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Selective Minimalism: The Judicial Philosophy Of Chief Justice John Roberts

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PART I: Introduction

When the Chief Justice of the United States Supreme Court speaks, the country listens. That is what made John Roberts's opening comments at his confirmation hearing for the Chief Justice position so surprising. Of all the possible topics to discuss—abortion, gay rights, the death penalty, etc.—he chose baseball: "Judges are like umpires," he said, "Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire."[1]

The analogy, though imperfect, was clear. Roberts envisioned a Court different from the one that existed over the past few decades where, many felt, broad holdings with far reaching implications were made based more on policy decisions than on the law and facts in the record.[2] To Roberts, the integrity of the Court, if not its constitutional mandate, required much more restraint. His stated goal was to usher in an era of judicial minimalism; a judicial philosophy that preferred narrow decisions. In his usual aphoristic way, he once said, "[i]f it is not necessary to decide more . . . [then] it is necessary not to decide more."[3] He also cared about how these decisions were reached. The Court was certainly not a political branch; decisions are based on the law and facts in the record on appeal, and never on empty policy rationales or results-based jurisprudence. His goals were ambitious, but he was clearly determined.

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

[2] For a survey of the debate over whether the Rehnquist court was minimalistic or actually more broad, *see* Robert Anderson IV, *Measuring Meta-Doctrine: An Empirical Assessment of Judicial Minimalism in the Supreme Court*, 32 HARV. J.L. & PUB. POL'Y 1045 (2009).

[3] *Chief Justice Says His Goal Is More Consensus on Court*, NY TIMES (May 22, 2006) *available at* http://www.nytimes.com/2006/05/22/washington/22justice.html?_r=0.

After almost 10 years on the bench, however, a performance evaluation is in order, and the results are in: he has not hewed to those stated goals. A review of Roberts's opinions reveals that he is engaged in something different than what he promised. It is an inconsistent type of minimalism, which I call "selective minimalism." That is, Roberts's adherence to a limited role of the courts and apolitical decisionmaking has not been a constant star in his constellation of decisions. Rather, the scope of his decisions, and the rationales that underlie them, depends on at least two determinative features: (1) whether the conduct or statute at issue has strong support from a unified front of concomitant branches; and (2) whether the issues implicate relationships between private citizens and the government, or business interests and the government. When the circumstances serve those interests, Roberts's minimalism is in full force; when they do not, his jurisprudential approach becomes less disciplined and takes on a results-based form that he expressly criticized in his nomination hearings.

A comprehensive inquiry into any Justice's judicial philosophy must look beyond the court decisions that carry his or her name. Analysis of their decisions can be best understood by first looking to insight from their life. Part II will begin this inquiry by describing Roberts's biography. Part III will describe and analyze a representative set of his cases to help explain his "selective minimalism." It will cover ten cases in total—a spectrum of majority, concurring, and dissenting opinions—organized thematically by prevalent concepts: standing, crime and terrorism, freedom of speech, and race. Part IV will conclude by discussing interesting ways to think of Roberts's successes and failures according to his overarching philosophies.

PART II: Biography

John G. Roberts, Jr. was never mediocre. His life before the Supreme Court, from childhood to the D.C. Circuit bench, can be best described as a quiet, steady ascendancy to the

top of his profession. But the man who would eventually be labeled "one of the great Supreme Court advocates of his generation,"[4] and then the youngest chief justice since John Marshall, was born in Buffalo in 1955 and grew up in a modest, middleclass life in Long Beach, Indiana.[5]

Life around this small, Michigan Lake-side town painted the backdrop for Roberts's immediate success. His father's job as a steel executive with Bethlehem Steel brought in for the family enough money to send Roberts to the prestigious all-boys boarding school, La Lumiere, in nearby LaPorte.[6] He belonged there. As one teacher in his previous school reminisced, he was always the student through which she could measure her success. She stated, "[i]f he understood the concept, I was good . . . If not, teach it all over again."[7] At La Lumiere, things were no different. He was valedictorian of the class of 1973.[8] He was captain of the football team, a varsity wrestler, and member of the student council and drama club.[9] In an early predictor of his oral advocacy skills, he also excelled at the school's so-called declamation contest where he would write and memorize his own speeches.[10] He showed an extraordinary gift for writing. As one fellow student remembered, "[h]e could take an argument that was borderline absurd and argue for it so well that you were almost at the point of having to accept his stance even though it was intuitively obvious that it was absurd."[11]

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[4] Adam Liptak, *A Career Largely on One Side of the Bench and Involving a Wide Variety of Issues*, NY TIMES (July 20, 2005), *available at* http://www.nytimes.com/2005/07/20/politics/politicsspecial1/20cases.html?pagewanted=print&_r=0.

[5] JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 203 (2011); *John G Roberts Fast Facts*, CNN.COM, Mar 25, 2013, *available at* http://www.cnn.com/2013/03/25/us/john-g-roberts-fast-facts/.

[6] Todd S. Purdum, *Court Nominee's Life Rooted in Faith and Respect for Law*, NY Times (Jul 21, 2005), *available at* http://www.nytimes.com/2005/07/21/politics/21nominee.html?pagewanted=all.

[7] *Id.*

[8] JEFFERY TOOBIN, THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT 8 (2012)

[9] Toobin, The Oath, *supra* note 8.

[10] Toobin, The Oath, *supra* note 8.

[11] Todd S. Purdum, *Court Nominee's Life Rooted in Faith and Respect for Law*, NY Times (Jul 21, 2005), *available at* http://www.nytimes.com/2005/07/21/politics/21nominee.html?pagewanted=all.

Roberts's superb memory and writing skills led him to Harvard College, where he graduated summa cum laude in 1976, after only three years.[12] During all three summers, he came home to the steel mill in Indiana and worked as an assistant electrician to help pay for school.[13] That fall, he entered Harvard Law School and worked his intellect to the same result. He was selected onto the Harvard Law Review, where he served as managing editor and wrote two published papers; one on the takings clause,[14] the other on the contract clause.[15] By all accounts, he was an even-tempered student who, though some students remember as having a conservative outlook, was never politically active or outspoken about his views.[16] He was simply "brilliant."[17]

After graduating magna cum laude, he accepted two prestigious clerkships. In 1979, he took a position with Judge Henry Friend, the esteemed judge on the Second Circuit, where he is said to have learned from Friendly's belief in the limited role of judges.[18] A year later, he joined then-Associate Justice William Rehnquist where, as he recalled years later, he learned to shift away from "fluid and wide-ranging" constitutional analysis to more solid ground focusing on text and precedent.[19]

When the clerkship at the Supreme Court ended, Ronald Reagan was elected president, and Roberts chose to join the administration.[20] He began as an assistant to the attorney general,

