberts as “crafty.”⁴ In his opening comments at his confirmation hearing for the position, Roberts made clear that he envisioned a Court different from the previous, which that many felt was more politically driven and resulted in over-broad decisions and hard-to-apply law.⁵ The Judiciary Committee questionnaire provides much insight into Roberts’ perspective.⁶ Roberts highlighted the importance of modesty and humility numerous times in his responses and stated that “precedent plays an important role in promoting the stability of the legal system.”⁷

According to Roberts, the Court needed to exercise much more judicial restraint than it had in the past.⁸ The Chief sought to guide the Court towards a more minimalistic and narrower-reaching approach that honored precedent. More specifically, Roberts stated that he intended to promote judicial minimalism, seek more consensus from the Court, and encourage more respect for precedent and *stare decisis*.⁹ Roberts also asserted that he

³ MARCIA COYLE, *THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION* 22 (2013).

⁴ See Purdum et al, *infra* note 21.

⁵ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before S. Comm. On the Judiciary*, 109th Cong. 55, 141-42 (2005) [hereafter *Roberts Confirmation Hearing*].

⁶ See Nancy Gibbs, Perry Bacon Jr., and Viveca Novak, *5 Things You Need to Know About Roberts*, Time. (September, 5, 2005) Vol 166 Issue 10, p28-32, 28.

⁷ *Id.*; see also *Roberts Confirmation Hearing*, supra note 5 at 55.

⁸ *Id.*

⁹ *Id.*; see also *Chief Justice Say His Goal Is More Consensus on Court*, THE ASSOCIATED PRESS (May 22, 2006) available at <http://www.nytimes.com/2006/05/22/washington/22justice.html>.

understood the importance of separating his personal views, including religion, from his judicial reasoning, in order to make proper legal decisions.¹⁰

An attempt to uncover the Chief Justice's unique philosophy requires a comprehensive look at both the influences throughout his life, as well as the cases bearing his name. Part I consists of a biography of John Roberts, providing an inquiry into what has most influenced the Chief throughout his life, from childhood to Chief. Part II analyzes two representative sets of cases by the Chief to illustrate the ways Roberts has utilized various tactics, namely judicial minimalism, consensus, and respect for precedent, in order to reach particular results. Ten cases will be covered — a compilation of majority, concurring, and dissenting opinions — in chronological order, to gain a better understanding of this multifaceted approach. Finally, Part III discusses Roberts' "strategist" philosophy and how it has facilitated his ultimate goal of preserving the Court as the supreme legal forum.

PART I. BIOGRAPHY: THE FOUNDATION OF A PHILOSOPHY

John Glover Roberts, Jr., was not "genetically engineered" to be the Chief Justice of the Supreme Court, but it sometimes seems that way.¹¹ His life prior to the Court, from his childhood through his judgeship on the D.C. Circuit, is best described as an almost effortless rise to the top.¹² Regardless, the man who would eventually take the top seat in our highest court was recognized early on for his brilliance and charm.¹³

¹⁰ *Id.*

¹¹ JEFFREY TOOBIN, *THE NINE* 262 (2007).

¹² *Id.*

¹³ *See, e.g.* JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 203 (2011).

The journey of the 17th and presiding Chief Justice of the United States Supreme Court begins in Buffalo, New York on January 27, 1955.¹⁴ Roberts' parents were Rosemary (Podrasky) and John Glover (aka "Jack") Roberts, Sr., an electrical engineer and executive with Bethlehem Steel.¹⁵ When John was in the fourth grade, the Roberts, including his three sisters, Kathy, Peggy, and Barbara, moved to Long Beach, Indiana.¹⁶

John Roberts had excellent educational opportunities from his early years. Roberts attended Roman Catholic grade school Notre Dame Elementary then La Lumiere School, a prestigious all-male Catholic boarding school in a neighboring La Porte, Indiana.¹⁷ "I won't be content to get a good job by getting a good education, I want to get the best job by getting the best education," Roberts wrote, at the age of 13, in his 1968 admission letter.¹⁸ Therefore it is no surprise that Roberts was not only an excellent and dedicated student, he was also incredibly involved and well-rounded. He was captain of the varsity football team, wrestled, sang in the choir, served as an executive on student council, co-edited the student newspaper, and participated in drama.¹⁹

His teachers also recognized his intellect. One even used the young Roberts as a rubric for her teaching – "[i]f he understood the concept, I was good...if not, I would teach it all over again."²⁰ A classmate from La Lumiere recalled an English teacher describing

¹⁴ Todd S. Purdum, Jodi Wilgoren and Pam Belluck, *Court Nominee's Life Is Rooted in Faith and Respect for Law*, The New York Times (July 21, 2005) available at <http://www.nytimes.com/2005/07/21/politics/21nominee.html>.

¹⁵ *Id.*

¹⁶ STEVENS, *supra* note 13.

¹⁷ Purdum et al, *supra* note 14.

¹⁸ Tim Jones, Andrew Zajac and Andrew Martin, *John Roberts' Rule: Reach for the Top*, Chicago Tribune (July 24, 2005) available at http://articles.chicagotribune.com/2005-07-24/news/0507240376_1_john-roberts-hogan-harts-on-new-liberalism/2.

¹⁹ *John G. Roberts, Jr.*, The Oyez Project at IIT Chicago-Kent College of Law (hereinafter Oyez), http://www.oyez.org/justices/john_g_roberts_jr (last visited November 5, 2014); *see also id.*

²⁰ Purdum et al, *supra* note 14.

Roberts' papers as "outrageous but very well crafted."²¹ In addition to his extraordinary gift for writing, Roberts' also shined as an oral advocate; another classmate recalled his distinctive ability to make an incredibly persuasive argument even at such a young age.²² Unsurprisingly, Roberts was valedictorian of La Lumiere Class of 1973.²³

Roberts aspired to be a history professor and attended Harvard University (then Harvard College).²⁴ He also worked for Bethlehem Steel during summers to help finance his education, a fact stated by Bush when he publicized Roberts' nomination to indicate that he was not someone to whom all was handed.²⁵ He graduated in 1976 summa cum laude and a member of Phi Beta Kappa with his bachelor's in history in only three years.²⁶

Roberts then attended Harvard Law School.²⁷ Although he initially thought he was not "good enough" for Harvard Law, Roberts ultimately served as the managing editor of the *Harvard Law Review*, where a colleague included Justice Ginsburg's daughter, Jane.²⁸ While at Harvard, Roberts excelled academically and stood out for his mild temperament and respect for differing perspectives.²⁹

By the time John Roberts began applying for clerkships as a second year, the status of the position in legal culture had begun to change from an informal process into a "highly competitive ideological identifier" where lower court clerkships were becoming essential

²¹ *Id.*

²² *Id.*

²³ JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* 8 (2012).

²⁴ Oyez, *supra* note 19.

²⁵ Jones, et al, *supra* note 18.

²⁶ John Roberts, Bio.com, available at <http://www.biography.com/people/john-roberts-20681147> (last visited Sep. 10, 2014).

²⁷ Purdum et al, *supra* note 14.

²⁸ *Id.*; see also TOOBIN, *THE NINE*, *supra* note 11.

