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The Umpire of the Court - Biography and Judicial Philosophy of Chief Justice John G. Roberts, Jr.

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PART I: BIOGRAPHY

Chief Justice John Roberts was born on January 7, 1955 in Buffalo, New York to Rosemary nee Podrasky and John Glover “Jack” Roberts, Sr.¹ Jack Roberts, Sr. worked as a plant manager with Bethlehem Steel.² When John Roberts was in the fourth grade, Jack Roberts was transferred to Long Beach, Indiana to build the new Bethlehem Steel Mill in Burns Harbor, Indiana. John Roberts, his parents, and his three sisters, Cathy, Peggy, and Barbara, lived in a small summer cottage for several years before building a new split level home a few blocks away in Long Beach, Indiana.³ Jack Roberts, Sr. provided a stable, comfortable life for his family.⁴

The Chief Justice was born and raised a Roman Catholic.⁵ Roberts attended both private Catholic elementary and high schools.⁶ In 1973, Roberts graduated from La Lumiere School, a Roman Catholic boarding school.⁷ While at the La Lumiere School, Roberts obtained a classical education, studying Latin and French.⁸ He excelled at these subjects and was well respected among his peers and teachers.⁹ From an early age, Roberts built a reputation as a brilliant mind. Teachers often tested their methods out on him.¹⁰ If Roberts could not understand their methods the first time around, the teachers would alter them accordingly.¹¹ Adept at math, writing, and rhetoric, Roberts far surpassed his other classmates.¹² Additionally, Roberts excelled in athletics

¹ See Todd S. Purdum, Jodi Wilgoren, Pam Belluck, *Court Nominee's Life Is Rooted in Faith and Respect for Law*, The New York Times, 2 (July 21, 2005) http://www.nytimes.com/2005/07/21/politics/21nominee.html?ex=1279598400&en=c055515d290a3215&ei=5090&partner=rssuserland&emc=rss&_r=0.

² See *id.*

³ See *id.*

⁴ See *id.*

⁵ See *id.*

⁶ See *id.*

⁷ See *id.*

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.*

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and other extracurricular activities.¹³ He was captain of the football team, competed in wrestling and track, and participated in the school drama productions.¹⁴

Roberts reaped the financial benefits of his father's executive position, attending private school and living in a wealthy neighborhood. However, Jack Roberts, Sr. instilled some valuable life lessons in the Chief Justice, including the importance of hard work and the plight of the less fortunate. Roberts and his childhood friend, John Langley, worked at Burns Harbor steel mill during summer recess.¹⁵ While Jack Roberts, Sr. worked in his cushy business office, young John Roberts worked on the floor with the regular employees.¹⁶ He interacted with those less fortunate than him, many of whom would never attend college.¹⁷ This experience epitomizes what many commend him for: his modesty and work ethic.

When it came time to choose a college, the Chief Justice debated Amherst or Harvard.¹⁸ Amherst seemed like an ideal choice for his original professional aspirations of becoming a history professor.¹⁹ Ultimately, the Chief Justice attended Harvard College. Roberts majored in history and distinguished himself academically. In 1976, he graduated *summa cum laude*. Interestingly, in spite of his father's moderate wealth, Roberts continued to work in the steel mills every summer to pay for his private education tuition.²⁰

A true Harvard man, the Chief Justice attended Harvard Law School.²¹ Roberts proved to his colleagues and professors that he was a brilliant legal mind as a member and managing editor

¹³ See *id.* at 3.

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *John G. Roberts, Jr.*, The Oyez Project at IIT Chicago-Kent College of Law (Sept. 10, 2014) http://www.oyez.org/justices/john_g_roberts_jr.

²¹ See Purdum, *supra*. at 3.

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of the Harvard Law Review.²² Fellow students and friends at Harvard Law acknowledged that Roberts possessed conservative ideologies, but none labeled him politically conservative.²³ Rather, many considered his conservatism to be more akin to an “old-fashion” philosophy.²⁴ Roberts had a respect for institutions and history, which tempered his revolutionary thinking.²⁵ As post-Vietnam era political upheaval lingered, Roberts was more concerned with honing his legal skills instead of picketing the White House.²⁶ In 1979, Roberts graduated from Harvard Law *magna cume laude*.²⁷

After being admitted to the bar, Roberts served as a law clerk for Judge Henry Friendly for the United States Court of Appeals for the Second Circuit and then Justice William Rehnquist.²⁸ Judge Friendly also attended Harvard College and Harvard Law School.²⁹ Judge Friendly took judicial precedent seriously.³⁰ His decisions regularly sifted through earlier cases, distinguishing their facts in light of the legal issues argued, discerning new trends, and clarifying peculiar outcomes.³¹

From 1980 to 1981, Roberts clerked for then-Associate Justice William Rehnquist on the Burger Court.³² Justice Rehnquist established himself as the most conservative of President Richard Nixon’s appointees, preferring a narrow view of Fourteenth and Fifth Amendment rights and federal power while championing expansive state powers. Justice Rehnquist was often the

²² *See id.*

²³ *See id.* at 4.

²⁴ *See id.*

²⁵ *See id.*

²⁶ *See id.*

²⁷ *See id.*

²⁸ *See id.* at 4-5.

²⁹ *See id.*

³⁰ *See* Michael Boudin, *Judge Henry Friendly and the Craft of Judging*, 159 U. Pa. L. Rev. 1, 3, 7 (2010).

³¹ *See* Purdum, *supra.* at .

³² *See* Marcia Coyle, *The Roberts Court, The Struggle for the Constitution*, The National Law Journal, (Simon & Shuster 2013).

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sole dissenter in many cases in the early days on the Burger Court.³³ However, his conservative views eventually became the majority view of the Court.³⁴ Chief Justice Rehnquist utilized his position to significantly limit the extensive powers of Congress under the Commerce and Equal Protection and Due Process Clauses.³⁵ Roberts expounds a similar conservatism in his decisions, particularly with regards to federal power.³⁶

From 1981 to 1982, Roberts served in the Reagan administration as a Special Assistant to U.S. Attorney General William French Smith. From 1982 to 1986, Roberts served as Associate Counsel to President Ronald Reagan under White House Counsel Fred Fielding.³⁷ After practicing in the public sector, Roberts moved into private practice at Hogan & Hartson.³⁸ While in private practice, Roberts argued thirty-nine times before the Supreme Court.³⁹ As the premiere Supreme Court advocate of his time, Roberts represented a range of clients and argued both conservative and liberal legal issues before the Court.⁴⁰ His work colleagues respected him for his brilliant oratory skills, hard work, and modesty.⁴¹

After Roberts practiced at Hogan & Hartson for several years, he eventually returned to the public sector to serve in the George H. W. Bush Administration as Principal Deputy Solicitor General from 1989 to 1993 and as Assistant to Acting Solicitor General Kenneth Starr.⁴² Under Starr's advisement, Roberts tackled many controversial issues, including the legality of

³³ See Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court*, 221 (1979).

³⁴ See *id.*

³⁵ See *United States v. Morrison*, 529 U.S. 598 (2000) (striking down the civil damages provision in the Violence Against Women Act as an imposition of unwarranted congressional power in violation of the Commerce Clause).

³⁶ See Peter Baker, *Bush Nominates Roberts as Chief Justice*, Washington Post, at 2 (Sept. 6, 2005) <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/05/AR2005090500173.html>.

³⁷ See Coyle, *supra*. at 18-19, 21.

³⁸ See Purdum, *supra*. at 5.

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See Jo Becker, *Work on Rights Might Illuminate Roberts's Views*, Washington Post (Sept. 8, 2005) <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/07/AR2005090702394.html>.

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affirmative action programs and abortion.⁴³ Specifically, Roberts co-wrote a brief arguing that *Roe v. Wade* should be overturned.⁴⁴ Roberts handled both liberal and conservative cases and argued both sides with remarkable impartiality.⁴⁵ Some of Roberts' more conservative cases came to the forefront as the Bush administration mulled over his nomination for a justiceship.⁴⁶ Later on, during Roberts' confirmation hearings, opponents of Roberts' nomination argued that his conservative and religious views made him unsuitable for the Supreme Court.⁴⁷

In May 2001, President George W. Bush nominated Roberts for the position of judge for the U.S. Court of Appeals for the D.C. Circuit.⁴⁸ From 2001 through 2003, Roberts authored 49 opinions, which provoked two dissents from other judges and authored three dissents of his own.⁴⁹ Roberts exhibited the makings of a prominent, effective legal mind, expressing modesty and restraint, while displaying brilliant oratory and writing skills.⁵⁰

The Chief Justice has maintained ties to the Republican Party, specifically to President G.W. Bush. On September 16, 2005, President George Bush nominated Roberts for the position of Chief Justice.⁵¹ Roberts' nomination sought to guarantee the continuance of Bush's influence on the judiciary long after Bush left the White House.⁵² At age 50, Roberts was the youngest Chief Justice since John Marshall, giving Roberts decades to shape the court's direction.⁵³ On

⁴³ *See id.*

⁴⁴ *See id.*

⁴⁵ *See Coyle, supra*. at 21

⁴⁶ *See id.* at 21-22.

⁴⁷ *See id.* at 22.

⁴⁸ *See Oyez Project, supra*.

⁴⁹ *See Oyez Project, supra*.

⁵⁰ *See Lawrence Tribe and Joshua Matz, Uncertain Justice: The Roberts Court and The Constitution*, 8 (Henry Holt 2014).

⁵¹ *See Peter Baker, Bush Nominates Roberts as Chief Justice*, Washington Post, at 1 (Sept. 6, 2005) <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/05/AR2005090500173.html>.

⁵² *See id.* at 1.

⁵³ *See id.* (Chief Justice John Marshall was appointed to Chief Justice in 1801).

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September 5, 2005, two days after the death of former Chief Justice William Rehnquist, Roberts was confirmed.⁵⁴

During Roberts' confirmation hearings, he articulated his judicial philosophy and his faithfulness to *stare decisis*.⁵⁵ Roberts stated that he preferred to be remembered as a modest judge, as someone who appreciated his limited role as judge and who applied the law in a way that benefitted the legal system as a whole.⁵⁶ Roberts sought to build consensus around narrow opinions that did not decide any more than each case required out.⁵⁷ Roberts stated,

Judges are like umpires. Umpires don't make the rules, they apply them. The role of the umpire and a judge is critical to make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire...And I will remember that it's my job to call balls and strikes, and not to pitch or bat.⁵⁸

On October 3, 2005, the first term of the Robert's Court began.⁵⁹ Roberts set out with the intent to continue the legacy of his successor as Umpire of the court.⁶⁰

Roberts is aptly considered a conservative justice and decides cases in accordance with a conservative judicial philosophy.⁶¹ Roberts grew up in a strict Catholic household and continues to practice as a devout Catholic, but he keeps that aspect of his life private and apart from his legal career.⁶² His religious background illuminates his conservative leanings, but his Catholic upbringing does not overpower his judicial philosophy.⁶³

⁵⁴ *See Id.*

⁵⁵ *See Coyle, supra.* at 22.

⁵⁶ *See ibid.* at 23.

⁵⁷ *See id.* at 24

⁵⁸ *See id.* at 23.

⁵⁹ *See id.* at 26.

⁶⁰ *See id.* at 19; *see also Baker, supra.* at 2.

⁶¹ *See Baker, supra.* at 2.

⁶² *See Purdum, supra.* at 6.

⁶³ *See id.*

Similarly, his efforts to act as the Umpire remain largely unaffected by his affiliations with the Republican Party and right-wing ideologies.⁶⁴ One does not seek a judicial nomination if one is not politically motivated and does intend to use his or her position to dictate the country's future. However, as Roberts encounters controversial legal issues, his opinions consistently articulate a judicial philosophy that falls outside of the indoctrinated influence of his political affiliations.⁶⁵

Rather, as the Umpire, Roberts articulates an honest, straight-shooting judicial philosophy that aims to stay within the bounds of controlling legal institutions.⁶⁶ These institutions include the Constitution, judicial precedent, and the role of the Court. Roberts holds firmly to his belief that the Chief Justice must act like the Umpire, he must call the strikes and balls fairly, objectively, and consistently within the bounds of these institutions. While Roberts is not steadfastly opposed to making exceptions or creating new precedent, the Chief Justice's judicial philosophy articulates the importance of tempered evolution; a slow, conservative step-by-step evolution of the law.⁶⁷ Roberts' judicial philosophy maintains the sanctity of the aforesaid institutions while allowing progress in areas of law that evolve with societal standards. Consensus, minimalist decision-making, and adherence to judicial precedent marks Roberts' tenure as the Umpire and his intent to have everyone, including the Court, play by the rules.

PART II: CASE ANALYSIS

a. Article I and II Federal Powers

i. National Federation of Independent Business v. Sebelius (Majority)

⁶⁴ See Baker, *supra*. at 2 (acknowledging that Roberts has expressed in his decisions, briefs, and oral arguments an opposition to more liberal issues such as affirmative action, but that many proponent's of Roberts' nomination believed that these ideologies would not inhibit him from interpreting the Constitution and carrying out his duties).

⁶⁵ See Purdum, *supra*. at 4, 6.

⁶⁶ See Baker, *supra*. at 2.

⁶⁷ See Coyle, *supra*. at 23, 24.

In 2012, the Court ruled on the constitutionality of the Patient Protection and Affordable Care Act (“ACA”).⁶⁸ More specifically, it ruled on the power of the federal government to regulate the economy.⁶⁹ Prior to the 1930’s, the Supreme Court attempted to police the federal government, but with the advent of President Franklin Delano Roosevelt’s New Deal initiative, the Court retreated from a more active role as police officer and deferred contested matters to the democratic process.⁷⁰ *National Federation of Independent Business v. Sebelius*, also known as The Health Care Case, constituted the Court’s revived attempt to police and constrain the power of the federal government.⁷¹

In 2010, President Barack Obama and his Democratic allies mustered the votes necessary to pass the Affordable Care Act in the House and Senate.⁷² The ACA contains several key components to further its goal of providing universal insurance coverage.⁷³ The most important component of the ACA and the primary component at issue in *Sebelius* is the “individual mandate”, which directs people who can afford insurance on the private market to buy a plan unless they otherwise received coverage under Medicaid, Medicare, or employer plans.⁷⁴ The federal government imposed a “share responsibility payment,” levied as part of the federal income tax, on individuals who failed to buy insurance pursuant to this “individual mandate”.⁷⁵

⁶⁸ See Requirement to Maintain Minimum Essential Coverage, 26 U.S.C.A. § 5000A (2014).

⁶⁹ See Tribe, *supra*. at 54.

⁷⁰ See *id.*; see also David A. Strauss, *Commerce Clause Revisionism and the Affordable Care Act*, 2012 Sup. Ct. Rev. 1 (2012) (citing cases).

⁷¹ See Tribe, *supra*. at 54 (concluding that while the Roberts Court partially upheld the ACA and the federal government’s power to implement and carry out national insurance coverage, it constrained the federal government’s regulatory power under the Commerce Clause and Necessary Proper Clause).

⁷² See *ibid.* at 55 (The Senate used a special budgetary voting procedure that required only fifty-one votes to pass changes House Democrats demanded. On March 23, 2010, President Barack Obama signed the bill into law).

⁷³ See *id.* at 56-57 (discussing key components of ACA, including: (1) requiring states to expand their Medicaid programs; (2) providing subsidies for middle-income Americans to buy insurance; (3) creating government-run exchanges, on which American can shop for policies; (4) penalizing large employers who do not provide affordable insurance to their employees; and (5) prohibiting insurance companies from denying coverage to and charging more for individuals with preexisting medical conditions).

⁷⁴ See *id.* at 57; see also 26 U.S.C.A. § 5000A-(a).

⁷⁵ See § 5000A-(b).

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In spite of the ACA's inherent complexity, the "individual mandate" provision provided two clear-cut choices: pay for healthcare or pay the shared responsibility tax.⁷⁶

On March 23, 2010, when President Obama signed the ACA into law, Florida and twelve other states filed a complaint with Federal District Court for the Northern District of Florida.⁷⁷ Thirteen additional states, some individuals, and the National Federation of Independent Business joined in the lawsuit.⁷⁸ The parties argued that the individual mandate exceeded Congress' powers enumerated in Article I.⁷⁹ The District Court agreed with the parties' contentions, but the Eleventh Circuit reversed in part.⁸⁰ On remand, the District Court reaffirmed its holding that the individual mandate exceeded Congress' Article I powers.⁸¹ On June 28, 2012, the Roberts Court issued its ruling on in the Health Care Case.⁸²

Chief Justice Roberts begins his analysis by defining the Court's role.⁸³ The Supreme Court, in Roberts' view, does "not consider whether the Act embodies sound policies as that judgment is entrusted to the Nation's elected leaders."⁸⁴ The Court only asks whether Congress has the power under the Constitution to enact the challenged provisions.⁸⁵ With this statement,

⁷⁶ See Coyle, *supra*. at 57.

⁷⁷ See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012).

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² See Coyle, *supra*. at 60. Justice Ginsburg filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which Justice Sotomayor joined, and in which Justices Breyer and Kagan joined in part. Justices Scalia, Alito, and Thomas filed a dissenting opinion. Although not the focus of this analysis, the Court struck down the Medicaid expansion provision, which stripped noncompliant states of their Medicaid fund, as an impermissible coercion of the federal government. The Medicaid expansion provision is not discussed in this comment.

⁸³ See *Sebelius*, 132 S.Ct. at 2577 (Roberts, J.)

