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**IN SEARCH OF JUSTICE: AN EXAMINATION  
OF THE APPOINTMENTS OF JOHN G. ROBERTS AND  
SAMUEL A. ALITO TO THE U.S. SUPREME COURT AND  
THEIR IMPACT ON AMERICAN JURISPRUDENCE**

Alberto R. Gonzales\*

ABSTRACT

During 2005, President George W. Bush appointed Federal Circuit Court Judges John G. Roberts and Samuel A. Alito to the U.S. Supreme Court. These appointments were the culmination of years of examination of the work, character, and temperament of both men commencing during the 2000 presidential transition. Our evaluation included face-to-face interviews; an analysis of judicial opinions, speeches, and writings; and conversation with friends, colleagues, and court experts. Based on this work, a select group of Bush Administration officials developed a set of predictors that formed the basis of our recommendation to President Bush that he elevate Circuit Court Judges Roberts and Alito to the Supreme Court. This Article explains how Judges Roberts and Alito were evaluated, and our assessment of how they would perform on the Court. The Article then examines whether the Bush Administration correctly predicted how these two men would decide cases before the Court by reviewing some of their most significant opinions to date.

We begin with an explanation of the process used in developing our recommendation to the President followed by a thorough examination of the factors we weighed (such as political considerations and confirmation challenges). The Article includes a thorough, though certainly not exhaustive, review of the circuit court opinions of each man. This early body of work is then compared to their most recent work on the Supreme Court in certain key areas of the law. There is a remarkable, though not unexpected, consistency between Justices Roberts's and Alito's jurisprudence on the circuit courts and on the Supreme Court. Based on this comparison, the Article concludes that the Bush Administration successfully anticipated that Chief Justice Roberts and Justice Alito would decide cases using a consistent set of principles including judicial restraint, respect for precedent, and statutory interpretation based on plain language.

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## INTRODUCTION

There are many decisions and events that define a presidency. Sometimes a president is defined by his response to an attack on American soil, such as Pearl Harbor or September 11th. A president's legacy has also been shaped by the manner in which he leads the country through a crisis like the Great Depression, or serves as Commander-in-Chief during a world war. One type of decision that receives too little public attention, but which often represents a president's most enduring legacy, is a president's appointments to the U.S. Supreme Court. Because the U.S. Constitution provides federal judges life tenure,<sup>1</sup> appointees serve well beyond the term of the president who appointed them, and their decisions will affect the lives of Americans spanning over several administrations. Although unelected, the votes of the members of the Court often do affect the policy decisions of the elected branches. On matters of constitutional questions, absent a subsequent contrary constitutional amendment or a change in the majority make-up of the Court, these decisions on law and policy by the Court are final and binding.<sup>2</sup>

Every administration approaches Supreme Court nominations differently. President George W. Bush, understanding their importance, directed me in early 2001, as White House Counsel, to develop a list of potential nominees in anticipation of a vacancy. After consulting with some of my predecessors in the White House, my team of lawyers in the Counsel's Office institutionalized a formal selection process. Relying in part upon that process, President Bush nominated Judges John G. Roberts and Samuel A. Alito to the Supreme Court in 2005. This Article describes the nomination process employed by the Bush Administration and examines the reasons for the Roberts and Alito nominations. Next, the Article describes our expectations in 2005 for both men as members of the Supreme Court. Finally, the Article examines the most significant of their Supreme Court opinions, and compares those to the expectations of the Bush Administration. Based on that comparison, the Article concludes that the Bush White House was successful in predicting how Chief Justice Roberts and Justice Alito would decide cases before the Supreme Court. As a result, one can argue that President Bush achieved his objective of nominating judges who would consistently decide cases based on a conservative set of principles, thus placing the jurisprudence of the Court on a conservative path for future generations.

## I. THE NOMINATION PROCESS

*A. Expectations of the President*

During the 2000 presidential campaign, candidate George W. Bush promised the American people that if elected president, he would nominate strict constructionists

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<sup>1</sup> U.S. CONST. art. III, § 1.

<sup>2</sup> See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958).

to the U.S. Supreme Court—jurists in the mold of Justices Antonin Scalia and Clarence Thomas.<sup>3</sup> After his election, President Bush conveyed to me his commitment to keep his promise to the American people. As the incoming White House Counsel, the President looked to me to work with Attorney General John Ashcroft to identify potential nominees.

The President also made clear to me that he wanted to avoid surprises. He wanted reliable conservatives—individuals with a track record adhering to a conservative judicial philosophy. On more than one occasion, I heard him make reference to his father’s nomination of Justice David Souter. Although appointed by a Republican president, Justice Souter had become one of the more liberal members of the Court.<sup>4</sup> The President’s disappointment with regard to that appointment was evident to me. I often reminded President Bush there were no guarantees or sure things with respect to these appointments, but assured him that we would be disciplined in vetting candidates and recommending only those individuals who in our judgment would exercise a conservative judicial philosophy.

### *B. Mechanics of the Selection Process*

Presidents throughout our history have employed various methods to decide appointments to the Court.<sup>5</sup> Some have been very involved personally in evaluating and selecting candidates, while others much less.<sup>6</sup> Although he considered these appointments very important, President Bush never ordered or directed a formal process. However, from time to time he asked about our progress in developing a list of candidates, and he appeared satisfied with my explanation of both the method and scope of our review. When sifting through the names of possible appointees and narrowing the list to a handful of serious contenders, we weighed both informal assessments as well as formal evaluations.

#### 1. Pre-Vacancy: Informal Process

Throughout President Bush’s first term, he and I had many conversations about judges and filling a Supreme Court vacancy. We had had similar conversations about Texas Supreme Court Justices when he was Texas Governor and I served as his General Counsel, but these White House discussions were far more serious and frequent. Most were informal, one-on-one conversations in the Oval Office. The

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<sup>3</sup> See William G. Ross, *The Role of Judicial Issues in Presidential Campaigns*, 42 SANTA CLARA L. REV. 391, 468 (2002).

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1037, 1069–70 (1987); Joel K. Goldstein, *Choosing Justices: How Presidents Decide*, 26 J.L. & POL. 425, 427–28 (2011).

<sup>6</sup> Goldstein, *supra* note 5, at 474–75.

President was not a lawyer, so we spent some time discussing certain styles of judging and, on a basic level, various principles of judging. I spoke with him about what he wanted in a nominee and probed how he expected judges to decide cases. I asked him whether he was willing to take on a tough confirmation fight. From time to time he would inquire about the names at the top of my list and why. Sometimes he would volunteer a name to me (confirming my suspicions that he received names from other sources) and ask for my views. President Bush was fairly consistent in his expectations of his judicial appointees. Diversity was important, but a conservative judicial philosophy was most important. His willingness to take on a major confirmation fight varied depending on outside events or the President's need to get congressional support for an important part of the President's policy.

In addition to my private conversations with the President, during my tenure as White House Counsel, and then later as Attorney General, I reviewed binders of information, and considered a number of recommendations about potential candidates from various individuals and organizations. Sometimes, unsolicited recommendations were made by letter or email. Often I met with individuals or groups leaders to solicit their views. During this fact-gathering process, there emerged fairly quickly a consensus among legal experts, Court watchers, the media, and lawyers in my office regarding a select group of federal circuit court judges as the leading candidates. I anticipated the President would not only ask me about their judicial philosophy, but also my views of each of them as a person, as a judge, and as a potential nominee. So I made it a point to meet these judges and, time permitting, to get to know them. These meetings were informal and private. Some occurred in my West Wing office, but other meetings took place outside of the office. One such private meeting, now publicized,<sup>7</sup> occurred at the Justice Department with D.C. Circuit Judge John Roberts in 2005, after I had become Attorney General. These private conversations helped me form an opinion of each of these candidates. I, in turn, would share my views with the President.

## 2. Pre-Vacancy: Formal Process

At the beginning of the Bush administration in 2001, I tasked Brett Kavanaugh, one of the Associate Counsels in the White House Counsel's Office, to coordinate the initial formal vetting of potential Supreme Court nominees. The work began with a compilation of the names of men and women identified by the bar, media, friends, and colleagues as qualified and conservative in their views, or known to be Republican and conservative in their philosophy of judging. I directed that we cast a wide net and leave no stone unturned to find potential nominees. The vetting list, which initially numbered over one hundred, included current and former judges; current and former

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<sup>7</sup> See, e.g., Stephen Gillers, David Luban & Steven Lubet, *Improper Advances*, SLATE (Aug. 17, 2005, 2:50 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2005/08/improper\\_advances.single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2005/08/improper_advances.single.html).

members of Congress; current and former cabinet members, agency heads, law professors, and university administrators; as well as distinguished members of the bar. Each name was subjected to a preliminary vetting by lawyers in the Counsel's Office and a select group of lawyers at the Justice Department.

Some candidates had obvious confirmation challenges and were quickly eliminated from further consideration. Others, we concluded, were not ready or simply not qualified by virtue of experience or a background issue. Still others were disqualified because of writings, speeches, judicial opinions, public editorials, or statements inconsistent with a conservative judicial philosophy. As a result of this preliminary vetting, our initial list was shortened to approximately fifty names. These individuals were then assigned to various lawyers in the Counsel's Office and at the Department of Justice, who were asked to do a more in-depth due diligence review, and to prepare brief two-to-three page summaries.

Because there were no Supreme Court vacancies during President Bush's first term, we had ample time to vet candidates. Based on numerous discussions and our review of these brief two-to-three page summaries, we narrowed our list down to twenty names. The lawyers were again tasked to prepare more lengthy summaries—in some cases over fifty pages—of these individuals, including a biographical examination, summaries of qualification and accomplishments, discussion of confirmation issues, review of speeches, other written materials, and anything else that spoke to or provided clues about that person's philosophy of judging, including relevant legal or judicial opinions.

### 3. Post-Vacancy

Early in the Bush Administration, lawyers in the Counsel's Office had developed a timeline and game plan to move the White House from the point of an announced vacancy to the point of an announcement of a nominee. While the Chief of Staff understood this work, it was never formally presented to the President. Consequently, no formal procedure or plan was adopted by the White House in advance of a vacancy describing how final recommendations were to be developed and provided to the President, although it was my understanding based on conversations with the President and his Chief of Staff that the final vetting would be conducted by a small group of senior Administration officials. In February 2005, I left the Counsel's Office and was appointed as Attorney General. A few months later, we learned that Justice Sandra Day O'Connor intended to step down and the people chosen to make final recommendations to the President for O'Connor's successor included Vice President Dick Cheney, Chief of Staff Andy Card, Senior Advisor Karl Rove, the new White House Counsel Harriet Miers and me—the Attorney General.

Following Justice O'Connor's announcement, our group met several times, usually in the Vice President's West Wing office, reviewing the summaries prepared by the Department of Justice and the Counsel's office. Based on those discussions, the

group decided initially to interview four individuals: Fourth Circuit Judge Mike Luttig, Second Circuit Judge Samuel A. Alito, Fourth Circuit Judge J. Harvey Wilkinson III, and D.C. Circuit Judge John J. Roberts. Judges Luttig, Wilkinson, and Alito were veteran judges, respected and accomplished. It would surprise few serious Court watchers that we had decided to move forward and interview them. On the other hand, although he was a highly regarded appellate lawyer, I had not considered John Roberts as one of the early favorites. However, after his appointment to the D.C. Circuit, Judge Roberts's performance confirmed that he deserved to be on our short list of candidates. In order to try to minimize publicity about who we were considering and to avoid leaks about the interviews in the weeks after the O'Connor announcement, each judge met secretly with our group of five for about forty-five minutes in the residence of the Vice President at the Naval Observatory.

In those interviews, each candidate was asked a common set of questions, as well as questions unique to their personal circumstances and experiences. Because of my position as Attorney General, and all of the work I had done over four years as White House Counsel to prepare for a vacancy, the group deferred to me in taking the lead in asking questions. Harriet Miers also asked questions, but, not surprisingly, relatively little was asked by the other three members (none of whom were lawyers). Most of the discussions with the candidates related to their judicial philosophy. After each interview, our group quickly debriefed before moving on to the next interview. Following the four interviews, we huddled, and after some deliberation, decided who to recommend that the President interview.

#### 4. Factors in the Selection Process

Based on my conversations with President Bush and my experiences on the Texas Supreme Court, I had a clear vision regarding the type of person I would recommend to the President. I approached the job of developing a short list of candidates in a methodical, straightforward manner. Other members of the selection group may have looked at different factors or placed greater weight on one or more of these factors. Interestingly, however, despite these possible differences in evaluating candidates for the Court, there was almost universal agreement amongst the members of the group on the final ranking of the candidates we interviewed.

First, I looked at qualifications. Was this a person of professional excellence and high achievement? Was this person capable of handling the job by virtue of his or her education, skills, and experience? How would the nominee be rated by the bar associations? Is this someone I would be proud to have standing by the President at a Rose Garden or East Room announcement?

Second, I looked at the personal qualities of the candidates such as character, courage, and discipline. Does this person have the character to stand up to the unimaginable scrutiny of the nomination process and the difficult questioning in a confirmation hearing? Does he or she have the courage to do the right thing in applying



the law, no matter how unpopular or contrary to the nominee's personal biases and views? Is the person strong enough to withstand criticism of his or her decisions? Will the person be influenced by accusations—justified or not—of judicial activism? Does the nominee have the discipline to apply a consistent set of principles in deciding cases over a period of ten, twenty, or thirty years and not be seduced by the siren call of the legal elites in the bar and academia to do that which is popular or politically correct?

Third, I looked at confirmability. Did the President's party control the Senate? Did we have the fifty-one votes necessary to confirm this nominee? Who, and how influential and experienced, was the Senate Judiciary Chairman? Was the President trying to fill a seat considered a swing vote on the Court? For example, was this a vacancy in the O'Connor or Kennedy seat, where an appointment by a conservative or liberal President might tip the balance of the Court? Was this a nominee who had executive branch experience and had authored privileged executive branch memos that the Senate would demand to see? Would this nomination result in an institutional fight between the Senate and the White House over such documents, and was the President strong enough politically to win that fight? Was this nominee, this seat, worth the fight?

Fourth, I looked at intangibles and political considerations. President Bush cared about gender and racial diversity in our courts. For example, after the death of Chief Justice Rehnquist and the nomination of Judge Roberts to the Rehnquist vacancy, the President wanted to fill the O'Connor vacancy in 2005 with a qualified woman—thus the Harriet Miers nomination.<sup>8</sup> I did not take into account geographic or educational diversity; however, I did take into account the nominee's age. I looked for someone old enough to have the wisdom and maturity that comes from life's experiences, but young enough to serve on the Court for thirty to forty years and impact the jurisprudence of our country. Consequently, I also considered the health of a potential nominee.

Fifth, and most important, was the judicial philosophy of a potential nominee—the processes used by a judge to interpret our Constitution and the laws passed by Congress. I looked for individuals who based their constitutional interpretation on the original intent of the Framers, if at all discernible; who did not believe the Commerce Clause<sup>9</sup> and the doctrine of preemption<sup>10</sup> were intended, nor should be used, to allow federal involvement in every aspect of our lives; who understood that the Constitution

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<sup>8</sup> President Bush nominated Miers on October 3, 2005, to fill the vacancy left on the Court by Justice O'Connor. *See Bush Picks White House Counsel for Supreme Court*, CNN (Oct. 4, 2005, 8:07 AM), <http://www.cnn.com/2005/POLITICS/10/03/scotus.miers/>. On October 27, 2005, President Bush withdrew Miers's nomination at her request. *See Miers Withdraws Nomination*, FOX NEWS (Oct. 27, 2005), <http://www.foxnews.com/story/2005/10/27/miers-withdraws-nomination/>. Miers stated she was "concerned that the confirmation process presents a burden for the White House and our staff that is not in the best interest of the country." *Id.*

<sup>9</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>10</sup> *See, e.g., Altria Grp., Inc. v. Good*, 555 U.S. 70, 77–78 (2008) (discussing the doctrine of preemption); *see also* U.S. CONST. art. VI, cl. 2.

is a limited document by design, and that not all issues should be constitutionalized and taken out of the hands of our elected leaders. In doing so, that judge would strengthen respect for the judiciary, uphold the rule of law, and permit the people—through their elected representatives—to make choices about the issues of the day.

I did not think it appropriate to ask about a candidate's personal or political views. Because we expected judges to set them aside, we considered these views irrelevant. Of course, to set aside personal and political views and rule according to the law is not always easy, especially on those cases of national interest and in times of crises. All judges will be tempted to abandon judicial philosophy on cases of personal importance to them. The good ones resist. Indeed, the good ones will apply a misguided law as it exists and trust democracy to fix that law. Applying all of these factors, I felt comfortable recommending Judges Roberts and Alito to the President.