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[12] Stevens, supra note 5, at 204.
[13] Stevens, supra note 5, at 204.
[14] John G. Roberts, Jr., *Developments in the Law—Zoning, The Takings Clause*, 91 HARV. L. REV. 1462 (1978).
[15] Todd S. Purdum, *Court Nominee's Life Rooted in Faith and Respect for Law*, NY Times (Jul 21, 2005), *available at* http://www.nytimes.com/2005/07/21/politics/21nominee.html?pagewanted=all;
John G. Roberts, Jr., Comment, *Contract Clause—Legislative Alteration of Private Pension Agreements:* Allied Structural Steel Co. v. Spannaus, 92 HARV. L. REV. 86 (1978).
[16] Todd S. Purdum, *Court Nominee's Life Rooted in Faith and Respect for Law*, NY Times (Jul 21, 2005), *available at* http://www.nytimes.com/2005/07/21/politics/21nominee.html?pagewanted=all.
[17] *Id.*
[18] *Id.*; Stevens, *supra* note 5, at 204.
[19] Toobin, The Oath, *supra* note 8, at 38–39.
[20] Toobin, The Oath, *supra* note 8, at 39.

then moved to the White House counsel's office.[21] While he was far from the highest ranking in the office, he demonstrated value though his clear and effortless writing style that he would use with characteristic force throughout his career. For example, when a congressman proposed a conference to discuss power sharing among the branches, Roberts retorted to his superiors, "[t]here already has, of course, been a 'Conference on Power Sharing.' It took place in Philadelphia's Constitution Hall in 1787, and someone should tell [the Congressman] about it and the 'report' it issued."[22] Similarly, when Chief Justice Burger pushed for an additional appellate court to lighten the Supreme Court's caseload, Roberts cheekily said, "[w]hile some of the tales of woe emanating from the Court are enough to bring tears to the eyes, it is true that only Supreme Court justices and schoolchildren are expected to and do take the entire summer off."[23]

When his tenure with the administration ended in 1986, he briefly joined the prominent former D.C. law firm Hogan & Hartson but was immediately called back to the executive branch as a deputy at the solicitor general's office.[24] Between his time there and his return to private practice, Roberts argued an astounding thirty-nine cases and established himself as one of the favorites among the justices.[25] His successes did not go unnoticed when, in 2003, President Bush nominated Roberts to a judgeship on the Court of Appeals for the District of Columbia Circuit, which many regard as a pipeline for potential Supreme Court nomination.[26] He was confirmed by a unanimous senate.[27] Then, after only a short two years on the bench, the president elevated Roberts again, this time to replace Justice O'Connor, who was retiring

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[21] Toobin, The Oath, *supra* note 8, at 39.
[22] Toobin, The Oath, *supra* note 8, at 40.
[23] Toobin, The Oath, *supra* note 8, at 40.
[24] Toobin, The Oath, *supra* note 8, at 40.
[25] Toobin, The Oath, *supra* note 8, at 40–41.
[26] Todd S. Purdum, *In Pursuit of Conservative Stamp, President Nominates Roberts*, NY TIMES (July 20, 2005), *available at* http://www.nytimes.com/2005/07/20/politics/politicsspecial1/20nominee.html?pagewanted=all.
[27] *Id.*

from the Court.[28] But after an ailing Chief Justice Rehnquist passed away just a week after, Bush announced that Roberts would instead be nominated to take the seat of his former mentor.[29]

At the confirmation hearings before the Judiciary Committee, Roberts shined. As he had always done for oral arguments, he sat before the row of Senators with no papers, and answered their questions with an easy erudition showed why he is one of the best advocates of his time. Reflecting on Roberts's ability to quote the Federalist papers by memory and summarize a wide body of case law, one Senator remarked that Roberts "retired the trophy" for judicial nominees.[30] Most Senators agreed. Roberts championed values that most though admirable and reasonably attainable: he described his desire for more unanimous decisions, a narrow role for courts (reflected notably in his umpire analogy), and the importance of adherence to precedent and the doctrine of stare decisis.[31] He was confirmed on September 22, 2005 by the Judiciary Committee's vote of 13–5, and by the full Senate by 78–22.[32]

As with the addition of any new justice to the Court, the dynamics of the nine changed when Roberts joined. But his role as Chief Justice affected changes that extended beyond adding a new personality, judicial philosophy, or strategies as would occur if an associate justice were replaced. Roberts has assumed responsibilities unique to the Chief Justice and he made alterations in ways that bespeak his personality. Certain obligations of a Chief Justice are constant: administering the oath of office to the president, presiding over the justices' private certiorari or voting conferences and open court proceedings, and assigning a justice to author an

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[28] JEFFREY TOOBIN, THE NINE 323 (2007).
[29] Toobin, The Nine, *supra* note 28, at 327.
[30] Toobin, The Nine, *supra* note 28, at 327.
[31] *Roberts Confirmation Hearing*, at 55, 141–42, 424.
[32] Toobin, The Nine, *supra* note 28, at 327.

opinion (when the Chief sides with the majority).[33] Where the Chief Justice is given discretion, however, Roberts parted ways with tradition. Whereas his predecessor, Chief Justice Rehnquist, wore a robe with four gold stripes on each sleeve, Roberts did away with such ostentation and decided to revert back to wearing the same all-black robe as the other justices.[34] That the decision stemmed from the seeds of a unpretentious life is unmistakable. Likewise, he increased the length of private conferences to allow for more discussion of a case's merits and reasoning to consider a grant.[35] He is also more forgiving with time at oral argument where, contrary to Chief Justice Rehnquist's strict practice of silencing advocates the moment the red light flashed, Roberts will allow a few comments after time.[36]

In essence, John Roberts is not William Rehnquist; neither in the sense of procedural adherence or jurisprudential attitude. But neither is the image Roberts projects to the world—that of a modest man who wants to get things right while staying out of limelight—a reflection of his judicial philosophy. To best answer what his philosophy is, one must turn to his opinions.

PART III: Case Studies.