⁸⁴ See *id.*

⁸⁵ See *id.*

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Roberts foreshadows what is to come, a revival of the court’s power to constrain federal power to explicitly enumerated limitations in the Constitution and existing judicial precedent.⁸⁶

Roberts’ opinion contains a recurring theme: the federal government cannot compel individuals to act as the government would have them act.⁸⁷ In accordance with this theme, Roberts defines the constitutional parameters at issue in the present case. Pursuant to Article I, Section 8, Clause 3, Congress can regulate commerce with foreign nations, among the states, and the Indian tribes.⁸⁸ Roberts articulates three categories of permissible regulation, including: the channels of interstate commerce; persons or things in interstate commerce; and activities that substantially affect interstate commerce.⁸⁹ While the third category of permissible congressional power can be expansive, Roberts’ tone suggests there is a limitation to such expansive power.⁹⁰ Additionally, pursuant to Article I, Section 8, Clause 1, Congress may lay and collect taxes to pay debts and provide for the defense and welfare of the country.⁹¹ Lastly, pursuant to Article I, Section 8, Clause 18, Congress can make laws necessary and proper for carrying out the aforementioned powers.⁹²

Roberts addresses federal power pursuant to the Commerce Clause first. Roberts acknowledges that Congress has employed the Commerce Power broadly, regulating any act that directly affects interstate commerce and extending to any activity or amalgam of similar activities that substantially impact it.⁹³ The Chief Justice and the dissent examine *Wickard v. Filburn*, the Court’s most far-reaching interpretation of the Commerce Clause, to define federal

⁸⁶ See *id.* (citing *McCulloch v. Maryland*, 17 U.S. 316, 345 (1819) and *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824) for premise that the Constitution’s express conferral of some powers to the federal government makes clear that it does not grant others and that the Federal Government may only exercise the powers granted to it by the Constitution).

⁸⁷ See *id.* at 2589.

⁸⁸ See U.S. Const. Article I, § 8, Cl. 3.

⁸⁹ See *Sebelius*, 132 S.Ct. at 2578 (citing *United States v. Morrison*, 529 U.S. 598, 609 (2000)).

⁹⁰ See *id.*

⁹¹ See U.S. Const. Article I, § 8, Cl. 1.

⁹² See U.S. Const. Article I, § 8, Cl. 18.

⁹³ See *id.* at 2586.

power.⁹⁴ *Wickard* authorized Congress to regulate a purely intrastate because the cumulative nature of intrastate or personal activity had substantial and “actual effects” on interstate commerce.⁹⁵ The government and dissent in *Sebelius* relies on this precedent to emphasize that the failure of individuals to purchase insurance has a substantial and deleterious effect on interstate commerce, creating a cost-shifting problem that burdens insurers and insured taxpayers to cover costs incurred by uninsured, unhealthy individuals.⁹⁶

In contrast, Roberts identifies a distinct limitation on congressional power that squarely aligns with *Wickard*. Roberts stresses that the power to regulate presupposes that there is an existing activity to regulate, *i.e.*, the production of wheat for personal use.⁹⁷ The Commerce Clause does not authorize Congress to compel individuals to *become active* in commerce by purchasing an unwanted product, *i.e.*, health insurance, because their *inaction* may affect commerce.⁹⁸ Roberts cautions that “[c]onstruing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority.”⁹⁹ In contrast to the dissent, Roberts affirms that *Wickard* does not permit Congress to regulate *inactivity*, *i.e.*, abstaining from purchasing health insurance on the open market.¹⁰⁰

While Roberts is careful to not use the term “slippery slope”, he imagines a state of unbridled congressional control, wherein the federal government uses its expansive powers to

⁹⁴ See *id.* (citing *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942)) (The Court permitted Congress to regulate a farmer’s personal growth and consumption of wheat on his farm because the farmer’s personal use when taken together with the actions of many others similarly situated substantially affected interstate commerce); see also Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 Harv. L. Rev. 1, 42 (2012) (discussing the impact of *Wickard v. Filburn* on the Court’s interpretation of the Commerce Clause).

⁹⁵ See *Wickard*, 317 U.S. at 119-20, 24 (overlooking what activity was being regulated and considering overall economic realities of farmer’s activity on interstate commerce).

⁹⁶ See *id.* at 2585.

⁹⁷ See *Wickard*, 317 U.S. at 127-28 (upholding Congress’ power to regulate farmer’s *production of wheat* for personal use because he exceeded his allotted quota under federal program to regulate the price of wheat).

⁹⁸ See *Sebelius*, 132 S.Ct. at 2585.

⁹⁹ See *id.* at 2587.

¹⁰⁰ See *Wickard*, 317 U.S. at 124.

coerce individuals to buy any product that solves any problem no matter how attenuated to interstate commerce.¹⁰¹ Just like most individuals will likely engage in markets for food, clothing, transportation, shelter, or energy, Roberts asserts that this fact does not authorize Congress to mandate that specific classes of individuals purchase particular products in those markets.¹⁰² Just because vegetables are good for one's health and may prevent future sickness and preempt the need for insurance, this economic reality does not give Congress the power to mandate that individuals buy vegetables.¹⁰³

Similarly, the Government's argument predicated on the Necessary and Proper Clause failed by the same logic. Roberts' theme of congressional restraint surfaces once again. Roberts acknowledges that judicial precedent construes the Necessary and Proper Clause broadly, upholding laws considered "necessary" as well as "convenient", "useful", or "conducive" to the Government's "beneficial exercises".¹⁰⁴ Conversely, judicial precedent also supports restraint on such powers, declaring improper a law that precipitates a "mere usurpation" of power by the federal government.¹⁰⁵ Roberts concedes that the ACA may be "necessary" to achieve its intended goal of insurance reform, but it contravenes specifically enumerated federal powers and constitutes an improper means for achieving that goal.¹⁰⁶ Roberts concludes that the mandate grants the federal government a "great substantive and independent power", which allows it to

¹⁰¹ See *Sebelius*, 132 S.Ct. at 2585.

¹⁰² See *id.* at 2590 (making interesting distinction between the regulation of classes of individuals and the regulation of classes of activities. The Government argued that because uninsured individuals actively seek out and obtain health insurance they are "active in the market" and are therefore subject to regulation. Roberts contends that this reasoning is backwards as the mandate targets younger, healthy individuals who are less likely in need of health insurance. The mandate targets a class of individuals, who not yet engaged in commerce, rather than the activity these individuals engage in).

¹⁰³ See *id.* 2590-91 ("Congress will regulate the American people from cradle to grave!").

¹⁰⁴ See *United States v. Comstock*, 560 U.S. 126, 148-49 (2010).

¹⁰⁵ See *Printz v. United States*, 521 U.S. 898, 924 (1997).

¹⁰⁶ See *Sebelius*, 132 S.Ct. at 2592.

reach beyond its enumerated constitutional boundaries and draw within its regulatory scope those individuals who would otherwise fall outside of it.¹⁰⁷

At this point in Roberts' opinion, it seemed as though he had made up his mind, that the ACA had valid goals yet far exceeded permissible federal power. "The most straightforward reading of the mandate," Roberts asserts, "is that it commands individuals to purchase insurance."¹⁰⁸ However, Roberts articulates a second, equally plausible interpretation: that the individual mandate does not compel individuals to buy insurance, but rather imposes a tax on those who fail to do so.¹⁰⁹ The mandate establishes a condition, *i.e.*, not owning health insurance, which triggers a tax, *i.e.*, the shared responsibility payment.¹¹⁰ Roberts invokes the historically recognized judicial duty to save a law from unconstitutionality if one can find any fair means to do so.¹¹¹

To invoke the taxing power, Roberts must determine if the shared responsibility payment constitutes a penalty or a tax. Roberts provides three justifications for interpreting it as a tax, including: (1) the tax is far less than the price of insurance; (2) the mandate does not contain a scienter requirement; and (3) the payment is collected by the IRS through normal means of taxation.¹¹² The mere fact that the mandate encourages individuals to engage in certain conduct does not render the tax a penalty, as a penalty entails some unlawful act or omission with ensuing negative legal consequences.¹¹³ Beyond requiring a payment to the IRS the mandate, the mandate did not impose negative legal consequences.¹¹⁴

¹⁰⁷ *See id.*

¹⁰⁸ *See id.* at 2593.

¹⁰⁹ *See id.* at 2593-94.

¹¹⁰ *Id.* at 2564.

¹¹¹ *See* Tribe, *supra*. at 63.

¹¹² *Id.* at 2595-96.

¹¹³ *See id.*

¹¹⁴ *Id.* at 2597.

Roberts' theme surfaces once again. Roberts' emphasizes that Congress' taxing power has its limits.¹¹⁵ Even if the mandate operated as a tax, it would lose its character as a tax if it became the functional equivalent of a penalty, *i.e.*, a mechanism for regulation and punishment.¹¹⁶ Congress' authority to tax is strictly limited to its power to direct payment and collect money.¹¹⁷ Since Congress obtained the power to tax a particular transaction, the legislature bears the burden to oversee and ensure its reasonableness.¹¹⁸

Justices Scalia, Kennedy, Thomas, and Alito do not agree with Roberts' interpretation of the individual mandate. The justices accuse Roberts of overstepping his judicial role to interpret law and rewriting the mandate in order to save it from unconstitutionality.¹¹⁹

Justice Ginsberg denounced the Chief Justice's reasoning that the mandate could be saved by the taxing power even though the Commerce Clause and Necessary and Proper Clause afforded the federal government sufficient authority to invoke and carry out the individual mandate.¹²⁰ Ginsberg asserts that the mandate was regulatory in nature and that it could be upheld in that manner.¹²¹ In sharp contrast to Justice Roberts, Ginsberg asserts that the Framers of the Constitution intended that the Commerce Clause grant Congress the authority to enact economic legislation in the interests of the Union and in those cases where the separate states are incompetent to do so.¹²² To capably carry out such an enormous power, Congress must maintain

¹¹⁵ *Id.* at 2599.

¹¹⁶ *Id.* at 2600.

¹¹⁷ *See id.* (concluding that Commerce Clause grants Congress greater control over individual behavior than that granted by the taxing power, and under the Commerce Clause, Congress may command individuals to do as it directs and those who disobey may be subjected to criminal sanctions, which suggests that this power contains regulatory and punitive elements).

¹¹⁸ *See id.*; *see also* Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 Harv. L. Rev. 1, 51 (2012) (discussing cases).

¹¹⁹ *See id.* at 2651, 2655 (Scalia, Kennedy, Alito, Thomas J. dissenting).

¹²⁰ *See id.* at 2613, 2618-19 (Ginsberg, J. dissenting)(Justice Sotomayor joined).

¹²¹ *See id.* at 2619.

¹²² *See id.* at 2615-16 ("Alexander Hamilton emphasized, 'than to infer the extent of any power, proper to be lodged in the national government, from ... its immediate necessities. There ought to be a CAPACITY to provide for future

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leeway to undertake and solve national problems directly and realistically.¹²³ Justice Ginsberg pillories Roberts for the “inactivity” limitation.¹²⁴ Ginsberg exclaims, “[g]iven these far-reaching effects on interstate commerce, the decision to forgo insurance is hardly inconsequential or equivalent to ‘doing nothing.’”¹²⁵ She prophesies that the sheer number of uninsured individuals who do not need insurance coverage today will likely need it tomorrow.¹²⁶ Therefore, the decision to forego insurance has substantial effects on the national economy and constitutes an economic decision the federal government has the authority to regulate.¹²⁷

ii. Boumediene v. Bush (2008) (Dissent)

In 2008, the Roberts Court revisited the extent of power of the federal government and the delicate balance between the Executive and Legislative branches in a different context.

In 2001, the Bush Administration United States launched its War on Terror.¹²⁸ In the wake of the War on Terror, the Administration enacted several laws that limited the rights of enemy personnel captured at home and abroad.¹²⁹ In 2001, the Bush Administration enacted the Authorization for Use of Military Force (“AUMF”), which authorized the President to “use all necessary and appropriate forces” against any nation, organization, or person that “planned, authorized, committed, or aided” the attacks of 2001 to prevent future attacks against the United States.¹³⁰ The AUMF authorized the detention of detainees or enemy personnel at the United States’ Guantanamo Bay Naval Base, over which the United States maintained an indefinite

contingencies[,] as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity.”).

¹²³ See *id.* at 2616.

¹²⁴ See *id.* at 2615.

¹²⁵ See *id.* at 2617.

¹²⁶ See *id.* at 2620.

¹²⁷ See *id.* at 2619-20, 2621.

¹²⁸ See Tribe, *supra.* at 186.

¹²⁹ See *id.*

¹³⁰ See Authorization for Use of Military Force, Pub. L. No. 107-40 (2001).

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lease and *de jure* sovereignty.¹³¹ In 2002, the Executive Branch enacted the Military Commission No. 1, which provided in part that all cases concerning enemy personnel be heard by a military commission, that these commissions could consider hearsay evidence and any evidence obtained through enhanced interrogation techniques, and that detainees could not hear or learn about any evidence deemed classified prior to trial.¹³² Additionally, it limited a detainees' ability to seek *habeas corpus* review.¹³³ From 2004 onward, the Court tackled and declared unconstitutional many of the Bush Administration's national security policies.¹³⁴

In 2005, Congress passed the Detainee Treatment Act of 2005 ("DTA"), which prohibited any court, justice, or judge from considering an application for *habeas corpus* filed by or on behalf of an alien detained at Guantanamo and gave the D.C. Court of Appeals "exclusive" jurisdiction to review CSRT decisions.¹³⁵ In 2006, Congress passed the Military Commissions Act of 2006 ("MCA"), which contained provisions similar to those enumerated in the Military Commission No. 1.¹³⁶

The Court considered the constitutionality of the DTA and MCA in *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).¹³⁷ Justice Kennedy wrote the majority opinion, holding that aliens

¹³¹ See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (upholding federal government's power to detain aliens at Guantanamo Bay as a fundamental and necessary incident to war).

¹³² See Department of Defense, Military Commission Order No. 1 § 6(A)(3), 4(C).

¹³³ See *id.*

¹³⁴ See *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that Guantanamo Bay was not outside civilian court jurisdiction and that detainees must be afforded *habeas corpus* relief); see also *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (declaring Military Commission No. 1 unconstitutional because Constitution authorized Congress, not Executive Branch, to set up military commissions and to try enemy personnel detained in War on Terror).

¹³⁵ See Detainee Treatment Act of 2005, § 1005(e), 10 U.S.C.A. § 801 (2006).

¹³⁶ See Military Commissions Act of 2006, 28 U.S.C.A. § 2241 (2014); see also H.R. Rep. No. 109-664(II), 2006 WL 2767036, Purpose and Summary (Sept. 25, 2006) (Commissions may hear and consider hearsay evidence or any evidence obtained through enhanced interrogation techniques and detainees could not attempt to refute or learn about evidence against them deemed classified. Moreover, the Act attempted to mandate that all outstanding *habeas corpus* submissions on behalf of the captives should be quashed); See Alissa J. Kness, *The Military Commissions Act of 2006: An Unconstitutional Response to Hamdan v. Rumsfeld*, 52 S.D. L. Rev. 382, 383 (2007).

¹³⁷ See Linda Greenhouse, *The Mystery of Guantánamo Bay* *Lecture University of California, Berkeley September 17, 2008*, 27 Berkeley J. Int'l L. 1, 17-18 (2009) (noting that the Court initially refused to hear *Boumediene v. Bush*, with Justice Souter, Justice Ginsberg, and Justice Breyer dissenting, however, last minute statements by army personnel on behalf of Boumediene swayed the Court to hear the case).

detained as enemy combatants have the right to *habeas corpus* under the Constitution and any alternative procedures provided by Congress in the DTA and MCA were insufficient.¹³⁸ Much of Kennedy's argument is predicated on the notion that *habeas corpus* relief is a fundamental individual liberty and a right historically afforded to aliens.¹³⁹ For the first half of Kennedy's opinion he analyzes the birth and evolution of *habeas corpus* in painstaking detail, slowly moving from its origination in England's Magna Carta to its use during World War II.¹⁴⁰ Kennedy draws numerous analogies between England and its foreign territories under *de facto* English control, such as Ireland, wherein *habeas corpus* was afforded to non-citizens.¹⁴¹

Kennedy states that the Constitution and its drafters believed that freedom from unlawful restraint constituted a fundamental principle of liberty and the writ of *habeas corpus* constituted the means to secure that freedom.¹⁴² Kennedy asserts that the Suspension Clause protects an individual's *habeas corpus* rights by providing that *habeas corpus* may be suspended only in cases of a threat to public safety, such as in cases of rebellion or invasion.¹⁴³ Following precedent set forth in *Johnson v. Eisentrager*, Kennedy concludes the Suspension Clause applies in the present case because the petitioners are aliens arrested outside the United States, the United States maintains complete control and jurisdiction over the detention, and the financial and administrative costs of holding the Suspension Clause applicable in a case of military detention abroad as not so great as to limit the reach of the Clause.¹⁴⁴ Therefore, Kennedy determines that there was no justification to suspend the writ.¹⁴⁵

¹³⁸ See Tribe, *supra*. at 197.

¹³⁹ See *id.*

¹⁴⁰ See *Boumediene v. Bush*, 553 U.S. 723, 740-41 (2008) (Kennedy, J.).

¹⁴¹ See *id.* at 750-51.

¹⁴² See Tribe, *supra*. at 197-98.

¹⁴³ See *Boumediene*, 553 at 745-46, 756.

¹⁴⁴ See *id.* at 766-67 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950)) (Kennedy articulates a three-part test to ascertain the reach of the Suspension Clause in United States territories, including: (a) is the detainee an enemy alien; (b) has the detainee never been or resided in the United States; (c) was the detainee captured outside of United

Next, Kennedy distinguishes the *habeas corpus* restrictions of the MCA and DTA from the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which the Court declared constitutional.¹⁴⁶ In contrast to the prisoners targeted by the AEDPA, the detainees did not receive a fair trial in open court nor did they have the opportunity to directly appeal their convictions.¹⁴⁷ Furthermore, Kennedy compares the MCA and DTA to judicially recognized “*habeas substitutes*”.¹⁴⁸ These “*habeas substitutes*”, Kennedy determines, provided alternative or substitute review procedures that streamlined the review process rather than eliminating it all together.¹⁴⁹ In Kennedy’s view, the MCA and DTA totally suspend the *habeas corpus* right and circumscribe the proper channels for *habeas* review in federal court.¹⁵⁰

Lastly, Kennedy rejects the government’s argument that the United States lacked sovereignty over Guantanamo Bay and therefore the petitioners could not assert their *habeas corpus* rights.¹⁵¹ Kennedy finds that the United States clearly exercised *de facto* control over Guantanamo Bay for more than a hundred years and as such, constitutional protections of *habeas corpus* relief ran from the United States to its Naval Base.¹⁵² Additionally, because the writ of *habeas corpus* extended to the Naval Base, the detainees were not required to exhaust their procedures of judicial review prior to invoking the right.¹⁵³

States territory and held in military custody as a prisoner of war; (d) was the detainee tried and convicted by a Military Commission sitting outside the United States; (e) was the detainee tried for offenses against laws of war committed outside the United States; (f) and is the detainee at all times imprisoned outside the United States).