²⁹ Purdum et al, *supra* note 14.

prerequisites for Supreme Court placement.³⁰ Irrespective, Roberts' academic performance caught the eye of prominent Second Circuit Court of Appeals Judge Henry Friendly.³¹ Roberts graduated from Harvard Law *magna cum laude* in 1979 and was Friendly's first choice as clerk for the 1979–1980 term.³²

Not only was Judge Friendly one of the most well-respected appellate-level judges in the country at the time,³³ both Roberts and Friendly were originally from small upstate New York towns, had a profound appreciation for education, and graduated from Harvard and Harvard Law.³⁴ Friendly also began his legal career as a clerk for one of the most respected judicial figures of an earlier generation, Justice Brandeis.³⁵ Roberts' conservatism also appealed to Friendly.³⁶ Friendly was hospitalized during Roberts' clerkship and greatly relied on the prized student during this time as a result.³⁷

While on the Second Circuit, Judge Friendly was regarded as a conservative who epitomized the practice of judicial restraint.³⁸ Friendly also, however, demonstrated "remarkable creativity in circumventing precedent and formulating new rules in multiple areas of the law."³⁹ During his confirmation hearings, Roberts described his former boss as a man that had "total devotion to the rule of law and the confidence that if you just worked hard enough at it, you'd come up with the right answers."⁴⁰ Friendly has also been

³⁰ Brad Snyder, *The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts*, 71 OHIO ST. L.J. 1149, 1215 (2010)(internal citation omitted).

³¹ *Id.*

³² *Id.* at 1216; Purdum et al, *supra* note 14.

³³ TOOBIN, THE NINE, *supra* note 11.

³⁴ Snyder, *supra* note 30, at 1218

³⁵ *Id.*

³⁶ *Id.*

³⁷ Jones, et al, *supra* note 18.

³⁸ DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA (2012)(publisher's description).

³⁹ *Id.*

⁴⁰ Roberts Confirmation Hearing at 202.

referred to as “the archetypal judge’s judge, a meticulous craftsman, a fine writer, and hard to pigeonhole politically.”⁴¹ Roberts tends to exhibit some if not all of these qualities. Friendly undoubtedly had a noticeable influence on John Roberts, not only in reference to his approach to the law, but in utilizing creative means in order to find the correct answer.

Roberts then accepted a clerkship with the not-yet-Chief Justice William Rehnquist on the United States Supreme Court.⁴² Rehnquist was considered a leading conservative in his era and undoubtedly stood out amongst the primarily-left Court of that time.⁴³ The thirteen months Roberts spent in Rehnquist’s chambers spanned from the 1980 election through the dawn of the “Reagan revolution” in D.C.⁴⁴ “It was a time when the Supreme Court was far different, more liberal, and that made John Roberts stand out among the other clerks.”⁴⁵

Additionally, at least at that point in his career, Rehnquist did not demonstrate much respect for precedent and also preferred narrower analyses.⁴⁶ Rehnquist was more results-oriented and restrained, “instead of writing exhaustive opinions that defined entire areas of law.”⁴⁷ One of the ideals that Roberts admits he learned from Justice Rehnquist was concision, stating that he learned “to try to write crisply and efficiently” from him.⁴⁸ Although Roberts may not take an identical approach to that of Rehnquist, he undoubtedly learned methods suitable for his developing perspective. In fact, “sprinkled through the arc

⁴¹ Roger Parloff, *On history's stage: Chief Justice John Roberts Jr.*, FORTUNE (January 3, 2011) available at <http://fortune.com/2011/01/03/on-historys-stage-chief-justice-john-roberts-jr/>.

⁴² Snyder, *supra* note 34.

⁴³ Dorsen, *supra* note 38.

⁴⁴ Adam Liptak and Todd S. Purdum, *As Clerk for Rehnquist, Nominee Stood Out for Conservative Rigor*, The New York Times (July 31, 2005) available at <http://www.nytimes.com/2005/07/31/politics/politicsspecial1/31roberts.html?pagewanted=all>.

⁴⁵ *Id.*

⁴⁶ Snyder, *supra* note 30 at 1223-24.

⁴⁷ *Id.* at 1224.

⁴⁸ *Id.*

of Judge Roberts's career” are hints of Justice Rehnquist's influence, from memorandums the young Roberts wrote in his early years to decisions Roberts has issued.⁴⁹ Rehnquist also taught Roberts the value of balancing family and work.⁵⁰

Although Roberts’ clerkships were quite different experiences, “legal analysts believe that working for both Friendly and Rehnquist influenced Roberts’ conservative approach to the law.”⁵¹ Both Judge Friendly and Justice Rehnquist believed in the “limitations of judging,” and tended to be more minimalistic in their approach.⁵² However, each provided Roberts with different sets of tools that helped structure his mosaic: Friendly was creative and determined; Rehnquist was more focused on results and efficiency amongst the Court. Roberts knew how to selectively pluck methods from his mentors to carve his own path.

It is also worth noting that according to a fellow former Rehnquist clerk, Roberts had a gift for presenting a case in such a way that enabled the judges to rule in his favor without feeling that he or she was drifting too far from precedent.⁵³ This was an ability that the Chief continued to cultivate, regardless of whether in public or private practice.

Following these esteemed opportunities, Roberts embarked on an entirely different path than that of his predecessors in order to gain a more diverse perspective.⁵⁴ From 1981 to 1982, Roberts worked for the Reagan Administration as a Special Assistant to U.S. Attorney General William French Smith, and from 1982 to 1986 Roberts served as

⁴⁹ Liptak, et al, *supra* note 44.

⁵⁰ *Id.*; see also Snyder, *supra* note 30.

⁵¹ Bio.com, *supra* note 26.

⁵² Jones, et al, *supra* note 18.

⁵³ *Id.*

⁵⁴ Snyder, *supra* note 30 at 1225.

Associate Counsel to President Reagan.⁵⁵ As a young Reagan Administration aide, he registered his skepticism toward court-recognized "fundamental rights," such as the right to privacy.⁵⁶ Although Judge Friendly suggested not spending "too much time in the public sector," Roberts gained much of his formative legal experience while under the Reagan Administration.⁵⁷

Roberts admired the court as an institution so appellate advocacy intrigued his analytical mind.⁵⁸ Following his stint in the public-sector, Roberts went private in 1986 as an Associate for Hogan & Hartson in their Washington D.C. headquarters,⁵⁹ becoming partner after just one year.⁶⁰ Gaining this type of experience appeared a natural progression towards the federal bench and his was yet another calculated step in forging his own path and developing his own unique philosophy.⁶¹ While at Hogan & Hartson, Roberts was known for "crisp writing, obsessive preparation and smooth-as-glass performances in court. He never seemed flustered or defensive, and his authoritative tone made even the most complicated legal parsing sound as obvious as 2 plus 2."⁶² This type of advocacy required a type of acting yet Roberts managed to demonstrate reasonableness whilst doing so.⁶³ He played to his audience, just as he had in the past.⁶⁴ Since his early years at La

⁵⁵ "Former Hogan & Hartson Partner John G. Roberts, Jr. Confirmed as Chief Justice of the United States" (Press release), Hogan Lovells, (September 29, 2005); Purdum et al., *supra* note 14; *see also* OYEZ, *supra* note 19.

⁵⁶ Charles Lane, *Roberts Was Influenced by Critics of the Warren Court*, The Washington Post (September 6, 2005) available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/05/AR2005090501433.html>.

⁵⁷ Snyder, *supra* note 30 at 1225.

⁵⁸ Michael Grunwald, *Roberts Cultivated an Audience with Justices for Years*, The Washington Post (September 11, 2005) available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/10/AR2005091000807.html>.

⁵⁹ Purdum et al., *supra* note 14.

⁶⁰ Snyder, *supra* note 30.

⁶¹ Grunwald, *supra* note 58.

⁶² *Id.*

⁶³ Snyder, *supra* note 30.

⁶⁴ *Id.*

Lumiere, Roberts has consistently created experiences that not only honed his existing abilities but also added new sets of skills to his legal arsenal.