## II. OUR EXPECTATIONS: EVALUATION OF CIRCUIT JUDGE JOHN G. ROBERTS, JR.<sup>11</sup>

### *A. Qualifications and Confirmation Considerations*

By virtually every measure, save perhaps one, we considered Judge John G. Roberts, Jr. uniquely qualified to serve on the Supreme Court. Roberts graduated from Harvard College in 1976 and Harvard Law School in 1979.<sup>12</sup> Following law school, he clerked with Judge Henry J. Friendly of the U.S. Court of Appeals for the Second Circuit from 1979 to 1980.<sup>13</sup> Following his year with Judge Friendly, Roberts clerked for then–Associate Justice William H. Rehnquist on the U.S. Supreme Court from 1980 to 1981.<sup>14</sup> After completing his second clerkship, Roberts joined the Reagan Administration as Special Assistant to Attorney General William French Smith from 1981 to 1982.<sup>15</sup> He then left the Justice Department to take on a position as Associate Counsel to the President from 1982 to 1986.<sup>16</sup>

Roberts left the White House in 1986 to enter private practice as an appellate lawyer at Hogan & Hartson.<sup>17</sup> Roberts resigned his partnership at Hogan to accept an

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<sup>11</sup> Some of the material in this Part is based on the work of White House and Department of Justice attorneys, or reflected in partial drafts of internal memorandums as well as the personal notes of the author.

<sup>12</sup> *Biographies of Current Justices of the Supreme Court*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Mar. 2, 2014) [hereinafter *Biographies of Current Justices*].

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Judicial Nominations: Chief Justice John G. Roberts, Jr.*, WHITE HOUSE, <http://georgewbush-whitehouse.archives.gov/infocus/judicialnominees/roberts.html> (last visited Mar. 2, 2014) [hereinafter *Judicial Nominations: Chief Justice Roberts*].

<sup>16</sup> *Biographies of the Current Justices*, *supra* note 12.

<sup>17</sup> *Judicial Nominations: Chief Justice Roberts*, *supra* note 15.

appointment as Principal Deputy Solicitor General in the Administration of President George H.W. Bush from 1989 to 1993.<sup>18</sup> In 1992, President George H.W. Bush nominated Roberts for appointment to the U.S. Court of Appeals for the D.C. Circuit.<sup>19</sup> The Senate took no action on the nomination, and with the change in administrations in 1993, Roberts resigned from the Solicitor General's Office and returned to Hogan & Hartson.<sup>20</sup>

In May 2001, President George W. Bush nominated Roberts for a seat on the D.C. Circuit.<sup>21</sup> He was confirmed by a voice vote on May 8, 2003.<sup>22</sup> Judge Roberts's judicial record, while solidly conservative, was quite limited. However, he was considered one of the best appellate lawyers in the country, was well respected in the elite D.C. bar, and was supported by lawyers on both sides of the political aisle. The fact that he had a limited judicial record presented a political challenge to the President's opponents because there was little paper trail to attack. Consequently, we in the White House anticipated Judge Roberts would be challenged for his work in the executive branch. We worried about Judge Roberts's internal memos as a former executive branch official, and the possibility of an institutional fight over access to these documents. Fortunately, after hurriedly reviewing available records at the National Archives and at the Reagan Presidential Library, we concluded there was little in those records to provide ammunition for the opposition.

### *B. Jurisprudence*

Although Judge Roberts had served for only two years on the U.S. Court of Appeals for the D.C. Circuit, his written opinions were clear, concise, and displayed impressive powers of legal analysis and were characterized by faithful application of precedent, fidelity to statutory text, and willingness to draw on common sense and plain speak. We concluded that all of this validated his stated adherence to principles of judicial restraint. Our review of his opinions indicated a readiness to limit federal regulation on Commerce Clause grounds, a tendency to defer broadly to the elected branches and to the discretion accorded to administrative agencies as to policy matters, as well as a less-deferential posture toward case-specific agency rulings.

#### 1. Commerce Clause

Judge Roberts had written only one opinion dealing with Commerce Clause issues. In *Rancho Viejo, LLC v. Norton*,<sup>23</sup> Judge Roberts dissented from denial of

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Judicial Nominations and Confirmations: 108th Congress*, U.S. SENATE COMMITTEE ON THE JUDICIARY, <http://www.judiciary.senate.gov/nominations/108thCongress.cfm> (last visited Mar. 2, 2014).

<sup>23</sup> 334 F.3d 1158 (D.C. Cir. 2003) (denial of rehearing en banc).

rehearing en banc in a Commerce Clause challenge to Fish and Wildlife Service regulations that protected endangered toads by halting a construction project that restricted the toads' movements.<sup>24</sup> The circuit panel upheld the regulation on Commerce Clause grounds, finding that the regulation itself affected interstate commerce by affecting commercial development.<sup>25</sup> Judge Roberts dissented from denial of rehearing en banc, saying that the panel explanation seemed inconsistent with *United States v. Lopez*<sup>26</sup> and *United States v. Morrison*,<sup>27</sup> each of which struck down federal laws that in particular applications might have regulated activities constituting interstate commerce.<sup>28</sup> Judge Roberts wrote that the appropriate question was not whether regulation substantially affects interstate commerce, but whether the activity being regulated does so.<sup>29</sup> This suggested an inclination to decide that, notwithstanding the regulation's limitations on commercial activity, the degree of the toads' habitat within a single state removed the interstate element and failed to support the government's actions on Commerce Clause grounds. We viewed this position as consistent with the most recent Supreme Court precedent in this area, and as evidence of Judge Roberts's fidelity to the principle of stare decisis for the circuit courts.

## 2. Fourth Amendment

Judge Roberts had only authored two opinions of note dealing with privacy violations in the Fourth Amendment context. Both cases evidenced Judge Roberts's faithfulness to precedent and unwillingness to expand privacy rights.

In *Stewart v. Evans*,<sup>30</sup> a government employee maintained in her government office a file that included documents relating to a discrimination complaint she had filed against the then–Inspector General of the Department of Commerce.<sup>31</sup> When Congress requested documents regarding the Inspector General, the plaintiff wanted to cooperate, but did not want department lawyers reviewing her files.<sup>32</sup> So, an external team of Special Matters Unit (SMU) lawyers, who were responsible for responding to the congressional request, reviewed the plaintiff's files and agreed to deny access to department personnel.<sup>33</sup> Despite the arrangement, a department lawyer reviewed her files that had been stored in a safe.<sup>34</sup> The plaintiff sued, claiming the department review was an unconstitutional search.<sup>35</sup>

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<sup>24</sup> *Id.* at 1160.

<sup>25</sup> *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1069 (D.C. Cir. 2003) (circuit panel).

<sup>26</sup> 514 U.S. 549 (1995).

<sup>27</sup> 529 U.S. 598 (2000).

<sup>28</sup> *See Rancho Viejo*, 334 F.3d at 1160.

<sup>29</sup> *Id.*

<sup>30</sup> 351 F.3d 1239 (D.C. Cir. 2003).

<sup>31</sup> *Id.* at 1241.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1241–42.

<sup>35</sup> *Id.* at 1242.

Judge Roberts rejected the plaintiff's claim, holding the plaintiff had no reasonable expectation of privacy in the documents because she had voluntarily provided them to the SMU team.<sup>36</sup> Judge Roberts believed it important that, because the plaintiff had entrusted her documents to the SMU team to be reviewed for possible disclosure to Congress, this defeated the plaintiff's claim to privacy.<sup>37</sup> Responding to the plaintiff's argument that the plaintiff had been assured that intra-department personnel access to her documents would be restricted, Judge Roberts explained, "[t]he Fourth Amendment protects privacy; it does not constitutionalize non-disclosure agreements."<sup>38</sup>

In *United States v. Holmes*,<sup>39</sup> the defendant moved to suppress evidence of a scale used to weigh cocaine, discovered during a *Terry* stop.<sup>40</sup> During a frisk of the defendant, a police officer felt a hard object and, when asked, the suspect said it was a scale.<sup>41</sup> The officer testified he believed it was a scale, but nevertheless retrieved the object.<sup>42</sup> Although the officer's subjective belief was that the object was not dangerous, Judge Roberts ruled that it was objectively reasonable to collect the object to confirm that it was not dangerous.<sup>43</sup> Judge Roberts found that the propriety of such a search is judged only on the objective reasonableness of the officer's actions.<sup>44</sup>

To those of us evaluating Judge Roberts, both cases appeared consistent with precedent, but we believed critics could use these cases to characterize Judge Roberts as hostile to privacy rights.

### 3. Equal Protection

The Federal Communications Commission (FCC) created a preference for small businesses in awarding broadcast licenses.<sup>45</sup> This followed a D.C. Circuit panel striking down an FCC preference for minorities and female-owned businesses. In *Sioux Valley Rural Television v. FCC*, Judge Roberts upheld the FCC preference that had been challenged for perpetuating unconstitutional race and sex based preferences.<sup>46</sup> Judge Roberts followed D.C. Circuit precedent to hold that, "the [FCC]'s consideration of 'the effect a rule change would have on minority- and women-owned businesses does not evince its discriminatory intent.'"<sup>47</sup> He accepted the FCC's explanation that

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<sup>36</sup> *Id.* at 1243–44.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1244.

<sup>39</sup> 385 F.3d 786 (D.C. Cir. 2004).

<sup>40</sup> *Id.* at 787 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 788.

<sup>43</sup> *Id.* at 790–91.

<sup>44</sup> *Id.* at 790.

<sup>45</sup> *Sioux Valley Rural Television v. FCC*, 349 F.3d 667, 669 (D.C. Cir. 2003).

<sup>46</sup> *Id.* at 675.

<sup>47</sup> *Id.* (quoting *Omnipoint Corp. v. FCC*, 78 F.3d 620, 634 (D.C. Cir. 1996)).

the revised rule promoted finality, avoided disruption in service, and promoted fairness to the auction participants, who had relied in good faith on the preferences.<sup>48</sup> The Bush evaluation team believed opponents of race- or sex-based classifications might criticize the deference shown to the FCC, but Judge Roberts's approach appeared consistent with restrained judicial decisionmaking.

In the highly publicized case of *Hedgepeth v. Washington Metropolitan Area Transit Authority*,<sup>49</sup> Judge Roberts affirmed a grant of summary judgment dismissing a claim by a twelve-year-old girl who was arrested for eating a french fry in a Washington, D.C. Metrorail station.<sup>50</sup> She was charged because of the Washington Metropolitan Area Transit Authority's zero-tolerance policy for food consumption in the Metro, and because D.C. law does not allow non-traffic citations for minors.<sup>51</sup> Consequently, minors who violated this policy had to be arrested.<sup>52</sup> The girl brought a claim, alleging the law discriminated against her because of her age.<sup>53</sup> Although Judge Roberts acknowledged this was an unfortunate event for a twelve-year-old girl, he concluded, "[t]he question before us, however, is not whether these policies were a bad idea, but whether they violated the Fourth and Fifth Amendments to the Constitution."<sup>54</sup> Applying a rational-basis test, Judge Roberts concluded the policy did not violate the Constitution because concerns about parental awareness and accurate identification of juveniles are sufficient to meet rational-basis review.<sup>55</sup> There was significant public criticism of the arrest; prevailing opinion found it to be a silly and ridiculous response to the actions of a twelve-year-old.<sup>56</sup> We viewed Judge Roberts's decision as evidence that he would not be swayed by public opinion or sentiment in deciding cases.

#### 4. Due Process

In *Bloch v. Powell*,<sup>57</sup> a returning foreign-service employee claimed he was denied an immediate annuity without due process.<sup>58</sup> Judge Roberts held the employee had no constitutionally protected interest in receiving an immediate annuity.<sup>59</sup> He found that

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<sup>48</sup> *Id.*

<sup>49</sup> 386 F.3d 1148 (D.C. Cir. 2004).

<sup>50</sup> *Id.* at 1150.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1151.

<sup>54</sup> *Id.* at 1150.

<sup>55</sup> *Id.* at 1159.

<sup>56</sup> See, e.g., Martin Weil, *In D.C., Roberts Got Taste of National Spotlight*, WASH. POST (July 20, 2005), <http://washingtonpost.com/wp-dyn/content/article/2005/07/19/AR2005071902106.html>.

<sup>57</sup> 348 F.3d 1060 (D.C. Cir. 2003).

<sup>58</sup> *Id.* at 1062.

<sup>59</sup> *Id.* at 1069.

such benefits are provided with the consent of the Secretary of State.<sup>60</sup> Finally, he found that this broad grant of discretion to the Secretary defeated the employee's right to any protected interest in an immediate annuity.<sup>61</sup> He went on to add that neither department regulations nor prior decisions limited the Secretary's discretion.<sup>62</sup> While this decision could be used to show Judge Roberts's lack of concern for due process rights, we believed it served as an example of appropriate deference to executive-branch authority and discretion.

### III. OUR EXPECTATIONS: EVALUATION OF CIRCUIT JUDGE SAMUEL A. ALITO

#### A. *Qualifications and Confirmation Considerations*

On paper, Samuel Alito's experiences made him an even stronger candidate for the Court than Judge Roberts. Alito graduated from Princeton University in 1972 and Yale Law School in 1975.<sup>63</sup> He clerked from 1976 to 1977 for Judge Leonard Garth of the Third Circuit.<sup>64</sup> Alito worked as an Assistant U.S. Attorney in the appellate division from 1977 to 1981.<sup>65</sup> Starting in 1981, he worked for five years as an Assistant Solicitor General at the Justice Department.<sup>66</sup> From 1985 to 1987, he worked at the Justice Department in the Office of Legal Counsel as Deputy Assistant Attorney General.<sup>67</sup>

In 1987, Alito was appointed and served as the U.S. Attorney for the District of New Jersey.<sup>68</sup> In 1990, President George H.W. Bush nominated him to the U.S. Court of Appeals for the Third Circuit, and he was unanimously confirmed to that court by voice vote.<sup>69</sup> At forty years of age, he was the second-youngest federal appeals court judge in the country at that time.<sup>70</sup>

We believed that Alito was among the most qualified candidates in the country for appointment to the Supreme Court. He was nearly fifty-five years old with extensive

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<sup>60</sup> *Id.* at 1068–69.

<sup>61</sup> *Id.* at 1069.

<sup>62</sup> *Id.*

<sup>63</sup> John Fox, *Biographies of the Robes: Samuel Anthony Alito, Jr.*, PBS, [http://www.pbs.org/wnet/supremecourt/future/robes\\_alito.html](http://www.pbs.org/wnet/supremecourt/future/robes_alito.html) (last visited Mar. 2, 2014).

<sup>64</sup> *Biographies of Current Justices*, *supra* note 12.

<sup>65</sup> *Id.*; *Justice Alito Offers Lessons from the Bench—And a Distinguished Career*, DUKE L. NEWS (Oct. 1, 2013), <http://law.duke.edu/news/justice-alito-offers-lessons-bench-and-distinguished-career/> [hereinafter *Justice Alito Offers Lessons*].

<sup>66</sup> *Biographies of Current Justices*, *supra* note 12.

<sup>67</sup> *Id.*; *Lives in the Law: Supreme Court Justice Samuel A. Alito*, DUKE L. NEWS (Sept. 15, 2010), <http://law.duke.edu/news/5549/>.

<sup>68</sup> *Biographies of Current Justices*, *supra* note 12.

<sup>69</sup> *Samuel Alito Fast Facts*, CNN (Feb. 19, 2013, 5:18 PM), <http://www.cnn.com/2013/02/03/us/samuel-alito-fast-facts>.

<sup>70</sup> Janet Hook, Richard B. Schmitt & Faye Fiore, *A Phillies Fan with Blue-Chip Legal Stats*, L.A. TIMES (Nov. 1, 2005), <http://articles.latimes.com/2005/nov/01/nation/na-profile1>.

and varied legal and judicial experience. His entire legal career had been spent handling difficult and complex legal issues in the Solicitor General's Office, the Office of Legal Counsel, while serving as U.S. Attorney, and on the federal bench. He had experience in both criminal and civil areas.

Not surprisingly, with a fifteen-year record on the bench, we anticipated there would be criticism of some of Alito's opinions. Judge Alito's dissent from the Third Circuit's opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>71</sup> where he argued that even the spousal notification provision should be upheld, was a conservative position that the Supreme Court subsequently rejected.<sup>72</sup> We also worried that his opinion in *Fatin v. INS*,<sup>73</sup> in which he argued that an Iranian feminist's asylum petition should not be granted because she did not have a well-founded fear of persecution upon deportation to Iran,<sup>74</sup> would attract opposition from women's rights organizations. Additionally, we were concerned that his joining of the opinion in *Black ex rel. Black v. Indiana Area School District*<sup>75</sup> would cause critics to describe him as showing insensitivity to the dangers of child molestation. Finally, we worried about opposition from the criminal defense bar, because of Judge Alito's knowledge of and sympathy for practical issues facing law enforcement.<sup>76</sup>

### B. Jurisprudence

Judge Alito had served on the U.S. Court of Appeals for the Third Circuit for fifteen years and had authored hundreds of opinions. He had developed a reputation as an intelligent and scholarly conservative judge. As a circuit court judge, his opinions reflected fidelity with precedent. On questions of statutory construction, Judge Alito generally relied first on the plain language of a statute.<sup>77</sup> Many opinions reflected an unwillingness to rely on legislative history,<sup>78</sup> although he frequently discussed legislative history as support for what he has clearly found the plain language to say.<sup>79</sup> Judge Alito had also formerly served as a prosecutor, and his understanding of the practical issues facing law enforcement officers were evident in some of his criminal law opinions.