A. Guarding the Courthouse Doors: An Inquiry into Standing.

From his school days in Massachusetts to his days in New York clerking for Judge Friendly and finally to his life in Washington D.C., John Roberts must have spent countless hours and miles on the highways that connect those cities. He would have joined the millions of commuters that travel these roads, their cars and busses spitting noxious gases into the atmosphere. Though one might think this environmental issue troubled the Environmental Protection Agency (EPA), the agency during the George W. Bush administration took no action

[33] Stevens, *supra* note 5, at 44.
[34] *See* Toobin, The Nine, *supra* note 28, at 142; Stevens, *supra* note 5, at 208.
[35] Stevens, *supra* note 5, at 210.
[36] Stevens, *supra* note 5, at 172, 201.

to redress it. From this inaction, the Supreme Court's decision in *Massachusetts v. EPA* was borne.[37]

In the early 2000s, a collection of States, local governments, and private organizations alleged that the EPA has abdicated its responsibility under the Clean Air Act to regulate the emissions of several greenhouse gases.[38] They argued that the previous decade registered some of the warmest months ever recorded on the planet, that international climate change research bodies have concluded that greenhouse gasses were causing this climate change, and the warming posed a threat to people and property if left unchecked.[39] In rejecting their petitions to act, the EPA reasoned that the Clear Air Act did not give it authorization to issue mandatory regulations to address global climate change, and even if it could, it would not because the parties could not show an unequivocal causal link between green house gas emissions and the increase in global temperature.[40] Further, the EPA characterized any potential action as contrary to the President's "comprehensive approach" to the problem, which included nonregulatory program action, voluntary private sector reductions in green house emissions, and more exhaustive research before instituting new regulations.[41]

The antecedent issue to these questions, and a critical aspect of the Court's decision, was the EPA's argument that none of the parties had standing to bring suit because the alleged harm—the effects of greenhouse emissions—are widespread and therefore too general a problem to satisfy Article III's "case and controversy requirement."[42] The Court, in a 5-4 split

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[37] 549 U.S. 497 (2007).
[38] *Id.* at 505. Massachusetts was one of the states that intervened in the litigation after the private organizations had petitioned the EPA to act, asserting its injury as the loss of land due to sea level rise. *Id.*
[39] *Id.* at 510.
[40] *Id.* at 511.
[41] *Id.* at 513.
[42] *Id.* at 517. As the Court explains, the standing doctrine generally has three constitutional requirements that all litigants must meet in order for their claim to be justiciable in federal court: (1) an actual, concrete injury in fact;

along ideological lines, held that of all the litigants, at least Massachusetts had standing to sue.[43] Justice Stevens, writing for the majority, held that standing was satisfied even though the regulation's ability to affect change was not entirely certain because "it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it."[44] He added, "Because of the enormity of the potential consequences associated with manmade climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant."[45] Lastly, unlike private citizen suits, Massachusetts is treated differently because states have a special claim to standing in the federal courts to protect their "quasi-sovereign" interests in "all the earth and air within [their] domain[s]."[46]

The Chief Justice, writing for a four-justice dissent, disagreed with what he felt was the majority's expansive reading of the standing requirements. First, in his typical reader-friendly way, Roberts wrote that, before determining whether the plaintiffs have standing, "the Court changes the rules" by asserting that states are not normal litigants.[47] This conclusion, he argues, has no basis in the Court's jurisprudence and is absent from the general judicial review provisions of the Clear Air Act. He observed that the majority's resurrection of 100 year old precedent to support the contention is telling evidence that the relaxed-standing argument needed all the help it could get.[48]

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(2) causation; and (3) redressability. *See id.* at 521–526. For the "case and controversy" language, *see* U.S. CONST. art. III, § 2.

[43] *Id.* at 526.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 519 (citing Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907)).

[47] *Id.* at 536 (Roberts, C.J., dissenting).

[48] *Id.* at 536, 540 (stating that the citation is "an implicit concession that petitioners cannot establish standing on traditional terms"); Richard Murphy, *Abandoning Constitutional Standing: Trading A Rule of Access for A Rule of Deference*, ADMIN. & REG. L. NEWS at *16 (Spring 2009) (commenting on majority's decision to rely on such outdated precedent).

The heart of Robert's dissent, though, attacked the majority's approach to standing's "redressability" requirement—i.e., the likelihood, beyond mere speculation, that a decision in the plaintiff's favor will redress the injury. He wrote,

> [e]ven if the regulation *does* reduce emissions . . . the Court never explains why that makes it *likely* that the injury in fact—the loss of land—will be redressed. Schoolchildren know that a kingdom might be lost "all for the want of a horseshoe nail," but "likely" redressability is a different matter. The realities make it pure conjecture to suppose that EPA regulation of new automobile emissions will *likely* prevent the loss of Massachusetts coastal land.[49]

The majority's relaxed standing requirement, at its core, allows litigants to use the courts as forums for policy debates, rather than for deciding concrete issues.[50] The standing doctrine's limitation on which issues the courts can hear, according to Roberts, "is crucial in maintaining the tripartite allocation of power set forth in the Constitution. In [his] view, the Court . . . fails to take this limitation seriously."[51]

Roberts's dissent reveals a critical aspect of his judicial philosophy: the role of the courts must be a limited one given the narrow standing requirements that the framers put forth in Article III's "case and controversy" language. Since the doctrine must be considered in any suit brought in federal court, Roberts's aggressive take on sorting who can and cannot sue facilitates his minimalist approach to judging. The fewer litigants that have standing, the fewer decisions the Court will have to address.

Of course, the counter argument adopted by the majority suggests that this narrow approach imposes an unjustified and unprincipled limit on the availability of the federal forum.[52] The fundamental fork in the road between the two positions, though, is whether the

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[49] *Id.* at 546 (emphasis in original).
[50] *Id.* at 547.
[51] *Id.* (internal quotation marks and citation omitted).
[52] ERWIN CHIMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 79 (4th ed. 2011).

concept of "forum availability" is, in fact, a good thing. For example, a necessary byproduct of fewer litigants is that the would-be plaintiffs would have to turn to other avenues to redress their problems—namely the political and executive forums. This separation of powers concept—this "tripartite allocation of power"—reinforces that notion. Roberts thus puts his faith in the idea that the concomitant branches can and will redress people's problems and, if not, the people will see to it that new legislators and executives are elected. Were this basic assumption untrue, Roberts suggests, the federal courts would necessarily be superior to the coordinate branches. Given that the separation of powers is premised on horizontal parity, his dissent shows an unwillingness to accept that proposition.

Behind the academic battle of constitutional norms, however, lies the practical implications of Roberts's restrictive view on standing. Roberts, unlike most of the other justices, came to the Court after successful private practice where he represented mostly large corporations or entities against individual plaintiffs.[53] Given that the basic strategy for defense counsel is to dispose of cases as early in litigation as possible, procedural mechanisms like standing would have been valuable weapons. One can easily imagine how years of arguing for narrowed standing requirements and benefiting from procedurals roadblocks helped shape Robert's judicial philosophy in this area. Indeed, his largely pro-business voting positions after he joined the Court stay true to this viewpoint.[54] Ultimately, Roberts activates his minimalisms in the standing context and acts as a careful sentinel of the courthouse doors.

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[53] *See, e.g.*, Toyota Motor Mfg v. Williams, 534 U.S. 184 (2002) where Roberts argued, and the Court agreed, that a Toyota employee diagnosed with carpel tunnel syndrome could not recover damages from Toyota under the Americans with Disabilities Act; *see also* Jefferson v. City of Tarrant, 522 U.S. 75 (1997) where Roberts successfully defended a wrongful death claim against the city brought by the family of a woman who died in a fire.