¹⁴⁵ See *id.*

¹⁴⁶ See *Felker v. Turpin*, 518 U.S. 651 (1997) (upholding AEDPA’s provisions limiting ability of persons to file successive writs of *habeas corpus* because it did not unconstitutionally suspend the writ in violation of the Suspension Clause).

¹⁴⁷ See *Boumediene*, 553 U.S. at 777-78.

¹⁴⁸ See *id.* at 785 (citing *Swain v. Pressley*, 430 U.S. 372 (1977); *United States v. Hayman*, 342 U.S. 205 (1952)).

¹⁴⁹ See *id.*

¹⁵⁰ See *id.* at 777-78.

¹⁵¹ See *id.* at 753.

¹⁵² See *id.* at 753, 756.

¹⁵³ See *id.* at 794-95.

From the outset of his dissent, Roberts criticizes the majority for intervening in affairs left solely for the federal government without any legally cognizable power to intervene.¹⁵⁴ Roberts asserts that Congress set up a system that provided some of the most “extensive legal and procedural protections” afforded enemy combatants in the history of the United States.¹⁵⁵ Roberts surmises that “[o]ne cannot help but think after surveying the modest practical results of the majority’s ambitious opinion that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants.”¹⁵⁶

Accordingly, Roberts addresses a threshold matter apart from the writ’s scope.¹⁵⁷ Roberts asserts that “[t]he critical threshold question in these cases”, prior to any inquiry about the writ’s scope, “is whether the system the political branches designed protects whatever rights the detainees may possess”.¹⁵⁸ If the system protects detainee rights, then there is no need for any additional process, such as *habeas* relief.¹⁵⁹ Roberts calls the majority reasoning “misguided” and “fruitless” because it does not analyze the process of the DTA or its satisfaction of detainee rights, but simply shifts the responsibility of overseeing foreign policy and national security concerns from the federal government to the judiciary.¹⁶⁰

Roberts details the judicial review process that Congress envisioned when it enacted the DTA. The detainee appears before a Combatant Status Review Tribunal (“CSRT”) followed by review in the D.C. Circuit. Congress authorized the D.C. Circuit to decide whether the CSRT proceedings were consistent with the Constitution and laws of the United States.¹⁶¹ Roberts

¹⁵⁴ See *id.* at 801 (Roberts, J. dissenting) (Roberts joins Justice Scalia’s opinion analyzing judicial precedent and history of *habeas corpus*).

¹⁵⁵ See *id.*

¹⁵⁶ See *id.*

¹⁵⁷ See *id.* at 802.

¹⁵⁸ See *id.*

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See *id.* at 803.

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contends that because the Supreme Court granted certiorari before the D.C. Circuit could render its review, the Court cannot determine if Circuit review vindicates the petitioner's rights and if the petitioner-detainees are entitled to *habeas* relief.¹⁶² The effect of the majority's decision, Roberts forewarns, is to impose an additional, time-consuming judicial review process that may not prove to be any more effective than the statutorily defined process under the DTA.¹⁶³

Roberts found support for his argument in the Court's previous decision in *Hamdi v. Rumsfeld*.¹⁶⁴ The Court in *Hamdi*, Roberts argues, concluded that a military tribunal could adequately and properly vindicate a citizen enemy combatant's due process rights, and if necessary, a citizen enemy combatant could seek review in an Article III court.¹⁶⁵ Roberts' suggests that if *Hamdi* found that a military tribunal satisfied the due process rights of a *citizen*, then *non-citizens* should receive no greater rights.¹⁶⁶ The DTA represented Congress' attempt to provide accused alien combatants constitutionally adequate opportunities to contest their detentions before a military tribunal, *i.e.*, CSRT, and seek review in an Article III court, *i.e.*, D.C. Circuit.¹⁶⁷ In accordance with judicial precedent, Roberts concludes that DTA's two-tier level of review, with the combined efforts of the CSRT and D.C. Circuit, sufficiently protects the alien enemy combatant's due process rights.¹⁶⁸

Roberts then analyzes every statutory right afforded to petitioners at the CSRT stage. Roberts cites to the Government's Implementation Memorandum and determines that every petitioner possesses the right to present evidence that he was wrongfully detained, including to

¹⁶² See *id.* at 803, 804.

¹⁶³ See *id.* at 807-808.

¹⁶⁴ See *Hamdi v. Rumsfeld*, 542 U.S. 504 (2004) (guaranteeing an American citizen challenging his detention as an enemy combatant the right to notice of the evidence before him and a fair opportunity to rebut the evidence before a neutral decisionmaker).

¹⁶⁵ See *Hamdi*, 542 U.S. at 533, 538.

¹⁶⁶ See *Boumediene*, 553 U.S. at 804 (emphasis added).

¹⁶⁷ See *id.* at 810.

¹⁶⁸ See *id.*

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call all reasonably available witnesses, to question hostile witnesses, to introduce documentary evidence, and to testify before the tribunal.¹⁶⁹ Roberts’ rejects the majority’s disapproval of the admission of hearsay stating that *Hamdi* expressly approved the use of hearsay by *habeas* courts.¹⁷⁰ Additionally, Roberts notes that each petitioner is provided a personal representative, who reviews classified documents and challenges this evidence at the CSRT on the petitioner’s behalf.¹⁷¹ “Keep in mind”, Roberts reassures, “that all this is just at the CSRT stage”.¹⁷²

Roberts flatly rejects the majority’s argument that because the DTA prohibits a petitioner from presenting new or additional evidence after the CSRT stage, but before the D.C. Circuit stage, the DTA does not constitute a sufficient replacement for *habeas* review.¹⁷³ Roberts criticizes the majority for declaring unconstitutional an act of Congress based upon some hypothetical case wherein a detainee loses out on the benefits of newly discovered evidence.¹⁷⁴ Roberts fully acknowledges that the DTA does not envision the introduction of newly discovered evidence before the D.C. Circuit, but the DTA permits the D.C. Circuit to remand a case for a new CSRT determination.¹⁷⁵ Roberts assumes that if newly discovered evidence appeared, the D.C. Circuit would remand for additional findings.¹⁷⁶ More importantly, Roberts affirms that judicial precedent dictates that the Court’s decision to declare an act unconstitutional cannot be solely predicated on hypothetical cases.¹⁷⁷

¹⁶⁹ *See id.* at 816-17.

¹⁷⁰ *See id.*

¹⁷¹ *See id.* 816-17 (noting that Geneva Convention, like the DTA, does not allow prisoners of war or detainees to gain or ever gain access to classified files).

¹⁷² *See id.* at 818 (discussing additional safeguards in D.C. Circuit).

¹⁷³ *See id.* at 818-19.

¹⁷⁴ *See id.* at 820.

¹⁷⁵ *See id.*

¹⁷⁶ *See id.*

¹⁷⁷ *See id.*

In conclusion, Roberts suggests that Congress fell victim to a “bait and switch”.¹⁷⁸ Roberts contends that *Hamdi’s* rationale was directly applicable to this case, but the majority afforded it scant review.¹⁷⁹ Congress, the President, and the Nation’s military leaders made a good faith effort to comply with the Court’s precedent, but the majority refused to take “yes” as answer.¹⁸⁰ Roberts criticizes the majority for misconstruing the structure of the DTA when its structure looks very similar to the structure blessed by the *Hamdi* Court.¹⁸¹ Similarly, Roberts derides the majority for declaring unconstitutional the DTA without recommending or proposing alternatives of its own and disregarding evidence that the DTA will look substantially similar to *habeas* relief.¹⁸² Lastly, Roberts criticizes the majority for displacing Congress’ policy choices with the majority’s own.¹⁸³ The role of the judiciary, Roberts contends, was to determine if the DTA and MCA procedures meet the essential standard of fairness under the Due Process Clause; it was not to displace congressional choices of policy with the judiciary’s own.¹⁸⁴

b. First Amendment – Freedom Of Speech

i. Citizens United v. Fed. Election Comm’n, 558 U.S. 310 (2010)

In 2010, the Supreme Court tackled the First Amendment rights of corporations to advocate or oppose the election or defeat of political candidates. The Court afforded corporations and unions the right to spend as much money as they choose so long as these

¹⁷⁸ *See id.* at 811.

¹⁷⁹ *See id.*

¹⁸⁰ *See id.* at 812, 822 (criticizing majority because it refuses to concede that Congress did something right; that in spite of earlier failed attempts, Congress intended to enact an adequate substitute for *habeas* relief).

¹⁸¹ *See id.* at 812, 823 (criticizing the majority’s persistent misreading of the statute and arguing that the statute, like general *habeas* review law, clearly grants the CSRT, D.C. Circuit, and Administrative Review boards the authority to order the release of a detainee and therefore fashion a remedy and that this statutorily defined remedy constitutes a sufficient substitute for *habeas* relief).

¹⁸² *See id.*

¹⁸³ *See id.* at 822.

¹⁸⁴ *See id.* at 825.

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entities do not coordinate their political advertising with a candidate’s campaign.¹⁸⁵ Many commenters criticize *Citizens United v. Federal Election Commission* for irreparably harming the nation’s political process by allowing corporate funds to covertly coordinate “independent” election activities.¹⁸⁶ However, the Roberts Court was in a tough position as its current judicial precedent on a corporation’s First Amendment rights was contradictory and did not articulate a clear rule as to what campaign activities a corporation could lawfully influence.

The case arose from efforts by *Citizens United*, a nonprofit corporation that accepted contributions from for-profit corporations, to promote and distribute a documentary aptly named *Hillary: The Movie* that attacked Hillary Clinton during her efforts to obtain the Democratic president nomination. *Citizens United* sought to distribute and promote *Hillary: The Movie* through video-on-demand and television. Federal law prohibited any “electioneering communications” funded by corporations from taking place thirty days before a primary election.¹⁸⁷ *Citizens United* challenged limitations imposed by Section 203 of the Bipartisan Campaign Reform Act of 2002 (“BCRA”) on independent expenditures made by corporations within thirty days of a primary election.¹⁸⁸ During the first round of oral arguments, *Citizens United* argued that *Hillary: The Movie* did not constitute an electioneering communication that urged voters to defeat Clinton’s nomination.¹⁸⁹ Rather, it took a broader critical view of Hillary Clinton’s political ideologies and actions.¹⁹⁰ However, several of the more conservative justices, including Alito, Scalia, Kennedy, and Thomas sought to decide the broader constitutional issue

¹⁸⁵ See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

¹⁸⁶ See *Tribe*, *supra*. at 89.

¹⁸⁷ See 2 U.S.C. §441(b).

¹⁸⁸ See *Tribe*, *supra*. at 91.

¹⁸⁹ See *id.* at 92.

¹⁹⁰ See *id.*

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from the very beginning.¹⁹¹ Ultimately, Citizens United sought declaratory and injunctive relief against the Federal Election Commission (“FEC”) and argued that current limitations imposed by Section 203 on corporate independent expenditures resulted in an unreasonable chilling effect on First Amendment free speech rights.¹⁹²

Justice Kennedy wrote the opinion of the Court.¹⁹³ Justice Kennedy’s opinion praised the values of unfettered free speech and criticized government censorship, even if well-intentioned.¹⁹⁴ Extolling the core principles of First Amendment liberty, Justice Kennedy did not fully decide *Citizens United* on narrow grounds.¹⁹⁵ Kennedy moved beyond a narrow holding that the movie was not publically distributed nor the functional equivalent of express advocacy into the limitations of the First Amendment.¹⁹⁶ In order to address the constitutional limitations of the First Amendment, Kennedy reconsidered the entire facial validity of Section 203 and its effects on political speech.¹⁹⁷ Kennedy reasoned that because these types of cases invoke serious implications for statutory and constitutional interpretation the Court should address and correct any inconsistencies in his past jurisprudence.¹⁹⁸

Kennedy asserted that the Court has consistently recognized that First Amendment protections extend to associations of persons, individuals, and corporations and any limitations

¹⁹¹ See *id.*; see also Jeffrey Toobin, *The Oath*, 165-69 (New York: Random House, 2012) (noting that the Court the parties back to reargue the constitutional issues after it decided that *Hillary: The Movie* did not constitute an electioneering communication).

¹⁹² See *id.*

¹⁹³ Justice Thomas joined Justice Kennedy’s opinion except for Part VI.

¹⁹⁴ See Tribe, *supra*. at 93

¹⁹⁵ See *id.*

¹⁹⁶ See *Citizens United*, 558 U.S. at 892 (holding that Court could not resolve *Citizens United* on an as applied basis, solely analyzing the facts of the case before it, as this would chill political speech. Therefore, the Court broadened the case from *Citizen’s United* initial narrower arguments, focusing only on *Hillary*, to reconsider both the validity of its prior jurisprudence and the facial validity of § 441b).

¹⁹⁷ See *id.* at 892-94 (applying strict scrutiny and requiring government to demonstrate that statute served a compelling interest and was narrowly tailored to meet that interest).

¹⁹⁸ See *id.* at 894-95.

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cannot be premised on the entity's corporate identity.¹⁹⁹ Kennedy rectified the holding in *Austin v. Michigan State Chamber of Commerce* with more corporation-friendly jurisprudence.²⁰⁰ In addressing limitations of the First Amendment on corporations, Kennedy determined the pre-*Austin* line of reasoning that forbids restrictions on political speech based on the speaker's corporate identity is the correct reasoning.²⁰¹ The majority held that prohibitions on corporate speech imposed by Section 441(b) constitutes an outright ban on free speech and since the government could not articulate a narrowly tailored and compelling interest that supports such ban, Section 441(b)'s ban is unconstitutional.²⁰² Kennedy rejects the government's argument that it sought to prevent corruption or the appearance of corruption.²⁰³ Additionally, Kennedy rejects the government's argument that it sought to protect corporate shareholder rights.²⁰⁴

Justice Roberts wrote a concurring opinion that addressed the importance of adhering to *stare decisis* and the importance of abandoning precedent that is no longer viable.²⁰⁵ Roberts asserts that the First Amendment protects "more than just the individual on a soapbox and the

¹⁹⁹ See *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n. 714 (1978) (declaring unconstitutional Massachusetts campaign finance law that prohibited corporate donations in ballot initiatives unless the corporation's interests were directly involved and allowing corporations to exercise their First Amendment rights through contributions); see also *Buckley v. Valeo*, 424 U.S. 1, 56, 96 S. Ct. 612, 652, 46 L. Ed. 2d 659 (1976) (invalidating federal expenditure ban, which applied to individuals, corporations, and unions, because it failed to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process, but upholding public financing scheme, disclosure rules, and limits on direct contributions to campaigns).

²⁰⁰ *Id.* at 888-89, 912-13 (overruling *Austin v. Mich. Chamber of Commerce*, 492 U.S. 652 (1990), which upheld a requirement that corporations use a political action committee rather than the corporation's general treasury funds to support or oppose candidates for office in the state of Michigan).

²⁰¹ *Id.* at 903-904.

²⁰² *Id.* at 897, 913.

²⁰³ See *id.* at 909-10 (citing *Buckley*, 424 U.S. at 47 and *McConnell v. Federal Election Commission*, 540 U.S. 93, 136-138 (2003) (rejecting "anti-corruption" argument and holding that: (1) independent expenditures "do not give rise to corruption or the appearance of corruption"; (2) government interest of preventing corruption was limited to *quid pro quo* corruption; (3) this interest justifies restrictions on direct contributions to candidates, not on independent expenditures; and (4) any influence of independent expenditures in the electoral or campaign process will not result in loss of confidence in political process).

²⁰⁴ See *id.* at 911 (rejecting "shareholder protection" argument and holding that: Under a shareholder protection interest, if shareholders of a media corporation disagreed with its political views, the government would have the authority to restrict the media corporation's political speech, i.e., running editorials, and such a ban is over-inclusive because it includes corporations comprised of a single shareholder).

²⁰⁵ See *id.* at 917 (Roberts, J.) (Justice Alito joined).

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lonely pamphleteer”.²⁰⁶ Roberts acknowledges that it is the Court’s obligation to refrain from addressing constitutional questions except when necessary to decide issues before it.²⁰⁷

Nevertheless, Roberts contends that the constitutional issue – whether Section 441(b) may be enforced, consistent with the First Amendment, against corporations – was indispensably necessary to resolving *Citizens United*.²⁰⁸

According to Roberts, “[t]here is a difference between judicial restraint and judicial abdication”.²⁰⁹ Roberts disagrees with the dissent’s reaffirmation of *Austin* decision and contends that the cases succeeding *Austin* did not specifically ask the Court to reconsider *Austin*’s holding.²¹⁰ Roberts criticizes the dissent for overlooking the negative consequences of *Austin* on the Court’s First Amendment jurisprudence and recognizes that while *stare decisis* is important, it is a “principle of policy” subject to change in a principled and intelligible way.²¹¹ Roberts agrees with the majority opinion that *Austin* constituted an “aberration” that departed significantly from corporation-friendly First Amendment jurisprudence, which specifically declared unconstitutional restrictions on speech that enhanced the voice of others or equalized the ability of individuals or groups to influence the outcome of elections.²¹² Roberts contends that the slight factual distinctions between *Citizens United* and previous cases do not sanction prohibitions on a corporation’s rights under the First Amendment.²¹³

²⁰⁶ *See id.*

²⁰⁷ *See id.* at 918.

²⁰⁸ *See id.* at 919.

²⁰⁹ *See id.*

²¹⁰ *See id.* at 920.

²¹¹ *See id.*

²¹² *See id.* at 921 (citing *Buckley*, 424 U.S. at 48-49).

²¹³ *See id.* (noting that *Bellotti* involved a referendum rather than a candidate election).