In 1989, Roberts was called back to serve for the republican George H. W. Bush administration as Principal Deputy Solicitor General, where he stayed until 1993.⁶⁵ The Solicitor General's office was a type of "way station for almost every prominent Supreme Court specialist, offering unparalleled opportunities for bright, young lawyers to gain court experience," and Roberts excelled.⁶⁶ By this time he was confident in his oral advocacy skills and returned to the public sector, ready for whatever opportunity to gain more experience. Towards the end of his term as Solicitor, President Bush nominated Roberts to the United States Court of Appeals for the District of Columbia Circuit; however, no Senate vote was held and the nomination expired.⁶⁷

In 1993, Roberts returned to private practice at Hogan & Hartson, harmonizing the importance of balance he learned from Rehnquist.⁶⁸ Rehnquist fostered in Roberts the necessary balance between work and family, and Roberts applied this concept facilitating a balance between the public and private sector, which made him an even more comprehensive advocate. This time around at Hogan & Hartson, Roberts became the head of the appellate practice within the firm and argued some 39 cases before the Supreme Court, prevailing in 25.⁶⁹ But Roberts maintained a level of humility; after being asked why he lost a case 9 to 0, Roberts's response was that there were only nine justices.⁷⁰ Even

⁶⁵ Purdum et al., *supra* note 14.

⁶⁶ Grunwald, *supra* note 58.

⁶⁷ Purdum et al., *supra* note 14.

⁶⁸ "Chief Justice John Roberts," PBS *NewsHour* (March 9, 2007).

⁶⁹ Grunwald, *supra* note 58.

⁷⁰ *Id.*

as an advocate, Roberts devoted his career to interpreting the Court's decisions, searching for correct legal answers based on records, statute, and precedent.⁷¹

In 2001, President George W. Bush nominated Roberts again for a seat on the D.C. Circuit Court, but the democratically controlled Senate successfully thwarted the efforts, as they were disinterested in another right-wing Circuit Judge.⁷² However, Roberts' nomination was resubmitted in early 2003 and was subsequently confirmed on May 8th of that year.⁷³ Fully equipped with a comprehensive legal arsenal, the next move in his well-crafted plan was to gain a perspective from the other side of the bench. Roberts spent two years on the D.C. circuit where he participated in a number of notable rulings.⁷⁴ "As a judge on the D.C. Circuit, Roberts' record was generally conservative, though his approach seemed to be guided not by an ideology of originalism, but rather one of judicial restraint."⁷⁵

Roberts' life-long preparation climaxed two years later, on July 19, 2005 when a withdrawn nomination for Associate Justice turned into one for Chief.⁷⁶ President Bush nominated John Roberts to the United States Supreme Court to fill a vacancy created by the anticipated retirement of Associate Justice Sandra Day O'Connor.⁷⁷ At the time, Roberts was the first Supreme Court nominee since Stephen Breyer eleven years earlier.⁷⁸ However, in an unfortunate turn of events, the then-Chief, William H. Rehnquist, died on

⁷¹ *Id.*

⁷² Purdum et al., *supra* note 14

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Jeremy Byellin, *John G. Roberts: The Conservative, Yet Apolitical and Consensus-Building Chief Justice*, Thomson Reuters Legal Solutions Blog (August 29, 2013) available at <http://blog.legalsolutions.thomsonreuters.com/top-legal-news/john-g-roberts-conservative-yet-apolitical-consensus-building-chief-justice/>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

September third of that year, while Roberts' confirmation was still pending before the Senate.⁷⁹ Two days later, the President withdrew Roberts' nomination as Justice O'Connor's successor, and announced his new nomination — to Chief Justice — the seat of one of his own former mentors.⁸⁰

Roberts shined at his Confirmation Hearings before the Senate Judiciary Committee, appearing before the panel of Senators as prepared as ever, just like in his oral arguments, needing no documents to reference.⁸¹ On September 22, 2005, the Committee approved Roberts' nomination by a vote of 13–5, and the Senate confirmed Roberts' nomination one week later, making him the 109th member of the Supreme Court.⁸² Roberts was only 50 years old when he took the bench as Chief Justice, making him the youngest member of the Court and the third youngest to have ever become Chief Justice.⁸³ Roberts is also one of a mere thirteen Catholic Justices, out of 111 total, in the history of the Supreme Court.⁸⁴ The distinctiveness of John Roberts' age and religion were obstacles in his nomination that, but for his comprehensive legal arsenal, Roberts could not have overcome.

“A certain humility should characterize the judicial role,” stated Roberts in his 2005 Senate Judiciary Committee Hearing regarding his nomination.⁸⁵ Roberts envisioned an approach that was both desirable and respectable: a minimalistic approach, more unanimous decisions from the Court, and adherence to and respect for precedent and *stare*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Jeffrey Toobin, *The Nine* 28 (2007); *see also generally Roberts Confirmation Hearing, supra* note 5.

⁸² Purdum et al., *supra* note 14; *see also Supreme Court Nominations, available at* <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm>.

⁸³ Bio.com, *supra* note 26.

⁸⁴ Purdum et al., *supra* note 14.

⁸⁵ *Roberts Confirmation Hearing*, at 55.

decisis.⁸⁶ Roberts desired a Supreme Court consisting of individuals that were not afraid to learn from others who typically operate in a contrary school of thought. As illustrated next through a variety of cases, because Roberts is not narrowly driven by any type of ideology and prefers to approach cases individually, utilizing an array of various tools, he is often difficult to predict and has been known to surprise.⁸⁷

PART II. CASE STUDIES: ROBERTS' PHILOSOPHY AS CHIEF JUSTICE

Roberts penned his first dissent in *Georgia v. Randolph* where he utilized precedent to argue for a particular result.⁸⁸ Here, the Court held 5-3 that police had no constitutional right to search a house without a search warrant when one resident consents and another objects.⁸⁹ In 2001, the police were called to Scott Randolph's residence when his wife reported a domestic dispute.⁹⁰ Randolph was arrested for drug possession after police searched the home and found cocaine.⁹¹ The officers did not have a search warrant but Randolph's wife consented, despite objection by Randolph.⁹² At trial, Randolph argued that because of the objection, the search violated his constitutional protections, and the prosecution argued that the wife's consent was sufficient.⁹³ The trial court ruled for in favor of the prosecution, but the appellate court and Georgia Supreme Court ultimately sided with Randolph, finding that a search violates the Fourth Amendment if one resident objects, regardless of whether another resident consents.⁹⁴

⁸⁶ *Roberts Confirmation Hearing*, at 55, 141, 424.

⁸⁷ See Byellin, *supra* note 75.

⁸⁸ 547 U.S. 103 (2006).

⁸⁹ *Id.*

⁹⁰ *Id.* at 106.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 108.

⁹⁴ *Id.*

Justice Souter delivered the majority opinion which focused on the authority that co-inhabitants may exercise that affect the others in the home.⁹⁵ Souter then compared the reasonableness of this type of a search with that in *Minnesota v. Olsen*, where the Court held that “overnight houseguests have a legitimate expectation of privacy in their temporary quarters,” and determined that such was a logical application to the case at hand.⁹⁶ The majority concluded that under the Fourth Amendment, a “physically present occupant’s express refusal of consent to a police search of a premises was dispositive as to that occupant, regardless of the consent of a fellow occupant.”⁹⁷

Chief Justice Roberts opened his quite-lengthy dissent, and first as Chief Justice, by stating that “the Court create[d] constitutional law” in its ruling.⁹⁸ From Roberts’ perspective, the Court’s prior cases established that co-inhabitants assume the risk that one or the other may share access to their belongings.⁹⁹ Roberts added that he feared the holding would limit the efforts of law enforcement seeking to protect abused spouses.¹⁰⁰ Roberts then stated that the “correct approach” already existed in Fourth Amendment precedent, and provided extensive case law in support.¹⁰¹

Since he sought a different outcome, Roberts made clear that he had an issue with the majority reaching beyond its authority and failing to practice judicial restraint.¹⁰² Roberts believed the majority’s analysis “alter[ed] a great deal of established Fourth Amendment law” and as such, “a warrantless search [was] reasonable if police obtain the

⁹⁵ *Id.* at 111.

⁹⁶ *Id.* at 113; 495 U.S. 91 (1990).