[54] *See, e.g.*, Citizens United v. FEC, 558 U.S. 310 (2010) (ban on corporations and unions using treasury funds for independent campaign spending violates First Amendment); Wal-Mart v. Duke, 131 S.Ct. 2541 (2011) (class action against Wal-Mart for discrimination failed because class did not have requisite common questions of law or fact); Chamber of Commerce v. Whiting, 131 S.Ct. 1968 (2011) (Arizona employer ID law not preempt by federal immigration law).

B. Crime, Terrorism, and Habeas Jurisdiction.

If access to the federal courthouse is important to Roberts in the traditional civil context, the issue (and his vehemence) is magnified in the context of military detentions. Such was the case when the Court decided the Guantanamo Bay detainee case *Boumediene v. Bush* in June 2008.[55] This blockbuster terrorism detention case completed what was a long slog through the federal courts in the years proceeding the attacks on September 11, 2001.[56] The culmination of those previous cases—all of which acknowledged certain rights of enemy combatants—was Congress's codification of two statutes: the Detainee Treatment Act (DTA),[57] which stripped all federal courts of jurisdiction (except the United State Court of Appeals for the District of Columbia) to hear writs of habeas corpus by noncitizen enemy combatants held in Guantanamo Bay; and the Military Commission Act (MCA),[58] which holds the same but applies it retroactively to cover all noncitizen detainees.

Boumediene v. Bush represented the last chapter in a series of setbacks to the Bush Administration and Congress in the terrorism/detention context. In a 5-4 decision, Justice Kennedy wrote that the plaintiffs—six Algerian detainees held in Guantanamo Bay—could not be prevented from filing habeas petitions in federal court because the DTA and MCA's preclusion of jurisdiction was unconstitutional.[59] The majority held that the Constitution's Suspension Clause[60] is an affirmative right that reaches, and has full effect on, the detainees

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[55] 553 U.S. 723 (2008).
[56] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (holding that American citizen captured in foreign country and held as an enemy combatant must be accorded due process); Rasul v. Bush, 542 U.S. 723 (2004) (holding that Guantanamo detainees can have habeas petitions filed heard in federal court).
[57] Pub. L. 109-148, 119 Stat. 2739.
[58] 28 U.S.C. § 2241(e) (2006)
[59] *Boumediene*, 553 U.S. at 771.
[60] U.S. Const. Art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.")

held extraterritorially in Guantanamo.[61] Moreover, the remedies provided to the detainees through the DTA and MCA, including the D.C. Circuit's exclusive jurisdiction and deferential review of "enemy combatant" designations, were not adequate substitutes for the right.[62] The Court thus stymied what it believed was Congress's attempt to impermissibly circumscribe habeas review in ways that had full presidential support.

Roberts, writing a dissent joined by Justices Scalia, Thomas, and Alito, upbraided the majority for what he perceived as blatant judicial overstepping. He began the opinion by bluntly stating, "[t]oday the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants."[63] To Roberts, the decision should have been about context. "The political branches," he wrote, "crafted these procedures amidst an ongoing military conflict, after much careful investigation and thorough debate."[64] Nonetheless, he continues,

> [t]he Court rejects them today out of hand, without bothering to say what due process rights the detainees possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has exhausted the procedures under the law. And to what effect? The majority merely replaces a review system designed by the people's representatives with a set of shapeless procedures to be defined by federal courts at some future date.[65]

Such a result is not a win for the detainees, as Roberts writes, but rather leaves them with the prospect of more litigation down the road that forces the unsuited district courts to make

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[61] *Boumediene*, 553 U.S. at 771.
[62] *Id.* at 799.
[63] *Id.* at 801 (Roberts, C.J., dissenting).
[64] *Id.*
[65] *Id.*

decisions—e.g., what to do with classified information about terrorist detainees—that have national security implications.[66]

The crux of Roberts' dissent turns on his position about the appropriate role of the judiciary in the military context. Though the stakes may be different than the *EPA* standing cases, the underlying philosophy bleeds through. Whereas the *Boumediene* majority focuses on what it believes to be "a profound reaffirmation of the rule of law," Roberts sees an unraveling of the rule of law by an officious institution.[67] As he writes at the outset of his dissent, "[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."[68] To Roberts, such policies derive from a realm that the President and Congress alone have dominion. And the decision to undermine their determinations is even more disconcerting to him given the consensus among both of those branches about an appropriate course of conduct to deal with this unique challenge. Were there ever a time to take a reserved approach to overruling congressional legislation, the antiterrorism statutes were prime candidates; as such, Roberts's dissent epitomizes his arguments about the need for judicial minimalism.

His minimalism also shines through in the criminal law context, where he has shown a proclivity towards decisions that require case-by-case examinations rather than sweeping propositions about how criminal law should work. His separate writing in *Graham v. Florida* epitomizes this.[69] In 2010, Justice Kennedy wrote the majority opinion in this case, which held

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[66] *Id.* at 826. Here, Roberts's strong yet controlled passion is evident. He is more reserved in expressing the same sentiment as Justice Scalia, who sharply predicts that the Court's decision "will almost certainly cause more Americans to be killed," adding hyperbolically that "[t]he Nation will live to regret what the Court has done today." *Id.* at 828, 850 (Scalia, J., dissenting).
[67] *See* Chimerinsky, *supra* note 52, at 390.
[68] *Boumediene*, 553 U.S. at 801 (Roberts, C.J., dissenting).
[69] 560 U.S. 48 (2010).

that imposing a life sentence without the possibility of parole on juvenile offender for a non-homicide crime violates the Eighth Amendment.[70] In so holding, the Court announced a categorical rule applicable to every juvenile that commits a non-homicide offence.[71]

Roberts, concurring in the judgment, disagreed that the Court had to "invent a new constitutional rule of dubious provenance" to reach its conclusion.[72] Rather, he would have held that that the Eighth Amendment requires courts to take the offender's age into consideration as part of a case-specific gross disproportionality inquiry, weighing it against the seriousness of the crime.[73] The rationale, Roberts indicated, was twofold. First, the context of criminal sentences calls for a person-specific inquiry into whether the person can eventually be fit to rejoin society. The jury and the judge are fit to make these determinations on the ground, and the Court should not undermine or underemphasize their ability to do so. Second, the Court's Eighth Amendment precedent answers the question narrowly, without requiring broad rules.[74] Specifically, he wrote, the Court's decision in *Roper v. Simmons* drew a categorical line at whether a juvenile could be subject to capital punishment, but its holding did not reach these types of decisions; instead *Roper* is valuable for what it *did* explicitly say, that juveniles are typically less blameworthy than adults and therefore it should be a major, but not dispositive, factor.[75]

Roberts's concurrence in *Graham* shows a dedication to narrow decisionmaking in the criminal context that shares qualities similar to his *Boumediene* dissent. The *Boumediene* decision exemplifies how Roberts employs a minimalist approach when the majority acts

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[70] *Id.* at 82.
[71] *Id.* at 75.
[72] *Id.* at 86 (Roberts, C.J., concurring).
[73] *Id.*
[74] *Id.* at 90.
[75] *Id.* (citing Roper v. Simmons, 543 U.S. 551 (2005)).

contrary to the wishes of the two other branches of government. Those branches, according to Roberts, are best fit to make determinations about its own treatment of individuals who pose threats to the nation. The courts should stay away. However, *Graham* involved a decision by certain states to allow life without parole for juveniles, but nowhere the issue implicate the kind of unified front of branches to which Roberts would feel compelled to defer. Instead, he employs a true minimalistic approach by making a decision that is narrow, case-by-case, and shows deference to precedent.