Roberts interprets *Austin*'s rationale to authorize the prohibition of political speech by a category of speakers solely to effectuate equality among speakers.²¹⁴ Roberts criticizes the dissent for succumbing to the “temptation” of equalizing speech and to prevent an individual or group from more effectively supporting or opposing a candidate.²¹⁵ Roberts reiterates that to rely on *Austin* when its reasoning spawns future mistakes would fundamentally undercut rule of law principles that *stare decisis* seeks to protect and inhibits the Court's jurisprudence from developing in a principled and intelligible way.²¹⁶

ii. *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011)

In 1998, Arizona reformed traditional public financing programs in response to several corruption scandals involving its governor, several legislators, and two United States senators.²¹⁷ The Clean Citizens Elections Act provided public money to candidates who agreed to limit their personal or private spending to \$500, participate in at least one debate and return unspent money.²¹⁸ The matching funds provision of the Clean Citizens Elections Act provided that candidates received initial public grants and then additional public funding based on amounts spent by privately financed opponents and by independent groups supporting them.²¹⁹ The dual purpose of the Act was to ensure that candidates relying predominantly on public funding were not outspent by wealthy opponents and their supporters as well as to encourage candidates to

²¹⁴ See *id.* at 922-23, 924 (rejecting government's argument that *Austin*'s compelling interest was the prevention of actual or apparent quid pro quo corruption and protection of corporate shareholders rights, rather than diminishment of the corrosive and distorting effects of aggregations of wealth accumulated with assistance by corporations).

²¹⁵ See *id.* at 923.

²¹⁶ See *id.* at 924.

²¹⁷ See Tribe, *supra.* at 116; see also Citizens Clean Elections Act, Ariz. Rev. Stat. Ann. § 16-940 *et seq.* (1998).

²¹⁸ See Ariz. Rev. Stat. Ann. § 16-941(A)(2), § 16-956(A)(2), § 16-953.

²¹⁹ See §§ 16-952(A)-(C).

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utilize and recognize the benefits of Arizona’s public funding system.²²⁰ Arizona followed in the footsteps of several other states that implemented similar laws.²²¹

Past and future Arizona candidates and two independent expenditure groups, the conservative Goldwater Institute and the libertarian Institute for Justice, challenged the constitutionality of the matching funds provision, arguing that it penalized their speech and burdened their ability to exercise their rights under the First Amendment.²²² The District Court entered a permanent injunction against Arizona’s enforcement of the matching funds provision.²²³ The Ninth Circuit reversed, holding that the provision imposed minimal burden on First Amendment rights and that it was justified by the State’s interest to reduce *quid pro quo* political corruption.²²⁴

Roberts wrote the majority opinion.²²⁵ Roberts predominantly relies precedent set forth in *Davis v. Federal Election Commission*.²²⁶ Davis stands for the proposition that a state or the federal government cannot enact campaign finance laws so restrictive that it unconstitutionally coerces a candidate or its supporters to choose between the right to engage in “unfettered free speech” or succumb to discriminatory fundraising limitations implemented solely to level the playing field.²²⁷ Roberts states that *Davis’s* logic controls in the instant case as the matching funds provision “imposes an unprecedented penalty” on a wealthy candidate’s ability to exercise

²²⁰ See Tribe, *supra*. at 116.

²²¹ See Adam Liptak, *Justices Strike Down Arizona Campaign Finance Law*, NYTimes.com, http://www.nytimes.com/2011/06/28/us/politics/28campaign.html?_r=0, Jun. 27, 2011 (noting that Connecticut, Florida, Maine, Minnesota and North Carolina adopted public financing systems similar to Arizona’s, but courts blocked the enforcement of these laws).

²²² See *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2816 (2011).

²²³ See *id.* (Roberts, J.)

²²⁴ See *id.*

²²⁵ Justices Alito, Thomas, Kennedy, and Scalia joined.

²²⁶ See *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 742 (2008) (declaring unconstitutional the “Millionaire’s Amendment” of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441a-1(a), which provided that if a candidate for the U.S. House of Representatives spent more than \$35,000 of personal funds, the opponent of this candidate could collect individual contributions up to \$9,600 per contributor, or three times the normal contribution limit of \$2,300).

²²⁷ See *Bennett*, 131 S.Ct. at 2818.

his or her free speech rights and permits his or her adversary to take advantage of the leveled playing field.²²⁸ Moreover, Roberts asserts that *Bennett* poses even greater constitutional implications than *Davis* as the matching funds provision initiates the direct and automatic release of public money for the benefit of the public candidate at the expense of the privately funded candidate, who may forego his or her personal spending as well as any spending provided by an independent expenditure groups to avoid the matching funds automatic disbursement of funds.²²⁹

Roberts finds that independent expenditure groups suffer substantially from the matching funds provision because these groups lack a political connection to the electoral process and rely solely on the infiltration of monies to support or oppose a candidate.²³⁰ Roberts determines these independent expenditure groups face a harsh choice, *i.e.*, trigger the matching funds provision, change the content of their speech, or withdraw entirely.²³¹ Roberts states that the record contains numerous examples of candidates curtailing fundraising efforts and discouraging independent expenditure group donations.²³² Roberts asserts that it is illogical to coerce a candidate to hover just below the matching funds threshold by rejecting independent expenditure funding or be subject to the discriminatory application of this threshold.²³³

Roberts then focuses his analysis on statutory structure and legislative intent to determine if the matching funds provision furthers a compelling interest and is narrowly tailored to achieve that interest.²³⁴ Roberts does not find Arizona's justifications to be compelling.²³⁵ Roberts

²²⁸ *Id.* (acknowledging that there is slight differences between the Millionaire's Amendment analyzing in *Davis* and the matching funds provision because the matching funds provision did not impose an outright cap).

²²⁹ *Id.* at 2819.

²³⁰ *Id.* at 2819-20.

²³¹ *Id.* at 2820 (rejecting Arizona's separate argument that *Davis* was distinguishable).

²³² *Id.* at 2822.

²³³ *See id.* at 2823.

²³⁴ In accordance with this standard, the Court has consistently invalidated restrictions on campaign expenditures, restraints on independent expenditures applied to express advocacy groups, limits on uncoordinated political party expenditures, and prohibitions against unions, nonprofit associations, and corporations from making independent expenditures for electioneering communication. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 52-54 (1976); *Federal*

rejects Arizona’s argument that the state has an interest in promoting free and open debate in state elections because Arizona increases speech for one group while impermissibly burdening the speech of another.²³⁶ To further this point, Roberts discredits the dissent’s claim that judicial precedent has never found public funding or government subsidies for one group to constitute a First Amendment burden on another group.²³⁷ Roberts asserts that none of the cases the dissent cites “involved a subsidy given in direct response to the political speech of another, to allow the recipient to counter that speech.”²³⁸ In fact, the “direct response” is distinguishable from disclosure or disclaimer requirements as these types of provisions do not result in a direct windfall to the opposing party.²³⁹ Roberts concludes that it is the incremental distribution of public funds in direct response to private funding that impermissibly burdens speech.²⁴⁰ The state’s desire to level the playing field is not compelling enough to warrant such an intrusion on First Amendment rights, especially when Arizona enacted austere contribution limits and stringent fundraising disclosure requirements to deter potential corruption.²⁴¹

Justice Kagan penned a forceful dissent, exclaiming that “[e]xcept in a world gone topsy-turvy, additional campaign speech and electoral competition is not a First Amendment injury.”²⁴² Kagan asserts that the petitioners’ claims are illogical because Arizona offered support to any

Election Comm’n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 256-65 (1986); *Colorado Republican Federal Campaign Comm. v. Federal Election Comm’n*, 518 U.S. 604, 608 (1996); *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 372 (2010).

²³⁵ See *id.* at 2820.

²³⁶ See *id.* at 2821.

²³⁷ See *id.*

²³⁸ See *id.* at 2822 n. 9 (citing *Buckley*, 424 U.S. at 91-95, 96).

²³⁹ See *id.* at 2822.

²⁴⁰ See *id.* at 2824, 2833 (Roberts acknowledged that if Arizona provided a lump-sum distribution without any reference to concurrent private funding, such lump-sum provisions would not impermissibly burden speech. Unlike the dissent, Roberts does not believe that the direct response model are substantially similar to the lump-sum model and does not believe that the direct response model provides an improved method of distributing public funds).

²⁴¹ See *id.* at 2825-26, 2827.

²⁴² See *id.* at 2833 (Kagan, J. dissenting).

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person running for state office, but the petitioners *refused* that assistance.²⁴³ It is illogical to claim that Arizona violated the petitioner’s First Amendment rights by disbursing funds to other speakers when the petitioners could have received, but spurned, the state’s financial assistance.²⁴⁴ Kagan asserts that “[s]ome people might call that *chutzpah*”.²⁴⁵ Kagan concludes that Arizona’s matching funds provision subsidizes rather than restricts free speech to guarantee robust campaigns that elect representatives not beholden to the few, but accountable to everyone.²⁴⁶

c. Fourth Amendment – Warrantless Search and Seizure

i. *Georgia v. Randolph* (2006) (Dissent)

In 2006, the Roberts Court tackled the issue of the Fourth Amendment’s prohibition against warrantless searches. *Georgia v. Randolph* was Roberts’ first dissent since ascending to his role as Chief Justice.²⁴⁷ On July 6, 2001, Respondent Scott Randolph and his wife, Janet, got into a domestic dispute, which prompted Janet to call the police.²⁴⁸ When the police came to the Randolph residence, Janet informed the police that her husband removed their child to their neighbor’s home.²⁴⁹ She also informed the police that her husband was a habitual cocaine-user.²⁵⁰ The police went with Janet to retrieve the boy and upon returning to the Randolph residence she reiterated to the police claims of Scott’s drug abuse and volunteered that there was drug evidence in the home.²⁵¹ Janet consented to a police search.²⁵² Scott refused to consent to a

²⁴³ See *id.* at 2835.

²⁴⁴ See *id.*

²⁴⁵ See *id.*

²⁴⁶ See *id.* at 2829, 2833.

²⁴⁷ See Linda Greenhouse, *Roberts Dissent Reveals Strain Beneath Court’s Placid Surface*, NY Times (Mar. 23, 2006) http://www.nytimes.com/2006/03/23/politics/23scotus.html?pagewanted=all&_r=0 (the Court issued its opinion in *Georgia v. Randolph* approximately five months after Roberts ascended to the role of Chief Justice).

²⁴⁸ See *Georgia v. Randolph*, 547 U.S. 103, 107 (2006).

²⁴⁹ See *id.*

²⁵⁰ See *id.*

²⁵¹ See *id.*

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police search.²⁵³ Upon Janet's consent, the police entered the house and found evidence of drugs.²⁵⁴ At some point during the search Janet revoked her consent.²⁵⁵ Respondent was indicted for possession of cocaine and the trial court denied his motion to suppress the evidence as products of a warrantless search unauthorized by consent.²⁵⁶

Justice Souter delivered the opinion of the Court. The issue to be decided was as follows: whether an evidentiary seizure is lawful with the permission of one occupant when the other, who later seeks to suppress the evidence, is present at the scene and expressly refuses to consent.²⁵⁷ The Court's existing Fourth Amendment jurisprudence held that a warrantless entry and search of one's premises is valid when police obtains voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant criminal defendant.²⁵⁸ In this case, the Court held, that because Scott was physically present on the premises and refused to consent to police entry, the police's entry and search of the Randolph residence constituted an unreasonable and invalid warrantless search.²⁵⁹

Souter determined that the facts in *United States v. Matlock* were reasonably analogous to *Randolph* and as such, *Matlock*'s rule of law that co-habitation entails some form of common understanding that one co-occupant can affect the other co-occupant's interests is applicable.²⁶⁰ Nevertheless, Souter noted that this case was a matter of first impression for the Court as none of

²⁵² *See id.*

²⁵³ *See id.*

²⁵⁴ *See id.*

²⁵⁵ *See id.*

²⁵⁶ *See id.* at 107-108.

²⁵⁷ *See id.* at 106.

²⁵⁸ *See id.* at 106, 109 (citing *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *United States v. Matlock*, 415 U.S. 164 (1974)).

²⁵⁹ *See id.* at 106.

²⁶⁰ *See id.* at 109-110 (suggesting that if the police approach a dwelling and a woman with a baby on her hip permits police entry and search, the validity of the search is premised on the reasonable belief that the woman resided as a co-tenant in the dwelling and possessed the authority as a co-tenant to consent).

the Court’s “co-occupant consent-to-search” cases contained the additional fact of a second occupant being physically present and refusing permission to search.²⁶¹

Justice Souter supports his decision to distinguish *Randolph* from preceding cases with what he considers to be a “shared social expectation”.²⁶² Specifically, in the context of social guests who temporarily inhabit a dwelling, Court precedent holds that these guests are entitled to some degree of privacy and a co-occupant cannot consent to entry and search over the objection of the guest.²⁶³ Souter argues that no reasonable person would enter and search a dwelling if a co-occupant stood in the doorway saying, “stay out”.²⁶⁴ While Souter acknowledges the consenting occupant’s interest in revealing criminal activity as well as his or her interest in deflecting or dispelling any suspicion raised by sharing the dwelling with a criminal, a co-occupant must obtain these benefits without the advantage of a rule of law that ignores his or her co-occupant’s refusal.²⁶⁵ Souter asserted that the threshold element of “physical presence” offered a justified and pragmatic formula, a bright-line in which to judge warrantless searches.²⁶⁶

The Chief Justice criticizes the majority opinion for creating a new precedent in the Court’s Fourth Amendment jurisprudence based upon “randomness” and “happenstance”, overlooking the grim realities that will likely result from such a peculiar, yet judicially invoked protection.²⁶⁷ Roberts first explains the current judicial precedent clearly stands for the

²⁶¹ Compare *Randolph*, 547 U.S. at 109, with *Matlock*, 415 U.S. at 166 (Respondent Matlock was arrested for robbery and sought to suppress evidence obtained during the search of his premises, which he rented from the Graff family. The Graff family rented the home to several other individuals, including Matlock and Ms. Graff. When the police approached the dwelling, Ms. Graff allegedly consented to their entrance. *Matlock* followed judicial precedent, which held that the consent of one who possesses common authority over premises or effects is valid as against the *absent*, non-consenting person with whom that authority is shared)(emphasis added).

²⁶² See *Randolph*, 547 U.S. at 111.

²⁶³ See *id.* at 113 (citing *Minnesota v. Olson*, 495 U.S. 91, 99 (1990)).

²⁶⁴ See *id.* at 113.

²⁶⁵ See *id.* at 115-16.

²⁶⁶ See *id.* at 122.

²⁶⁷ See *id.* at 127 (Roberts, J. dissenting).

proposition that a warrantless search is reasonable if police obtain the voluntary consent of a person authorized to give it, including co-occupants.²⁶⁸

Roberts cautions that the practical effects of the majority's limitation pins the consent against the objector.²⁶⁹ The majority's limitation necessarily places the consent, the objector, and the police in the predicament of determining who holds more authority to consent to or refuse entry and search.²⁷⁰ To demonstrate the peculiarity of the majority's opinion, Roberts postulates a number of hypothetical situations in which a guest may feel disinclined to turn away from a room or dwelling even if a co-occupant objects.²⁷¹ Roberts explains that an invited guest, *i.e.*, the police, who encounters two disagreeing co-occupants would *not* turn away based upon what the majority considers a social expectation.²⁷² Roberts stresses that long settled judicial precedent recognizes that while "[o]ur common social expectations" assume that one will not share with another what we have shared with them, "...that is the risk we take in sharing."²⁷³

One of Roberts' hypotheticals depicts a domestic violence case. Robert forewarns that there will be many cases in which a consenting co-occupant's wish to have the police enter is overridden by an objection from another present co-occupant.²⁷⁴ As a result of the co-occupant's refusal, the police will turn away and the consenting co-occupant will likely be subject to the same or worse abuse for calling and acquiescing to a police search.²⁷⁵

In accordance with his judicial philosophy, Roberts continuously reiterates long-settled judicial precedent throughout his dissenting opinion. Roberts argues that the majority's efforts to

²⁶⁸ *See id.*

²⁶⁹ *See id.* at 129.

²⁷⁰ *See id.*

²⁷¹ *See id.*

²⁷² *See id.* at 130.

²⁷³ *See id.* at 131, 133 (citing *United States v. Jacobsen*, 446 U.S. 109, 117 (1984); *United States v. Miller*, 425 U.S. 435, 443 (1976); *United States v. White*, 401 U.S. 745 (1971) for proposition that "shared social expectations" is not a widely used as a means of demonstrating "reasonableness" in existing Fourth Amendment jurisprudence).

²⁷⁴ *See id.* at 136-37.

²⁷⁵ *See id.* at 138.

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distinguish *Matlock* and *Rodriguez* based on factual inconsistencies are misplaced.²⁷⁶

Specifically, if the criminal defendants in *Matlock* and *Rodriguez* had been present to object, one can reasonably assume that they would have done so.²⁷⁷ The co-occupants in *Matlock* and *Rodriguez* possessed authority to admit the police into areas over which they exercised control, despite the presumed wishes of their *present* co-occupants.²⁷⁸ “The common thread in our decisions upholding searches conducted pursuant to third-party consent”, Roberts explains, “is an understanding that a person ‘assume[s] the risk’ that those who have access to and control over his shared property might consent to a search”.²⁷⁹

d. Eighth Amendment – Cruel and Unusual Punishment

i. *Baze v. Rees*, 553 U.S. 35 (2008)

In 2008, in *Baze v. Rees*, the court considered Kentucky’s capital punishment regime for certain criminal offenses.²⁸⁰ Kentucky provided for legal injection as a humane method of execution.²⁸¹ The petitioners, convicted of double homicide, did not dispute that the lethal injection protocol, if applied as intended, would result in a humane death.²⁸² Rather, the petitioners argued if improperly applied, the execution could result in significant pain, constituting cruel and unusual punishment in violation of the Eighth Amendment.²⁸³

Roberts delivered the opinion of the court. Roberts discusses, albeit briefly, the evolution of capital punishment and preferred methods of execution, including hanging, electrocution, and

²⁷⁶ See *id.* at 133-34 (citing *Matlock*, 415 U.S. at 166; *Rodriguez*, 497 U.S. at 179).

²⁷⁷ See *id.* at

²⁷⁸ *Id.* at 134.

²⁷⁹ See *id.* at 134.

²⁸⁰ See *Baze v. Rees*, 553 U.S. 35, 40 (2008) (Roberts, J.).