⁹⁷ *Id.* at 122-23.

⁹⁸ *Id.* at 127.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

voluntary consent of a person authorized to give it,” such as a co-inhabitant.¹⁰³ Roberts resented the Court for not adhering to precedent, specifically, that the Court “circumvented existing doctrine and created a new standard by which Fourth Amendment reasonableness is to be measured.”¹⁰⁴

Roberts employed another tool from his arsenal to support his dissent in *Caperton v. A.T. Massey Coal Co., Inc.*¹⁰⁵ Here, the Supreme Court held in a 5-4 opinion that the Due Process Clause of the Fourteenth Amendment required a judge to recuse him or herself not only when actual bias has been demonstrated or when economic interest has been determined, but also when the facts show a probability of bias.¹⁰⁶

Here, mining company president Hugh Caperton filed a lawsuit against A.T. Massey Coal Company alleging tortious interference, fraudulent misrepresentation, and fraudulent concealment, which ultimately resulted in the company going out of business.¹⁰⁷

At trial level, a West Virginia jury found in favor of Caperton and awarded \$50 million in damages.¹⁰⁸ The Supreme Court of Appeals of West Virginia granted review; however, prior to hearing the case, Caperton motioned for Justice Brent Benjamin to recuse himself from the case.¹⁰⁹ Caperton argued that since Massey's C.E.O. had donated \$3 million to Justice Benjamin's campaign to win a seat on the Supreme Court of Appeals, Justice Benjamin's participation would present an unacceptable appearance of impropriety.¹¹⁰

¹⁰³ *Georgia v. Randolph* at 141, 128.

¹⁰⁴ Aubrey H. Brown III, *Georgia v. Randolph, the Red-Headed Stepchild of an Ugly Family: Why Third Party Consent Search Doctrine is an Unfortunate Fourth Amendment Development That Should Be Restrained*, 18 Wm. & Mary Bill Rts. J. 471 (2009).

¹⁰⁵ 556 U.S. 868 (2009).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 869.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

Justice Kennedy wrote the majority opinion where the Supreme Court reasoned that Justice Benjamin must recuse himself from participation in the case in question because only “a risk of actual bias” was needed, not actual bias.¹¹¹

Scalia, Thomas, and Alito joined the Chief in his forceful dissent, where Roberts argued that the majority carelessly expanded the standard for which a judge need recuse himself by merely showing a “probability of bias,” because it “cannot be defined in any limited way” and “provides no guidance to judges and litigants about when recusal will be constitutionally required” of them.¹¹² Roberts also raised the point that the Supreme Court had recognized only two situations in which the Fourteenth Amendment’s Due Process Clause disqualified a judge¹¹³ and differentiated the objective nature of those two situations to the entirely subjective inquiry required by the “probability of bias” standard set by the majority.¹¹⁴ Roberts furthered his argument by adding that the result would “erode public confidence in judicial impartiality,” an ongoing concern of the Chief, and raised forty specific points of uncertainty that would arise as a result of the majority’s vague holding.¹¹⁵

Roberts had a clear objective in this case — he did not want a categorical rule that would be incorrectly applied to all similar situations and result in a flood of unmanageable due process litigation. Roberts complained that “the majority again depart[ed] from a clear, longstanding constitutional rule to accommodate an “extreme” case involving “grossly disproportionate” amounts of money.”¹¹⁶ The majority’s holding suggested that “massive

¹¹¹ *Id.* at 884.

¹¹² *Id.* at 890-91 (Roberts, C.J., dissenting)

¹¹³ When the judge has a direct financial interest and when a judge presides over a criminal contempt case in his own court.

¹¹⁴ *Caperton* at 891 (citing *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) and *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971)).

¹¹⁵ *Id.* at 891; *see also Id.* at 893-98.

¹¹⁶ *Id.* at 901.

independent expenditures” can assist in creating the appearance “of quid pro quo corruption,” i.e. money for a vote.¹¹⁷ This helps explain Roberts’ conflict with the majority and illustrates his precedent tactic.

Roberts also emphasized that the majority’s standard was excessively vague and even “inherently boundless,” and used forty questions to emphasize this point.¹¹⁸ With this, Roberts attempted to argue that the Court should try to avoid a “floodgates” problem by utilizing judicial restraint, which the majority failed to recognize. It also appeared to be his hope that a future Court might reverse this decision, and permit judges to be the sole evaluators of judicial partiality.

Roberts utilizes a minimalistic approach in the criminal context as well, where he prefers case-by case evaluations rather than broad applications. His concurring opinion in *Graham v. Florida* illustrates this well.¹¹⁹ In *Graham v. Florida*, the Court held that juvenile offenders cannot be sentenced to life imprisonment without parole for non-homicide offenses.¹²⁰ Graham was sixteen when he committed armed burglary and assault and battery along with two accomplices.¹²¹ Six months later, Graham was arrested again for home invasion robbery.¹²² Though Graham denied involvement, he acknowledged that he was in violation of his plea agreement.¹²³ The trial court found Graham guilty of both armed burglary and attempted robbery, sentencing him to the maximum “authorized by

¹¹⁷ Tribe, *supra* note 2 at 119-20; *see generally* Caperton.

¹¹⁸ Caperton, *supra* at 899.

¹¹⁹ 560 U.S. 48 (2010)

¹²⁰ *Id.*

¹²¹ *Id.* at 53.

¹²² *Id.* at 54.

¹²³ *Id.* at 55.

law on each charge: life imprisonment and fifteen years, respectively.¹²⁴ Because Florida had since abolished its system of parole, it became a life sentence without parole.¹²⁵

The majority concluded that the Eighth Amendment prohibited the imposition of a life sentence without parole on a juvenile offender who committed a non-homicide crime.¹²⁶ However, the defendant need not be guaranteed eventual release from prison; rather, he or she must only have some realistic opportunity to obtain release before the end of the life term.¹²⁷ Further, since it could not be conclusively determined at the time of sentencing that the defendant would be a danger to society for the rest of his or her life, a sentence of this magnitude “denies the juvenile a chance to demonstrate growth and maturity.”¹²⁸

Although Roberts agreed with the majority that Graham’s life sentence without parole violated the Eighth Amendment’s prohibition on “cruel and unusual punishment,” Roberts criticized the majority for failing to limit its holding.¹²⁹ Roberts felt there was “no need to invent a new constitutional rule of dubious provenance in reaching that conclusion” and based his reasoning on Court precedent.¹³⁰ More specifically, the lack of culpability comparison of juveniles versus adults described in *Roper v. Simmons* and cases that required “‘narrow proportionality’ review of noncapital sentences.”¹³¹ Roberts also argued that the Court had not yet established a clear and consistent path for lower courts to follow when applying the “narrow proportionality” analysis and as a result, precedent required

¹²⁴ *Id.* at 57.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 82.

¹²⁸ *Id.* at 73.

¹²⁹ *Id.* at 86.

¹³⁰ *Id.*

¹³¹ *Id.*; 543 U.S. 551(2005).

that this type of deferential review encompass an analytical comparison between the crime committed and the sentence thereby imposed.¹³²

Although the majority focused on whether *Roper v. Simmons* should also apply to sentences of life without the possibility of parole, Roberts disagreed with how the majority applied the law.¹³³ Roberts stated that “in *Roper*, the Court tailored its analysis of juvenile characteristics to the specific question whether juvenile offenders could constitutionally be subject to capital punishment,” not as “the basis for a new categorical rule that juveniles may never receive a sentence of life without parole for nonhomicide crimes.”¹³⁴ He stated that precedent regarding “narrow proportionality” provided that the offender’s juvenile status should be at the center of the inquiry.¹³⁵

Roberts believed that the majority used this case as “a vehicle to proclaim a new constitutional rule,” and that it reached far beyond the current facts to reach a result.¹³⁶ Roberts felt that such a broad conclusion — that a life sentence without parole for a juvenile for any nonhomicide case is unconstitutional — was not only unnecessary but also unwise.¹³⁷ Roberts again knew the precise result he wanted, one he believed was just, and this concurrence reflects his narrow decision-making tactic in the criminal law context.