C. First Amendment Protections.

While Roberts was on the losing end of the combatant detention cases, he was eventually able to draft a majority opinion in a case with overt national security implications; although, this time, in the surprising context of First Amendment jurisprudence. In *Holder v. Humanitarian Law Project*, Roberts wrote for 5 other justices, holding that a federal law prohibiting material support of terrorist-designated foreign organizations did not violate the First Amendment as applied to groups seeking to teach and advocate peaceful resolution of conflicts to such organizations.[76]

Based on its finding that certain organizations "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct," Congress adopted a law prohibiting the provision of "material support or resources" to certain foreign organizations that engage in terrorist activity.[77] Its definition of "material support" covers a wide range of activities, some of which clearly relate to illegal conduct and others that seem more innocuous.[78] Moreover, the Secretary of State has the authority to determine which

[76] 130 S.Ct. 2705 (2010).
[77] *Id.* at 2712-13 (citing 18 U.S.C. § 2339B).
[78] Currently, "material support" means "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance,

organizations qualify as foreign terrorist organizations.[79] Following passage of the so-called "material support" statute, several U.S. citizens and domestic organizations that intended to provide support for the political and humanitarian activities of two organizations labeled as "foreign terrorists" brought suit.[80] They sued on the theory that, among other things, the criminal prohibition on providing support to those organizations violate their free speech rights as a ban on political speech.[81]

The Court, lead by Roberts, rejected their arguments and held that such speech could be constitutionally restricted so long as it was done in connection with a designed foreign terrorist organization.[82] The majority so held in part because it believed the statute did not reach most forms of expression. Roberts stated that, under the statute, "plaintiffs may say anything they wish on any topic. They may speak and write freely about [foreign terrorist organizations], the governments of [the countries to which these organizations belong], human rights, and international law. They may advocate before the United Nations."[83] It is only the unique circumstance of "coordination [directly] with foreign groups" that the statute prohibits.[84]

The bottom line for Roberts is that, even if certain lawful speech with no imminent threat is reached, the restriction is permissible given the congressional and executive support for the statute. He wrote: "Congress made specific findings regarding the serious threat posed by international terrorism," adding that the majority was relying upon "affidavits stating the

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safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials." 18 U.S.C. § 2339A(b)(1); *see also* 18 U.S.C. § 2339B(g)(4).

[79] *Holder*, 130 S.Ct. at 2713 (internal citation omitted).

[80] *Id.* at 2713–14.

[81] *Id.* at 2722-23. The plaintiffs raised two other constitutional claims that the majority also disposed of. First, they claimed that the "material support" statutes violated the Due Process Clause of the Fifth Amendment because were statutory terms are impermissibly vague. Second, they claimed that the statute also violated their First Amendment freedom of association. *Id.* at 2716.

[82] *Id.* at 2722-23, 2725.

[83] *Id.* at 2722-23.

[84] *Id.* at 2723.

Executive Branch's conclusion [that] . . . 'the experience and analysis of the U.S. government agencies charged with combating terrorism strongly support' Congress's finding that all contributions to foreign terrorist organizations further their terrorism."[85] In words that could have been taken exactly from his *Boumediene* dissent, Roberts continues, "[t]hat evaluation of the facts by the Executive, like Congress's assessment, is entitled to deference. This litigation implicates sensitive and weighty interests of national security and foreign affairs."[86] Lastly, in a clear attempt to show that his rationale should not be confined to First Amendment contexts, he uses the *Boumediene* majority's own words against itself by stating, "[w]e have noted that 'neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.'"[87] To Roberts, his deferential judicial philosophy regarding national security and terrorism was finally good law, and he wanted to make sure it would not be caged in.

A troubling aspect of Robert's *Humanitarian Law Project* decision is its relationship to past First Amendment jurisprudence. Although he does not address it in his opinion, this case is the first time the Court ruled that speech advocating only lawful, nonviolent activity can be criminally punished, even where the speakers' intent is to discourage violence. As Breyer argues in dissent, "coordination" is not punishable, especially given the longstanding principle from *Brandenburg v. Ohio* that the First Amendment "protects advocacy even of *unlawful* action so long as that advocacy is not 'directed to inciting or producing *imminent lawless action* and . . . *likely to incite or produce* such action.'"[88] Here, the plaintiffs' conduct is lawful, and not imminent. Yet, Roberts does not address, or even cite to, this bedrock principle. Moreover,

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[85] *Id.* at 2724, 2727 (internal citation and quotation marks omitted).
[86] *Id.* at 2727.
[87] *Id.* (quoting Boumediene v. Bush, 553 U.S. 723, 797 (2008)).
[88] *Id.* at 2733 (Breyer, J., dissenting) (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)) (emphasis in original).

he eschews any label of scrutiny, though he acknowledges that intermediate and strict could have been applicable.[89] Instead, Roberts rejects intermediate scrutiny, and applies a more "rigorous" test, but never expressly adopts the strict scrutiny language.

The end result shows Roberts engaging in a type of legal gerrymandering to reach a certain result without confining himself to an analytical framework. There is little doubt that, had Roberts accepted strict scrutiny outright (as the circumstances persuasively called for it), he would have placed the government in an uphill battle to defend any future challenges to this statute or similar national security laws. And, in doing so, his opaque reasoning leaves unanswered important questions about the state of the *Brandenburg* doctrine. For example, his decision could arguably support congressional legislation prohibiting any individual from lending support to the nonviolent activity of gang members (e.g., youth mentoring programs), given that those organizations pose serious threats and their apprehension is in the hands of the executive branch. These are the types of questions that a true minimalist would not have implicated when the decision did not require it.

That is not to say, however, that Roberts is unreceptive to free speech infringements. As his majority opinion in *Snyder v. Phelps* a year later indicates, he has a keen sense of the values of free speech when national security implications are not at stake.[90] In this emotionally-charged case, the Court refused to uphold punishment of Westboro Baptist Church, an extremist religious group that protests at the funerals of military service members by waving hate signs.[91]

While serving in Iraq, Marine Lance Corporal Matthew Snyder was killed in the line of duty.[92] His father chose the family's local Catholic Church in Maryland to hold the funeral.[93]

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[89] *Id.* at 2723 (noting parties' respective arguments to apply intermediate or strict scrutiny).
[90] 131 S.Ct. 1207 (2011)
[91] MARCIA COYLE, THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION 324–25 (2013).
[92] *Snyder*, 131 S.Ct. at 1213.