²⁸¹ See *id.*; see also Execution of Death Sentence, Ky. Rev. Stat. Ann. § 431.220(1)(a).

²⁸² See *id.*.

²⁸³ See *Baze*, 553 U.S. at 41, 62.

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lethal injection.²⁸⁴ Roberts calculates that 36 states and the federal government have adopted lethal injection as the exclusive or primary means of implementing the death penalty and 30 of those states used Kentucky's combination of drugs in their lethal injection protocols.²⁸⁵ Roberts opines that while the Court "[h]as never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment", states have voluntarily restructured their methods to ensure humane execution of its prisoners.²⁸⁶

Judicial precedent dictates that subjecting individuals to a risk of future harm, *i.e.*, if the lethal injection procedures are improperly applied, can qualify as cruel and unusual punishment in violation of the Eighth Amendment.²⁸⁷ Roberts explains that in order to violate the Eighth Amendment the procedures must be "sure or very likely to cause serious illness and needless suffering," and give rise to "sufficiently imminent dangers", as well as pose "substantial risk of serious harm," or an "objectively intolerable risk of harm".²⁸⁸ Additionally, Roberts relies on existing Eighth Amendment jurisprudence that holds, "[s]imply because an execution method may result in pain...does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual".²⁸⁹ Roberts concludes that the slight risk of pain depicted by the

²⁸⁴ See *Baze, supra*. at 44 (noting that Kentucky, for example, used electrocution as the humane form of execution until 1998. Kentucky provided that prisoners convicted before 1998 could opt for electrocution, but the prisoners must do so 20 days before their scheduled executions. By 2008, the statute dictated that lethal injection was the default method of execution).

²⁸⁵ See *id.* at 43-44 n. 1 (citing cases); see also 18 U.S.C. § 3591 *et seq.* (providing for lethal injection by federal government).

²⁸⁶ See *id.* at 48 (citing to cases where the Court upheld execution by firing squad and electrocution as humane forms of execution).

²⁸⁷ The petitioners argued that there was significant risk that the procedures for administering the sodium thiopental, or the barbiturate general anesthetic, would not be followed and therefore the drug would not have its intended effect. *Id.* at 49.

²⁸⁸ *Id.* (citing *Helling v. McKinney*, 509 U.S. 25, 33, 34-35 (1993); *Farmer v. Brennan*, 511 U.S. 825, 842, 846 (1994)).

²⁸⁹ See *id.* at 50 (citing *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), where mechanical malfunction in electrocution chair constituted an "accident" and cruel and unusual punishment).

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petitioners did not warrant a finding that Kentucky’s lethal injection procedures violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.²⁹⁰

Moreover, Roberts dismisses the petitioners’ claims that a slightly modified, safer alternative exists and because of these proposed alternatives the current lethal injection protocol violates the Eighth Amendment.²⁹¹ The proffered alternative method must address the “substantial risk of harm” and to do so it must be feasible, readily implemented, and significantly reduce a substantial risk of severe pain.²⁹² Roberts has no intention of transforming the courts into “boards of inquiry” responsible for determining “best practices” of executions.²⁹³

Roberts meticulously analyzes the extensive protocol for administering the lethal injection explicitly outlined in Kentucky’s execution on death sentence statute.²⁹⁴ Given Kentucky’s extensive lethal injection protocol, including redundant measures for ensuring the administration of sufficient dosage of lethal drugs and constant medical oversight to correct any deficiencies, Roberts concluded that any risks identified by petitioners were not so substantial or imminent as to amount to an Eighth Amendment violation.²⁹⁵

Roberts recognizes that “[r]easonable people of good faith disagree on the morality and efficacy of capital punishment”, however, “for many who oppose it no method of execution would ever be acceptable”.²⁹⁶ Despite opposition to capital punishment, the Court has

²⁹⁰ *See id.*

²⁹¹ *See id.* at 51, 57-58.

²⁹² *See id.* at 52.

²⁹³ *See id.* at 51 (forewarning that transforming courts into “boards of inquiry” will result in increased litigation with petitioners looking to protract execution process with new technology that purports to improve procedures).

²⁹⁴ *See id.* at 45-46 (examining statutorily mandated safeguards, including: (1) administration of precise quantity of drugs; (2) presence of certified medical personnel to perform the venipuncture procedures; (3) additional medical personnel to mix the precise quantity of drugs; (4) the construction of execution facilities with a control room, monitored by the warden and deputy warden separated from the witness room; and (5) the presence of a physician to revive the prisoner if a stay of execution should be granted).

²⁹⁵ *Id.* at 55-56 (noting that Kentucky executed one prisoner pursuant to this protocol without any issues).

²⁹⁶ *See id.* at 61.

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consistently held that the Constitution does not prohibit capital punishment.²⁹⁷ Furthermore, Roberts reiterates the Court has never set a precedent for declaring any state method of execution cruel or unusual.²⁹⁸ Roberts has no intention of setting such a precedent.

ii. *Graham v. Florida*, 560 U.S. 48 (2010)

Jamer Graham was 16 years old when he committed armed burglary in Jacksonville, Florida.²⁹⁹ Graham entered into a plea agreement with the prosecution.³⁰⁰ The Florida trial court sentenced Graham to probation and withheld adjudication of guilt.³⁰¹ Shortly thereafter, Graham was arrested for a home invasion robbery, a crime of which he denied involvement.³⁰² As a result, the trial court adjudicated Graham guilty of the earlier charges, revoked his probation, and sentenced him to life in prison for the burglary.³⁰³ However, because Florida abolished its parole system, the life sentence left Graham no possibility of parole.³⁰⁴ Graham challenged his sentence under the Eighth Amendment's Cruel and Unusual Punishments Clause.³⁰⁵ The Florida First District Court of Appeal affirmed his conviction.³⁰⁶

Justice Kennedy, writing for the majority, addressed the principal issue: whether the Eighth Amendment's Cruel and Unusual Punishment Clause permits a juvenile offender to be sentenced to life in prison without parole for a non-homicide crime.³⁰⁷ Kennedy explains that the Eighth Amendment specifically bars the imposition of excessive fines or bail or the use of cruel

²⁹⁷ *See id.*

²⁹⁸ *See id.* at 62.

²⁹⁹ *See Graham v. Florida*, 560 U.S. 48, 53 (2010), *as modified* (July 6, 2010).

³⁰⁰ *See id.* at 54.

³⁰¹ *See id.*

³⁰² *See id.*

³⁰³ *See id.*; *see also* Adam Liptak, *Justices Limit Life Sentences for Juveniles*, NYTimes.com http://www.nytimes.com/2010/05/18/us/politics/18court.html?_r=0, May 17, 2010.

³⁰⁴ *See id.*; *see also* Fla. Stat. § 921.002(1)(e) (2003).

³⁰⁵ *See id.*

³⁰⁶ *See Graham*, 560 U.S. at 58.

³⁰⁷ *See id.* at 52-53 (Kennedy, J.).

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and unusual or barbaric punishments.³⁰⁸ Judicial precedent dictates that a determination of whether a punishment is cruel and unusual is predicated on evolving standards of decency of society; this standard embodies a moral judgment.³⁰⁹ Furthermore, Kennedy states that the “concept of proportionality is central to the Eighth Amendment” and existing jurisprudence.³¹⁰

Kennedy acknowledges that the Court has not consistently applied the test for proportionality.³¹¹ In *Harmelin v. Michigan*, the Court held that that the Eighth Amendment contains “‘narrow proportionality principle,’ that ‘does not require *strict* proportionality between crime and sentence’ but rather ‘forbids only extreme sentences that are ‘grossly disproportionate’ to the crime’”.³¹² Pursuant to the *Harmelin* standard, the Court evaluates if a punishment is “grossly disproportionate to the crime” by comparing the gravity of the offense and the severity of the sentence and the defendant’s sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions.³¹³

Kennedy also acknowledges a separate line of cases that impose two subsets of categorical rules for the Eighth Amendment, including: (1) the nature of the offense, or (2) the characteristics of the offender.³¹⁴ Cases applying the “nature of offense” subset prohibit the death penalty for non-homicide offenses.³¹⁵ Similarly, cases applying the “characteristics of the offender” subset prohibit the death penalty for individuals less than 18 years of age or who lack

³⁰⁸ See *id.* 58; see also U.S. Const. amend. VIII.

³⁰⁹ See *id.* at 58.

³¹⁰ See *id.* at 59.

³¹¹ See *id.*

³¹² See *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (emphasis added).

³¹³ See *id.* 60 (acknowledging that the Court has upheld life sentences without parole for non-violent felonies. For example, the Court has upheld a sentence of 25 years for defendant’s third offense of stealing golf clubs and upheld a life sentence with a possibility of parole for defendant’s third non-violent felony of obtaining money by false pretenses).

³¹⁴ See *id.* at 61-62 (acknowledging that these cases predominantly analyze the imposition of the death penalty, not life sentences without parole).

³¹⁵ See *Kennedy v. Louisiana*, 554 U.S. 407, as modified (Oct. 1, 2008), *opinion modified on denial of reh’g*, 554 U.S. 945 (2008) (prohibiting the imposition of the death penalty for crime of rape of child when death of the victim was not the intended result).

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the requisite intellectual capacity.³¹⁶ Kennedy asserts that the categorical approach envisions that the Court will exercise its own judgment by applying objective indicia of society's standards.³¹⁷ Kennedy asserts that the categorical approach is applicable in *Graham*.³¹⁸ Considering all objective indicia of society's standards, the Court held a life sentence without parole constituted cruel and unusual punishment in violation of the Eighth Amendment.³¹⁹

Chief Justice Roberts wrote a concurring opinion. Roberts accuses the Court of attempting to “invent a new constitutional rule of dubious provenance” to justify the ruling.³²⁰ Roberts reaches the same result, but founded on two separate principles: (1) the “narrowly proportionality” standard and (2) judicial precedent set forth in *Roper v. Simmons*, which gives significant weight to the culpability of juvenile offenders.³²¹

The standard of “narrowly proportionality” directs a court to apply a case-by-case analysis of the gravity of the offense and the harshness of the penalty, keeping in mind that a court does not possess absolute power to “second-guess” the decisions of the state legislature or sentencing court.³²² Roberts disagrees with Kennedy's application of the proportionality standard.³²³ Roberts clarifies that the court's threshold inquiry should begin with a comparison between the gravity of the offense and the harshness of the penalty, considering all relevant

³¹⁶ See *Roper v. Simmons*, 543 U.S. 551 (2005) (prohibiting the imposition of death penalty for individuals younger than 18 years old); *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting imposition of death penalty for individual with low functioning intellectual capacity).

³¹⁷ See *Graham*, 560 U.S. at 61 (objective indicia of society's standards include national consensus, judicial precedent, and the Eighth Amendment's text, purpose, history, and meaning).

³¹⁸ See *id.* at 61.

³¹⁹ See *id.* at 67, 68, 71-74, 79, 81 (considering several factors, including: (1) that rarity of sentence showed a national consensus opposing the sentence; (2) juvenile offenders lacked diminished moral culpability, particularly in non-violent crimes; (3) a life sentence without parole constituted a particularly harsh punishment for a juvenile, who will spend more time in prison than an adult sentenced the same; (4) reasons for incarceration, including retribution, deterrence, incapacitation, and rehabilitation are not served by sentence and will provide little substantive benefit to juvenile; (5) the offender's age and lack of maturity; and (6) global opposition to sentence).

³²⁰ See *id.* at 86 (Roberts, J. concurring).

³²¹ See *id.* (citing *Roper v. Simmons*, 543 U.S. 551 (2005)).

³²² See *id.* at 88 (explaining that “narrowly proportionality” standard envisions that state legislature or sentencing court decisions will rarely succumb to constitutional challenges).

³²³ See *id.*

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factors including mental state and motive.³²⁴ Roberts asserts that if, and only if, an inference that the punishment is “grossly disproportionate” arises from this threshold inquiry, can the court proceed with intra- and inter-jurisdictional comparisons.³²⁵

Furthermore, Roberts’ asserts that the majority unwisely creates a new constitutional rule – that a sentence of life without parole imposed on *any* juvenile for *any* non-homicide offense is unconstitutional.³²⁶ Roberts cautions that the Court’s rule completely undermines the case-by-case analysis required by existing Eighth Amendment jurisprudence and is unsuited for cases in which the juvenile commits far more heinous non-homicide crimes.³²⁷ “[T]he whole enterprise of proportionality review”, Roberts explains, “is premised on the ‘justified’ assumption that ‘courts are competent to judge the gravity of an offense, at least on a relative scale’”.³²⁸

Moreover, Roberts stresses the applicability of *Roper v. Simmons* to justify a less severe sentence for Graham and juveniles similarly situated.³²⁹ Roberts rebuts the Court’s interpretation of *Roper* as outright banning the imposition of a life sentence without parole on juveniles for non-homicide crimes. Conversely, Roberts interprets *Roper* as standing for the proposition that juveniles may receive such sentences so long as these sentences are “less severe than death”.³³⁰ Roberts stresses that the true benefit of *Roper* is its emphasis of the offender’s juvenile status as central to the inquiry of what constitutes a proportional punishment.³³¹ Roberts finds that because Graham’s youth contributed to his reckless behavior and criminal activity as well as his

³²⁴ See *id.*

³²⁵ See *id.*

³²⁶ See *id.* at 94.

³²⁷ See *id.* at 95.

³²⁸ See *id.* at 96.

³²⁹ See *Roper v. Simmons*, 543 U.S. at 569-70 (declaring death penalty for juveniles cruel and unusual punishments and articulating three differences between juveniles and adults that demonstrate that juveniles have diminished moral capacities and cannot reliably be classified among the “worst offenders”, including: (1) “lack of maturity and an underdeveloped sense of responsibility”; (2) greater susceptibility to “negative influences and outside pressures”; and (3) a developing character.)

³³⁰ See *Graham*, 553 U.S. at 90.

³³¹ *Id.* at 90.

enhanced susceptibility to peer pressure, Graham was markedly less culpable than a typical adult who commits the same offenses.³³²

Because there is a strong inference that Graham's life sentence without parole was grossly disproportionate to his criminal activity, Roberts proceeds to intra- and inter-jurisdictional comparisons.³³³ By analyzing Florida's sentencing statistics, Roberts agrees with the majority that Florida is an outlier in its willingness to impose a life sentence without parole on juveniles for non-homicide offenses.³³⁴ Roberts concludes that Graham received a much harsher sentence than other juveniles.³³⁵

iii. *Miller v. Alabama*, 132 S.Ct. 2455 (2012) (Dissent)

In 2012, the Court reexamined *Graham* and ultimately extended the ruling of *Graham* to include non-homicide as well as homicide crimes. The Court analyzed two consolidated cases, *Jackson v. Hobbs* and *Miller v. Alabama*. Kuntrell Jackson was 14 when he and two other teenagers went to a video store in Arkansas with the intent to rob it.³³⁶ Jackson stayed outside while the other two teens entered the store, pulled out a gun, and killed the store clerk.³³⁷ Jackson was charged as an adult and given a life term without the possibility of parole.³³⁸ Similarly, Evan Miller, a 14-year-old boy from Alabama, was convicted of murder after he and another boy beat a 52-year-old neighbor in Alabama after the three had spent the evening

³³² See *id.* at 91-92.

³³³ See *id.* at 93.

³³⁴ See *id.*

³³⁵ See *id.*

³³⁶ See Adam Liptak and Ethan Bronner, *Justices Bar Mandatory Life Terms for Juveniles*, http://www.nytimes.com/2012/06/26/us/justices-bar-mandatory-life-sentences-for-juveniles.html?hp&_r=0, June 25, 2012.

³³⁷ See *id.*

³³⁸ See David G. Savage, *Supreme Court rules mandatory juvenile life without parole cruel and unusual*, <http://articles.latimes.com/2012/jun/25/news/la-pn-supreme-court-rules-juvenile-life-without-parole-cruel-and-unusual-20120625>, June 25, 2012.

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smoking marijuana and playing drinking games.³³⁹ The two youths then set fire to the neighbor's home, from which the neighbor died of smoke inhalation.³⁴⁰ Evan Miller was charged as an adult and received a life sentence without the possibility of parole.³⁴¹

Justice Kagan wrote the majority opinion of the Court, which held that mandatory life without parole for individuals under the age of 18 at the time of their crime constitutes cruel and unusual punishment in violation of the Eighth Amendment.³⁴² Justice Kagan asserts that *Graham v. Florida* and *Roper v. Simmons* collectively stand for the proposition that the concept of proportionality rooted in the Eighth Amendment requires that courts give significant weight to a juvenile's "lessened culpability", greater "capacity for change", and enhanced susceptibility to peer pressure.³⁴³ Therefore, Justice Kagan interprets *Graham* and *Roper* to prohibit imposition of a state's most severe penalties on juvenile offenders without giving any consideration to their status as children.³⁴⁴ Given their diminished culpability, juvenile offenders cannot be subject to the same offenses that an adult would be subjected to, even in homicide crimes.³⁴⁵

Moreover, Kagan asserts that *Graham*, *Roper*, and its progeny envision that each child receive individualized sentencing, which takes into account several factors, including a juvenile's personal background and upbringing.³⁴⁶ The Court's repugnance for mandatory life without parole for juvenile offenders is premised on the lack of consideration given to the juvenile's family and home environment or other realities that influence the juvenile's violence

³³⁹ *See id.*

³⁴⁰ *See id.*

³⁴¹ *See* Ala. Code § 12-15-34 (1977) (Alabama law required that Miller be tried as a juvenile, but permitted the District Attorney to seek removal of Miller's case to adult court).

³⁴² *See Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012).

³⁴³ *See id.* at 2463-64.

³⁴⁴ *See id.* at 2466.

³⁴⁵ *See id.*

³⁴⁶ *See id.* at 2467.