In *Northwest Austin Mun. Util. Dist. No. One (NAMUNDO) v. Holder* the Supreme Court ruled that Section 5 of the Voting Rights Act (VRA) was unconstitutional.¹³⁸ In this case, NAMUNDO sought a declaratory judgment pursuant to Section 4(a) of the VRA and

¹³² *Id.* at 87-88 (citing *Lockyer v. Andrade*, 583 U.S. 63, 73 (2003) and *Solem v. Helm*, 463 U.S. 277, 290-91 (1983)).

¹³³ *Id.* at 89.

¹³⁴ *Id.*

¹³⁵ *Id.* at 90.

¹³⁶ *Id.* at. 94.

¹³⁷ *Id.*

¹³⁸ 557 U.S. 193 (2009).

alternatively argued that Section 5 was unconstitutional.¹³⁹ Section 5 prohibited “covered jurisdictions,” i.e. states and political sectors with histories of racial discrimination in voting, from changing voting procedures without preclearance from either the Attorney General or a panel of three judges from the D.C. District Court.¹⁴⁰ The District Court rejected both claims and stated that the bailout under Section 4(a) only applied to “counties, parishes, and subunits that register voters, not to an entity like the district that does not register its own voters.”¹⁴¹ Furthermore, the court rejected NAMUNDO’s argument that Congress’ 2006 25 year extension of Section 5 rendered the provision unconstitutional.¹⁴²

In its unanimous decision, the Supreme Court held that the VRA permitted all political subunits, including NAMUNDO, to seek bailout from the preclearance requirements of the VRA.¹⁴³ Writing for the Court, the Chief Justice stated that although the historic accomplishments of the VRA were undeniable, its modern applicability raised serious constitutional concerns.¹⁴⁴ Roberts reasoned that although the Court historically upheld this provision of the VRA,¹⁴⁵ conditions had “unquestionably improved,” and as a result, the burdens imposed by Section 4(a) of the VRA no longer justified current needs.¹⁴⁶

Roberts avoided addressing the constitutionality of the preclearance requirement of Section 5, stating that “normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.”¹⁴⁷ Roberts acknowledged that the

¹³⁹ *Id.* at 193.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 193-94.

¹⁴⁴ *Id.* at 201, 206.

¹⁴⁵ See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) and *City of Rome v. United States*, 446 U.S. 156 (1980).

¹⁴⁶ *Id.* at 201.

¹⁴⁷ *Id.* at 204, 206 (citing *Escambia County v. McMillan*, 466 U.S. 48 (1984)).

Court's approach stretched the statutory text, but he said it should avoid deciding difficult constitutional questions when it could.¹⁴⁸ Roberts rationalized that since *NAMUNDO* expressly described the constitutional challenge to Section 5 as an alternative to its statutory argument, it was not necessary to address.¹⁴⁹

Although Roberts ultimately decided the case on narrow grounds, he cleverly crafted new law in *NAMUNDO*.¹⁵⁰ Roberts encouraged Congress to modify the VRA to account for the nation's current needs and political conditions, not those based on 35 year old data.¹⁵¹ Despite utilizing judicial restraint with the narrow holding, Roberts clearly contradicted his intention to adhere to precedent in this opinion in order to achieve an overarching goal. Roberts allegedly long opposed the VRA by the time he became Chief and outwardly expressed such while working under President Reagan.¹⁵² Roberts unapologetically embraces various mechanisms in order to reach particular results. Here, he utilized whatever means available to convey his argument that racial imbalance in voting was no longer an issue in the South.

Roberts also cleverly plucked from his legal arsenal in *Citizens United v. Federal Election Commission (FEC)*, whereby he wrote a concurring opinion.¹⁵³ Here, the Court overruled *Austin v. Michigan Chamber of Commerce* and portions of *McConnell v. FEC*, where the Court held that political speech may be banned depending on the speaker's corporate identity, and held that under the First Amendment, corporate funding of

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 206.

¹⁵⁰ See Tribe, supra note 2 at 34.

¹⁵¹ *NAMUNDO* at 204.

¹⁵² See Tribe, supra note 2 at 34 (citing Rick Hasen, "How Would a Justice Roberts Vote on the Constitutionality of a Reauthorized Section 5?," *Election Law Blog*, August 15, 2005, <http://electionlawblog.org/archives/003863.html>).

¹⁵³ 558 U.S. 310 (2010).

independent political broadcasting in elections cannot be restricted.¹⁵⁴ Here, Citizens United sought an injunction against the FEC to bar the application of the Bipartisan Campaign Reform Act (BCRA) to its film *Hillary: The Movie*, which expressed opinions regarding then-Senator Hillary Clinton’s capabilities as President.¹⁵⁵

Section 203 of the BCRA is a federal law that prohibits corporate entities or labor unions from using their general treasury accounts for speech that is an “electioneering communication” or that expressly advocates for a candidate, negatively or positively.¹⁵⁶ The Court previously held that limits on electioneering communication may be banned based on the corporate identity of the speaker.¹⁵⁷ Electioneering communication is any broadcast communication that “refers to a clearly identified candidate for Federal office” that is made within 30 days of a primary election¹⁵⁸ and is publicly distributed¹⁵⁹. The D.C. District Court denied the injunction and held that Section 203 was constitutional as decided in *McConnell v. FEC*.¹⁶⁰

In a 5-4 decision, the majority held that under the First Amendment, corporate funding of independent political broadcasts in candidate elections could not be restricted.¹⁶¹ Writing for the majority, Kennedy stated that political speech was “indispensable to decisionmaking in a democracy,” regardless of whether the speech came from a corporation or an individual.¹⁶² He concluded that this constitutional protection was

¹⁵⁴ *Id.* at 310.

¹⁵⁵ *Id.* at 310.

¹⁵⁶ *Id.* at 310 (quoting 2 U.S.C § 441(b)).

¹⁵⁷ *Id.* at 310

¹⁵⁸ *Id.* at 310 (citing 2 U.S.C § 434(f)(3)(A)).

¹⁵⁹ *Id.* at 310 (citing 11 CFR § 100.29(a)(2)).

¹⁶⁰ *Id.* at 320-21.

¹⁶¹ *Id.* at 324.

¹⁶² *Id.* at 349 (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)).

inconsistent with *Austin*, and as a result overruled *Austin* and the portions of *McConnell* that relied on *Austin*.¹⁶³

The Chief wrote separately "to address the important principles of judicial restraint and *stare decisis* implicated in this case."¹⁶⁴ Roberts explained why his vote harmonized with his values of judicial minimalism, respect for precedent, and consensus that he so outwardly expressed.¹⁶⁵ He highlighted that the general practice of judicial restraint does not trump the obligation of the Court to faithfully interpret the law.¹⁶⁶ Roberts cited various case law in which the court had overruled precedent and argued that had prior Courts strictly adhered to *stare decisis*, "segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants."¹⁶⁷

In a lengthy dissent, Justice Stevens asserted that the Court "changed the case to give themselves an opportunity to change the law," by purposely broadening the scope of the case in order to reach a particular outcome.¹⁶⁸ Broadening the scope of the argument enabled Roberts to choose how much he wanted to benefit the Republican Party.¹⁶⁹ The Chief knew that in order to reach a specific outcome, overruling precedent was necessary. However, given the emphasis he placed on judicial restraint and respect for precedent during his confirmation hearings, Roberts recognized that if he wrote the majority opinion he would be highly criticized.¹⁷⁰ By handing the opinion over to Kennedy, Roberts

¹⁶³ *Id.* at

¹⁶⁴ *Id.* at 373 (Roberts, C.J., concurring).