The members of Westboro Baptist Church learned about the funeral and, as they typically do, picketed a short distance away from the Church gates holding signs that included such phrases as "God Hates the USA/Thank God for 9/11," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," and "God Hates You."[94] Snyder's father sued the picketers for intentional infliction of emotional distress and intrusion upon seclusion.[95]

In an 8-1 decision, with Justice Alito as the lone dissenter, Justice Roberts wrote that liability could not be imposed on the Church, even for engaging in such vicious speech.[96] "Given that Westboro's speech was at a public place on a matter of public concern," he wrote, "that speech is entitled to 'special protection' under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt."[97] This conclusion was only possible because Roberts, with almost unanimous support, outlined a broad understanding of what constituted speech on a matter of public concern. Westboro's picket signs were a matter of public concern because "the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import."[98] Given that the state has alternatives to protect funeral-goers' privacy, like creating buffer zones, "we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[99]

It seems hard to reconcile Roberts's decisions in *Snyder* and *Holder*. He would prohibit those who want to engage in peaceful coordination with organizations to inculcate lawful

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[93] *Id.*
[94] *Id.*
[95] *Id.* at 1214.
[96] *Id.* at 1219–20.
[97] *Id.* at 1219.
[98] *Id.* at 1217.
[99] *Id.* at 1218, 1220.

political values, while protecting the rights of religious extremists who intentionally batter families during emotionally fraught times. The critical difference is that, in *Holder*, Roberts's decision was supported by the a unified front of the coordinate governmental branches. Indeed, in *Holder*, Roberts rejected arguments that lawful material support would help, not harm, Congress's initiative because of his excessive deference to Congress's ability to make those types of determinations on its own. Given that Roberts's *Snyder* opinion extracts valuable political discourse from such hateful comments that are at best peripherally related public debate, there is no other reason to treat differently the plainly political discourse that falls under "material support."

Another important difference between the two cases is that *Snyder* involved a private litigant's suit against another private citizen. But Roberts does not show the same openness to the protection of speech when a private citizen sues the government, even where the government is regulating speech in its capacity as a quasi-private actor.

When the government regulates speech in its capacity as an educator, Roberts reverts to a deference akin to *Holder*. In *Morse v. Frederick*, a student arrived late to school and joined his classmates watching the Olympic torch procession pass by.[100] While he waited, he unfurled a large banner that read "Bong Hits 4 Jesus."[101] The school principal asked the student to remove the banner, believing that it encouraged illegal drug use, and suspended the student when he refused to comply.[102] The student challenged his punishment on free speech grounds.

In an opinion by Roberts, the five-justice majority held that school officials may punish speech that appears to advocate illegal drug use and, thus, the suspension was permissible.[103]

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[100] 551 U.S. 393 (2007).
[101] *Id.* at 397.
[102] *Id.* at 398.
[103] *Id.* at 410.

The Court stated that that those who viewed the banner would understand it to be advocating and promoting illegal drug use.[104] In its view, the words on the banner could be taken as an invitation to smoke marijuana or as a celebration of drug use.[105] Puzzlingly though, whereas "Westboro's signs plainly relates to public . . . matters,"[106] here, Roberts stated that the words bear no political or religious meaning—that is, "this is plainly not a case about political debate over the criminalization of drug use or possession."[107] Accordingly, the protections afforded to the banner's expressions were limited.

But this limitation notwithstanding, the banner did not fall cleanly into any of the Court's carve outs from First Amendment protection in the school speech context. As Roberts recognizes, up to that point, the Court had generally recognized three circumstances where the school can prohibit student speech: first, where speech causes a material disruption;[108] second, where speech is lewd and lacks a political message;[109] and third, where speech is school sponsored.[110] Here, the student's banner does not fit well into any one. Faced with two options—either adhere to the doctrine, reversing the punishment that does not fall under any exception, or create a new judge-made carve out—Roberts chose to reshape the doctrine by creating a fourth exception for speech that advocates illegal drug use. This plainly was an act of policy-based decisionmaking.

The reason why Roberts would engage in such an awkward twisting of precedent becomes more clear when he explains what drives the school-drug issue. He writes, "Congress has declared that part of a school's job is educating students about the dangers of illegal drug

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[104] *Id.* at 401–402.
[105] *Id.* at 403.
[106] Snyder v. Phelps, 131 S.Ct. 1207, 1212 (2011).
[107] *Id.* at 403.
[108] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
[109] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
[110] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

use. It has provided billions of dollars to support state and local drug-prevention programs."[111] Pursuant to those ends, "[t]housands of school boards throughout the country . . . have adopted policies aimed at effectuating this message."[112]

Robert's own history likely worked the tipping point in the decision. A student of unmatched capabilities throughout his educational life, he always kept his schooling at the front of his thoughts. As a high school student at La Lumiere School, he was inculcated with the values of academic excellence upon which the institution was built.[113] The traditional curriculum he received there mixed with his punctilious view of schooling were worlds apart from the types of students who would unfurl "Bong Hits 4 Jesus" banners merely to gain attention.[114] Even at Harvard undergraduate and law school, Roberts arrived there when the Cambridge campus was no longer the radicalized bastion of liberalism that it had been in the late '60s, where the campus would have been littered with protests and banners, and he left before the campus was deeply divided over legal studies in the '80s.[115] The totality of this educational upbringing placed Roberts firmly in support of laws that preserve discipline and order within the schools; and therefore, his deferential approach to the government as educator is unsurprising.

But Roberts's lack of restraint in *Morse* cuts against the commitments he made at his senate hearing, and he casts even more doubt in the *Citizens United v. Federal Elections Committee* decision.[116] The Court notoriously overruled its previous precedent and struck down

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[111] *Morse*, 551 U.S. at 408.
[112] *Id.*
[113] *See* Toobin, The Oath, supra note 5, at 8.
[114] *See* Toobin, The Oath, supra note 5, at 8.
[115] Todd S. Purdum, *Court Nominee's Life Is Rooted in Faith and Respect for Law*, NY TIMES (July 21, 2005), *available at* http://www.nytimes.com/2005/07/21/politics/21nominee.html?pagewanted=all&_r=0; Toobin, The Oath, *supra* note 5, at 25.
[116] 558 U.S. 310 (2010)

part of the Bipartisan Campaign Reform Act's restrictions on independent expenditures by corporations to get candidates elected or defeated.[117]

In the decades leading up to the decision, the Court had made several key pronouncements about corporate political speech: first, corporations possess free speech rights;[118] second, expenditures in election campaigns are core political speech;[119] and third, corporations can spend money in election campaigns, but the money must be raised in a separate account from its corporate fund.[120] The third pronouncement, which the Court decided in *Austin v. Michigan Chamber of Commerce* in 1990, was the focus of Justice Kennedy's majority decision in *Citizens United*. In expressly overruling *Austin*, Kennedy wrote, "[n]o case before *Austin* has held that Congress could prohibit independent expenditures for political speech based on the speaker's corporate identity," adding, "[p]olitical speech is indispensible to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."[121] Accordingly, the rationale behind *Austin* was rejected and the provision of the Bipartisan Campaign Finance Reform Act modeled after it was held unconstitutional.