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<sup>71</sup> 947 F.2d 682, 720 (3d Cir. 1991) (Alito, J., dissenting).

<sup>72</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>73</sup> 12 F.3d 1233 (3d Cir. 1993).

<sup>74</sup> *Id.* at 1243.

<sup>75</sup> 985 F.2d 707 (3d Cir. 1993).

<sup>76</sup> *See, e.g., Doe v. Goody*, 361 F.3d 232, 244–49 (3d Cir. 2004) (Alito, J., dissenting).

<sup>77</sup> Elliott M. Davis, Note, *The Newer Textualism: Justice Alito's Statutory Interpretation*, 30 HARV. J.L. & PUB. POL'Y 983, 990–92 (2007).

<sup>78</sup> *See, e.g., Pa. Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423, 426–28 (3d Cir. 2000).

<sup>79</sup> *See, e.g., Pa. Office of the Budget v. Dep't of Health & Human Servs.*, 996 F.2d 1505, 1509–11 (3d Cir. 1993).



## 1. Commerce Clause

In *United States v. Rybar*,<sup>80</sup> Rybar challenged a federal statute making it unlawful for any person to purchase or transfer a machine gun, irrespective of any interstate activity as an element of the crime.<sup>81</sup> The majority rejected a Commerce Clause challenge and Judge Alito dissented, asking, “[W]as *United States v. Lopez* . . . a constitutional freak? Or did it signify that the Commerce Clause still imposes some meaningful limits on congressional power?”<sup>82</sup> Judge Alito regarded this law as the “closest extant relative of the statute struck down in *Lopez*. . . .”<sup>83</sup> Both, he said, prohibit purely intrastate activity, and neither was based on any congressional findings that the regulated activity affects interstate commerce.<sup>84</sup> Judge Alito was very critical of the majority for in essence finding “that the private, purely intrastate possession of machine guns has a substantial effect on the interstate machine gun market.”<sup>85</sup> He posited that this theory, if accepted, would go far toward converting Congress’s authority to regulate interstate commerce into a “plenary police power. . . . [T]he majority’s theory leads to the conclusion that Congress may ban the purely intrastate possession of just about anything. But if *Lopez* means anything, it is that Congress’s power under the Commerce Clause must have some limits.”<sup>86</sup>

## 2. Equal Protection and Due Process

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>87</sup> the Third Circuit considered the constitutionality of a Pennsylvania law that required women be provided information twenty-four hours in advance of obtaining an abortion, a parental notification requirement for minors, reporting requirements for abortion facilities, and a requirement that a spouse be notified in advance of an abortion.<sup>88</sup> The Third Circuit upheld most of these provisions, but struck down the spousal notification requirements as an unconstitutional burden on a woman’s right to have an abortion.<sup>89</sup>

The court considered the possibility that a husband might use violence or threats of violence to prevent his wife from having an abortion, withhold financial support to force his wife to refrain from having an abortion, or exploit the fact that his wife is pregnant to shame her out of having an abortion.<sup>90</sup> The majority concluded that

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<sup>80</sup> 103 F.3d 273 (3d Cir. 1993).

<sup>81</sup> *Id.* at 274.

<sup>82</sup> *Id.* at 286 (Alito, J., dissenting).

<sup>83</sup> *Id.* at 287.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 291.

<sup>86</sup> *Id.*

<sup>87</sup> 947 F.2d 682 (3d Cir. 1991).

<sup>88</sup> *Id.* at 687.

<sup>89</sup> *Id.* at 687, 715.

<sup>90</sup> *Id.* at 712.

possible consequences such as these constituted an undue burden. Applying strict scrutiny to the Pennsylvania statute, the Court held the spousal notification provision unconstitutional.<sup>91</sup>

Judge Alito, in dissent to the majority's rendering of the spousal notification law as unconstitutional, disagreed that the provision imposed an undue burden.<sup>92</sup> Relying on Justice O'Connor's observation that a provision does not impose an undue burden unless it affects a large number of women, Judge Alito found the plaintiffs had failed to show how many women would be affected by the spousal notification provision.<sup>93</sup> He observed that most wives inform their husbands, and unmarried women are not subject to the requirement.<sup>94</sup> In assuming that some percentage of women would eventually tell their husbands without substantial repercussions, Judge Alito concluded that the spousal notification requirement would have an impact on abortions to some degree, but not enough to constitute an undue burden.<sup>95</sup>

The Supreme Court heard the case and five Justices disagreed with Judge Alito, holding that the spousal notification requirement did violate the liberty interest of the substantive due process clause of the Fourteenth Amendment because it imposed an undue burden on a woman's right to have an abortion.<sup>96</sup>

We predicted that the opinion would be a focus of controversy if Judge Alito were to be nominated. It was controversial when written, and we anticipated that it would be the focus for pro-choice organizations. The majority opinion was viewed as very conservative and out of the mainstream by some, although the Supreme Court upheld almost all of the Pennsylvania regulations.<sup>97</sup> Judge Alito's position was even more conservative, and he interpreted limits on the substantive due process rights of women in a manner that a conservative Supreme Court ultimately rejected.<sup>98</sup>

In *Pemberthy v. Beyer*,<sup>99</sup> Judge Alito held that the Equal Protection Clause does not prohibit a prosecutor from peremptorily challenging jurors because of their ability to speak Spanish in a case where the evidence included material translated from Spanish to English.<sup>100</sup> Here the prosecutor argued that the translation would be a vital part of the case and he feared Spanish-speaking jurors disputing the official translation and being a persuasive voice in the jury room because of their ability to speak

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<sup>91</sup> *Id.* at 715.

<sup>92</sup> *Id.* at 719 (Alito, J., dissenting in part and concurring in part). Judge Alito concurred in the rest of the opinion upholding the remainder of the Pennsylvania abortion provisions at issue. *Id.*

<sup>93</sup> *Id.* at 720–22 (citing *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 464 (1983) (O'Connor, J., dissenting)).

<sup>94</sup> *Id.* at 722.

<sup>95</sup> *Id.* at 723.

<sup>96</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992).

<sup>97</sup> *Id.* at 833.

<sup>98</sup> *Casey*, 947 F.2d at 719.

<sup>99</sup> 19 F.3d 857 (3d Cir. 1994).

<sup>100</sup> *Id.* at 858.

Spanish.<sup>101</sup> The lower court found that striking Spanish-speaking jurors was tantamount to striking them on the basis of their race, even though some of the Spanish-speaking individuals struck were non-Hispanic.<sup>102</sup>

Judge Alito disagreed, finding language ability and ethnicity to not necessarily coincide. He went on to conclude that language-based peremptory challenges are not subject to the same degree of scrutiny as applied under *Batson v. Kentucky*<sup>103</sup> to race-based challenges.<sup>104</sup> Although Judge Alito rejected strict or heightened scrutiny, he cautioned trial judges to carefully assess a prosecutor's actual motivation for making a language-based challenge to ensure that the challenges are not motivated by race or ethnicity.<sup>105</sup>

In *Planned Parenthood of Central New Jersey v. Farmer*,<sup>106</sup> the Third Circuit considered the constitutionality of New Jersey's partial-birth abortion statute.<sup>107</sup> The State of Nebraska had a very similar abortion statute that had been challenged.<sup>108</sup> The Third Circuit case was argued, and the majority opinion drafted, before the Supreme Court issued its opinion on the constitutionality of the Nebraska statute in *Stenberg v. Carhart*.<sup>109</sup> The Supreme Court held the Nebraska statute unconstitutional.<sup>110</sup>

The Third Circuit held its opinion, however, until after *Stenberg* was decided.<sup>111</sup> Seeing that nothing in the Supreme Court's opinion in *Stenberg* contradicted the opinion the Third Circuit had already written, the Third Circuit issued its previously written opinion without change and without discussing the *Stenberg* decision.<sup>112</sup> Judge Alito concurred in the judgment, but refused to join the court's opinion because it failed to discuss *Stenberg*.<sup>113</sup> Understanding his role as a lower court judge to follow precedent, he would have held simply that, because the New Jersey statute and the Nebraska statute were virtually identical in material respects, the Third Circuit was bound to follow the *Stenberg* precedent.<sup>114</sup> We believed that Judge Alito was correct in citing to *Stenberg*<sup>115</sup> to remove any doubt as to the validity of the Third Circuit position in light of that precedent.

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<sup>101</sup> *Id.* at 863.

<sup>102</sup> *Id.*

<sup>103</sup> 476 U.S. 79 (1986).

<sup>104</sup> *Pemberthy*, 19 F.3d at 870–71.

<sup>105</sup> *Id.* at 873.

<sup>106</sup> 220 F.3d 127 (3d Cir. 2000).

<sup>107</sup> *Id.* at 130.

<sup>108</sup> *See Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* (decided June 28, 2000); *Farmer*, 220 F.3d 127 (decided July 26, 2000).

<sup>112</sup> *Farmer*, 220 F.3d at 127.

<sup>113</sup> *Id.* at 152 (Alito, J., concurring).

<sup>114</sup> *Id.*

<sup>115</sup> *Stenberg*, 530 U.S. 914.

The case of *Phillips v. Borough of Keyport*<sup>116</sup> considered the constitutionality of the Borough's denial of zoning and construction permits to proprietors of adult book and video stores on the basis of an adult entertainment user ordinance.<sup>117</sup> Sitting en banc, the Third Circuit held that the Borough had violated the plaintiff's right to substantive due process.<sup>118</sup> It found that where a state or local official had prevented or punished constitutionally protected expression because of a distaste for the content of that expression, that restriction violates the substantive due process clause unless the action taken meets strict scrutiny.<sup>119</sup>

Judge Alito dissented in part, taking the Court to task for ignoring and not overruling a line of substantive due process cases in the Third Circuit on which the plaintiffs had relied.<sup>120</sup> He was critical of *Bello v. Walker*,<sup>121</sup> which seemed to hold that substantive due process is violated whenever a government official who harbors some improper motive deprives a person of certain property rights.<sup>122</sup> The majority had avoided determining whether *Bello* was correct by transforming the plaintiff's due process claim into a First Amendment claim and requiring them to show that the government official harbored an intent that was violative of the First Amendment.<sup>123</sup> Judge Alito would have preferred to overrule *Bello* and its progeny.<sup>124</sup> In his view, these cases had no support in Supreme Court precedent.<sup>125</sup> We concurred in Judge Alito's direct and straightforward approach.

### 3. First Amendment: Religion

In *C.H. v. Oliva*,<sup>126</sup> the plaintiff sued on behalf of her minor son, alleging that his constitutional right to free expression had been violated by certain actions of public school officials.<sup>127</sup> First, his teacher asked each pupil to make a poster depicting what he or she was thankful for.<sup>128</sup> Plaintiff's son drew a picture of Jesus.<sup>129</sup> The picture was

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<sup>116</sup> 107 F.3d 164 (3d Cir. 1997).

<sup>117</sup> *Id.* at 167–68.

<sup>118</sup> *Id.* at 181.

<sup>119</sup> *Id.* at 180.

<sup>120</sup> *Id.* at 183–85 (Alito, J., dissenting).

<sup>121</sup> 840 F.2d 1124 (3d Cir. 1988), *cert. denied*, 488 U.S. 851, 488 U.S. 868 (1988) (holding that municipal officials' deliberate abuse of a constitutionally adequate procedure for the purpose of denying a developer a building permit may violate due process rights, but that the resultant delay did not constitute a taking).

<sup>122</sup> *See id.*

<sup>123</sup> *Id.* at 1124; *Phillips*, 107 F.3d at 184 (Alito, J., dissenting in part).

<sup>124</sup> *Phillips*, 107 F.3d at 184.

<sup>125</sup> *Id.* at 184–85.

<sup>126</sup> 226 F.3d 198 (3d Cir. 2000), *cert. denied*, 523 U.S. 915 (2001).

<sup>127</sup> *Id.* at 204.

<sup>128</sup> *Id.* at 201.

<sup>129</sup> *Id.*

posted in the hallway along with other students' posters.<sup>130</sup> A school official took the poster down due to its religious content.<sup>131</sup> The following day the poster was returned to the hallway but placed in a less prominent location.<sup>132</sup>

The Third Circuit did not reach the merits, but found that some of the defendants were immune from suit and remanded the case to allow amendment of the pleadings with respect to the other defendants.<sup>133</sup> Judge Alito criticized the majority for raising procedural arguments that the parties had not raised and for avoiding the First Amendment issue.<sup>134</sup> He would have held that the plaintiff had alleged facts to support a violation of the First Amendment based on discriminatory treatment of the viewpoint expressed.<sup>135</sup>

In *FOP v. City of Newark*,<sup>136</sup> Sunni Muslim police officers whose religion required them to wear beards brought a First Amendment challenge to a department regulation requiring police officers to be clean shaven.<sup>137</sup> The Police Department provided exemptions to this rule for officers required to wear beards for medical reasons, but did not provide exceptions for religious reasons.<sup>138</sup> Here, Judge Alito held the department policy to strict scrutiny and found the City had violated the free exercise rights of Sunni Muslim police officers by refusing to grant them a religious exemption from the Police Department's no-beard policy when the City had granted exception from the policy to officers who need to wear beards for medical reasons.<sup>139</sup>

#### 4. First Amendment: Free Speech

In *Saxe v. State College Area School District*,<sup>140</sup> the panel reviewed whether a school district's anti-discrimination policy violated the First Amendment.<sup>141</sup> Judge Alito found the policy, which prohibited harassment defined as "verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability or other personal characteristics," to be unconstitutional.<sup>142</sup> Here, students and their parents who felt compelled by their religion to speak out feared doing so because of the policy.<sup>143</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 202–03.

<sup>134</sup> *Id.* at 203 (Alito, J., dissenting).

<sup>135</sup> *Id.* at 214.

<sup>136</sup> 170 F.3d 359 (3d Cir. 1999).

<sup>137</sup> *Id.* at 360.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 367.

<sup>140</sup> 240 F.3d 200 (3d Cir. 2001).

<sup>141</sup> *Id.* at 202.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 203.

Judge Alito reversed the district court, ruling that there is no categorical harassment exception to the First Amendment's Free Speech Clause.<sup>144</sup> He also found that the First Amendment protects deeply offensive speech that impugns another's race or that denigrates religious beliefs.<sup>145</sup> He stated, "'Harassing' or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections."<sup>146</sup> Additionally, Judge Alito held the policy to be overbroad because it prohibited speech that was not vulgar or lewd, as well as a significant amount of core political and religious speech.<sup>147</sup>

In an earlier case, *Edwards v. California University of Pennsylvania*,<sup>148</sup> Judge Alito held that a public university can suspend a professor for refusing to adhere to the school's required curriculum.<sup>149</sup> He found that the University, not the professor, had the right to decide what is taught in the classroom.<sup>150</sup> Thus, the content of the speech in the classroom belonged to the University, not the professor. Finding the state to be the speaker, Judge Alito held the state may "make content-based choices."<sup>151</sup>

#### 5. Fourth Amendment

The case of *United States v. Kithcart*<sup>152</sup> involved an inmate appealing his conviction on the basis that the district court should have suppressed evidence obtained by the police during a traffic stop.<sup>153</sup> Following a robbery, police dispatchers described the robbers as "two black males in a black sports car," such as a Camaro.<sup>154</sup> An hour after the robbery, a police officer in a neighboring township noticed a black Nissan driven by a black male.<sup>155</sup> When the officer pulled up behind the Nissan stopped at a red light, it drove through the light.<sup>156</sup> The officer stopped the car and discovered firearms in the vehicle.<sup>157</sup> Judge Alito held there was no probable cause for the arrest and search based on the imprecise vehicle match, the time lapse, and the lack of information about the robbery.<sup>158</sup> This case demonstrates that Judge Alito will rule against law enforcement when there is a clear violation of the Constitution.

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<sup>144</sup> *Id.* at 204.

<sup>145</sup> *Id.* at 206.

<sup>146</sup> *Id.* at 209.

<sup>147</sup> *Id.* at 217.

<sup>148</sup> 156 F.3d 488 (3d Cir. 1998).

<sup>149</sup> *Id.* at 489.

<sup>150</sup> *Id.* at 491.

<sup>151</sup> *Id.* at 492.

<sup>152</sup> 134 F.3d 529 (3d Cir. 1998).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 530.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 531–32.