¹⁶⁵ See Tribe, *supra* note 2 at 93.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 378 (Roberts, C.J., concurring).

¹⁶⁸ *Citizens United*, *supra* note 153 at 398 (Stevens, J., dissenting).

¹⁶⁹ Jeffrey Toobin, *Money Unlimited*, THE NEW YORKER (May 21, 2012) available at <http://www.newyorker.com/magazine/2012/05/21/money-unlimited>.

¹⁷⁰ *Id.*

accomplished “a far-reaching result without leaving his own fingerprints.”¹⁷¹ This was incredibly strategic on behalf of the Chief and vividly illustrates how Roberts strategically attains the results he desires.

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC is another case that emphasizes how Roberts puts his arsenal to use.¹⁷² Here, the Court unanimously ruled that federal discrimination laws did not apply to religious organizations' selection of religious leaders.¹⁷³ In this case, Cheryl Perich filed a lawsuit against the Hosanna-Tabor Evangelical Lutheran Church and School in Redford, MI for allegedly firing her in violation of the Americans with Disabilities Act (“ADA”) after she was diagnosed with narcolepsy.¹⁷⁴ Perich filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), which agreed and authorized a lawsuit against Perich’s employer.¹⁷⁵

Hosanna-Tabor structured its defense on the "ministerial exception" under the First Amendment.¹⁷⁶ This exception provides religious institutions with certain rights and concessions to manage employment matters without interference from the courts.¹⁷⁷ The district court granted summary judgment in favor of the school, but the Sixth Circuit Court of Appeals vacated the grant and remanded the case back to the lower court for a full trial on the merits.¹⁷⁸ The court then held that Perich's role at the school was not religious in nature and refused to apply the exception.¹⁷⁹

¹⁷¹ *Id.*

¹⁷² 132 S. Ct. 694 (2012).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 653.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 697.

¹⁷⁸ *Id.* at 650.

¹⁷⁹ *Id.*

Chief Justice Roberts delivered the opinion of the Court and discussed first the extensive history of the exception, highlighting that it was established to prevent state interference with the governance of churches, which violates the Establishment and Free Exercise Clauses of the First Amendment.¹⁸⁰ The bulk of the decision focused on whether or not Perich was a minister for the purposes of the exception, ultimately determining that she was.¹⁸¹ Roberts based this partly on the fact that the school held her out as a minister with a role distinct from that of its “lay” teachers.¹⁸² He also noted that Perich held *herself* out to be a minister by accepting the formal call to religious service required for her position and that she performed “important religious functions” for the Church.¹⁸³

Roberts, however, explicitly left undecided whether religious organizations could be sued for other reasons by stating “[w]e express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct.”¹⁸⁴ This was a “commendable example of judicial minimalism,” however, unlike his “forty questions” in *Caperton*,¹⁸⁵ Roberts failed to work out all of the implications of the holding in advance, which created uncertainty.¹⁸⁶ Roberts believed that the correct answer was found in the Constitution — the explicit separation of church and State. And although Roberts maintains that he separates politics from religion, he arguably desired ruling in favor of religious freedom. Regardless, in constructing the argument the way he did, Roberts utilized minimalism as the means to his end.

¹⁸⁰ See *id.* at 702-05.

¹⁸¹ See *id.* at 664.

¹⁸² *Id.* at 665.

¹⁸³ *Id.* at 707, 708 (emphasis added).

¹⁸⁴ *Id.* at 710.

¹⁸⁵ Discussed *supra*.

¹⁸⁶ Michael W. McConnell, *Reflections on Hosanna-Tabor*; 35 HARVARD J. LAW & PUB. POL. 821, 835 (2012).

In 2010, President Obama signed the Affordable Care Act (ACA), into law. The state of Florida, subsequently joined by twenty-five other states, several individuals, and the National Federation of Independent Business, filed suit in the Eleventh Circuit challenging both the individual mandate as well as the Medicaid expansion provisions of the Act.¹⁸⁷ The challenge arose first because the ACA contained a minimum coverage provision, which was accomplished by amending the tax code and providing an individual mandate, requiring that by 2014, non-exempt individuals who failed to purchase and maintain a minimum level of health insurance were subject to a “shared responsibility” penalty, or a tax.¹⁸⁸ Secondly, the ACA also contained an expansion of Medicaid, which states were required to accept in order to receive federal Medicaid funding.¹⁸⁹ The Court of Appeals upheld the Medicaid expansion as a valid exercise of Congress’ spending power, but determined that Congress lacked the power to enact the individual mandate.¹⁹⁰ The court also found that the mandate was severable from the ACA’s other provisions and that the Anti-Injunction Act did not bar the suit.¹⁹¹

The questions therefore brought before the Supreme Court included whether the suit was barred by the Anti-Injunction Act (“Act”) by challenging the alleged tax; whether Congress had the power under the Taxing and Spending Clause to require individuals to purchase health insurance; whether the mandate was severable from the ACA; and finally whether Congress exceeded its powers to induce States to comply by threatening to withhold federal Medicaid funding.

¹⁸⁷ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2571 (2012).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

This case is likely Roberts' most infamous decision, at least from a societal perspective. Chief Justice Roberts cast the "swing vote" in the 5-4 ruling and delivered most of this lengthy opinion.¹⁹² First, the majority held that the Anti-Injunction Act did not bar the suit because Congress did not intend the individual mandate to be treated as a tax under the ACA.¹⁹³ Roberts explained that this did not necessarily determine whether the penalty was a tax or not, but rather that it was not such that would *bar suit* under the Act.¹⁹⁴

Roberts also concluded that the individual mandate was not a valid exercise of Congress' power under the Commerce and Necessary and Proper Clauses.¹⁹⁵ Roberts highlighted precedent in stating that although the Court had consistently construed the scope of power under the Commerce Clause as broad, it had a finite limit reaching only "activity."¹⁹⁶ Roberts furthered stating that although the mandate obligated individuals to become active in commerce, it did not constitute a regulation of existing commercial activity.¹⁹⁷ He then stated that the individual mandate only granted Congress the ability to create the precursor to the exercise of an enumerated power and that if the mandate was a "necessary" aspect of the ACA, then expanding such federal power to Congress was therefore improper.¹⁹⁸

In arguably the most controversial and critical aspect of the decision, Roberts concluded that the individual mandate was effectively an imposition of a tax, and that such a provision was within Congress' power relegated by the Taxing Clause.¹⁹⁹ Although he

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* (emphasis added).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 2573.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

acknowledged that this likely conflicted with the Court's Anti-Injunction Act argument, he stated that, because the payment was not meant to induce the purchase of insurance, was not necessarily unlawful punishment, and was collected by the IRS by customary means, it qualified as such.²⁰⁰

Finally, Roberts held that “the Medicaid expansion violate[d] the Constitution by threatening States with the loss of their existing Medicaid funding if they decline[d] to comply with the expansion.”²⁰¹ Roberts argued effectively that the Spending Clause depended on whether or not individual States voluntarily and deliberately accept the terms of the federal welfare programs.²⁰² By threatening to reduce federal funding, Congress essentially coerced States into accepting the expansion.²⁰³ As such, by removing the voluntary aspect, Congress exceeded its enumerated powers, which rendered the Medicaid expansion provision of the ACA unconstitutional.²⁰⁴

Roberts caused quite a bit of commotion with this decision and is arguably still rather unpopular with conservatives as a result.²⁰⁵ Roberts, however, did not appear hesitant regarding his objective, stating that the purpose was to “save a statute from unconstitutionality,” which albeit provocative from a political standpoint, aligns with his asserted drive towards consensus.²⁰⁶ Furthermore, the Chief verbalized that he purposely chose to avoid a political battle by choosing his judicial beliefs over political pressure.²⁰⁷

²⁰⁰ *Id.*

²⁰¹ *Id.* at 2574; *see also id.* at 2601-06.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *See id.*

²⁰⁵ James Oliphant, *Tipping the Scales*, National Journal (2012) available at <http://www.nationaljournal.com/magazine/john-roberts-tipping-the-scales-20120726>.