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and inclination for criminal activity.³⁴⁷ Kagan articulates that in accordance with *Graham*, *Roper*, and its progeny a sentencing judge or jury must have the opportunity to consider mitigating factors prior to imposing the harshest sentences for juvenile offenders.³⁴⁸ Therefore, by mandating that a juvenile convicted of homicide receive a life sentence without parole, regardless of their age, age-related characteristics, or the nature of their crimes, mandatory sentencing schemes in Alabama and Arkansas violates the Eighth Amendment’s principle of proportionality and ban on cruel and unusual punishment.³⁴⁹

Justice Roberts wrote a dissenting opinion.³⁵⁰ Roberts acknowledges that while the present case “presents grave and challenging questions of morality and social policy”, the Court’s role “is to apply the law, not to answer such questions.”³⁵¹ Roberts asserts that controlling Eighth Amendment jurisprudence determining if a punishment is cruel and unusual entails a threshold inquiry of the “objective indicia of society’s standards, as expressed in legislative enactments and state practice”.³⁵² This threshold inquiry ascertains the “consensus” among states in a given sentencing practice and indicates to the court if the sentencing practice at issue has deviated from that consensus.³⁵³ As such, Roberts meticulously analyzes state sentencing guidelines that have increasingly and more frequently used the life-without-parole sentence as a means of preventing repeat offenses.³⁵⁴ Roberts finds that many state legislatures

³⁴⁷ See *id.* at 2468-69.

³⁴⁸ See *id.* at 2473 (acknowledging that most states do not have separate penalty provisions for juvenile offenders. Of the 29 jurisdictions mandating life without parole for children, more than half do so by virtue of generally applicable penalty provisions, imposing the sentence without regard to age).

³⁴⁹ See *id.* at 2475.

³⁵⁰ Justice Scalia, Justice Thomas, and Justice Alito joined.

³⁵¹ See *id.* at 2477 (Roberts, J. dissenting).

³⁵² See *id.* at 2477-78 (citing *Graham*, 560 U.S. at 60; *Kennedy v. Louisiana*, 554 U.S. 407, 422 (2008); *Roper*, 543 U.S. at 564).

³⁵³ See *id.*

³⁵⁴ See *id.* at 2479 (criticizing the majority’s argument that the reason for the sentence’s frequent use is due to its statutorily mandated imposition).

clearly see a need for the sentence and have intentionally amended their laws to provide for it.³⁵⁵

Roberts concludes that the objective evidence demonstrates that the consensus among states is to formally require and frequently impose the life imprisonment without parole for homicide offenses, regardless of age.³⁵⁶

Roberts concedes that while Eighth Amendment jurisprudence traditionally considers the “evolving standards of decency that mark the progress of a maturing society”, standards of decency does not constitute “leniency”.³⁵⁷ Roberts clarifies the role of the Court, which is to leave matters of decency to the national consensus among the states.³⁵⁸ Roberts criticizes the Court’s reasoning because it effectively invalidates state and federal laws without any regard for the consensus.³⁵⁹ Roberts disapproves of the Court’s rule of law as it undermines legislative authority to impose sentencing guidelines and fails to define an outer limit.³⁶⁰

e. Fourteenth and Fifth Amendments

i. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007)

In 2007, the Roberts Court tackled the issue of race and affirmative action. In *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, the Court analyzed two public school programs, which used race as mechanism for assigning or transferring students to public elementary and high schools in their school districts. Seattle School District No. 1 in Washington voluntarily implemented a program, which assigned students to public high schools

³⁵⁵ See *id.* at 2480 (discussing how one legislature purposely amended their laws to include life-without-parole sentences for homicide offenses post-*Graham*).

³⁵⁶ See *id.* at 2478.

³⁵⁷ See *id.*

³⁵⁸ See *id.* at 2478-79.

³⁵⁹ See *id.* at 2481 (arguing that *Ropper* and *Graham* specifically affirmed the legality of life-without-parole sentences for juvenile offenses who commit *homicides*).

³⁶⁰ See *id.* at 2482.

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in the Seattle area based on familial relationships and race.³⁶¹ Pursuant to the program, incoming high school students ranked their choice of school.³⁶² However, some of these schools, specifically the Ballard School, were particularly popular among the incoming class.³⁶³ The program dictated that if too many students chose one particular school, the school board could utilize certain “tiebreakers”, including race, to determine what schools these students should attend.³⁶⁴ The program sought to racially integrate schools with a student population of more than 51% white population.³⁶⁵ If an oversubscribed school was not within 10 percentage points of the School District’s overall white and non-white racial balance, the District employed a tiebreaker that ideally served to bring the school into racial balance.³⁶⁶

Andy Meeks, an incoming freshman student, had been accepted into the Ballard School, but was later denied admission and assigned to another high school as a result of the race tiebreaker.³⁶⁷ His mother by and through Parents Involved in Community Schools (“Parents Involved”), a nonprofit corporation comprised of parents of aggrieved children, initiated the lawsuit against Seattle School District No. 1.³⁶⁸

The Jefferson County School District in Louisiana implemented a similar program.³⁶⁹ In contrast to Seattle, in 1973, a federal court mandated that Jefferson County desegregate its

³⁶¹ See Coyle, *supra*. at 33-34, 36 (explaining that Seattle’s primary motivation to implement assignment plan was due in part to School District’s housing patterns, which caused segregation in Seattle’s schools).

³⁶² See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 711 (2007).

³⁶³ See *id.* at 711 (From 2000-2001, 82% of the incoming high school class selected Ballard as well as three other schools, including Nathan Hale, Roosevelt, Garfield, and Franklin, as their top choices. Ballard, Nathan Hale, and Roosevelt possessed a white population that exceeded 51% of the total student population).

³⁶⁴ See *id.* (The first tiebreaker provided that school board selected for admission students who have a sibling currently enrolled in the chosen school. The second tiebreaker considered the racial composition of the school and the race of each individual student. Finally, if familial relations and race were not sufficient tiebreakers, the school board considered geographic proximity to each high school).

³⁶⁵ See *id.*

³⁶⁶ See *id.*

³⁶⁷ See *id.* at 714.

³⁶⁸ See *id.*

³⁶⁹ See *id.* at 715.

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schools.³⁷⁰ By 2000, a federal court deemed Jefferson County to have fulfilled its court mandate to desegregate.³⁷¹ Nevertheless, in 2001, Jefferson County voluntarily implemented an assignment plan, which assigned children to elementary schools and assessed school transfer requests based on race.³⁷² Jefferson County's program required all non-magnet schools to maintain a minimum black enrollment of 15 percent and a maximum black enrollment of 50 percent.³⁷³ Pursuant to the assignment plan, parents of kindergartners, first graders, and students new to the district could submit applications indicating a first and second choice among the schools within their geographic cluster.³⁷⁴ The district would not assign a student to a school if he or she would contribute to the overall racial imbalance at the school.³⁷⁵ Crystal Meredith, a Louisville parent, initiated the lawsuit against Jefferson County because her son could not attend the kindergarten closest to their home.³⁷⁶

The Seattle and Jefferson County cases were consolidated prior to Supreme Court review.³⁷⁷ By 2007, the composition of the Supreme Court witnessed a significant change, as Justices Roberts and Alito ascended to the bench.³⁷⁸ This change created uncertainty and

³⁷⁰ *See id.*

³⁷¹ *See id.* at 716.

³⁷² *See id.* (At the time, approximately 34 percent of the Jefferson County's 97,000 students were black while the remaining 66 percent were white).

³⁷³ *See id.*

³⁷⁴ *See id.* (Jefferson County's assignment plan gave significant weight to geographic location and racial makeup).

³⁷⁵ *See id.*

³⁷⁶ *See Coyle, supra.* at 29.

³⁷⁷ *See Parents Involved*, 551 U.S. at 711; *see Coyle, supra.* at 59 (before seeking Supreme Court review, the Sixth Circuit held that Jefferson County's schoolboard met its burden to establish a compelling interest because it articulated the reasons that the Supreme Court approved in *Grutter* and provided compelling interests and benefits of its policy, including improved student education and community support for public schools. Additionally, the Sixth Circuit concluded that the policy was narrowly tailored to this compelling interest, avoiding race in a predominant and unnecessary way that could harm members of a particular racial group. The Ninth Circuit, applying the reasoning in *Grutter*, held that Seattle had a compelling interest to secure the education and social benefits of racial diversification and ameliorate racial isolation that has resulted from Seattle's segregated housing patterns. The Ninth Circuit affirmed the school district's right to assign its students to any one of its schools and held that the program does not benefit any one particular race to the detriment of the other).

³⁷⁸ *See Coyle, supra.* at 88.

uneasiness among proponents of the assignment programs as the conservative beliefs of Roberts and Alito were well known, but their take on race and affirmative action were not.³⁷⁹

Roberts, writing for the majority, presented the fundamental issue: whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments.³⁸⁰ Chief Justice Roberts stated that when the government distributes burdens or benefits on the basis of race, the government's actions are reviewed under strict scrutiny.³⁸¹ As such, the Seattle and Louisville School Districts were required to demonstrate that the use of race in their assignment plans were "narrowly tailored" to achieve a "compelling" government interest.³⁸² Roberts identified two judicially recognized compelling government interests: remedying the effects of past discrimination, specifically segregation, and diversity in higher education, as evidenced in *Grutter v. Bollinger*.³⁸³ Roberts found that Jefferson County, like Seattle, did not implement its assignment plan for the purposes of remedying the effects of intentional discrimination.³⁸⁴ Roberts asserts that the dissent misconstrues the applicability of the remedial justification and completely overlooks the fact that Seattle was never deemed segregated by law and Jefferson County eliminated all vestiges of its prior status.³⁸⁵

Next, Roberts addressed the looming issue of the *Grutter* and *Gratz* opinions. First and foremost, Roberts iterates throughout his opinion that the specific interest found compelling in *Grutter* was diversity among the student body in *higher education* institutions.³⁸⁶ Roberts argues

³⁷⁹ See *id.*

³⁸⁰ See *Parents Involved*, 551 U.S. at 711.

³⁸¹ See *id.* at 720 (citing *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)).

³⁸² See *id.*

³⁸³ See *id.* at 720, 721 (citing *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)).

³⁸⁴ See *id.*

³⁸⁵ See *id.* 736-37.

³⁸⁶ See *id.* 721, 725 (emphasis added).

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that the Court in *Grutter* “expressly articulated key limitations on its holding,” focusing on broad-based diversity within the unique context of higher education.³⁸⁷ Roberts critically points out that the lower courts and the dissent disregarded the key limitations of *Grutter*, which did not apply to public elementary or high schools such as Seattle and Jefferson County.³⁸⁸

Even so, Roberts compares the Seattle and Louisville assignment plans to that the University of Michigan law’s school affirmative action program, which were upheld in *Grutter*. Roberts argues that the diversity interest of the University of Michigan’s law school did not focus on race alone.³⁸⁹ Roberts clarifies that the use of racial classifications in *Grutter* was part of a broader assessment of diversity and not to a mechanism to achieve racial balance among the incoming law school population.³⁹⁰ Roberts argues that *Grutter* stands for the proposition that a plan premised solely on the basis of balancing races is unconstitutional.³⁹¹ Hence, Roberts distinguishes *Grutter* from *Parents Involved* because the Seattle and Jefferson County assignment plans did not consider race as part of a broader effort to achieve “exposure to widely diverse people, cultures, ideas, and viewpoints”.³⁹²

Seattle and Jefferson County argued that, unlike *Grutter*, the districts instituted assignment plans on the basis of race in the effort to directly promote *racial* diversity and not *broader* diversity.³⁹³ As such, the Seattle’s tiebreaker plan and Louisville’s racial integration plan furthered this intended purpose. Roberts rejects this argument. Rather, Roberts concludes that such plans are not narrowly tailored to the goal of achieving the educational and social

³⁸⁷ See *id.* at 725 (citing *Grutter*, 539 U.S. at 327, 328, 334).

³⁸⁸ See *id.*

³⁸⁹ See *id.* at 722 (citing *Grutter*, *supra.* at 337)

³⁹⁰ See *id.* at 722.

³⁹¹ See *id.* at 722-23.

³⁹² See *id.* at 723 (citing *Grutter*, *supra.* at 330).

³⁹³ See *id.*

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benefits associated with racial diversity, but rather only seek to ensure numerical balance.³⁹⁴

Roberts forewarned that to allow racial balancing as a compelling end in of itself would ensure that it would forever be used, to initially obtain an appropriate mix of race and to continue the existence of this appropriate mix.³⁹⁵ In conclusion, Roberts determines that the assignment plans were more akin to the affirmative action program struck down in *Gratz* in that Seattle and Jefferson County, like the University of Michigan's undergraduate school, utilized race in a mechanical non-individualized way.³⁹⁶

Roberts rejected supplemental arguments made by Seattle and Jefferson County. Seattle contended that the use of race as a tiebreaker in its assignment plan reduced imbalanced racial concentration in schools and ensured that racially concentrated housing patterns did not prevent non-white students from accessing Seattle's most desirable schools.³⁹⁷ Similarly, Jefferson County articulated a similar goal, which sought to educate its students in a racially integrated environment.³⁹⁸ Roberts concluded that Seattle and Jefferson County failed to demonstrate that their plans furthered these goals.³⁹⁹ Moreover, Roberts determined that the assignment plans had minimal effect on minority populations, by only shifting a small number of students between schools, and that any marginal changes in student population outweighed the cost of subjecting students to disparate treatment based solely upon race.⁴⁰⁰

³⁹⁴ See *id.* at 726, 727.

³⁹⁵ See *id.* at 730-31.

³⁹⁶ See *id.* at 724 (To illustrate this point, Roberts explains the inherent problems in Seattle's assignment plan, which classified students as white or non-white. Roberts adjudges that a high school with 50 percent Asian American students and 50 percent white students but no African American, Native American, or Latino students qualified as balanced, whereas a school with 30 percent Asian American, 25 percent African American, 25 percent Latino, and 20 percent white students would not).

³⁹⁷ See *id.* at 725.

³⁹⁸ See *id.*

³⁹⁹ See *id.* at 727 (In support of this, Roberts found that Seattle did not demonstrate how the educational and social benefits of racial diversity were more likely achieved at a school that was 50 percent white and 50 percent Asian American, which qualified as diverse under Seattle's plan, than at a school that was 30 percent Asian American, 25 percent African American, 25 percent Latino, and 20 percent white).

⁴⁰⁰ See *id.* at 733.

Roberts finalizes his opinion with an analysis of *Brown v. Board of Education*.⁴⁰¹ Roberts contends that racial balancing undermines the fundamental principle of the Equal Protection Clause of the Fourteenth and its progeny of case law, which protects individuals, not groups.⁴⁰² Dividing individuals into racial groups promotes racial inferiority and endorses race-based reasoning and the conception of a Nation divided into racial blocs.⁴⁰³ Roberts suggests that Seattle and Jefferson County did exactly what *Brown* and its progeny prohibit, they used race as a factor in affording educational opportunities to some groups and not others.⁴⁰⁴ In the final paragraph of his opinion, Roberts advocates that,

For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way ‘to achieve a system of determining admission to the public schools on a nonracial basis,’ is to stop assigning students on a racial basis. *The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.*⁴⁰⁵

Roberts insists that it is possible to eliminate racial discrimination within the nation’s schools by simply ignoring race, or at least implementing policies that without any reference to race.⁴⁰⁶

ii. *United States v. Windsor* (2013) (Dissent)

In May 1996, Congress passed the Defense of Marriage Act (“DOMA”).⁴⁰⁷ Section 3 of DOMA defined “marriage” for purposes of federal law as the “legal union between one man and one woman as husband and wife”.⁴⁰⁸ Additionally, it defined a “spouse” as a “person of the

⁴⁰¹ See *id.* at 742.

⁴⁰² See *id.* at 746 (citing *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*) for premise that group classifications, no matter how benign, are inherently suspect and should be strictly prohibited).

⁴⁰³ See *id.* (citing *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 300-301 (1955) (*Brown II*)).

⁴⁰⁴ See *id.* at 747.

⁴⁰⁵ See *id.* (citations omitted).

⁴⁰⁶ See *id.*

⁴⁰⁷ See *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013).

⁴⁰⁸ See Definition of “Marriage” and “Spouse”, 1 U.S.C.A. § 7 (2006).

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opposite sex who is a husband or a wife.”⁴⁰⁹ Since DOMA did not recognize same-sex marriage under federal law it effectively barred same-sex couples from receiving federal benefits.

In 2007, Edith Windsor married her long-time partner, Thea Spyer, in Toronto, Canada, after a forty-year engagement.⁴¹⁰ Windsor and Spyer resided in New York at this time. New York recognized same-sex marriage and gave Full Faith and Credit to marriages entered into in other states or foreign jurisdictions.⁴¹¹ In 2009, Spyer passed away. Unfortunately, DOMA prevented the Internal Revenue Service (“IRS”) from treating Windsor as Spyer’s spouse under federal law, costing her more than \$363,000 thousand dollars in federal estate taxes.⁴¹² Shortly thereafter, Windsor was referred to Roberta Kaplan, at the firm of Paul, Weiss, Rifkind, Wharton & Garrison, who previously challenged New York’s gay marriage ban.⁴¹³ The American Civil Liberties Union later joined Kaplan in the *Windsor* case.⁴¹⁴

By 2010, sentiments regarding same-sex marriage had fundamentally changed.⁴¹⁵ The Obama Administration announced that while it would continue to enforce the law, it would not defend the law in court.⁴¹⁶ Accordingly, the Bipartisan Legal Advisory Group (“BLAG”) mounted a defense of Section 3 when the Obama administration refused to do so.⁴¹⁷

⁴⁰⁹ *See id.*

⁴¹⁰ *See* Peter Applebome, *Reveling in Her Supreme Court Moment*, NY Times, Dec. 10, 2012, <http://www.nytimes.com/2012/12/11/nyregion/edith-windsor-gay-widow-revels-in-supreme-court-fight.html>.

⁴¹¹ *See id.*

⁴¹² *See id.*

⁴¹³ *See id.*

⁴¹⁴ *See id.*

⁴¹⁵ *See* John Schwartz, *Gay Couples to Sue Over U.S. Marriage Law*, NYTimes.com, Nov. 8, 2010, http://www.nytimes.com/2010/11/09/us/09marriage.html?_r=0.

⁴¹⁶ *See* Office of Attorney General, *Statement of the Attorney General on Litigation Involving the Defense of Marriage Act*, U.S. Dept. of Justice Office of Press Release, Feb. 23, 2011, <http://www.justice.gov/opa/pr/statement-attorney-general-litigation-involving-defense-marriage-act>.