Showing a more sympathetic view toward law enforcement, Judge Alito held federal marshals had not used excessive force while carrying out a court-ordered eviction.<sup>159</sup> Property owners had chased government officials off their property using a truck and had threatened to shoot officers if they came onto their property.<sup>160</sup> Because the property owners were known to possess firearms, federal officers carried out the eviction with a shotgun and semiautomatic rifle.<sup>161</sup> The property owners alleged that marshals pointed guns in their faces, chests, and backs.<sup>162</sup> Judge Alito found the officers' conduct was objectively reasonable under the Fourth Amendment. "We must also keep in mind that a threat that may seem insignificant to us in the security of our chambers may appear more substantial to a reasonable officer whose own life or safety is at stake."<sup>163</sup>

Similarly, in *Leveto v. Lapina*,<sup>164</sup> the plaintiffs challenged on Fourth Amendment grounds actions by IRS agents who raided their home and veterinary clinic in a search for evidence of tax violations.<sup>165</sup> During the search, agents detained plaintiffs separately for six to eight hours incommunicado, interrogated each of them without providing *Miranda* warnings, and seized thousands of confidential documents.<sup>166</sup> Judge Alito found severe violations under the Constitution, but held the agents were protected by qualified immunity.<sup>167</sup> With respect to each constitutional violation, Judge Alito found that they were not clearly established at the time of the searches and seizures, and therefore the defendants were entitled to qualified immunity.<sup>168</sup>

In *United States v. Lee*,<sup>169</sup> the FBI installed video recording equipment in a hotel suite that was rented for the defendant by an informant.<sup>170</sup> The FBI installed video cameras in the room without a warrant, and the government argued that this did not differ from placing a wire on the body of the informant as the defendant had no expectation of privacy with respect to conversations with the informant.<sup>171</sup> On the other hand, the defendant argued a difference between recording equipment on the informant and placing surveillance equipment that stays in a private room twenty-four hours a day irrespective of the informant's presence.<sup>172</sup> Judge Alito held that the use

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<sup>159</sup> *Mellott v. Heemer*, 161 F.3d 117, 123 (3d Cir. 1998), *cert denied*, 526 U.S. 1160 (1999).

<sup>160</sup> *Id.* at 119–20.

<sup>161</sup> *Id.* at 120.

<sup>162</sup> *Id.* at 120–21.

<sup>163</sup> *Id.* at 122.

<sup>164</sup> 258 F.3d 156 (3d Cir. 2001).

<sup>165</sup> *Id.* at 156–57.

<sup>166</sup> *Id.* at 160–61.

<sup>167</sup> *Id.* at 166.

<sup>168</sup> *Id.*

<sup>169</sup> 359 F.3d 194 (3d Cir. 2004), *cert. denied*, 543 U.S. 955 (2004).

<sup>170</sup> *Id.* at 199.

<sup>171</sup> *Id.* at 202.

<sup>172</sup> *Id.* at 200.

of a fixed electronic device to record a meeting with an informant does not violate the Fourth Amendment.<sup>173</sup>

#### IV. SUPREME COURT JURISPRUDENCE: CHIEF JUSTICE JOHN ROBERTS'S DECISIONS FROM SEPTEMBER 2005 THROUGH JUNE 2013

[T]he importance of the question does not justify our rushing to decide it.<sup>174</sup>

The judicial record of the Chief Justice is best characterized as one of temperance and moderation. He consistently makes free use of the doctrine of justiciability and the principles of judicial avoidance in his jurisprudence. He is reticent to deploy the Supreme Court's authority unless he believes it absolutely necessary. He is, in his opinions, loath to create overarching constitutional edicts, preferring instead to decide cases individually. He is deferential to both congressional and executive authority, as well as judicial precedent. His opinions habitually take a reserved, reasonable tone that logically and dispassionately progresses through his argument or dissent.

In keeping with his tendency toward reticence, the Chief Justice has not been especially prolific during his tenure. He has authored barely one-hundred total Supreme Court Opinions, dissents, and concurrences out of more than five hundred cases that have come before him. This Part first considers his work regarding the issue of judicial avoidance, which contains many of his defining opinions.<sup>175</sup> Second, he has taken a vocal interest in the limits of government authority, particularly executive and legislative authority, writing to support judicial deference and restraint in at least five key cases.<sup>176</sup> Also, many of his writings pertain to constitutional civil rights, particularly in the area of the First Amendment, which he typically supports but construes narrowly.<sup>177</sup> Finally, Chief Justice Roberts has made several notable contributions to the area of criminal procedure.<sup>178</sup> Within every area of law, Chief Justice Roberts can be seen to rely most often on four defining principles of jurisprudence: judicial avoidance, judicial deference, narrow construction, and clarity.

##### *A. Judicial Avoidance*

Chief Justice Roberts strongly believes in judicial restraint. He will not hear a case that has not perfected justiciability in every aspect, regardless of the nature of the

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<sup>173</sup> *Id.* at 203.

<sup>174</sup> *Nw. Austin Municipal Util. Dist. No. One v. Holder (NAMUDNO)*, 129 S. Ct. 2504, 2508 (2009).

<sup>175</sup> *See infra* Part IV.A.

<sup>176</sup> *See infra* Part IV.B.

<sup>177</sup> *See infra* Part IV.C.

<sup>178</sup> *See infra* Part IV.D.



issue at hand.<sup>179</sup> If he does see fit to hear a case, his opinions are usually clearly directed only to the circumstances at hand—avoiding generalized rules and broad interpretations. He does not rush to address constitutional issues; if he can decide a case on procedural or legislative grounds then he will do so, regardless of the controversy in question. The Chief Justice has established himself as a judge who does not rush to decide an issue on the merits unless he believes it to be strictly necessary, and those cases are certain to be irresolvable on all grounds other than judicial review.

For example, in *Northwest Austin Municipal Utility District Number One v. Holder* (*NAMUDNO*),<sup>180</sup> a 2009 case, the Chief Justice indicated that the Voting Rights Act may have been outdated,<sup>181</sup> but he nonetheless led the majority in declining to rule on the constitutionality thereof.<sup>182</sup> Rather than address the controversial issue of the Act's constitutionality, he instead led the Court to choose another route, opting to construe the statutory definition of "political subdivision" as broader than that defined in the Act itself.<sup>183</sup> By doing so, Chief Justice Roberts avoided ruling on the constitutionality of the Act, instead determining that the issue of constitutionality was only an argument in the alternative to the applicability of the Act.<sup>184</sup> *NAMUDNO* is most notable for containing what might be considered a guiding principle of the Chief Justice's opinions, that, "the importance of the question does not justify our rushing to decide it."<sup>185</sup>

In the context of *NAMUDNO*, Chief Justice Roberts's discussion of the constitutional issues—including the exceptional and intrusive nature of the Voting Rights Act—was moderately unusual, as it was not necessary to discuss the Act in such detail in order to reach the decision of the Court.<sup>186</sup> Although much of the constitutional issue is presented in the context of factual background, the Chief Justice also wrote several paragraphs discussing the constitutional argument and the need for the Court to address it.<sup>187</sup> This discussion foreshadowed his majority opinion in *Shelby County v. Holder* in 2013,<sup>188</sup> which declared part of the Act unconstitutional.<sup>189</sup> It is not clear what motivated the constitutional discussion in *NAMUDNO*. It may have been linked to the dissent by Justice Thomas, the need to address what he saw as a pressing issue, or arguably a means of warning the legislature of the Court's stance toward the Act

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<sup>179</sup> See, e.g., *NAMUDNO*, 129 S. Ct. 2504; *Massachusetts v. EPA*, 549 U.S. 497, 535 (2007) (Roberts, C.J., dissenting).

<sup>180</sup> 129 S. Ct. 2504.

<sup>181</sup> *Id.* at 2512, 2516.

<sup>182</sup> *Id.* at 2516.

<sup>183</sup> *Id.* at 2514–15.

<sup>184</sup> *Id.* at 2513.

<sup>185</sup> *Id.* at 2508.

<sup>186</sup> See *id.* at 2511–12.

<sup>187</sup> *Id.* at 2511–13.

<sup>188</sup> 133 S. Ct. 2612 (2013).

<sup>189</sup> *Id.* at 2631.

should it be forced to consider such a case on the merits.<sup>190</sup> However, it might have been more truly in keeping with principles of avoidance to mention the issue only passingly. A similar pattern is seen in *National Federation of Independent Businesses v. Sebelius (NFIB)*,<sup>191</sup> although in that case the tendency toward dicta is amplified.<sup>192</sup> If *NAMUDNO* is any indication, some of the dicta in *NFIB* may appear again in a discussion on the merits of later cases.<sup>193</sup>

The Chief Justice advocated application of the same principle of avoidance seen in *NAMUDNO* in his dissent to *Boumediene v. Bush*.<sup>194</sup> The majority determined that detainees at Guantanamo Bay, Cuba, were entitled to habeas corpus relief; however, Chief Justice Roberts disagreed on the grounds that none of the detainees had exhausted the remedies offered to them by statute.<sup>195</sup> In his determination, it was premature to determine the scope of habeas corpus relief without first determining that the statutory remedies granted to detainees were inappropriate to protect their rights.<sup>196</sup> He further objected that the statutory system was adequate to protect those rights, and thus that any determination of relief was only an inappropriate attempt by the Court to control federal policy.<sup>197</sup> This is very much in keeping with a moderate and temperate theory of jurisprudence. Similarly, Chief Justice Roberts wrote a dissent in *Massachusetts v. EPA* opining that there was no controversy or redressability, and thus no justiciability, when Massachusetts challenged the EPA's environmental regulation statutes.<sup>198</sup>

This refusal to intervene judicially when inappropriate has remained steadfast, even in the face of serious allegations such as torture. In *Munaf v. Geren*,<sup>199</sup> Chief Justice Roberts refused to oppose the transfer of American citizens into Iraqi custody to be prosecuted for their crimes in Iraq, despite objections that they would be tortured.<sup>200</sup> He ruled that determinations about possible torture concerns and the fitness of prison facilities internationally were within the purview of the executive branch, and declined to overrule executive authority on the issue.<sup>201</sup> Again, despite serious and pressing concerns, the Chief Justice adhered to his firm beliefs on the role of the judiciary.<sup>202</sup>

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<sup>190</sup> *NAMUDNO*, 129 S. Ct. at 2511–13.

<sup>191</sup> 132 S. Ct. 2566 (2012).

<sup>192</sup> *Id.* at 2577–80; see also *infra* Part IV.B.1.c.

<sup>193</sup> See *Shelby Cnty.*, 133 S. Ct. at 2622–24; *NFIB*, 132 S. Ct. at 2593–94; *NAMUDNO*, 129 S. Ct. at 2511–13.

<sup>194</sup> 553 U.S. 723, 801 (2008) (Roberts, C.J., dissenting).

<sup>195</sup> *Id.* at 804–05.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 801–02.

<sup>198</sup> 549 U.S. 497, 535–36 (2007) (Roberts, C.J., dissenting).

<sup>199</sup> 553 U.S. 674, 700–03 (2008).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> See generally *Munaf*, 553 U.S. 674.

Even where the Chief Justice reaches a conclusion on the merits, he usually chooses to create limited, fact-based holdings as opposed to generalized rules of constitutionality. In *Graham v. Florida*,<sup>203</sup> the case of a juvenile sentenced to life without parole, he authored a concurrence to affirm that the sentence was in this case unconstitutional, but objected to the majority's ruling that such sentences are always unconstitutional.<sup>204</sup> In his opinion, there was a sufficient framework already in place to determine constitutionality on a case-by-case basis.<sup>205</sup> Chief Justice Roberts also indicated that there were other cases in which he felt such a sentence was warranted, and objected to the Court's use of a single fact-pattern as a vehicle to categorically overrule prior jurisprudence.<sup>206</sup>

*B. Government Authority: Articles I, II, and III of the U.S. Constitution*

Much of Chief Justice Roberts's tendency toward judicial restraint may be attributed to his support for executive and legislative authority. He stands for a limited judicial authority that refrains from passing on the constitutionality of government action unless necessary and a strong deference to the authority of each governmental branch in its own field. His opinions on congressional authority, executive authority, and the judiciary make it clear that he is a strong proponent of the constitutional separation of powers doctrine.

1. Article I: Congressional Authority

The Chief Justice favors congressional authority and federal preemption if necessary; however, this is balanced by respect for state sovereignty when appropriate and a willingness to oppose federal legislative overreaching. Although Chief Justice Roberts has voiced respect for the respective branches of government and the authority of each branch in its field,<sup>207</sup> his opinions are less deferential to the authority of federal administrative agencies.<sup>208</sup> During his tenure, the Court has specifically addressed groundbreaking cases of state immigration laws, the dormant Commerce Clause, and federal healthcare reform, amongst other issues.<sup>209</sup>

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<sup>203</sup> 130 S. Ct. 2011, 2039 (2010) (Roberts, C.J., concurring).

<sup>204</sup> *Id.* at 2036.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 2041–42.

<sup>207</sup> *See Munaf*, 553 U.S. at 689.

<sup>208</sup> *See Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2616, 2624 (2013).

<sup>209</sup> *See, e.g., NFIB v. Sebelius*, 132 S. Ct. 2566 (2012) (healthcare reform); *Arizona v. United States*, 132 S. Ct. 2492 (2012) (immigration); *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007) (dormant Commerce Clause).

*a. Immigration*

In context of the Chief Justice's established support for the text of the Constitution, including federal preemption when necessary, his recent stance on immigration is not surprising. In *Arizona v. United States*,<sup>210</sup> Chief Justice Roberts joined in a majority opinion that invalidated most of a proposed Arizona immigration law regulating unauthorized aliens.<sup>211</sup> The majority held that three out of four challenged aspects of the legislation were preempted as trespassing on a field of pervasive federal regulation.<sup>212</sup> The fourth contested statute was determined to be not yet ripe for review, as there existed a possibility that the text could be construed and applied in a fashion consistent with the federal scheme.<sup>213</sup> Although the Chief Justice did not author any part of this opinion, these conclusions are clearly in keeping with his judicial philosophy. They exhibit strong deference to federal authority in those fields granted by the Constitution, as well as reluctance to rule on issues that might be resolved without judicial interference.

Although his work shows a strong respect for congressional authority, Chief Justice Roberts will not refrain from invalidating federal law or the policies of federal agencies if he sees a need. In a different immigration case, *Judulang v. Holder*,<sup>214</sup> the Chief Justice joined the majority in declaring the policy of the Board of Immigration Appeals for deportation relief "arbitrary and capricious" although he did not author any part of this opinion either.<sup>215</sup>

*b. The Commerce Clause*

Chief Justice Roberts has been known to be deferential to not only federal government, but to state and local government when appropriate. In *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*,<sup>216</sup> he authored the majority opinion—in favor of local government—regarding a private business's challenge to local waste hauling ordinances that favored the government.<sup>217</sup> He determined in that case that the dormant Commerce Clause did not prohibit local governments from favoring themselves in waste-control ordinances.<sup>218</sup> Further, he again lauded the benefits of moderation and judicial restraint in his conclusion, where he noted that it is outside the purview of the Court to impose judicial supremacy on the

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<sup>210</sup> 132 S. Ct. 2492 (2012).

<sup>211</sup> *See id.* at 2492.

<sup>212</sup> *Id.* at 2510.

<sup>213</sup> *Id.*

<sup>214</sup> 132 S. Ct. 476 (2011).

<sup>215</sup> *Id.* at 479.

<sup>216</sup> 550 U.S. 330 (2007).

<sup>217</sup> *See id.* at 330.

<sup>218</sup> *Id.* at 347.

police functions of local governments and cautioned against using the Commerce Clause as a vehicle to reclaim *Lochner*-era judicial oversight.<sup>219</sup>

*c. Healthcare Reform*

It is not unusual, given the Chief Justice's typically restraint-oriented view of the Commerce Clause, that he would lead the majority in invalidating a congressional attempt to use the clause as a vehicle for federal healthcare reform.<sup>220</sup> His deference to other branches does have an outer limit, and this is particularly clear in relation to the Commerce Clause where his opinions indicate he is wary of abuse.<sup>221</sup> The ruling in *NFIB*<sup>222</sup> is notable in this regard for numerous reasons.<sup>223</sup> For example, it is unusual for the Chief Justice to construe a statute in a manner that obliges a ruling rather than avoids it.<sup>224</sup> Other points of note include the rhetoric of Chief Justice Roberts's Commerce Clause decision and his construction of the Medicaid expansion.<sup>225</sup> While a number of these elements are surprising and even immoderate when taken alone, in context of the decision and its repercussions, the Chief Justice's opinion can be arguably construed as the epitome of moderation and judicial restraint.

The first extraordinary component of the decision in *NFIB* is the Chief Justice's dismissal of the applicability of the Anti-Injunction Act, an act prohibiting judicial review of taxes not yet legally due.<sup>226</sup> While the majority opinion favoring judicial review is not controversial, it is unusual in that it construes legislation as a non-tax for the purposes of the Anti-Injunction Act, but later labels the same as a tax in the holding.<sup>227</sup> It is virtually unprecedented for the Chief Justice to go to such efforts to construe a matter as justiciable, rather than the inverse.<sup>228</sup> As the dissent points out, this determination takes some amount of seemingly contradictory textual interpretation.<sup>229</sup> Regardless, the Chief Justice seemed to feel that judicial intervention was warranted by Congress's use of Commerce Clause authority, which is possibly the most surprising element of the decision.<sup>230</sup>

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<sup>219</sup> *Id.* (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

<sup>220</sup> *NFIB v. Sebelius*, 132 S. Ct. 2566, 2591 (2012).

<sup>221</sup> *See, e.g., United Haulers*, 550 U.S. 330.