²⁰⁶ *See id.*

²⁰⁷ Byellin, *supra* note 75.

However, according to Irvine Law School Dean Erwin Chemerinsky, this ruling shifted the Commerce Clause from a broad “nationalist perspective” to a narrower and more restrictive “federalist perspective.”²⁰⁸ Although Roberts stated that he avoided politics, he had other objectives here.²⁰⁹ The previous (Rehnquist) Court reestablished a federalist view, and Chemerinsky asserted that the ACA decision would indicate how much farther “the pendulum [would] swing.”²¹⁰ Roberts’s opinion in *Sebelius* showed that the pendulum swung far right under the Commerce Clause, which ultimately further limited Congress’ power under the clause.²¹¹ Roberts was willing to sacrifice short term results in favor of long term objectives.

More interesting perhaps, is just how much one of Roberts’ former mentors may have influenced this conclusion. Roberts likely discovered the creativity necessary to uphold the ACA on taxing power from Judge Friendly, and stored it in his legal toolbox.²¹² Roberts worked on many opinions for Judge Friendly that utilized creative taxing powers, in fact, “[n]ot once during the period of Roberts’ clerkship did his boss write an opinion ruling against the government in a tax case.”²¹³ Therefore, Roberts’ creative yet practical examination of the ACA was conceivably the result of extensive mentoring legal training and from Friendly.²¹⁴

²⁰⁸ John Dean, *Why Chief Justice Roberts Dared Not Overturn President Obama’s Healthcare Plan*, Verdict (June, 29, 2012) available at <http://verdict.justia.com/2012/06/29/why-chief-justice-roberts-dared-not-overturn-president-obamas-healthcare-plan#sthash.Nye20Ma9.dpuf>.

²⁰⁹ See Byellin, *supra* note 75.

²¹⁰ *Id.*

²¹¹ *Id.*; see also *Sebelius*, *supra* note 187.

²¹² See John Fabian Witt, *The Secret History of the Chief Justice’s Obamacare Decision* (June 29, 2012) available at <http://www.law.yale.edu/news/15758.htm>.

²¹³ *Id.*

²¹⁴ Witt, *supra* note **Error! Bookmark not defined.**

Roberts clarified that his analysis was a legal and not political, and in addition, Roberts persuaded six justices, including liberals Breyer and Kagan to limit Congress's spending powers, surprisingly.²¹⁵ Because he found an alternative constitutional rationale for upholding the individual mandate provisions of the ACA, the left was unable to criticize Roberts' perspective. Roberts was instead admired for his cooperation with the liberals of the Court. So although Roberts swayed from his typically conservative posture and aggravated the right in this decision, he did so with a greater objective in mind.

To understand just how strategic Roberts is in utilizing his conventional strategies to argue a particular outcome, it is helpful to examine another notable recent Court opinion. In *United States v. Windsor*, Edith Windsor was the widow and sole executor of the estate of her late spouse, Thea Clara Spyer, who died in 2009, leaving her entire estate to her Spyer.²¹⁶ The couple lived in New York but was married in 2007 in Canada, and New York state law recognized their marriage.²¹⁷ Because federal law did not recognize their marriage, the government denied the federal estate tax exemption for surviving spouses pursuant to the federal Defense of Marriage Act (DOMA) and imposed \$363,053 in taxes.²¹⁸

The Court first held that the federal government retained a significant and "immediate" enough stake in the issue at hand to support Supreme Court jurisdiction, despite the Department of Justice's corresponding position regarding DOMA's unconstitutionality.²¹⁹ Further, because the decision pertains to a potential federal tax

²¹⁵ See *Sebelius*, 132 S. Ct. at 2574; see also *id.*

²¹⁶ 133 S. Ct. 2675 (2013).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 2679-80.

imposition or refund, the government could potentially suffer economic harm and therefore maintained standing in the case.²²⁰

The Court also held that the States have the exclusive power to define marital relationships and that DOMA goes against legislative as well as historical precedent by attempting to frustrate such authority.²²¹ The Court stated that “[t]he Constitution’s guarantee of equality” cannot permit unjust treatment of a certain group of persons and therefore DOMA “violates basic due process and equal protection principles applicable to the Federal Government,” and is therefore unconstitutional.²²²

In a brief dissent, Roberts agreed with the two other dissenters believing that the case should have been rejected on standing grounds, yet also pointed out the effective narrowness of the majority’s opinion.²²³ Regardless, he evaded specificity and stated that he failed to find an unconstitutional basis for the statute because of the overwhelming congressional and executive support when the Act was passed.²²⁴ According to Roberts, “interests in uniformity and stability amply justified” Congress’ enactment of the Act.²²⁵ To him, without at least “some more convincing evidence that the Act’s principal purpose was to codify malice, [...] [he] would not tar the political branches with the brush of bigotry” by ignoring Congress’ comprehensive record.²²⁶ He also argued that the majority’s opinion failed to address the issue of state definitions of marriage affecting

²²⁰ *Id.*

²²¹ *Id.* at 2680-81.

²²² *Id.*

²²³ *See id.*

²²⁴ *Id.* at 2697.

²²⁵ *Id.* at 2696.

²²⁶ *Id.* (emphasis in original).

same-sex couples, which would inevitably come into play as the constitutionality of such definitions is questioned.²²⁷

It appears his position, evidenced by his careful choice of language, was primarily aimed at producing harmony amongst the Court. Although he leaned conservatively, Roberts asked his fellow Justices, both those siding with the majority as well as those in opposition, for collegiality, restraint, and respect for the legislature. Roberts also seems to have left himself some room regarding future cases turning on a similar issue. Generally speaking, Roberts' dissent in *Windsor* illustrates his desire for consensus and also the use of his minimalism.

In *Missouri v. McNeely* the Supreme Court held 5-4 that, generally, under the “exigent circumstances” exception of the Fourth Amendment, police must obtain a warrant before subjecting a drunk-driving suspect to a blood alcohol test.²²⁸ Here, a Missouri police officer stopped McNeely around 2a.m. after observing his truck “exceed the posted speed limit and repeatedly cross the centerline.”²²⁹ The officer suspected McNeely was intoxicated — McNeely had bloodshot eyes, was slurring his speech, and had the smell of alcohol on his breath.²³⁰ The officer subjected McNeely to several field sobriety tests and upon poor performance, attempted use of a portable breath device to detect his blood alcohol level.²³¹ Upon McNeely's repeated refusal, the officer transported him to a nearby hospital to have a blood sample taken.²³² The officer did not attempt to obtain a search warrant and despite the officer's continued explanation of the consequences, McNeely

²²⁷ *Id.* at 2697.

²²⁸ 133 S. Ct. 1552 (2013)

²²⁹ *Id.* at 1556.

²³⁰ *Id.*

²³¹ *Id.* at 1556-57.

²³² *Id.*

refused to consent.²³³ McNeely's blood alcohol content proved to be well above the legal limit in the state and he was subsequently charged with driving while intoxicated.²³⁴

Justice Sotomayor delivered the majority opinion of the Court which determined that, as the facts were presented, an involuntary drawing of an individual's blood qualified as a search as defined within the Fourth Amendment, and as such, required a valid search warrant.²³⁵ Sotomayor opened by discussing the general rule that the Fourth Amendment required a warrant to obtain evidence without consent.²³⁶ She followed that warrantless searches of an individual were reasonable, and the evidence received therefrom admissible, if it fell within a recognized exception, namely the exigency exception.²³⁷ Sotomayor however went further and stated that since, in situations such as this, evidence may be lost under emergency-like circumstances, that the reasonableness of a warrantless search "must be determined case by case based on the totality of the circumstances."²³⁸

The Chief Justice chimed in with an opinion concurring in part and dissenting in part.²³⁹ Roberts agreed with the outcome but criticized the vagueness of the majority's rule, stating that it did not provide straightforward guidance as to how police should handle cases like this.²⁴⁰ Roberts argued that since previous cases had already determined when the exigent circumstances exception should apply, that if there was time to secure a warrant, one should be secured, and if not, the exception should apply.²⁴¹ In support of his argument,

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 1563.