⁴¹⁷ *See* Basil Katz, *Defense of Marriage Act Unconstitutional: Judge*, Reuters, June 6, 2012, <http://www.reuters.com/article/2012/06/06/us-usa-gaymarriage-idUSBRE8551JW20120606> (The United States District Court for the District of New York held that Windsor should receive a refund for the federal estate taxes. The Government did not challenge this ruling. As such, BLAG stepped in in defense of DOMA when the case reached the Supreme Court; *see also* Decision, *Windsor v. United States*, F. Supp. 2d 394 (S.D.N.Y. 2012).

Justice Kennedy wrote the majority opinion.⁴¹⁸ Kennedy asserts, first and foremost, that Section 3 of DOMA does not forbid individual states from enacting laws that recognize same-sex marriage or providing state benefits to individuals in same-sex marriages.⁴¹⁹ Kennedy criticizes DOMA for departing from long-established precedent that affords individual states the power to define and regulate marriage and domestic relations and that guarantees that all incidents, benefits, and obligations derived from marriage to be uniform within each state.⁴²⁰ Kennedy contends that “[t]he State’s power in defining the marital relation is of central relevance...apart from the principles of federalism”.⁴²¹ Although Kennedy alludes to the principles of federalism, he does not declare DOMA unconstitutional based upon those principles.

Instead, the Court’s ruling is predicated on the Fifth Amendment and the liberty interests it protects.⁴²² Kennedy discerns the true purpose and practical effect of DOMA: to impose a “disadvantage, a separate status, and so a stigma” on same-sex couples.⁴²³ Kennedy finds support of this contention in DOMA’s legislative history of enactment and text, which expressed moral disapproval of homosexuality and pronounced a moral conviction that heterosexuality comported with traditional morality.⁴²⁴ Kennedy concludes that by creating two contradictory marriage regimes DOMA deprives couples of the rights, responsibilities, and benefits under federal law, including numerous federal regulations that control laws pertaining to social security, healthcare, housing, taxes, criminal sanctions, copyright, veterans’ benefits, and

⁴¹⁸ The Court did not address Section 2 of DOMA, which does not require states that do not recognize same-sex marriage to give Full Faith and Credit to same-sex marriages entered into in other states. *See* Certain acts, records, and proceedings and the effect thereof, 28 U.S.C. § 1738C (2013).

⁴¹⁹ *See Windsor*, 133 S. Ct. at 2683.

⁴²⁰ *See id.* at 2692.

⁴²¹ *See id.*

⁴²² *See id.* at 2693.

⁴²³ *See id.*

⁴²⁴ *See id.* at 2693 (citing H.R.Rep. No. 104–664, pp. 12–13 (1996)).

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bankruptcy protection.⁴²⁵ Kennedy argues that there is no legitimate government interest to deny the class of same-sex couples protection of personhood, dignity, and equal protection of the laws.⁴²⁶ Kennedy declares DOMA unconstitutional because it singles out a class of persons and treats this class as less respected than others in violation of the Fifth Amendment.⁴²⁷

In contrast, Roberts votes to uphold DOMA in a brief four-page dissent.⁴²⁸ Roberts attacks Kennedy's decision to declare DOMA unconstitutional on three fronts: (1) congressional intent; (2) uniformity and stability; and (3) state's rights and federalism. Roberts explains that in 1996 federal and state governments acted in unanimity in defining marriage and the class of individuals entitled to the incidents, benefits, and obligations derived therefrom.⁴²⁹ "Interests in uniformity and stability", Roberts asserts, "amply justified" Congress' decision to define marriage as a union between one man and one woman.⁴³⁰ Additionally, Roberts' asserts that because Congress' intentions did not vary so greatly from the states, it is incorrect to claim that it acted with malice or imposed a discriminatory law without a legitimate government interest.⁴³¹ Roberts "would not tar the political branches with the brush of bigotry" without a stronger showing that Congress codified the definition with malice.⁴³²

Furthermore, Roberts seeks to clarify an ambiguity that may arise from the majority's opinion. Roberts asserts that the decision does not decide nor constrict state power to define marriage.⁴³³ While the majority's decision to strike down DOMA relies heavily on state power

⁴²⁵ *See id.* at 2690.

⁴²⁶ *See id.* at 2696.

⁴²⁷ *See id.*

⁴²⁸ *See id.* (Roberts drafted a separate dissent on the constitutionality of DOMA, but joined Justice Scalia's dissent on standing and jurisdiction).

⁴²⁹ *See id.*

⁴³⁰ *See id.*

⁴³¹ *See id.*

⁴³² *Id.* at 2692 (Kennedy, J. opinion) (concluding that the H.R.Rep. No. 104–664, pp. 12–13 (1996) constitutes "strong evidence of a law having the purpose and effect of disapproval of that class").

⁴³³ *See id.* at 2697.

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to define marital relations, the constitutionality of that power will only come into play in future cases about the constitutionality of state marriage definitions.⁴³⁴ Therefore, the basic notions of federalism authorize each state to define marriage in a way that is different from its neighbor.⁴³⁵ Roberts does not interpret DOMA to infringe on that right.⁴³⁶

PART III: ANALYSIS

a. Article I and Article II Federal Power

i. Federal Power and Healthcare

When President Bush nominated John Roberts for the position of Chief Justice, Roberts expressed the intent to continue his successors' legacy.⁴³⁷ However, Roberts' judicial philosophy is distinct from that of Rehnquist's in that Roberts seeks to build a consensus among his colleagues, who remain evenly split between two conflicting ideologies. The burdensome task of creating consensus requires Roberts to diverge from a right-wing conservative ideology.

The Health Care Case exemplifies Roberts' attempt to build a consensus among his colleagues, but in accordance with his judicial philosophy. While Justice Roberts did not vote in line with his conservative colleagues, his opinion consistently articulates a conservative theme of restraint on federal power. Roberts sifts through years of American history to demonstrate the consistency of this theme and the importance of adhering to it.⁴³⁸ This is not to suggest that if historical, judicial, or legislative precedent existed to authorize such expansive federal powers that Roberts would flatly reject it. Roberts concedes that "legislative novelty is not necessarily fatal", that "there is a first time for everything," but this case did not warrant such novelty.⁴³⁹

⁴³⁴ See *id.*

⁴³⁵ See *id.*

⁴³⁶ See *id.*

⁴³⁷ See Baker, *supra.* at 2.

⁴³⁸ See *Sebelius*, 131 S.Ct. 2588 (referencing James Madison's The Federalist No. 45, at 293, which envisions a broad power of Congress to expand the nation's economy, but imposes explicit limitations on this power).

⁴³⁹ See *id.* at 2586.

As Chief Justice, Robert's must police the limits of federal power and ensure that the federal government plays by the rules. *Sebelius* in no way relegates the federal government to state of austerity; it simply institutes a carefully considered, clearly articulated boundary line of which this Court and future courts must consider. As the Umpire of the Court, Roberts called the shots. Neither the plain language of the Constitution nor the most-far reaching judicial precedent allowed the government to regulate what Roberts considers inactivity. Congress overstepped its bounds. Congress struck out.

As leader and Umpire of the Court, Roberts is tasked with providing a workable rule of law that can be easily understood and applied consistently in the future. To illuminate the importance of restraint on federal power, Roberts relies on a "slippery-slope" hypothetical, also known as the "broccoli horrible". In actuality, the "broccoli horrible" is most likely a "hypothetical and unreal impossibility".⁴⁴⁰ However, Roberts portrays the federal government as a big brother-like state to emphasize the inevitable consequences of a court that fails to impose an outer limit. The "broccoli horrible" constitutes a valid cautionary tale; a dramatization of what *could* happen, even if highly unlikely.

Some have criticized Roberts for the *Sebelius* decision because he expressed utter disdain for the mandate, yet he chose to save it.⁴⁴¹ This criticism is misplaced for two reasons. First, Roberts' action to save the ACA in no way makes him a champion of the liberal front. By labeling it a tax, in spite of Obama's express statements to the contrary, Roberts circumvents the

⁴⁴⁰ See *id.* at 2591, 2625 (there is nothing in the Court's jurisprudence or *Sebelius* to suggest that liberal or conservative justices would permit such an invasion in the interests of the national economy or the Union); see also Tribe, *supra.* at 65, 73; but see Let's Move Initiative, Feb. 9, 2010, <http://www.letsmove.gov/lear-facts/epidemic-childhood-obesity> (Michelle Obama launched the Let's Move Initiative, which implemented several programs to manage and prevent child obesity and to provide healthier foods in the nation's schools, ensure that every family has access to healthy, affordable food, and promote greater physical activity); see also Tribe, *supra.* at 65, 73.

⁴⁴¹ See Tribe, *supra.* at 56 ("The new law is nothing if not complex...Many of its provisions are still being interpreted and implemented, a process that will continue for years to come and affect virtually every patient, doctor, hospital, and branch of government.").

federal government's intent to pass innovative social legislation and lumps the mandate in with ordinary things that the Government taxes, including gasoline or earned income.⁴⁴² Roberts limited federal power where it could be most aggressive, *i.e.*, the Commerce and the Necessary Proper clauses. Additionally, by interpreting the mandate as a tax, Roberts places the burden on the government to administer the tax, regulate transactions, and defend the ACA's deficiencies.

Secondly, as Umpire, Roberts must call the shots fairly and objectively within the bounds of the law and with deference to political and judicial institutions. Throughout his opinion, Roberts acknowledges the necessity of insurance reform, but refused to expand Commerce and Necessary and Proper clause powers any farther than the Court previously affixed. In order to uphold this necessity, Roberts articulated a reasonable alternative and moderately broad federal power, *i.e.*, the taxing power. While Roberts effectively stripped the mandate of its regulatory nature, he *upheld* the mandate with *all* of its provisions. As Umpire, Roberts allowed the federal government a base run; it received judicial authority to regulate and administer the mandate in a reasonable manner and within bounds of the Constitution and judicial precedent.

ii. Federal Power and National Security

Moving back several years to 2004, the Roberts Court walked a delicate line in its consideration of the Bush Administration's War on Terror policies. The Court was stuck between a rock and a hard place. The Constitution gave the President express powers to manage war and military operations.⁴⁴³ However, Bush's abuse of such expansive power could not remain unchecked without some degree of judicial oversight.⁴⁴⁴

⁴⁴² See *Sebelius*, 131 S.Ct. at 2594.

⁴⁴³ See U.S. Const. Art. II, § 8, Cl. 11.

⁴⁴⁴ See Coyle, *supra*. at 192; see also *Hamdi*, 542 U.S. 507 (2004) (O'Connor, J. majority) (reaffirming that war does not give the President a blank check when it comes to the Nation's citizens).

President Bush nominated Roberts to the bench. Roberts also worked in the Solicitor Attorney General's Office during Bush Sr.'s administration.⁴⁴⁵ Roberts has maintained close affiliations with President Bush and the Republican Party.⁴⁴⁶ Therefore, it seemed logical that Roberts would vote in favor of the Bush Administration's policies, granting extensive wartime powers to both the President and Congress.

As the Umpire, Roberts fairly and objectively reviewed judicial precedent and analyzed the statutory structure and legislative intent of the DTA and MCA. By surveying and adhering to the Court's recent precedent, Roberts recognizes that the Court provided the federal government the legal basis to enact the DTA and MCA. Roberts is methodic in his legal analysis, meticulously comparing each provision of the DTA and MCA to the preferred structures described in *Hamdi* and its progeny.⁴⁴⁷ Roberts does not suggest that President Bush or Congress should receive a blank check during wartime, but in the case of *Boumediene*, the federal government hit a homerun.

The opinions of Roberts and Kennedy could not have been any more inapposite. Kennedy composed an opinion that reflected his deep fascination with individual liberty and constitutional structure.⁴⁴⁸ He surveyed countless centuries of English and American history.⁴⁴⁹ He then discussed the benefits of judicial intervention, with the judiciary acting as champion of individual liberty as well as vindication for the federal government's policies.⁴⁵⁰ In response,

⁴⁴⁵ See Tribe, *supra*. at 20.

⁴⁴⁶ This logic played out while Roberts sat on the D.C. Circuit. On July 15, 2005, the D.C. Circuit ruled and unanimously held in *Hamdan v. Rumsfeld* that military commissions, approved and statutorily enacted by Congress, constituted legitimate forums to try enemy combatants and that detainees could be tried before military commissions prior to a determination of their prisoner of war status. See *Hamdan v. Rumsfeld*, Decision of the United States Court of Appeals for the District of Columbia Circuit, July 18, 2005.

⁴⁴⁷ See *Boumediene*, 553 U.S. at 787-92; see also Coyle, *supra*. at 195.

⁴⁴⁸ See Coyle, *supra*. at 198.

⁴⁴⁹ See *id.*

⁴⁵⁰ See *id.*

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Roberts confirms that such judicial activism is neither the role of the Court nor a fair, objective, or legally sound precedent to make.

b. Analysis of First Amendment Rights

The Roberts Court faced tremendous criticism for its decision in *Citizens United* and *Bennett*.⁴⁵¹ Commentators suggested that the Roberts Court completely underestimated the relative ease in which independent expenditures could coordinate activities of candidates so long as they did not formally coordinate expenditures with candidates.⁴⁵² Additionally, some suggest that the Court miscalculated the influence of independent expenditures and how such influence can spawn the appearance of corruption even if a *quid pro quo* exchange does not take place.⁴⁵³ Because contemporary campaign finance jurisprudence interprets corruption to be tethered tightly to *quid pro quo* corruption, such as the sale of public office, some argue that this interpretation overlooks the effects of covert money in politics, which undermines the electoral integrity and fosters public diffidence in the electoral process.⁴⁵⁴

These concerns may be valid, but they do not provide a workable rule for First Amendment free speech rights. *Citizens United* and *Bennett* represent Roberts' attempts to Umpire a close game. The government came up to bat and championed adherence to the pro-*Austin* rationale, dictating that corporate wealth distorted open and public discussion of campaign issues.⁴⁵⁵ In contrast, individual candidates and independent expenditure groups came up to bat and advocated adherence to the pro-*Buckley* rationale, which provided First

⁴⁵¹ See Tribe, *supra*. at 88-89.

⁴⁵² *Ibid.* at 89.

⁴⁵³ See *id.* at 102.

⁴⁵⁴ See Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 Harv. L. Rev. 1563, 1603 (2012); Robert F. Bauer, *The Varieties of Corruption and the Problem of Appearance: A Response to Professor Samaha*, 125 Harv. L. Rev. F. 91, 94, 96 (2012) (citing *Randall v. Sorrell*, 548 U.S. 230, 248 (2006), which found that “the interests underlying contribution limits, preventing corruption and the appearance of corruption, ‘directly implicate the integrity of our electoral process.’ Yet that rationale does not simply mean ‘the lower the limit, the better.’”).

⁴⁵⁵ See Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limit*, New York Time, Jan. 21, 2010, http://www.nytimes.com/2010/01/22/us/politics/22scotus.html?pagewanted=all&_r=0.

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Amendment protections regardless of corporate form. The government struck out. Roberts defined and adhered to one rule of law: a campaign finance law premised on an equality interest or an intent to level the electoral playing field between privately and publicly funded candidates violate First Amendment rights. This rule of law targets what Roberts considered inconsistencies in the Court's jurisprudence.⁴⁵⁶

In our current political system, candidates are dependent on the people's votes, but they are also dependent upon those individuals or groups who have the means to fund a successful campaign.⁴⁵⁷ The potential for untoward influences in the electoral process do not justify limitations on such funding. Roberts recognizes the success of other mechanisms to control the accumulation of wealth in the electoral marketplace, including disclosure and disclaimer requirements as well as contribution limitations, that will not undermine the First Amendment's right to engage in free speech without unjustified government intrusion.⁴⁵⁸

c. Exceptions for Warrantless Search and Seizure under Fourth Amendment

The justices in *Georgia v. Randolph* strongly disagreed over the applicability of Fourth Amendment precedent and the permissibility of creating an exception to this precedent. As the Umpire, Roberts sought to build consensus around narrow opinions that adhered to preceding third-party consent cases. Roberts sifted through earlier cases, considered their facts in light of what was argued, discerned new trends, and clarified peculiar outcomes of the case. In sifting through earlier cases, Roberts concluded that the Court lacked legal justification for evaluating *Randolph* differently from preceding third-party consent cases. Roberts did not consider the

⁴⁵⁶ See Richard L. Hasen, *Is "Dependence Corruption" Distinct from A Political Equality Argument for Campaign Finance Laws? A Reply to Professor Lessig*, 12 Election L.J. 305, 307 (2013) (arguing that *Austin* provided Congress tremendous discretion to restrict speech by the news media and other widely recognized politically motivated entities or groups and that such a bleak view of independent expenditure groups and privately funded candidates did not justify leveling the playing field).

⁴⁵⁷ See Hasen, *supra*. at 309.

⁴⁵⁸ See *Bennett*, 131 S. Ct. at 2812.

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slight distinction in the facts of *Randolph* and these preceding cases to warrant an exception or a new trend in the Court's Fourth Amendment jurisprudence.⁴⁵⁹

Roberts then ventured into the realm of hypotheticals to show the peculiar outcome of the Court's ruling. In *Randolph*, Roberts describes an incident where the police arrive at scene of domestic violence. Scholarly critics suggest that Roberts' discussion of domestic violence was an "appeal to a kind of loaded imagery" and outside of the scope of *Randolph*, but these critics impute facts to create a hypothetical situation Roberts' never intended to create.⁴⁶⁰ The imputation of facts into Roberts' realistic scenario muddles his intent to show the peculiarity of the majority's reasoning. The Court affirmed, *inter alio*, that the Fourth Amendment affords the "home" special protections from government intrusion.⁴⁶¹ In accordance with the Court's reasoning, "widely shared social expectations" and "customary social usage" would influence the police to leave the alleged victim behind just because the other occupant, *i.e.*, the abuser, tells them to "stay out".⁴⁶² Thus, the Court safeguards the home at the expense of the abused spouse. This hypothetical scenario realistically demonstrates the peculiarity the *Randolph*'s precedent.