<sup>222</sup> *NFIB*, 132 S. Ct. 2566.

<sup>223</sup> *See* Alberto R. Gonzales & Donald B. Stuart, *What Implications Will the Supreme Court's Taxing Power Decision Have on the Goals of the Affordable Care Act and Healthcare?*, 6 J. HEALTH & LIFE SCI. L. 2, 189, 204–11 (2013).

<sup>224</sup> *See id.* at 207–09.

<sup>225</sup> *See id.*; *NFIB*, 132 S. Ct. at 2585–93, 2601–08.

<sup>226</sup> *See NFIB*, 132 S. Ct. at 2582–83.

<sup>227</sup> *Id.* at 2594.

<sup>228</sup> *See NAMUDNO v. Holder*, 129 S. Ct. 2504, 2516–17 (2009) (considering a matter as non-justiciable).

<sup>229</sup> *NFIB*, 132 S. Ct. at 2656 (Scalia, Kennedy, Thomas, & Alito, J.J., dissenting) (“That carries verbal wizardry too far, deep into the forbidden land of the sophists.”).

<sup>230</sup> *Id.* at 2600–01 (majority opinion).

In his consideration of the healthcare individual mandate,<sup>231</sup> Chief Justice Roberts wrote a separate, lone opinion opposing the notion that Congress could force individuals to participate in the economy under the Commerce Clause.<sup>232</sup> Such digression is highly unusual for the Chief Justice, given that the case was readily decided on other grounds.<sup>233</sup> In his opinion, Chief Justice Roberts drew a distinction between regulating commerce and creating commerce, and denied that Congress has the authority to regulate individuals for failing to participate in commerce.<sup>234</sup> He further provided a notable amount of detail as to the possible implications of allowing such a use, which is also uncharacteristic, even going so far as to provide an illustration utilizing *Wickard v. Filburn*.<sup>235</sup> This sort of unnecessary dicta regarding a constitutional matter in a case that was resolved on other grounds is almost antithetical to the judicial philosophy of avoidance evinced in Chief Justice Roberts's work to date. In explanation, Chief Justice Roberts indicated that he felt the need to consider and dismiss the most natural interpretation of the statute before an alternate construction; however, this seems inadequate in the context of his jurisprudence.<sup>236</sup>

Why the dicta, then? It is hard to know so early in the Chief Justice's tenure, but perhaps he was motivated to some degree to adopt a more balanced, cautious approach in high profile cases in order to protect the reputation of the Court as an institution. It is also possible that the Chief Justice feels very strongly about the Commerce Clause, and there is some evidence that he strongly disapproves of broad interpretation of these powers.<sup>237</sup> He has addressed unnecessary constitutional issues as dicta in at least three prior instances;<sup>238</sup> and if cases such as *NAMUDNO*<sup>239</sup> are representative of his motives, he may be issuing a tacit warning to Congress regarding the Court's views about the constitutionality of Commerce Clause issues. It may also be the case that he felt that Congress's use of its Commerce powers could not go unremarked in the instance of healthcare reform; perhaps he felt it was necessary to accept the urgent invitation of both sides to answer this question.<sup>240</sup> Or it is possible that he felt the need to balance

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<sup>231</sup> There were three primary issues before the Court: (1) the Court's authority to hear the case under the Anti-Injunction Act; (2) the constitutionality of the Healthcare Individual Mandate requiring citizens to purchase healthcare; and (3) the constitutionality of the Medicaid expansion requiring states to comply with the Act or lose federal Medicaid funding. *Id.* at 2581–82.

<sup>232</sup> *Id.* at 2593.

<sup>233</sup> *See id.* at 2608.

<sup>234</sup> *Id.* at 2587–93.

<sup>235</sup> *Id.* at 2587–88 (citing *Wickard v. Filburn*, 317 U.S. 111 (1942)).

<sup>236</sup> *Id.* at 2593–94.

<sup>237</sup> *See, e.g.,* *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007) (explaining the Chief Justice's views on the Commerce Clause).

<sup>238</sup> *See, e.g.,* *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011); *NAMUDNO v. Holder*, 129 S. Ct. 2504, 2511–13 (2009); *Munaf v. Geren*, 553 U.S. 674, 700–03 (2008).

<sup>239</sup> *NAMUDNO*, 129 S. Ct. 2504.

<sup>240</sup> *See NFIB*, 132 S. Ct. at 2586.

the decision favoring liberal policy, the result of which was displeasing to many conservative factions, with a discussion of the Commerce Clause which was undoubtedly beneficial to those same conservative factions.<sup>241</sup> Neither possibility, however, fits neatly with the moderate, objectively removed judicial persona that the Chief Justice has presented to date, and the involved Commerce discussion in *NFIB* remains an outlier in his jurisprudence in both tone and substance.<sup>242</sup>

Despite these oddities, holistically the *NFIB* decision achieved a very moderate resolution of the healthcare issue.<sup>243</sup> Whether intended or not, Chief Justice Roberts found a balance between the liberal and conservative factions who sought to either approve or dismiss the Act in its entirety.<sup>244</sup> The decision, via an affirmation of congressional taxation authority and a single modification to the Act itself, transformed healthcare reform from a controversial mandate to an optional program that, if it is successful, grants states the discretionary power to provide more citizens with healthcare.<sup>245</sup> The decision had merits for both conservative and liberal factions, and was overall an extremely temperate path, even though it was at odds with what might have been expected of the Court and of Chief Justice Roberts as an individual.

However, the holding in *NFIB*, while arguably achieving a balanced political outcome, is far from perfect.<sup>246</sup> First, the excision of the required Medicaid expansion fundamentally altered the Act and thwarted its intentions of insuring more Americans by removing one of the Act's most powerful enforcement tools.<sup>247</sup> Without the large-scale implementation originally considered by the Act, its benefits and effects are now less available and far more tenuous.<sup>248</sup> With the Court's designation of the Act as a tax rather than a mandate, even its likely impact on an individual's decision to obtain insurance is now unclear. The Court's decision, without a doubt, took away a substantial portion of the Act's authority and thus its potential mandated success in implementation.<sup>249</sup> To interpret the Act in a way that arguably frustrates the intent of a majority of Congress and the President is considered by some to be a vulgar application of judicial power.<sup>250</sup> However, while this decision may contravene the executive and legislative intent behind the Act, Chief Justice Roberts's first priority is always what he sees as the boundaries of the Constitution regardless of the influence of external powers.

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<sup>241</sup> See generally *id.*

<sup>242</sup> Compare, e.g., *id.*, with *Massachusetts v. EPA*, 549 U.S. 497, 535 (Roberts, C.J., dissenting).

<sup>243</sup> See generally *NFIB*, 132 S. Ct. 2566.

<sup>244</sup> See generally *id.*

<sup>245</sup> See *id.* at 2601 (discussing outcomes if the mandate is upheld).

<sup>246</sup> See generally *id.*

<sup>247</sup> See, e.g., *Gonzales & Stuart*, *supra* note 223, at 224–25.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> See *id.* at 209 (discussing the dissent).

Finally, the *NFIB* opinion is notable for its legal novelty. On its face, Chief Justice Roberts's analysis of congressional taxing authority appears to permit large-scale taxation as a blatant incentivizing alternative to express regulation. While Chief Justice Roberts made clear arguments on the basis of precedent which showed how all of these actions were already within congressional power, their usage in a context such as national healthcare is nonetheless novel and controversial.<sup>251</sup> It is possible to argue that it is an unwarranted and unprecedented expansion of congressional authority without outer limits, but the majority opinion seems to set clear limits on such taxation that diminish the likelihood of an unchecked legislative taxing power.<sup>252</sup> Chief Justice Roberts was clear to explain in detail, for instance, how in *NFIB* the incentivizing effect was neither unprecedented nor oppressive because it represented a legitimate choice.<sup>253</sup> He additionally made certain to explain why the individual mandate qualified as a tax rather than as a penalty, and indicated that any deviation from this standard would result in potential legislation being classified as a non-tax.<sup>254</sup>

Whatever the merits of the policy resulting from the Chief Justice's opinion, or even the legitimacy of the legal justification, the decision here eventually favored the people: It effectively placed most of the responsibility for choosing healthcare on the citizens, as they were given the option in 2012 to elect the President that would spearhead the Act's implementation, as well as the state representatives who would choose either to enroll or not to enroll in the state Medicaid expansion. The Chief Justice might have achieved the same result through determining that the case was not yet ripe for review, which, with the approval of those on the Court who approve of the Act, would have allowed the voters to determine the outcome in November elections. Arguably the decision not to decide would have been a more typical decision by Chief Justice Roberts,<sup>255</sup> with fewer peculiar elements. While his motives for choosing the route he did are inscrutable, it seems apparent that the Court's controversial decision favors, as is constitutionally appropriate, government by the people.

## 2. Article II: Executive Authority

Chief Justice Roberts supports executive authority, and is highly deferential to executive discretion within its designated sphere—most especially in regard to war

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<sup>251</sup> See *id.* at 210 (discussing the dissenters' opinion of the Act).

<sup>252</sup> *NFIB v. Sebelius*, 132 S. Ct. 2566, 2596–600 (2012).

<sup>253</sup> *Id.* at 2596–97.

<sup>254</sup> *Id.* at 2596–600.

<sup>255</sup> *Arizona v. United States* is somewhat telling in this respect: If there is legislation that might be construed constitutionally, the Chief Justice does not oppose using a “wait and see” approach upon review. 132 S. Ct. 2492 (2012) (expressing this position in the majority opinion joined by the Chief Justice). However, if the legislation is seemingly incapable of being construed constitutionally, then the Chief Justice will oppose enactment before it has an opportunity to be construed by the government, regardless of ripeness. See generally *id.*



and national security. However, in areas of judicial responsibility, he will not readily defer to presidential suggestion, even if the issue at hand is one related to foreign affairs. His philosophy in this respect is one of limitation—each branch has absolute authority, but only within its constitutionally limited realm.<sup>256</sup>

For example, the Chief Justice has upheld the president's ability to dismiss principal officers of federal agencies as necessary to his ability to faithfully execute U.S. laws, and has held unconstitutional congressional attempts to insulate certain officers from presidential removal for cause.<sup>257</sup> He authored the majority opinion in *Free Enterprise Fund v. Public Company Accounting Oversight Board* indicating that such an insulating arrangement violated separation of powers principles, and defied the electoral system by removing the people's choice of executive from the processes for which he was chosen.<sup>258</sup> He justified his position by referencing the possible repercussions if such a system were multiplied, insulating certain officers through a multitude of protections.<sup>259</sup> The Chief Justice often uses a similar method of illustrating his point by applying a potential holding to an array of future cases as the standard.<sup>260</sup> The Chief Justice has similarly upheld the authority of the executive in matters of war and national security,<sup>261</sup> but has declined to extend the executive's role in matters of foreign policy to include ratifying treaties domestically.<sup>262</sup>

#### *a. War and National Security*

A notable case for the Chief Justice was *Boumediene v. Bush*, where the majority decided that military detainees held at Guantanamo Bay were to be accorded procedural due process, and that the tribunal system set in place by the executive branch was inadequate to afford that process.<sup>263</sup> Chief Justice Roberts wrote a dissatisfied dissent strongly criticizing the majority opinion for the creation of a broad and unenforceable rule of policy, as well as for making such a decision on the grounds of what he perceived to be political motivations.<sup>264</sup> He stated, "One 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."<sup>265</sup>

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<sup>256</sup> See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 (2010) (discussing the separation of powers).

<sup>257</sup> *Id.* at 3147.

<sup>258</sup> *Id.* at 3155.

<sup>259</sup> *Id.*

<sup>260</sup> See, e.g., *NFIB v. Sebelius*, 132 S. Ct. 2566, 2593 (2012).

<sup>261</sup> See *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>262</sup> See *Medellin v. Texas*, 552 U.S. 491 (2008).

<sup>263</sup> See *Boumediene*, 553 U.S. at 798 (explaining the place of the Constitution during "extraordinary times").

<sup>264</sup> *Id.* at 801 (Roberts, C.J., dissenting).

<sup>265</sup> *Id.*

Despite these substantial misgivings, the important point in *Boumediene* for the Chief Justice was that, in his opinion, the case ought to have been decided on other grounds.<sup>266</sup> He wrote his dissent primarily to explain why the system already in place, constructed by the elected political branches, was adequate to preserve all rights due to detainees.<sup>267</sup> As he considered this adequacy to be a threshold inquiry, which in this case was met, Chief Justice Roberts felt the case ought to have been dismissed without further consideration.<sup>268</sup> He also joined in Justice Scalia's dissent,<sup>269</sup> but it is representative of Chief Justice Roberts's priorities that he chose the key issue as one of avoidance. The Chief Justice's dissent clearly evidences his strong support for the system set in place by the executive for wartime detainees under executive control, and may be reasonably regarded as similarly supportive of the executive's wartime authority and discretion.<sup>270</sup>

*b. Foreign Policy*

Although the Chief Justice supports the executive when constitutionally appropriate, he nonetheless draws a very rigid distinction between matters of foreign policy and matters of the judiciary. Particularly, in 2007, he led the majority in *Medellin v. Texas*<sup>271</sup> to conclude that a decision by the International Court of Justice (ICJ), a dispute-resolving body of the United Nations, was not applicable as domestic law.<sup>272</sup> Specifically, the ICJ determined that the United States had violated an Optional Protocol to the Vienna Convention by failing to afford certain criminal aliens various required consular notification benefits.<sup>273</sup> The ICJ ruled that the United States was obliged to review the verdicts of fifty-one named Mexican nationals in light of the Protocol's consular notification process.<sup>274</sup> Out of deference to the ICJ decision, President George W. Bush issued an executive memorandum dictating that the United States would fulfill these international obligations and that state courts should give effect to the ICJ's judgment.<sup>275</sup>

When *Medellin* appealed his state-court death sentence to the Supreme Court, Chief Justice Roberts wrote for the majority, determining that the ICJ decision simply was not applicable domestically because the treaty itself was not self-executing.<sup>276</sup>

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<sup>266</sup> *Id.* at 802.

<sup>267</sup> *Id.* at 802–03.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 826 (Scalia, J., dissenting).

<sup>270</sup> *See id.* at 801–27 (Roberts, C.J., dissenting) (supporting executive power over detainees).

<sup>271</sup> 552 U.S. 491 (2008).

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 499–501.

<sup>274</sup> *Id.* at 497–98.

<sup>275</sup> *Id.* at 498.

<sup>276</sup> That is, the treaty did not by its terms or existence bring into effect binding domestic law. *Id.* at 521–23.

Instead, the Chief Justice found that the treaty textually called for ratification by legislation in order to be effected domestically, and that no such legislation existed.<sup>277</sup> As such, the ICJ opinion was notable, but did not overrule the authority of state courts once they had reached a fair and impartial decision.<sup>278</sup> Because there was no domestic law here to the contrary, the issue was considered a purely judicial question that the courts had already lawfully resolved.<sup>279</sup>

This was a politically charged decision, as the Court effectively approved Medellín's capital punishment, which was administered, despite the ICJ order by the United Nations.<sup>280</sup> This decision only serves to show how strong the divide is between the political branches for Chief Justice Roberts, as even a decision by the United Nations coupled with an executive order by the President who nominated him to the Court could not sway him to deviate from constitutional principles of domestic sovereignty and separation of powers. His commitment to the principle embodied in the *Youngstown* tripartite,<sup>281</sup> that the president does not have the authority to, by executive memorandum, dictate domestic law into existence, was embodied in the *Medellin* decision.<sup>282</sup> He recognized the import of his decision in the opinion, where he opined that commitments to international law and relations with foreign governments are "plainly compelling" interests, but that, "[s]uch considerations . . . do not allow us to set aside first principles."<sup>283</sup>

### 3. Article III: The Judiciary

The Chief Justice strongly favors a reserved judiciary; he does not deem it necessary to exert the Court's authority in every occasion of possible misconduct, but instead advocates first cautiously determining if that authority is warranted and the case is justiciable. The Chief Justice's strong respect for the authority of the separate powers and the principles of judicial avoidance do not, however, limit his understanding of the scope of judicial authority.<sup>284</sup> In *Munaf v. Geren*,<sup>285</sup> for instance, he declared in no uncertain terms that the United States has the authority and the obligation to hear habeas corpus petitions by all U.S. citizens held in custody by color of U.S. law.<sup>286</sup>

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<sup>277</sup> *Id.* at 508–10, 521.

<sup>278</sup> *Id.* at 522–23.

<sup>279</sup> *See id.* (explaining the limits of foreign holdings domestically).

<sup>280</sup> *See id.* at 532 (upholding the judgment of the Texas Court of Criminal Appeals).

<sup>281</sup> *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (examining the separation of powers).

<sup>282</sup> *Medellin*, 552 U.S. at 528, 532.

<sup>283</sup> *Id.* at 524.

<sup>284</sup> *See supra* notes 200–01 and accompanying text (regarding American citizens scheduled to be surrendered to the Iraqi government who, fearing torture, sought habeas corpus relief).

<sup>285</sup> 553 U.S. 674 (2008).