Roberts's concurrence is notable for his characterization of the majority's break from its previous precedence. His opinion is largely devoted to "important principles of judicial restraint and stare decisis implicated in this case."[122] Although neither party required *Austin* to

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[117] 2 U.S.C. § 441b (2002), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).
[118] *See* First National Bank of Boston v. Bellotti, 435 U.S. 765, 776–77 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").
[119] *See* Buckley v. Valeo, 424 U.S. 1, 19 (1976) (stating that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached").
[120] *See* Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990) (reasoning that the regulation "ensures that expenditures reflect actual public support for the political ideas espoused by the corporation").
[121] *Citizens United*, 558 U.S. at 349 (internal quotation marks and citation omitted).
[122] *Id.* at 373 (Roberts, C.J., concurring).

be overruled in order to decide the case, the majority nonetheless took a more aggressive approach that reached its earlier decision.[123] Roberts felt that—contrary to his principles of restraint—this aggressiveness was warranted because "we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right."[124] But it is far from clear that the only difference between reaching or avoiding the constitutional issue is a matter of judicial accuracy. For one, the Court had upheld the same provision just 7 years earlier in *McConell v. Federal Election Commission*;[125] a critical difference over those years is not a major shift in the campaign financing world, but rather Justice Alito replaced a retiring Justice O'Connor (a majority vote in *McConnell*). Moreover, in his own 2007 majority opinion, *Federal Election Commission v. Wisconsin Right to Life*, Roberts refused to overrule the provision, as well.[126] If *Wisconsin Right to Life* was wrong, then he should have declared it so then; if the decision was right then, nothing materially changed since to suddenly render *Citizens United* correct. On the other hand, if Roberts was merely using *Wisconsin Right to Life* as a way to limit precedent before he jettisoned it outright—in that case he defined the types of ads that would fall under the regulation so broadly as to render the definition virtually meaningless—then he was merely making a disingenuous distinction that Scalia accused of being "faux judicial restraint."[127]

These types of inconsistent decisions go directly against the grain of Roberts's stated goals to ensure steady, predictable decisionmaking. That is not to say that justices can never change their minds—indeed, sometimes new approaches result in better decisions. But what it does suggest is that those fundamental aspects of precedence, like settled expectations, predictability, and unworkability, are ignored when the Court moves so radically back and forth

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[123] Coyle, *supra* note 91, at 224.
[124] *Citizens United*, 558 U.S. at 375 (Roberts, C.J., concurring).
[125] 540 U.S. 93 (2003).
[126] 551 U.S. 449 (2007).
[127] *Id.* at 498 n7 (Scalia, J., concurring).

over a mere course of years, and threatens the integrity of the Court. The deleterious effects will soon be felt. Take, for example, the Court's upcoming decision in *McCutcheon v. Federal Election Commission*, regarding whether the court will strike down aggregate contribution limitations. The result in *Citizens United* strongly suggest that the same majority will render the limitation unconstitutional. Such a result may be right, but that is not the point. Rather, the point is that the integrity of the institution will be harmed because the constant vacillations over the past few years, and over the past few decisions, will inevitably give the appearance that the Court is making a political decision. Roberts's decisions will have facilitated that result.

D. Decisions with Overt Racial Implications:

Roberts's decision in the First Amendment context are problematic for their lack of consistent minimalism. In the context of racial issues, however, Roberts's jurisprudential approach takes on a rogue form, entirely devoid of the intended markers for his tenure. Specifically, his decisions involving race and discrimination have been reached without the slightest concern for consensus, minimalism, or adherence to stare decisis.

Roberts wrote the majority opinions in two pivotal 5-4 decisions (with numerous concurrences and dissents) that had overt racial implications. In *Parents Involved in Community Schools v. Seattle School District No. 1*, Roberts wrote for the majority that struck down a school district's consideration of race in assigning students to public schools in order to increase racial integration.[128] In the context of voting rights, he wrote the majority opinion in *Shelby County v. Holder*, where the Court struck down § 4(b) of the Voting Rights Act of 1965, which identified states with histories of race-based voter suppression that have to get approval from federal authorities before making changes to their voting procedures.[129]

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[128] 551 U.S. 701 (2007).
[129] 133 S.Ct. 2612 (2013); Voting Rights Act of 1965, 42 U.S.C.A. § 1973b(b).

In *Parents Involved*, several school districts adopted plans to include race as a one of many factors when deciding which students would be assigned to certain schools. In addition to other factors including family members and neighbors attending the school, the school considered whether the student applicants would help it achieve greater racial diversity. Some of the school systems voluntarily imposed the plans after judicial desegregation orders were lifted; others imposed the plans without any history of discrimination.

Roberts, writing for a four-justice plurality, found that the school districts failed strict scrutiny because diversity in primary and secondary school classrooms was not a compelling governmental interest.[130] He stated, "[t]o the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end."[131] In his view, racial balancing is unequivocally an unconstitutional end, not a question of verbiage.

Roberts's position is derived from his misguided views about the importance of diversity, the pernicious effects of racism, and twisting of the Court's precedence. Regardless of the school boards' opinions on the matter (a complete about-face from his deference to local school policy-makers in the "Bong Hits 4 Jesus" case), Roberts's believed that the Court had already decided this issue in *Brown v. Board of Education*:

> Before *Brown,* schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. . . [T]he 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.[132]

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[130] *Parents Involved*, 551 U.S. at 730–33.
[131] *Id.* at 733.
[132] *Id.* at 747–48.