In spite of the majority's contentions, Roberts neither intended to decide *Randolph* on a hypothetical scenario nor obstinately prohibit any exceptions to Fourth Amendment jurisprudence. As Umpire, it is Roberts' duty to build a consensus among the justices while advancing narrow precedent to prevent future constitutional dissent or confusion. As

⁴⁵⁹ See C. Dan Black, *Georgia v. Randolph: A Murky Refinement of the Fourth Amendment Third-Party Consent Doctrine*, 42 Gonz. L. Rev. 321, 329-30 (2007) (Roberts affirmed that *Rodriguez*, *Matlock*, and *Randolph* were factually similar in that defendants in these cases had an unjustified expectation of privacy and had assumed risk that their co-occupants could allow entry of parties adverse to their interests, irrespective of defendant's presence).

⁴⁶⁰ See Daniel Manne, *Trouble at Home*, 40 Rutgers L. Rec. 188, 213-14 (2013) (Imputing imagery of a wife standing in the doorway with a "black eye" and claiming that Roberts' appeal to his imaginary scenario "is nothing more than a red herring" because the police in *Randolph* did not have probable cause to believe that any crime had occurred. In contrast, in Roberts' imaginary scenario, the police would have probable cause to believe that a crime, *i.e.*, domestic violence, occurred. Therefore, police entry in Roberts' scenario would be premised on probable cause, rather than co-occupant consent).

⁴⁶¹ See *Randolph*, 547 U.S. at 511.

⁴⁶² See *id.*

Umpire, Roberts called the shots. He concluded that Scott Randolph should have struck out because the Court diverged from judicial precedent and set forth an unworkable rule of law.⁴⁶³

d. Cruel and Unusual Punishment Clause of the Eighth Amendment

Roberts' interpretation of the Eighth Amendment is predicated solely on existing judicial precedent and evolving societal standards of a national consensus among states. As the Umpire, Roberts fairly and objectively evaluates earlier cases, considers their factual distinctions in light of what was argued, discerns new trends among the states, and clarifies any peculiar outcomes of the case. The role of the Court and legislative power supports his determination that matters of morality were not necessary to resolve the dispute at issue.⁴⁶⁴

Baze v. Rees, *Graham v. Florida*, and *Miller v. Alabama* represent the Roberts' appeal to narrow opinions, especially in cases that pose tremendous constitutional and legislative implications. For example, in *Graham v. Florida*, Roberts employed his conservative, minimalist philosophy to declare unconstitutional the mandatory imposition of life without parole on Graham, not the sentence in of itself.⁴⁶⁵ Roberts agreed that Graham's sentence violated the Cruel and Unusual Punishment Clause of the Eighth Amendment, but he advocated for a ruling premised on strict application of the proportionality standard that considered the particular defendant and particular crime at issue. He discerned a new trend based on the

⁴⁶³ See *Fernandez v. California*, 134 S. Ct. 1126, 1130 (2014) (reconsidering *Randolph* and holding that when an objecting co-occupant present, but later removed from premises for objectively reasonable purposes, such as lawful arrest, remaining occupant may validly consent to entry and search).

⁴⁶⁴ See Mary Berkheiser, *Developmental Detour: How the Minimalism of Miller v. Alabama Led the Court's "Kids Are Different" Eighth Amendment Jurisprudence Down A Blind Alley*, 46 Akron L. Rev. 489, 516 (2013).

⁴⁶⁵ See Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 4, 8, 17-19 (1999) (describing Justice Roberts's majority opinion in the health care law case as an exercise in "minimalism and self-control" that was a positive development for the law and the people).

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national consensus, but he did not agree that Graham's case necessitated the creation of a new legal precedent.⁴⁶⁶

Similarly, Roberts' conservative and minimalist judicial philosophy fueled his dissent in *Miller*, wherein he criticized the Court for straying from its narrowly tailored precedent and disregarding the national consensus. Roberts details the peculiar outcome of the majority's decision, which in effect subjected 29 states to revision of sentencing procedures and reconsideration of sentences for an estimated 5,000 juvenile inmates serving life without parole for homicide offenses.⁴⁶⁷ This peculiar outcome could have been avoided had the Court not strayed so far from the constraints of the law and widely accepted standards societal standards.

As Umpire, Roberts sets aside his personal views to devise a workable rule of law that legislatures and the Court can use as a basis to avoid larger constitutional and moral issues.⁴⁶⁸ Roberts was raised a devout Catholic and continues to actively practices his religion.⁴⁶⁹ However, Roberts prefers to keep that aspect of his life private, separate and apart from his public role as judge.⁴⁷⁰ His devout Catholicism likely fostered his conservative ideologies, but his role as Chief Justice is to call the shots fairly and objectively and without any reference to his personal views. If the Chief Justice's judicial philosophy expressed a moral or religious preference, it would fundamentally undermine his role as the Umpire. Therefore, Roberts' Eighth Amendment jurisprudence emphasizes the importance of existing precedent and a national consensus among states to maintain uniformity, predictability, and impartiality in the Court's jurisprudence.

⁴⁶⁶ See *Graham v. Florida*, 130 S. Ct. at 2036 (Roberts, C.J., concurring) (concluding that the Court could have resolved Graham's case without establishing a new precedent, that a life sentence without parole was prohibited for any juvenile for any non-homicide offense).

⁴⁶⁷ See Mary Berkheiser, *supra*. at 516.

⁴⁶⁸ See *id.* at 514-15.

⁴⁶⁹ See Purdum, *supra*. at 6.

⁴⁷⁰ See *id.*

e. Fourteenth and Fifth Amendments

i. Opinions Considering Race and the Fourteenth Amendment

The outcome of *Parents Involved* was especially significant for the Roberts Court as it brought the landmark ruling of *Brown v. Board of Education* as well as affirmative action cases to the forefront.⁴⁷¹ The Court had never ruled on an affirmative action case where the aggrieved parties challenged the *voluntary* use of race to achieve the benefits of diversity and to end racial isolation in public elementary and high schools.⁴⁷² Rather, the Court continuously exercised its authority to enforce *Brown* as many states repeatedly enacted policies that frustrated desegregation or simply refused to take affirmative steps to desegregate public schools.⁴⁷³ Alternatively, prior to *Parents Involved*, the Court considered several affirmative action programs implemented at high educational institutions, which set forth a threshold analysis for determining the constitutionality of future programs.⁴⁷⁴

⁴⁷¹ *Brown v. Board of Education*, 347 U.S. 483 (1954) (The Court held that state laws establishing separate public schools for black and white students were unconstitutional, as these laws violated the Equal Protection Clause of the Fourteenth Amendment. In the words of the unanimous decision of the Supreme Court, separate public educational facilities were inherently unequal. Even if the state-operated segregated black and white schools were of equal quality in facilities and teachers, segregation was inherently harmful to black students and in violation of the Fourteenth Amendment).

⁴⁷² See Coyle, *supra*, at 30.

⁴⁷³ Compare *Green v. County School Board*, 391 U.S. 430 (1968) (holding that Virginia school board maintains an affirmative duty to take whatever steps necessary to desegregate the unitary white school system), *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1970) (upholding North Carolina's mandatory busing policy as an appropriate remedy for the racial imbalance in its schools), *Keyes v. School District No. 1*, 413 U.S. 189 (1973) (holding that while the Denver school implemented program that mandated or permitted racial segregation, it instituted policies that manifested and maintained racially and ethnically segregated schools), with *Miliken v. Bradley*, 418 U.S. 717 (1974) (holding that boundary lines between 53 school districts in Detroit were not drawn with the intent to racially segregate all districts and the effect of these boundary lines did not violate the Equal Protection Clause).

⁴⁷⁴ Compare *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (striking down the admissions policy of the University of California, Davis' medical school, which reserved sixteen spots for minority students out of the 100 students enrolled annually in the program, because the admissions policy was not absolutely necessary to achieve the compelling goal of racial diversity), *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down admissions policy of the University of Michigan's undergraduate school for failing the heightened scrutiny test because the policy automatically awarded 20 points to minority students without individually assessing each applicant), with *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding the admissions policy of the University of Michigan's law school because the policy considered race as one of many factors, not the dominant factor, during the individual assessment of each applicant).

Roberts' opinion on race is premised in part on his belief that the country is best served by race neutral programs and that the country has evolved markedly since *Brown v. Board of Education*. The dissent does not deny that the country has evolved, but it attributes such evolution to affirmative action programs.⁴⁷⁵ The plurality and the dissent diverge on how the Seattle and Jefferson County programs brought about change in those school districts and whether race was truly necessary to bring out those changes.⁴⁷⁶ The dissent clarifies what it deems to be fallacies in the plurality opinion; specifically, that the implementation of affirmative action or assignments plans that explicitly use racial criteria suggests that such criteria has an important and necessary role to play in remedying the lingering effects of racial segregation.⁴⁷⁷

Parents Involved is difficult to rectify with Roberts' childhood upbringing. Roberts enjoyed the financial benefits of his father's executive position at Bethlehem steel. However, Roberts worked with lower class individuals in the steel mills, interacting with many individuals whom would likely never attend college.⁴⁷⁸ He witnessed firsthand that not everyone is born with a silver spoon in their mouth or possess the intellectual prowess that Roberts possessed. For this reason, Roberts' race-neutral viewpoint does not stem from a disconnect with the common man. Rather, it predicated on his interpretation of the law, his efforts to set an outer limit on Fourteenth and Fifth Amendment jurisprudence, and his hope that the Country and the Court can rise above the inequality that results from classifying based on race.

⁴⁷⁵ See *Parents Involved*, 551 U.S. at 860-61 (Breyer, J. dissenting).

⁴⁷⁶ See *Coyle, supra*. at 31 (For example, in 2000, Ballard's racial composition consisted of 70-30 white to non-white students. By 2003, the school's racial composition consisted of 57-43 white to non-white students); *but see Parents Involved*, 551 U.S. at 724 (Roberts, J.) (discussing Seattle's assignment plan and determining that white or non-white differentiation lead to peculiar results).

⁴⁷⁷ See *Parents Involved*, 551 U.S. at 860-61 (Breyer, J. dissenting).

⁴⁷⁸ See *Purdum, supra*. at 3.

The plain language of the Fourteenth Amendment is race-neutral in that all incidents, benefits, and obligations attributed by law must be applied to all individuals equally.⁴⁷⁹ It makes no mention of race, creed, or gender and in effect is colorblind.⁴⁸⁰ Any practice, policy, or program that affords benefits to one class of individuals, but not another violates the plain language of the statute. Nevertheless, the Court has recognized several permissible exceptions to this rule as a means of carrying out the Amendment's intended purpose, which was to end state-sponsored discrimination.⁴⁸¹ The Constitution set the floor while existing Fourteenth Amendment jurisprudence set the outer limit. The outer limit explicitly held that any program or policy that considers race as the predominant factor in affording an individual incidents, benefits, or obligations of such program or policy violates the Fourteenth Amendment.⁴⁸² Like Rehnquist, Roberts adheres to a narrow interpretation of the Fourteenth Amendment jurisprudence to ensure that the Court and legislatures do not stray too far from that outer limit.

As Umpire, Roberts analyzes the Seattle and Jefferson County programs within this outer limit.⁴⁸³ Roberts called the shots: the assignment plans exceeded the outer limit of existing precedent as both plans considered race a predominant factor in an effort to obtain a specific quota of a racial class. Seattle and Jefferson County struck out.

i. Opinions Considering Fifth Amendment Protection of Marriage Rights

Roberts' dissent in *Windsor* provides a very terse legal analysis. The brevity of Roberts' opinion was likely influenced by his decision in *Hollingsworth v. Perry*.⁴⁸⁴ In *Windsor*, like

⁴⁷⁹ See U.S. Const. Amend. XIV, § 1.

⁴⁸⁰ See *id.*; *Parents Involved*, 551 U.S. at 772 (Thomas, J. concurring); *but see Parents Involved*, 551 U.S. at 829 (Breyer, J. dissenting) (citing *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880)).

⁴⁸¹ See *Parents Involved*, 551 U.S. at 753-54 (Roberts, J.) (citing *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 5-6 (U.S. 1971)).

⁴⁸² See *Parents Involved*, 551 U.S. at 720, 723 (citing *Gratz*, 539 U.S. at 275).

⁴⁸³ See *id.*

⁴⁸⁴ See *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (declaring that the parties lacked standing because the only individuals who sought to appeal were those official proponents who had intervened in the District Court, but the

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Hollingsworth, Justice Roberts dismissed the case for lack of standing and avoided the difficult task of a ruling on its substantive merits.⁴⁸⁵

Roberts does not interpret *Windsor* or *Hollingsworth* to symbolize the Court's approval of same-sex marriage nationwide. Neither *Windsor* nor *Hollingsworth* set forth any judicial precedent interpreting the extent of same-sex marriage rights under the Fourteenth or Fifth Amendments. Rather, these cases simply codify the fine line between federal and state governments and each governing body's authority to define marriage in the realms in which they govern.⁴⁸⁶ This analysis falls squarely in line with Roberts' judicial philosophy in that federal and state institutions of government and their decisionmaking authority should be respected. Roberts clarifies the Court's role, which is to give deference to these institutions unless such institutions overstep constitutional or judicial precedent. As Umpire, Roberts fairly and objectively weighs DOMA's legislative history, congressional intent at the time of its enactment, and the national consensus among states to conclude that Congress and individual states lawfully exercised their decisionmaking authority.⁴⁸⁷

Additionally, Roberts' conservative and minimalist philosophy surfaces in *Windsor*. He did not intend to decide any more than *Windsor* required. Federalism principles adequately

proponents had not been ordered to do or refrain from doing anything. Their only interest in appealing was to uphold the constitutionality of generally applicable law. Roberts stated, "[a]s this Court has repeatedly held such a 'generalized grievance'—no matter how sincere—is insufficient to confer standing.").

⁴⁸⁵ See Maura Dolan, *Judge Strikes Down Prop. 8, Allows Gay Marriage in California [Updated]*, latimesblogs.com, <http://latimesblogs.latimes.com/lanow/2010/08/prop8-gay-marriage.html>, Aug. 4, 2010 (The facts of *Hollingsworth* are quite similar to that of *Windsor*. Like Edith Windsor, Kristin Perry and Sandra Stier, the aggrieved parties in *Hollingsworth*, initiated a case against Los Angeles County court clerks and California officials after Perry and Stier had been denied a marriage license because they were a same-sex couple. The aggrieved parties brought suit in federal district court. The federal district court judge entered a decision in favor of Perry and Stier, overturning Proposition 8 based on Due Process and Equal Protection Clauses of the Fourteenth Amendment. The State of California did not appeal the decision. Instead, official proponents of Proposition 8 challenged it. The Court of Appeals for the Ninth Circuit upheld the District Court's decision. Proponents of Proposition 8 appealed the decision to the Supreme Court)

⁴⁸⁶ See *Windsor*, 133 S.Ct. at 2697 (Roberts, J. dissenting); see also *Windsor*, 133 S.Ct. at 2705 (Alito, J. dissenting).

⁴⁸⁷ See *Windsor*, 133 S.Ct. at 2696-97.

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resolved the matter at issue and as such, he declined to address the Fifth Amendment equal protection argument.⁴⁸⁸

Nevertheless, by interpreting *Windsor* as a federalism issue, Roberts ignores an inconsistency in the Court's Fifth Amendment jurisprudence. Specifically, the Court has continually failed to announce a standard of review with regards to due process or equal protection claims in the context of sexual orientation.⁴⁸⁹ Under a rational basis review, it is unclear if a court would find irrational any reason proffered by a state for imposing a same-sex marriage ban.⁴⁹⁰ This has significant implications for same-sex couples seeking protection under the Due Process or Equal Protection Clauses as lower courts are free to apply this any standard of review to suit their ideological preferences.⁴⁹¹ By shying away from the same-sex marriage issue, Roberts permits lower courts to run amuck with *his court's* jurisprudence, inserting a rule of law and standard of review with no discernable outer limit.⁴⁹² As Umpire and leader of the Court, Roberts should have clarified the plurality's unclear articulation of a standard of review in sexual orientation cases.⁴⁹³ By shying away from the issue now, the Umpire places the burden on state legislatures to solve outstanding disputes.⁴⁹⁴

⁴⁸⁸ *See id.*

⁴⁸⁹ *See id.*; *see also Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴⁹⁰ *Compare De Leon v. Perry*, 975 F. Supp. 2d 632, 662 (W.D. Tex. 2014) (citing *Windsor* and applying rational basis test to strike down Texas' ban on same-sex marriage), *with Whitewood v. Wolf*, 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014) (applying intermediate scrutiny and declaring unconstitutional Pennsylvania statute that banned same-sex marriage and refused to afford Full Faith and Credit to same-marriages entered into in other states); *see also Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 160 (2008) (applying intermediate scrutiny), *and Varnum v. Brien*, 763 N.W.2d 862, 880 (Iowa 2009) (applying intermediate scrutiny).

⁴⁹¹ *See* Tiffany C. Graham, *Rethinking Section Five: Deference, Direct Regulation, and Restoring Congressional Authority to Enforce the Fourteenth Amendment*, 65 Rutgers L. Rev. 667, 697 (2013).

⁴⁹² *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014) (interpreting *Windsor* as striking down DOMA by looking at the "essence" of the law, or its "design" and "purpose", rather than considering legitimate justifications for its implementation).

⁴⁹³ *See Windsor*, 133 S.Ct. 2683-84.

⁴⁹⁴ *See* U.S. Depart. Of Labor Technical Release No. 2013-04, 2 (Sept. 18, 2013) (stating that "spouse" and "marriage" include same-sex couples legally married in any state or foreign jurisdiction that recognizes such marriages, but do not couples in domestic partnerships or civil unions); *see also* Rev. Rul. 2013-44 I.R.B. 432 (Oct. 28, 2013).

CONCLUSION

Roberts holds firmly to his belief that his role is to act like the Umpire of the Court. He consistently approaches each case in a methodical way, sifting through judicial precedent, discerning new trends, and rectifying any inconsistencies in the Court's legal or factual analysis. With this methodical analysis, Roberts decides if the parties struck out, circled the bases, or hit a homerun. While Roberts welcomes the creation of new precedent where warranted, he consistently advocates for the principled and intelligible evolution of the Court's jurisprudence. Roberts' respect for judicial precedent, his role as Chief Justice, and narrowly tailored opinions marks Roberts' tenure as the Umpire and leader of the Court.