²³⁹ *Id.* at 1569 (Roberts, C.J., dissenting in part, concurring in part).

²⁴⁰ *Id.*

²⁴¹ *Id.*

Roberts cited several cases where exigent circumstances excused a need for a warrant.²⁴² Additionally, Roberts reminded the Court that it had previously “held that forced blood draws can be constitutional,” and ultimately disagreed with the Court’s failure to set forth a bright-line rule.²⁴³

Roberts criticized the majority for creating new, difficult-to-apply law, and he argued aggressively for a less ambiguous rule. According to Roberts, reasonableness is the “touchstone of the Fourth Amendment,” a concept bred from Rehnquist.²⁴⁴ However, such fact-specific analysis does not correspond with bright-line rules.²⁴⁵ Here, Roberts believed the correct answer required a bright-line rule and although this contradicted his traditional stance, he was well-reasoned and creative by arguing precedent.²⁴⁶

Roberts also used his precedent tactic in *McCullen v. Coakley*, but in a much different manner than *McNeely*.²⁴⁷ In this case, the Court held unanimously that a 35 foot buffer zone around abortion clinics violated the First Amendment because it limited free speech too broadly.²⁴⁸ In 2007, Massachusetts amended its 2000 Reproductive Health Care Facilities Act, which had been enacted to address disputes regarding abortion outside abortion clinics, and expanded the buffer zone to 35 feet of an entrance or driveway of such facilities.²⁴⁹ Although the act made it a crime to stand within 35 feet of such facility regardless of one’s stance on the issue, it exempted four classes of individuals: “persons entering or leaving” the facility, “employees or agents of the facility acting within the scope

²⁴² *Id.* at 1570.

²⁴³ *Id.* at 1573-74.

²⁴⁴ See *Ohio v. Robinette*, 519 U.S. 33 (1996).

²⁴⁵ *Id.*

²⁴⁶ See *McNeely*, *supra* note 243.

²⁴⁷ 134 S. Ct. 2518 (2014).

²⁴⁸ *Id.*

²⁴⁹ *Id.* At 2522.

of their employment,” government or law enforcement agents also “acting within the scope of their employment,” and individuals utilizing the sidewalk solely for transportation to an unrelated destination.²⁵⁰

Petitioners sued the Attorney General and other officials claiming that the expanded buffer zones significantly hampered their efforts to provide “sidewalk counseling” with visitors of the facilities, claiming violation of the First and Fourteenth Amendments.²⁵¹ The district court held that, although the law restricted the “time, place, and manner” of protected speech, the law was constitutional because it was content-neutral and provided ample alternative means of communication.²⁵² The First Circuit Court of Appeals agreed and held that in *Hill v. Colorado* the Supreme Court had previously affirmed an analogous statute in Colorado that prohibited similar activities within 100 feet of such clinics.²⁵³

The issues then before the Court were whether the statute was constitutional under the First Amendment and whether *Hill v. Colorado* applied, and if so, should it be narrowed or overruled.²⁵⁴ Chief Justice Roberts delivered the opinion of the court and found that the Massachusetts law violated the First Amendment, yet sidestepped on addressing *Hill*.²⁵⁵

Roberts first analyzed the First Amendment issue as introduced in the district court and agreed that although the law did restrict speech to a certain extent, it was content-neutral and therefore not subject to strict scrutiny.²⁵⁶ Roberts did however conclude that

²⁵⁰ *Id.* at 2526 (citing § 120E1/2(b)(1)-(4)).

²⁵¹ *Id.* at 2528.

²⁵² *Id.*; 571 F. 3d 167 (2009)(citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)); *see also Id.* at 2525.

²⁵³ *Id.* at 2525; 708 F. 3d 1 (2013)(citing *Hill*, 530 U.S. 703 (2000)).

²⁵⁴ *Id.*

²⁵⁵ *See generally id.* at 2545 (Scalia, J., concurring).

²⁵⁶ *Id.* at 2522-23.

the statute did not satisfy the narrow tailoring requirement, which was ultimately its demise under the First Amendment.²⁵⁷

Although Scalia agreed with Roberts and the rest of the majority, he raised a few points in his concurrence that uncovered Roberts' strategy quite nicely.²⁵⁸ Scalia disagreed with Roberts regarding the content-neutrality and strict scrutiny of the statute, which emphasizes the minimalist approach that Roberts prefers to occupy.²⁵⁹

Scalia also raised the point that the majority failed to even mention "whether *Hill* should be cut back or cast aside," and stated that its reason for declaring the statute content-neutral was to avoid addressing *Hill* altogether.²⁶⁰ This directly illustrates Roberts' deference towards precedent and his aversion of overruling cases.

Roberts also tried to keep the opinion, or discussion therefrom, neutral, by failing to address *Hill* and by avoiding to consider the content of the speech of the abortion clinic employees. He kept the discussion politically-neutral and focused only on the issue of protected speech, without making it a solely right- versus left-wing, religiously-based argument. Although it appears he constructed a way to create more consensus among the members of the Court, his underlying goal was likely a more conservative result.

III. CONCLUSION

Roberts has a legal arsenal at his disposal, one he assembled throughout his lifetime. Evidenced from the above sampling are three of his favored tools: judicial restraint, consensus, and precedent. First, Roberts approaches issues before the Court as narrowly as

²⁵⁷ *Id.* at 2539.

²⁵⁸ *See generally id.* at 2541-50 (Scalia, J., concurring).

²⁵⁹ *Id.* at 2541.

²⁶⁰ *Id.*

possible, utilizing case-by-case analysis when advantageous. This permits Roberts to confront the merits of an issue only when necessary, and to save constitutional analysis for only essential situations. Secondly, consensus has been a focal point for Roberts during his tenure as Chief, and his persuasion has proven effective, especially in the most recent term. Finally, Roberts looks to precedent to reinforce his position, as well as to undermine reasoning he disagrees with. For Roberts, although the principle of *stare decisis* is central to a properly-functioning judicial system, reason trumps when necessary.

The Chief is not an originalist like Justice Thomas or a textualist like Scalia.²⁶¹ Unlike these two colleagues of his, Roberts maintains a deep respect for both tradition and precedent, which has resulted in a colorful yet untraditional judicial philosophy.²⁶² It is nonconformist, original, and authentic. It is unique to the Chief. He seeks justice and strategically utilizes whatever legal tools are available to reach the result he believes is fair — not only from a personal perspective, but from a broad one, considering both societal as well as legal norms and implications.

In perhaps even his most “politically-charged” decisions, those regarding health care, voting rights, even campaign finance, “Roberts has embraced what are arguably contradictions, abandoned precedent without explanation, or both.”²⁶³ One thing is certain however, Roberts is brilliant — this is not mistaken legal reasoning.²⁶⁴ Roberts is willing to make unorthodox legal arguments and refrain from following his own reasoning in order to shift the law in the direction he desires.²⁶⁵ He is The Strategic Justice.

²⁶¹ See Byellin, *supra* note 75.

²⁶² *Id.*

²⁶³ Dominic Perella, *Is Chief Justice John Roberts Contradicting Himself?*, MSNBC (April 7, 2014) available at <http://www.msnbc.com/msnbc/chief-justice-john-roberts-contradiction>.

²⁶⁴ *Id.*

²⁶⁵ *Id.*