<sup>286</sup> *Id.* at 705.

Both this case and *Medellin* show that he will not shirk the justiciable obligations of the Court, regardless of extenuating circumstances.<sup>287</sup>

*C. Civil Rights: The First, Fifth, Ninth, and Fourteenth Amendments to the U.S. Constitution*

Civil rights is an area of law where the Chief Justice has a very clear voice. His opinions demonstrate that he feels strongly on a personal level about many civil rights–related actions which he has found to be unconstitutional.<sup>288</sup> He is an especially large proponent of equality and equal treatment across racial and cultural boundaries.<sup>289</sup> He is also an advocate for the general applicability of constitutional rights without exception, regardless of the factual palatability of the situation.<sup>290</sup> He has written numerous notable opinions in these areas, most especially regarding the First, Fifth, Ninth, and Fourteenth Amendments regarding free speech and religion, equal protection, and fundamental rights such as abortion, privacy, and marriage.

1. The First Amendment

Several cases seem to make a clear statement that the Chief Justice is an advocate of separation of church and state, as well as an advocate for the rights of religious groups and the right to free speech as guaranteed by the First Amendment. His opinions on free speech are especially notable for their passion, and seem to indicate his strong feelings about these issues.<sup>291</sup> This does not mean, however, that Chief Justice Roberts is uncharacteristically eager to hear such cases.<sup>292</sup> Although he supports the First Amendment readily, his primary considerations still focus on the tenets of justiciability and judicial restraint in cases of both freedom of speech and freedom of religion and assembly.<sup>293</sup>

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<sup>287</sup> Nonetheless, Chief Justice Roberts then proceeded to indicate that there was a complete lack of such relief available in this case, as it would intrude on the sovereignty of foreign powers without proper authority. *Id.* at 700. This is particularly interesting considering his later opinion in *Medellin*, where he seems to expect that foreign powers should similarly refrain from such intrusion into U.S. domestic law. *Compare id.* at 700–03, with *Medellin*, 552 U.S. 491.

<sup>288</sup> *See, e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207, 1215–18 (2011).

<sup>289</sup> *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., dissenting).

<sup>290</sup> *See, e.g.*, *United States v. Stevens*, 130 S. Ct. 1577 (2010).

<sup>291</sup> *See, e.g.*, *Snyder*, 131 S. Ct. at 1215–20.

<sup>292</sup> At least three cases that explicitly addressed religious concerns have been avoided during his tenure on grounds such as standing and sovereign immunity. *See, e.g.*, *Sossamon v. Texas*, 131 S. Ct. 1651 (2011); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011); *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007).

<sup>293</sup> *See, e.g.*, *Hosanna-Tabor Evangelical Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012); *Morse v. Frederick*, 551 U.S. 393, 404–05 (2007) (explicitly restricting the holdings to the facts of the case).

*a. Freedom of Speech*

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and . . . inflict great pain. . . . [W]e cannot react to that pain by punishing the speaker. As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.<sup>294</sup>

Chief Justice Roberts has advocated for freedom of speech in numerous contexts, such as that of controversial private speech of public significance.<sup>295</sup> In 2011, the Chief Justice authored the majority opinion in *Snyder v. Phelps*, declaring lawful the inflammatory conduct of religious picketers near a military funeral of a soldier killed in the Iraq War.<sup>296</sup> The picketers were not on cemetery grounds, did not disrupt the funeral, and their signs could not be seen from the graveside service.<sup>297</sup> This point was significant for the majority; the picketers conducted a peaceful and legal demonstration in a location they were entitled to access.<sup>298</sup> However, Chief Justice Roberts first confronted the petitioner's<sup>299</sup> argument that the content of the speech itself was not constitutionally protected due to its personal nature.<sup>300</sup> Primarily relying on direct quotes from precedent, he first determined that the speech was protected as a matter of public significance (the war and homosexuality in the military).<sup>301</sup> In doing so, the Chief Justice made a stand for strong First Amendment protections despite political controversy. Nonetheless, in keeping with his principles of jurisprudence, Chief Justice Roberts was very clear in his conclusion that this holding was limited to only the facts at hand.<sup>302</sup>

Chief Justice Roberts has also advocated for free speech in the context of federal voting and campaigning regulations.<sup>303</sup> In a somewhat controversial five-to-four, multi-concurrence decision, the Chief Justice authored the majority opinion upholding a non-profit corporation's right to air a politically oriented radio advertisement before an election.<sup>304</sup> The challenge to the Bipartisan Campaign Reform Act, an act ratified as facially valid four years prior, overcame contentions of mootness and was determined to be in violation of the First Amendment as applied.<sup>305</sup> Chief Justice

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<sup>294</sup> *Snyder*, 131 S. Ct. at 1220.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 1218–20.

<sup>298</sup> *Id.*

<sup>299</sup> The petitioner in *Snyder* was the father of the deceased soldier. *Id.* at 1213–14.

<sup>300</sup> *Id.* at 1217.

<sup>301</sup> *Id.* at 1215, 1218.

<sup>302</sup> *Id.* at 1220.

<sup>303</sup> *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

<sup>304</sup> *Id.* at 455–57.

<sup>305</sup> *Id.* at 461–64, 476–81.

Roberts concluded his opinion by advocating the necessity, when in doubt, of ruling in favor of speech rather than censorship.<sup>306</sup>

Chief Justice Roberts has also invalidated other types of federal legislation due to First Amendment concerns.<sup>307</sup> In 2010, he invalidated a federal ban on depictions of animal cruelty for reasons similar to those he eventually voiced in *Snyder*.<sup>308</sup> This case is helpful in determining his First Amendment philosophy:

As a free-floating test for First Amendment coverage, [a societal cost-benefit balancing test] is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.<sup>309</sup>

This does speak to a constructionist tendency by the Chief Justice to protect most forms of speech from censure, regardless of the social condemnation that speech might elicit. There are, of course, exceptions—specifically in those cases related to the protection of children—like the school-specific case holding in *Morse v. Frederick*,<sup>310</sup> or the 2008 case ratifying an anti-child pornography law.<sup>311</sup>

For example, several years earlier, based on a very different set of facts, the Chief Justice struck down a free speech claim, holding that a principal may confiscate a student banner promoting illegal drug use at a school event.<sup>312</sup> In the majority opinion for *Morse*, Justice Roberts granted school officials special authority to restrict drug-related student expression at school that could not otherwise be constitutionally restricted.<sup>313</sup> Because the threat of promoting illicit drug use presented what the Court considered to be a real danger, the confiscation was deemed acceptable.<sup>314</sup> Although

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<sup>306</sup> *Id.* at 482. These principles are well summarized with surprising specificity in Justice Alito's concurrence to *Brown v. Entertainment Merchants Association*, a case striking down a California law banning the sale of violent video games to minors (the Chief Justice did not author an opinion in that case, but did join in Justice Alito's concurrence). *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2742 (2011) (Alito, J., concurring); see *infra* notes 558–64 and accompanying text.

<sup>307</sup> See, e.g., *United States v. Stevens*, 130 S. Ct. 1577, 1582, 1592 (2010).

<sup>308</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011); see *supra* notes 296–302 and accompanying text (concerning the religious picketers at a military funeral).

<sup>309</sup> *Stevens*, 130 S. Ct. at 1585.

<sup>310</sup> 551 U.S. 393, 397 (2007).

<sup>311</sup> *United States v. Williams*, 553 U.S. 285, 307 (2008).

<sup>312</sup> *Morse*, 551 U.S. at 397.

<sup>313</sup> *Id.* at 408–09.

<sup>314</sup> *Id.*

there was some debate as to how to interpret the limited, unclear precedent in this area, the Chief Justice (unsurprisingly) extracted only the minimal principles necessary to decide the case and refused to otherwise resolve a concrete First Amendment analysis.<sup>315</sup> This case is most telling of his jurisprudential philosophy, which will lead him, if warranted by the facts, to limit a freedom he most often supports.

*b. Freedom of Religion and Assembly*

Chief Justice Roberts has also had more than one occasion to uphold the First Amendment on grounds of freedom of religion and assembly.<sup>316</sup> In 2012, the Chief Justice wrote the majority opinion in *Hosanna-Tabor Evangelical Church & School v. Equal Employment Opportunity Commission*, barring an employment discrimination suit brought under the Americans with Disabilities Act (ADA) against a church by a congregationally appointed “called” teacher.<sup>317</sup> He held that the “ministerial exception,” grounded in the First Amendment’s guarantee of freedom of religion, protected a church’s ability to choose who would govern and lead it.<sup>318</sup> To interfere, even for possible ADA violations, would strip the church of its religious autonomy.<sup>319</sup> As such, the Chief Justice determined that this was a rare occasion that called upon the Court to protect religious institutions in accordance with the intent of the First Amendment, granting the church the freedom to “choose those who will guide it on its way.”<sup>320</sup> Typically, however, he limited the holding to the facts of the case and the context of employment discrimination.<sup>321</sup> He concluded that “[t]here will be time enough to address the applicability of the exception to other circumstances [such as contract and torts actions] if and when they arise.”<sup>322</sup>

Chief Justice Roberts authored another majority opinion early in his tenure that upheld the same autonomy of religion, but in the surprising context of the Controlled Substances Act (CSA).<sup>323</sup> The issue at hand in *Gonzales v. O Centro Espirita Beneficente*

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<sup>315</sup> *Id.* at 404–05.

<sup>316</sup> *See, e.g., Hosanna-Tabor Evangelical Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006).

<sup>317</sup> *Hosanna*, 132 S. Ct. at 694. The plaintiff was a “called teacher” who had undergone extensive religious education, been certified by the church, and “called” by the congregation before serving as a grade school teacher, as opposed to other “lay teachers” at her school who had no such religious education or certification. *Id.* at 699–700. Although there was some dispute as to whether she met the standard of a minister, Justice Roberts found her status as a “commissioned minister” and her corresponding treatment and duties to be persuasive. *Id.* at 707–08.

<sup>318</sup> *Id.* at 710.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> Although the primary law in this case was the Religious Freedom Restoration Act of 1993 (RFRA), the Chief Justice made a number of references to the Free Exercise Clause in

*Uniao do Vegetal* was whether the Government's request for a preliminary injunction against a Brazilian church's use of hoasca, a hallucinogenic drug from the Amazon region used in sacramental tea, was warranted.<sup>324</sup> He concluded that the Government had failed to meet the compelling interest test required to intrude on RFRA-protected<sup>325</sup> religious beliefs and practices.<sup>326</sup>

It is of note that *O Centro* was in the preliminary injunction stage, and that this was not a final decision on the merits.<sup>327</sup> However, the protective policy set forth, and the determination that the Government had evidenced no compelling interest, both bolstered protection of genuine religious use of hallucinogenic drugs.<sup>328</sup> The Chief Justice showed little regard for the CSA in this context, referencing the peyote exemption for Native American tribes, and opined that "congressional findings with respect to [CSA] substances should not carry the determinative weight, for RFRA purposes, that the Government would ascribe to them."<sup>329</sup>

In light of this history, it is not surprising to find that Chief Justice Roberts sided with the dissent, although he did not author an opinion, in a 2010 decision holding that a law school's policy requiring a Christian student organization to admit all members was reasonable.<sup>330</sup> Justice Alito's dissent in *Christian Society Chapter of the University of California, Hastings College of the Law v. Martinez* addressed precedent upholding student organizations' rights to free speech, as well as invoking doctrines of expressive association and free exercise of religion, to contend that religious student organizations are entitled to require their members to hold viewpoints in keeping with the values of the organization.<sup>331</sup> This merely reiterates the Chief Justice's viewpoint that religious institutions and organizations should not be held to certain regulations that impair their ability to conduct their theological affairs as their religion dictates.

## 2. The Fifth and Fourteenth Amendments: Equal Protection

The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.<sup>332</sup>

It is a sordid business, this divvying us up by race.<sup>333</sup>

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his foundational comments. *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 449, 431–33 (2006).

<sup>324</sup> *Id.* at 423.

<sup>325</sup> See *supra* note 323 for a brief discussion related to the RFRA.

<sup>326</sup> *O Centro*, 546 U.S. at 439.

<sup>327</sup> *Id.* at 423.

<sup>328</sup> See *id.* at 433.

<sup>329</sup> *Id.*

<sup>330</sup> *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2978, 2995, 3000 (2010) (Alito, J., dissenting).

<sup>331</sup> *Id.* at 3000–20.

<sup>332</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

<sup>333</sup> *League United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., dissenting).



Chief Justice Roberts is also a strong advocate for the Constitution in the context of equal protection. For instance, he authored the majority opinion in *Parents Involved in Community Schools v. Seattle School District No. 1 (PICS)*, a key 2006 case barring, under Fifth Amendment principles, the use of racial classifications as a tool to promote racial diversity in school districting and student assignment plans.<sup>334</sup> Even in the context of promoting racial diversity or remedying past racial harms, the Chief Justice held in *PICS* that racial segregation of students into categories of black and non-black for purposes of determining which public school they should attend was impermissible.<sup>335</sup> *PICS* is also interesting because the Chief Justice distinguished *Grutter v. Bollinger*<sup>336</sup> as acceptable, defending in some detail the holistic approach to racial diversity in higher education that considers race as one of many factors to be considered in admitting students.<sup>337</sup> Typical of his methodically fact-based approach and despite his strong feelings against racial classifications, *PICS* initially implied that there may be some circumstances, including affirmative action, where Justice Roberts sees race as an acceptable factor for consideration.<sup>338</sup>

However, more recently, the Court took a stronger stance against multifactor affirmative action programs than *PICS* originally indicated.<sup>339</sup> The Chief Justice joined in the majority opinion in *Fisher v. University of Texas at Austin*,<sup>340</sup> holding that the admissions policy at the University of Texas, which considers race as one of several factors in the admissions process, must be held to strict scrutiny on judicial review.<sup>341</sup> The Court reversed and remanded the case to the Fifth Circuit for strict-scrutiny review, but made no decision on the merits of such affirmative action policies.<sup>342</sup> The Chief Justice did not author an opinion, but it is notable that the Court in *Fisher* effectively raised the bar on affirmative action-type programs to an almost unreachable standard.<sup>343</sup> The Court held that: “In order for judicial review to be meaningful, a university must make a showing that its plan is narrowly tailored to achieve the only interest that this Court has approved in this context: the benefits of a student body diversity.”<sup>344</sup>

Chief Justice Roberts deplores racial distinctions, which can readily be seen in *Fisher*<sup>345</sup> and a number of similar equal protection holdings in which he has joined.<sup>346</sup>

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<sup>334</sup> *PICS*, 551 U.S. at 708–11.

<sup>335</sup> *Id.* at 747–48.

<sup>336</sup> 539 U.S. 306 (2003) (holding as constitutional a college’s admissions policy that considered race as one of numerous factors in a multifactor review).

<sup>337</sup> *PICS*, 551 U.S. at 722–23.

<sup>338</sup> *Id.*

<sup>339</sup> *See generally PICS*, 551 U.S. 701.

<sup>340</sup> 133 S. Ct. 2411 (2013).

<sup>341</sup> *Id.* at 2414–15.

<sup>342</sup> *Id.* at 2421–22.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* at 2421.

<sup>345</sup> *See id.* at 2418.

<sup>346</sup> *See supra* notes 332–33 and accompanying text.

He concluded *PICS* with a passionate paragraph discussing the evils of racial classifications by government, quoting extensively from precedent banning racial classification in other contexts.<sup>347</sup> He spoke of the policy and motivations behind *Brown v. Board of Education*,<sup>348</sup> as well as the harm of differential treatment based on race that case sought to rectify.<sup>349</sup> But it is his final, decisive statement that is most telling of his philosophy in this area: “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>350</sup>

In this context of championing equal rights, initially it may seem unusual that Chief Justice Roberts wrote a harsh dissent in part and concurrence in part in an election-district gerrymandering case with racial overtones.<sup>351</sup> The holding in *League of United Latin American Citizens v. Perry* found in favor of Hispanic-American plaintiffs and against the State of Texas on the basis of the Voting Rights Act (VRA).<sup>352</sup> In Chief Justice Roberts’s opinion, the case did not revolve around issues of discrimination, and as such the Court ought to have shown more deference to the considerations of the lower courts.<sup>353</sup> In his final statements, he opined that the redistricting proposed by the majority was itself an undesirable form of racial discrimination that was unnecessary in the circumstances:

Whatever the majority believes it is fighting with its holding, it is not vote dilution on the basis of race or ethnicity. I do not believe it is our role to make judgments about which *mixes* of minority voters should count for purposes of forming a majority in an electoral district . . . . It is a sordid business, this divvying us up by race. When . . . the minority enjoys effective political power in the area well in *excess* of its proportion of the population, I would conclude that the courts have no further role to play in rejiggering the district lines . . . .<sup>354</sup>

So despite initial appearances, this dissent in fact affirms the Chief Justice’s beliefs in equality.<sup>355</sup> The dissenting form is surprising, and unexpected methods are not

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<sup>347</sup> *PICS*, 551 U.S. at 745–48.

<sup>348</sup> 347 U.S. 483 (1954) (holding segregation in public schools to be unconstitutional).