In his epigrammatic way, he concluded, "[T]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[133]

The dissent was outraged. Rightfully so. Roberts's reliance on *Brown* was a "cruel irony," as Justice Stevens wrote.[134] Roberts had taken the promises guaranteed by the Equal Protection clause and upended them, conflating the idea of racial segregation with racial integration. This distortion of precedent ignores the context behind the desegregation cases and the march toward civil rights, turning the concept of racial equality into a game of mere wordsmithing. Moreover, Roberts's "colorblind" approach to the constitution implicated the Court's other racial diversity cases, including *Grutter v. Bollinger*.[135] Justice Stevens pointedly noted that "[t]he Court has changed significantly . . . It was then more faithful to *Brown* and more respectful of our precedent than it is today. It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision."[136] Justice Breyer, reading aloud from the bench the day the Court announced its opinion, asked, "[w]hat about stare decisis . . . ? [W]hat of the hope and promise of Brown?"[137] Then, in a line Breyer did not include in his written opinion, he added, "It is not often in the law that so few have so quickly changed so much."[138] The comment struck Justice Alito, who stared across the room at Breyer, but Roberts stayed expressionless, his teeth visible clenched.[139]

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[133] *Id.* at 748.
[134] *Id.* at 799 (Stevens, J., concurring).
[135] 539 U.S. 306 (2003) (upholding affirmative action policy in University of Michigan Law School).
[136] *Parents Involved*, 551 U.S. at 803 (Stevens, J., dissenting).
[137] *Opinion Announcement*, Parents Involved in Community Schools v. Seattle School District No. 1, *available at* http://www.oyez.org/cases/2000-2009/2006/2006_05_908.
[138] *Id.*; Toobin, The Nina, *supra* note 28 at 390.
[139] Toobin, The Nine, *supra* note 28; Coyle, *supra* note 91, at 112.

Civil right groups shared Breyer's outrage but not his surprise at the decision because they closely tracked Roberts's position on racial issues during his nomination.[140] They were likewise not surprised by his aversion to the Voting Rights Act. During his younger years in the Reagan Administration, he was a strong voice in the internal debate over Congress's plans for the Act.[141] Roberts cautioned in one memo among many that looser standards would "provide a basis for the most intrusive interference imaginable by federal courts into state and local processes."[142] Twenty years later, however, when he was questioned about the memo during his confirmation hearings, he maintained that he was merely advising his client and ensured that he would have an open mind.[143]

Not so. When Roberts penned the majority decision in *Shelby County v. Holder* in 2012, he engaged in one of his most outwards shows of judicial reaching since he became Chief Justice. The decision struck down §4(b) of the Act, which dictated a formula that those states that engaged in certain types of race-based voter discrimination in the 1960s would be subject to preclearance requirements. He did so, he said, because the "extraordinary measures" that required the imposition of the Act on those southern states no longer existed, even though, as he acknowledged, race-based voting discrimination still exists today.

Roberts's conclusion could not have been based on fact. The history of the Act up to its recent reauthorization showed overwhelming evidence that voting rights still needed protection. As Justice Ginsburg noted in dissent, over two years, the House and Senate Judiciary Committees held numerous hearings, interviewed witnesses, and received reports showing

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[140] Linda Greenhouse, *The Real John Roberts Emerges*, NY TIMES (June 29, 2013), *available at* http://opinionator.blogs.nytimes.com/2013/06/29/the-real-john-roberts-emerges/.
[141] *Id.*
[142] *Id.*
[143] *Id.*

countless "examples of flagrant racial discrimination" in covered jurisdictions.[144] The Reauthorization passed the House by a vote of 390-to-33; the Senate, 98-to-0.[145] President Bush signed the reauthorization a week later, recognizing the need for "further work . . . in the fight against injustice."[146]

In the face of this unified front of coordinate branches, Roberts simply did not see the issue of "extraordinary circumstances" in the same light. Instead of accepting Congressional and Presidential determinations, he imposed his own value judgment. In the name of federalism, he stated, "while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."[147] As he bluntly put it, "[o]ur country has changed."[148] But his authority for such a bold proposition cannot be Congress or the Executive branch, given their findings; instead, Roberts is suggesting that the segregation era, astounding for its overt racism, is dead and therefore the remedial measures that came about because of that era cannot be permissible post-burial.

To realize how dramatically Roberts departed from his ordinary framework, it is helpful to compare the decision to another recent Court opinion of great social import. In, *United States v. Windsor*, a woman named Thea Spyer passed away in 2009 in New York.[149] Spyer left her entire estate to her partner, a woman named Edith Windsor, to whom Spyer married in a lawful ceremony in Ontario a few years earlier.[150] Unlike most opposite sex spouses, however, Windsor was unable to claim an estate tax exemption because of a federal law, the Defense of Marriage Act (DOMA), "which excludes a same-sex partner from the definition of 'spouse' as

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[144] *Shelby Cnty.*, 133 S. Ct. at 2635 (Ginsburg, J., dissenting).
[145] *Id.*
[146] *Id.* (internal quotation marks and citation omitted).
[147] *Id.* at 2631 (Roberts, C.J.).
[148] *Id.*
[149] 133 S.Ct. 2675, 2682 (2013)
[150] *Id.*

that term is used in federal statutes."[151] The majority, lead by Justice Kennedy, held that DOMA was unconstitutional. He wrote, "DOMA violates basic due process and equal protection principles . . . The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[152]

In a short dissent, Roberts stated that he could not find an unconstitutional basis for the statute because of the overwhelming congressional and executive support at the time it was passed.[153] When DOMA was passed, according to him, it could not have been unconstitutional because "[i]nterests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world."[154] "At least without some more convincing evidence that the Act's principal purpose was to codify malice," he continues, "and that it furthered *no* legitimate government interests, I would not tar the political branches with the brush of bigotry."[155] This deference stands in stark contrast to his disregard of a comprehensive congressional record in *Shelby County*; and it evidences that the policy-based decision-making Roberts uses in racial contexts are stunning, even if cabined to this unique context.

Part IV: Conclusion.

At the end of the day, the ultimate question is whether Roberts's "selective minimalism" is a good thing, a bad thing, or somewhere in between. Most of his detractors would see this as unequivocally bad, and use as evidence his harmful decisions involving race and campaign finance. His supports would see the opposite. They would see a common core of values that

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[151] *Id.*
[152] *Id.* at 2693
[153] *Id.* at 2696–97 (Roberts, C.J., dissenting).
[154] *Id.* at 2696.
[155] *Id.* at 2696 (original emphasis).

Roberts generally applies to his cases, but when such application is not possible, he uses his logic and understanding of the world to make the best decision.

Both answers oversimplify the situation. In one aspect, Roberts's judicial approach is unjustifiable—the context of race. His decisions in *Shelby County* and *Parents Involved* seem to take no consistent approach at all, as Roberts turns his misguided worldview into judge-made law. But in the other contexts, it is less clear whether his varying applications of restraint are helpful and as harmful. Indeed, it is somewhat unfair to force upon any person, let alone a justice, a singular label or one unitary philosophy. In most contexts, like standing and terrorism or criminal law, Roberts has a consistent vein of deference and restraint in his opinions. In the First Amendment context, Roberts adheres to his approach when he can, but he is inevitably guided to more subjective and selective applications when the facts directly run afoul of his moral compass, as informed by his background experiences—e.g., student speech and discipline. In conclusion, whether one agrees that his approach to minimalism is helpful or harmful, it is undeniable one thing—selective.