<sup>349</sup> *PICS*, 551 U.S. at 746–48.

<sup>350</sup> *Id.* at 748.

<sup>351</sup> *League United Latin Am. Citizens v. Perry*, 548 U.S. 399, 493 (2006) (Roberts, C.J., concurring in part and dissenting in part).

<sup>352</sup> *Id.* at 410. The Chief Justice sharply criticized the majority for what he thought was a misrepresentation and misinterpretation of the lower court’s fact-finding, namely, that the voting districts as established actually granted the large majority of the vote to Hispanic-American citizens. *Id.* at 493.

<sup>353</sup> *Id.* at 493–94.

<sup>354</sup> *Id.* at 511.

<sup>355</sup> The Court, with Chief Justice Roberts in the majority, ruled again on the VRA in 2009. *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009). The majority held that crossover districts, where

unusual for Chief Justice Roberts,<sup>356</sup> but the eventual conclusion is foreseeable. Chief Justice Roberts does not believe in discrimination,<sup>357</sup> in any context, even to the benefit of minorities—an area where many would tread lightly.<sup>358</sup>

Chief Justice Roberts's most recent decision on the VRA balances his strong feelings toward racial discrimination with his respect for state sovereignty and congressional authority.<sup>359</sup> Writing for the majority, the Chief Justice held Section Four of the VRA to be unconstitutional.<sup>360</sup> Because Section Four mandated a harsh federal preclearance requirement for alterations to certain state voting laws, the Court held that the standard must be justified by exceptionally disparate racial conditions.<sup>361</sup> However, as the Court had implied in its earlier holding in *NAMUDNO*,<sup>362</sup> the standard on which Section Four was based has become outdated in the intervening forty-eight years since its inception.<sup>363</sup> The Court found Section Four to be antiquated, based on outmoded data and practices, and also found that it applied disparately to those few states singled out for preclearance.<sup>364</sup> In closing, the Chief Justice clarified that the rest of the VRA was not in question, again demonstrating his respect for the legislative process,<sup>365</sup> but that

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a minority group's preferred candidate is elected by coalition between the minority and members of the racial majority who choose to help support him, but the minority is not large enough to elect him alone, were not required or forbidden by the VRA. *Id.* at 1248–49. The Court declined to require by law the cooperation that has otherwise been achieved in modern society voluntarily, that is, the ability to elect minority-preferred candidates through the vote of both minority and majority members. *Id.* at 1249.

<sup>356</sup> *See, e.g.*, *NAMUDNO v. Holder*, 129 S. Ct. 1204, 1211–13 (2009) (unnecessarily addressing the constitutionality of an issue not before the Court several years before overturning part of the VRA on the basis of the same unconstitutionality).

<sup>357</sup> The Roberts Court, with the Chief Justice in the majority, similarly affirmed generalized racial equality when it ruled that a city's discard of fire-fighting exam results because of a possible disparate minority impact violated Title VII of the Civil Rights Act. *Ricci v. DeStefano*, 557 U.S. 557, 563 (2009).

<sup>358</sup> *Perry*, 548 U.S. at 510–11 (Roberts, C.J., concurring in part and dissenting in part).

<sup>359</sup> *See Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

<sup>360</sup> *Id.* at 2631.

<sup>361</sup> *Id.* at 2627–28.

<sup>362</sup> *NAMUDNO v. Holder*, 129 S. Ct. 1204, 2511–12 (2009).

<sup>363</sup> The Chief Justice addressed the earlier holding multiple times, stating that in 2009, we took care to avoid ruling on the constitutionality of the Voting Rights Act when asked to do so, and instead resolved the case then before us on statutory grounds. But in issuing that decision, we expressed our broader concerns about the constitutionality of the Act. Congress could have updated the coverage formula at that time, but did not do so.

*Shelby Cnty.*, 133 S. Ct. at 2631.

<sup>364</sup> *Id.* at 2627–28.

<sup>365</sup> *See id.* at 2631 (“Striking down an Act of Congress ‘is the gravest and most delicate duty that this Court is called on to perform.’” (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring))).

racial discrimination in voting is absolutely unacceptable.<sup>366</sup> However, Chief Justice Roberts and the Court could not condone the outdated Section Four formula for determining which states were subject to the preclearance requirement.<sup>367</sup>

### 3. The Fifth and Ninth Amendments: Fundamental Rights

Chief Justice Roberts's stance on fundamental, non-enumerated rights is less clear. In many cases, his opinions are tempered with respect for extant legislation.<sup>368</sup> During the Chief Justice's tenure, the Court has limited the right to abortion, and advocated balancing this right against the state's interest in the unborn.<sup>369</sup> The Chief Justice has joined in dissent to a holding illegitimizing use of the Controlled Substances Act to regulate physician-assisted suicide,<sup>370</sup> and has authored or joined in several opinions limiting a right to privacy.<sup>371</sup> Finally, he has recently authored two key opinions regarding homosexual marriage.<sup>372</sup>

#### *a. Abortion*

Chief Justice Roberts began leading the Court through historical and precedential decisions soon after he was confirmed. Early in the Chief Justice's career, the Court released *Gonzales v. Carhart*,<sup>373</sup> an important and highly controversial decision in abortion rights. In *Carhart*, the Court held the Partial-Birth Abortion Ban Act of 2003 to be constitutional,<sup>374</sup> thereby limiting the broad rights originally granted to women seeking abortion by *Roe v. Wade*.<sup>375</sup> Chief Justice Roberts joined in the majority, holding that Congress had a legitimate interest in promoting a respect for all human life, and may use methods up to and including limiting the manner in which abortions may be performed, so long as they do not place an undue burden on a woman seeking an abortion or a doctor granting one.<sup>376</sup>

Another case in abortion rights came early in Chief Justice Roberts's career on the Court. In *Ayotte v. Planned Parenthood of Northern New England*,<sup>377</sup> the Court

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<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

<sup>368</sup> *See, e.g., Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006); *see also infra* notes 376–83 and accompanying text.

<sup>369</sup> *Gonzales v. Carhart*, 550 U.S. 124 (2007).

<sup>370</sup> *Gonzales v. Oregon*, 546 U.S. 243 (2006).

<sup>371</sup> *See, e.g., FCC v. AT&T*, 131 S. Ct. 1177 (2011); *Nat'l Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746, 759 (2011).

<sup>372</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (Roberts, C.J., dissenting); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

<sup>373</sup> 550 U.S. 124 (2007).

<sup>374</sup> *Id.* at 167–68.

<sup>375</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>376</sup> *Carhart*, 550 U.S. at 158–64.

<sup>377</sup> 546 U.S. 320 (2006).

found that a parental notification act for minors seeking abortions need not be struck down in its entirety for unconstitutionality.<sup>378</sup> The Chief Justice joined with a unanimous Supreme Court to determine that while the act was unconstitutional in part, the remedy need not be a total bar against enforcing the act in its entirety.<sup>379</sup> Instead, the Court ordered the lower courts to reconsider the act and return a more “modest” remedy.<sup>380</sup> The Roberts Court has similarly repeatedly invalidated legislation piecemeal in other situations in an effort to uphold a law’s legislative intent.<sup>381</sup>

These cases indicate that whatever the Chief Justice may think of abortion, it is tempered with a strong respect for the legislature’s legitimate actions. Deference to each branch of government in its aspect is often evident in his judicial philosophy, so he predictably supports legislative control whenever possible. It is of note that in these controversial cases, he chose only to support the constitutional legislation, which might lead to the incorrect inference that his reactions to other types of controversy would be similarly deferential.<sup>382</sup> In other large cases, such as *NFIB*, the nature of the issue at hand—controversial or not—is shown to be only incidental in his determination of the Court’s appropriate response; Chief Justice Roberts reacts with deference or assertion to the issues of law, not to the breadth of the controversy.<sup>383</sup>

#### *b. Privacy*

Privacy as a fundamental right rather than a criminal procedure issue has yet to be a key issue before the Roberts Court. However, Chief Justice Roberts did author a somewhat skeptical and wry, if not disparaging, opinion for the unanimous majority in a case regarding the privacy rights of corporations.<sup>384</sup> Specifically, in *FCC v. AT&T*,

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<sup>378</sup> That is, a lower court had determined the act to be unconstitutional because it did not provide for a minor’s abortion without parental notification unless death was imminent, a provision which was potentially harmful to minors. *Id.* at 325.

<sup>379</sup> *Id.* at 331.

<sup>380</sup> *Id.*

<sup>381</sup> *See, e.g., NFIB v. Sebelius*, 132 S. Ct. 2566 (2012) (invalidating portions of the Affordable Care Act while leaving the remainder intact).

<sup>382</sup> In the same vein of controversial decisions, the Chief Justice joined in the dissent to a case holding that the Attorney General may not prevent doctors from assisting suicide or euthanizing patients through means of the Controlled Substances Act (CSA). *Gonzales v. Oregon*, 546 U.S. 243 (2006). The dissent by Justice Scalia argued that the phrase “legitimate medical purpose” in the applicable part of the CSA was both valid and entitled to judicial deference, and as such that the prohibition placed on physicians against euthanasia was a reasonable interpretation of the Act. *Id.* at 275. Additionally, the dissent argued that an independent analysis of the statute would lead to the same result as the most natural and reasonable interpretation. *Id.* at 275–76. Because of these reasons, these justices felt that denying physicians the right to euthanize patients was perfectly proper under statutory authority. *Id.* at 276.

<sup>383</sup> *See generally NFIB*, 132 S. Ct. 2566.

<sup>384</sup> *FCC v. AT&T*, 131 S. Ct. 1177 (2011).

he held that corporations could not claim a personal privacy exemption under the Freedom of Information Act to prevent certain records from a federal investigation from being disclosed to competitors.<sup>385</sup> He determined, via exposition of the dictionary, common usage, principles of grammar, context, and legislative intent, that the term “personal privacy” as used in the Act referred only to people.<sup>386</sup> Although the Chief Justice admitted that a corporation is an artificial person, the Chief Justice determined that the applicability of the word “person” to a corporation did not imply that the adjective, “personal,” was applicable as well.<sup>387</sup> He closed the opinion by opining, “We trust that AT&T will not take it personally.”<sup>388</sup>

*AT&T* seems to stand, if anything, for Chief Justice Roberts’s reluctance to strain the terminology of previous decisions.<sup>389</sup> Unfortunately, what this indicates about his beliefs about corporations, privacy, prior decisions of the Court, or English etymology is unclear. In any case, the tone of the case is at the same time slightly chastising and bemused, which is unusual for Chief Justice Roberts (who infrequently puns in his opinions).<sup>390</sup>

### *c. Homosexual Marriage*

The Chief Justice recently authored a decision for the Court considering California’s Proposition Eight, which defined marriage as between a man and a woman.<sup>391</sup> Despite intense public speculation regarding the controversial subject matter,<sup>392</sup> the Chief Justice and the majority decided *Hollingsworth v. Perry* on an issue of standing.<sup>393</sup> The State of California had refused to defend the constitutional challenge to Proposition Eight in court, and a group of the ballot’s official proponents had defended it instead.<sup>394</sup> When the District Court declared the proposition unconstitutional, the proponents appealed to the Ninth Circuit.<sup>395</sup> The Supreme Court, however, found that the proponents did not have standing to appeal because they had not suffered

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<sup>385</sup> *Id.* at 1185.

<sup>386</sup> *Id.* at 1182–85.

<sup>387</sup> *Id.* at 1182.

<sup>388</sup> *Id.* at 1185.

<sup>389</sup> *See generally AT&T*, 131 S. Ct. 1177.

<sup>390</sup> This case is also notable for its restriction of privacy. *Id.* Similarly, the Chief Justice joined in the majority opinion of a case holding that questions relating to illegal drug use on a questionnaire required by NASA of government employees did not intrude on any personal right to privacy as implied by precedent. *NASA v. Nelson*, 131 S. Ct. 746, 759 (2011).

<sup>391</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

<sup>392</sup> *See, e.g.*, Erwin Chemerinsky, *Commentary: What Might Happen?*, SCOTUSBLOG (Mar. 28, 2013, 6:40 PM), <http://www.scotusblog.com/2013/03/commentary-what-might-happen/>.

<sup>393</sup> *Hollingsworth*, 133 S. Ct. at 2667–68.

<sup>394</sup> *Id.* at 2659–61.

<sup>395</sup> *Id.* at 2660.

a concrete and particularized injury.<sup>396</sup> Although the case was resolved on a procedural issue rather than the merits, the Court's decision effectively and tacitly affirmed the right of homosexual couples to marry in California.<sup>397</sup>

However, the Chief Justice felt differently about the Defense of Marriage Act (DOMA).<sup>398</sup> Writing in dissent to the majority opinion in *United States v. Windsor*, Chief Justice Roberts opined that the Court did not have jurisdiction over the issue and that the Act was justified by the need for "uniformity and stability."<sup>399</sup> Despite this, he made it clear that he was not issuing an opinion on the merits or constitutionality of homosexual marriage in general, stating:

We may in the future have to resolve challenges to state marriage definitions affecting same-sex couples. That issue, however, is not before us in this case . . . . I write only to highlight the limits of the majority's holding and reasoning today, lest its opinion be taken to resolve not only a question that I believe is not properly before us—DOMA's constitutionality—but also a question that all agree, and the Court explicitly acknowledges, is not at issue.<sup>400</sup>

*D. Criminal Procedure: The Fourth, Fifth, Sixth, and Eighth Amendments to the U.S. Constitution*

In general, the Chief Justice does not frequently write in areas of criminal procedure and criminal law.<sup>401</sup> Generally, other members of the Court author the opinions that guide Court policy in this area.<sup>402</sup> His opinions are therefore only to be garnered through inference from his position on the majority or dissent. It is possible to conclude that he tends to be pro-law enforcement; however, there is nothing in this trend to suggest a strong preference.<sup>403</sup> An exception is the Eighth Amendment, where the

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<sup>396</sup> *Id.* at 2667–68.

<sup>397</sup> *See generally Hollingsworth*, 133 S. Ct. 2652.

<sup>398</sup> *See United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (Roberts, C.J., dissenting).

<sup>399</sup> *Id.* at 2696–711.

<sup>400</sup> *Id.* at 2697.

<sup>401</sup> This is noteworthy, as the Roberts Court has made several key contributions to search and seizure doctrine in the areas of warrantless searches incident to arrest and GPS tracking by law enforcement. *See infra* Part IV.D.

<sup>402</sup> *See, e.g., J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (Sotomayor, J.).

<sup>403</sup> For instance, Chief Justice Roberts joined in the dissent to the landmark opinion that held that a child's age should be considered for purposes of determining custody in context of *Miranda*. *Id.* at 2408–18 (Alito, J., dissenting). Chief Justice Roberts has also joined the majority in cases that limit the presumption of a right to counsel and allowed violations of the Sixth Amendment as admissible for impeachment purposes. *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009); *Kansas v. Ventris*, 129 S. Ct. 1841 (2009).

Chief Justice has authored two notable opinions.<sup>404</sup> However, far from revealing any underlying philosophy of criminal justice, both cases seem to be more about issues of judicial philosophy than criminal law. In keeping with his jurisprudential tendencies, Chief Justice Roberts's contributions in both instances turn on points of jurisprudence rather than the merits.<sup>405</sup>

First, the Chief Justice wrote for a plurality in *Baze v. Rees*, a 2008 case where two death row inmates convicted of double homicide challenged the constitutionality of Kentucky's lethal injection protocol as cruel and unusual.<sup>406</sup> His plurality opinion was a somewhat dry piece citing to historical precedent, in which he held that the protocol—used by a majority of states—was not cruel and unusual, nor did the risk of accidental misapplication make it so.<sup>407</sup> To Chief Justice Roberts and the majority, the case seemed to be more about state sovereignty in applying the death penalty and judicial restraint when faced with unworkable standards than any issue of morality.<sup>408</sup>

Conversely, Chief Justice Roberts concurred in the judgment in *Graham v. Florida*, a 2010 case holding that the imposition of a life sentence without parole on a non-homicide juvenile offender violated the Eighth Amendment.<sup>409</sup> The Chief Justice wrote separately to advocate limiting the holding to the facts of the case.<sup>410</sup> He disagreed with the majority's categorical holding that such a sentence is never warranted, instead advocating a case-by-case approach on the basis of "narrow proportionality" as set forth in precedent.<sup>411</sup> He then proceeded to apply this precedent, which led him to the conclusion that the facts in the case at hand were unconstitutional due to a number of factors, including the diminished culpability of juvenile offenders.<sup>412</sup>

However, he argued for a more restrained approach than the majority employed.<sup>413</sup> Calling the majority decision "unwise," he referenced specific facts of other "heinous or grotesque" crimes by juveniles that might warrant such a sentence.<sup>414</sup> Similarly, the Chief Justice joined in dissent to *Kennedy v. Louisiana* two years earlier, in which the

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<sup>404</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2036 (2010) (Roberts, C.J., concurring); *Baze v. Rees*, 553 U.S. 35 (2008).

<sup>405</sup> *Graham*, 130 S. Ct. at 2036; *Baze*, 553 U.S. 35.

<sup>406</sup> *Baze*, 553 U.S. at 46.

<sup>407</sup> *Id.* at 62. Chief Justice Roberts's objective tone in this case may have been due to the division on the Court—only two Justices failed to write a separate opinion, and only two joined the plurality rather than the judgment (two dissented). It is worth noting, however, that for Chief Justice Roberts, this controversial issue was simply a matter of historical precedent. *Id.*

<sup>408</sup> *Id.* at 106 ("In short, I reject as both unprecedented and unworkable any standard that would require the courts to weigh the relative advantages and disadvantages of different methods of execution or of different procedures for implementing a given method of execution.").

<sup>409</sup> *Graham*, 130 S. Ct. at 2034.

<sup>410</sup> *Id.* at 2036.

<sup>411</sup> *Id.*

<sup>412</sup> *Id.*

<sup>413</sup> *Id.* at 2042.

<sup>414</sup> *Id.* at 2041.



majority held that the death penalty could not constitutionally be imposed for child rape.<sup>415</sup> That dissent made a similar argument for the necessity of non-categorical rules<sup>416</sup> and may have influenced his line of reasoning in *Graham*.<sup>417</sup>

### *E. Conclusion*

The Chief Justice is a reserved decision-maker. His opinions tend to be thoughtful, balanced, and objective within the bounds of the law. While there are issues on which he may feel strongly, his first and foremost priority is consistently what he considers to be proper jurisprudence. His decisions evidence an almost-formulaic adherence to strict rules of judicial guidance, which he frequently wields in unexpected places or amidst controversy to resolve difficult fact patterns. In a majority of cases, his opinions can be categorized as follows:

#### Roberts's Rules of Order:

1. **Judicial Avoidance:** If at all possible, cases must be dismissed on grounds of standing, mootness, or ripeness. Never rush to make a decision unless necessary, and avoid the temptation to reinvent extant legal interpretations of law or precedent.<sup>418</sup>
2. **Judicial Deference:** Defer to the separate political branches and elected officials so long as they operate within constitutional boundaries. The legislature is elected to create the law, for better or for worse. The judiciary's role is not activism, nor should it have opinions on those issues before it. The Court's role is only to determine legality in context of current law, regardless of the relative value of potential outcomes.<sup>419</sup>
3. **Narrow Construction:** Avoid categorical rules; if a case must be decided, then limit holdings as much as possible to the facts at hand. If a law is found to be unacceptable, then every reasonable effort must be made to preserve the surrounding legislation.<sup>420</sup>
4. **Clarity:** If a new standard is defined, then that standard should be clear, concise, and easily applicable to a very specific set of facts. Any new standard should avoid confusing conflicts with precedent, and any standard that is overruled should be replaced with precision rather than generalization. This reinforces the need for judicial deference: to hold a legal law or policy invalid because it is generally undesirable also violates a

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<sup>415</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 447 (2008) (Alito, J., dissenting).

<sup>416</sup> *Id.*

<sup>417</sup> *Graham*, 130 S. Ct. at 2036–42.

<sup>418</sup> *See supra* Part IV.A.

<sup>419</sup> *See supra* Part IV.B.

<sup>420</sup> *See supra* Part IV.C.1.

standard of clarity when it fails to provide a detailed replacement policy based on direct analysis of the governing law.<sup>421</sup>

If the Chief Justice could be said to have a passion for any area of law, it would most likely be that of constitutional civil liberties. His opinions in the areas of equal protection, free speech, and freedom of religion are the least dispassionate of his work, and they often display moving sentiment about the controversy at hand and insightful understanding of its individual impact. The ideals of the Constitution seem especially clear to Chief Justice Roberts in these contexts, and he can be relied upon to defend those ideals. This personal commitment to and belief in the founding principles as well as the text of the Constitution act to fuel his nearly unyielding principles of jurisprudence. Chief Justice Roberts's opinions display a seemingly unassailable belief that the political process will eventually cure all wrongs, even when he openly disagrees with the wisdom of a given law or decision.<sup>422</sup>

In general, these are the ideal qualities of a justice of the Court, and in many cases Chief Justice Roberts has produced considered, articulate opinions guided by these principles. However, there is another, more unexpected quality which could be attributed to the Chief Justice: that of a thoughtful leader. This is a quality that, if it exists, has likely evolved over time and can most clearly be seen in *NFIB*.<sup>423</sup> In high profile cases like *NFIB* or *Baze*, where the Court might otherwise have been irreparably divided, the Chief Justice is found authoring keen majority opinions that bridge the gap between numerous concurrences and dissents.<sup>424</sup> Further, he seems to promote and respect the abilities and specialties of other Justices, whose majority opinions he often joins without comment.<sup>425</sup>

This quality, while perhaps beneficial in the short term, is nonetheless surprising because it departs from the strict, principle-based jurisprudence and reverence for the law that Chief Justice Roberts embodies in so many other ways. Regardless of whether this or some other factor is the motivation behind his outlying opinions, it will likely seem inadvisable to some to temper judicial decisionmaking with almost any outside concerns that could so readily lead to a lack of clarity and muddle the precise interpretation of the law for which the Chief Justice strives. Perhaps on balance, the Chief Justice is comfortable with making such accommodations for the benefit of the Court as an institution.

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<sup>421</sup> See *supra* Part IV.C.1.

<sup>422</sup> See, e.g., *NFIB v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) (opining, "Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.").

<sup>423</sup> See *NFIB*, 132 S. Ct. 2566.

<sup>424</sup> See *id.*; *Baze v. Rees*, 553 U.S. 35 (2008).

<sup>425</sup> See, e.g., *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009).

V. SUPREME COURT JURISPRUDENCE: ASSOCIATE JUSTICE SAMUEL ALITO:  
DECISIONS FROM JANUARY 2006 THROUGH JUNE 2013

The Court provides no cogent explanation why this legislative judgment should be overridden. Conclusory references to “decency,” “moderation,” “restraint,” “full progress,” and “moral judgment” are not enough.<sup>426</sup>

Justice Alito’s opinions are, on the whole, reserved and thorough. He has authored multiple opinions on points of criminal and civil procedure. He adheres strictly to text-based analysis and the principles of *stare decisis*. He moves methodically through issues in relation to statutory or precedential authority without deviation. However, underneath the surface of this body of precise work, Justice Alito is a deeply passionate and sometimes scathing advocate for criminal justice. He believes firmly in clearly delineated rules of broad applicability that law enforcement can consistently apply.<sup>427</sup> He does not believe in deviation from precedent or case-by-case criminal procedure.<sup>428</sup> He supports the policy decisions of the people and their elected state legislators regarding judicial sentencing guidelines, regardless of perceived harshness.<sup>429</sup> When necessary, he invariably upholds stringent sentencing legislation and advocates for the availability of harsh penalties.<sup>430</sup>

Justice Alito is reliable and assured. If he strongly disagrees with an opinion, he can be counted on to argue for his point consistently thereafter. His dissents can be surprisingly and sometimes wittily worded, but also harshly critical of the Court and those with whom he disagrees. In matters of criminal justice, his dissents are frequent, as he advocates a less lenient system than many members of the Court.<sup>431</sup> These dissents are sharply worded and bold, frequently looking to the possible detrimental effects of the decisions he protests or lamenting the Court’s misapplication of precedent. He moves through these issues with the same methodical, textually based rigidity he applies to his less controversial opinions, usually justifying his passionate tone with a more traditional basis in law. Overall, there is a certain dichotomy between the calm, academic persona displayed in his interview for the Court, in his confirmation hearing, and found in most of his work, as compared to the fiery, sharp-tongued author of dissents or concurrences such as those found in *J.D.B. v. North Carolina*,<sup>432</sup> *Montejo v. Louisiana*,<sup>433</sup> and *Arizona v. Gant*.<sup>434</sup>

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<sup>426</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 469 (2008) (Alito, J., dissenting).

<sup>427</sup> *See, e.g., J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2408 (2011) (Alito, J., dissenting).

<sup>428</sup> *See, e.g., Arizona v. Gant*, 556 U.S. 332, 358–65 (2009) (Alito, J., dissenting).

<sup>429</sup> *Id.*

<sup>430</sup> *See, e.g., Kennedy*, 554 U.S. at 465–66 (Alito, J., dissenting).

<sup>431</sup> *See, e.g., J.D.B.*, 131 S. Ct. at 2408 (Alito, J., dissenting); *Gant*, 556 U.S. at 355 (Alito, J., dissenting).

<sup>432</sup> *J.D.B.*, 131 S. Ct. at 2408 (Alito, J., dissenting).

<sup>433</sup> *Montejo v. Louisiana*, 129 S. Ct. 2079, 2092 (2009) (Alito, J., concurring).

<sup>434</sup> *Gant*, 556 U.S. at 355 (Alito, J., dissenting).

Although Justice Alito has written numerous opinions for the Court, his most noteworthy work can be seen in three critical areas of law. First, his most defining opinions can be found in the area of criminal procedure. He has also written notable opinions in the area of governmental authority, and finally in the area of civil rights. Within these opinions, he is primarily guided by three key principles of jurisprudence: stare decisis, general applicability, and constitutional state sovereignty and separation of powers.

*A. Criminal Procedure: The Fourth, Fifth, Sixth, and Eighth Amendments to the U.S. Constitution*

I can only assume that the dissent thinks that our constitutional precedents are like certain wines, which are most treasured when they are neither too young nor too old . . . .<sup>435</sup>

Justice Alito has been most notably prolific in the area of criminal procedure. He has authored opinions regarding numerous aspects of criminal law, and many of these opinions are especially noteworthy. First, he has written regarding the Fourth Amendment in several search and seizure cases. He has also written on the Sixth Amendment right to counsel. Additionally, he has authored opinions in Fifth Amendment due process cases, including a recent dissent to the groundbreaking case of *J.D.B.*<sup>436</sup> Finally, Justice Alito has written several interesting opinions which demonstrate his stance on criminal punishment in the area of Eighth Amendment issues.

1. The Fourth Amendment: Search and Seizure

[T]his test creates a host of uncertainties, and this case illustrates one of the problems.<sup>437</sup>

Justice Alito's passion for criminal justice became apparent within the first several years of his career on the Court and can very clearly be seen in *Gant*<sup>438</sup> and subsequent related cases. *Gant* could be considered as one of the defining cases of Justice Alito's Supreme Court career.<sup>439</sup> In *Gant*, the majority overruled *New York v. Belton*<sup>440</sup> in

<sup>435</sup> *Montejo*, 129 S. Ct. at 2093 (Alito, J., concurring).

<sup>436</sup> *J.D.B.*, 131 S. Ct. at 2408 (Alito, J., dissenting).

<sup>437</sup> *Grooms v. United States*, 129 S. Ct. 1981, 1981 (2009) (Alito, J., dissenting).

<sup>438</sup> *See Gant*, 556 U.S. at 355–65 (Alito, J., dissenting).

<sup>439</sup> *Id.*; see, e.g., Steven R. Shapiro, *ACLU Summary of the 2008 Supreme Court Term*, ACLU (Jan. 29, 2009), <http://www.aclu.org/organization-news-and-highlights/aclu-summary-2008-supreme-court-term> (discussing Justice Alito's dissent on overruling *Belton*).

<sup>440</sup> 453 U.S. 454 (1981) (holding that a search of a passenger's jacket located inside a motor vehicle was constitutionally acceptable as a contemporaneous search incident to the passenger's arrest).

favor of a new two-part rule regarding vehicular searches incident to arrest.<sup>441</sup> Previously, police officers were able to contemporaneously search the passenger compartment of an automobile when arresting an occupant of the automobile.<sup>442</sup> The majority in *Gant*, however, held that, “Police may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.”<sup>443</sup> Justice Alito’s considered and methodical dissent objected to the holding on grounds of reliance, precedent, workability, and bad reasoning.<sup>444</sup> He indicated that the new rule on vehicular searches incident to arrest was confused and unstable; that there was no reason to overrule a rule that was known and widely, workably used; and that the respondent had not requested that the Court overrule *Belton*.<sup>445</sup> Although Justice Alito’s dissent in *Gant* was composed in a well-argued, precise, and reasonable tone, he has since demonstrated that he was profoundly dissatisfied with the majority holding.

The decision in *Gant* did not rest easily with Justice Alito, and he found at least four more occasions to publicly raise his objections to the ruling.<sup>446</sup> Twice in 2009 he wrote dissents to grants of writ of certiorari to relate the legal issues in question to *Gant*.<sup>447</sup> In each he remarked that the problems were a direct product of the ruling in *Gant*,<sup>448</sup> which was too unclear.<sup>449</sup> Evidencing his enduring and persistent adherence to the principles of his judicial philosophy, he summarized with precisely the same comment in both cases: “As I observed in dissent [to *Gant*] . . . this test creates a host of uncertainties, and this case illustrates one of the problems.”<sup>450</sup>

In 2011, Justice Alito was again given an opportunity to officially revisit *Gant* when he authored the majority opinion in *Davis v. United States*,<sup>451</sup> determining that the exclusionary rule did not apply to evidence seized in accordance with current law before *Gant* had been decided.<sup>452</sup> There, Justice Alito approached the issue with a

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<sup>441</sup> *Gant*, 556 U.S. at 358–65 (Alito, J., dissenting).

<sup>442</sup> *Id.* at 340–41 (majority opinion).

<sup>443</sup> *Id.* at 351.

<sup>444</sup> *Id.* at 355–65 (Alito, J., dissenting).

<sup>445</sup> *Id.* at 364–65.

<sup>446</sup> *Davis v. United States*, 131 S. Ct. 2419, 2424–25 (2011); *Montejo v. Louisiana*, 129 S. Ct. 2079, 2092 (2009) (Alito, J., concurring); *Meggison v. United States*, 129 S. Ct. 1982 (2009) (Alito, J., dissenting); *Grooms v. United States*, 129 S. Ct. 1981, 1981 (2009) (Alito, J., dissenting).

<sup>447</sup> *See Meggison*, 129 S. Ct. at 1982; *Grooms*, 129 S. Ct. at 1981.

<sup>448</sup> *See Gant*, 556 U.S. 332.

<sup>449</sup> *Meggison*, 129 S. Ct. at 1982 (Alito, J., dissenting); *Grooms*, 129 S. Ct. at 1981 (Alito, J., dissenting).

<sup>450</sup> *Meggison*, 129 S. Ct. at 1982 (Alito, J., dissenting); *Grooms*, 129 S. Ct. at 1981 (Alito, J., dissenting).

<sup>451</sup> 131 S. Ct. 2419 (2011).

<sup>452</sup> *Id.* at 2424–25.

far different tone than his opinion in *Montejo* discussed below.<sup>453</sup> He did find cause to criticize Justice Scalia's voting record for inconsistency, but otherwise authored minimal dicta.<sup>454</sup> *Davis* might be seen as a final, vindicating opportunity for Justice Alito to oppose the ruling in *Gant*, which he found to be so undesirable.<sup>455</sup>

In other Fourth Amendment jurisprudence, Justice Alito concurred in the judgment to the recent GPS tracker case of *United States v. Jones*,<sup>456</sup> holding that the warrantless use of a GPS to track and monitor a defendant's vehicular movements constituted an unconstitutional search and seizure under the Fourth Amendment.<sup>457</sup> However, he disagreed with the methodology of the majority, which found the placement of the GPS objectionable because it was a trespass on the defendant's property, on the grounds of general applicability and disregard of precedent.<sup>458</sup> He felt that the ruling relied on a rationale long since overruled,<sup>459</sup> and was not broadly applicable.<sup>460</sup> Instead, Justice Alito thought that the prevailing standard—that of a reasonable expectation of privacy—was adequate to encompass the GPS tracking device placed on Jones's car and classify it as an unconstitutional search.<sup>461</sup> This opinion is a typical analysis for Justice Alito based in principles of stare decisis.<sup>462</sup> Rather than create broad new rules, which he repeatedly referenced as unwise and strained, he instead preferred a methodical, text-based analysis and application of precedent.<sup>463</sup>

## 2. The Sixth Amendment: Right to Counsel

*Montejo v. Louisiana*<sup>464</sup> is another defining case for Justice Alito, comparable to *Arizona v. Gant*.<sup>465</sup> The majority in *Montejo* overruled precedent, *Michigan v. Jackson*,<sup>466</sup> by limiting the presumption of the right to counsel during a criminal

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<sup>453</sup> See *Montejo v. Louisiana*, 129 S. Ct. 2079, 2092–94 (2009) (Alito, J., concurring); see also *infra* text accompanying notes 468–84.

<sup>454</sup> *Montejo*, 129 S. Ct. at 2093.

<sup>455</sup> *Davis*, 131 S. Ct. at 2434.

<sup>456</sup> 132 S. Ct. 945 (2012).

<sup>457</sup> *Id.* at 945.

<sup>458</sup> *Jones*, 132 S. Ct. at 957–64 (Alito, J., concurring).

<sup>459</sup> He first compared the trespass-based reasoning of the Court to other trespass-based Fourth Amendment cases superseded by *Katz v. United States*, 389 U.S. 347 (1967). *Jones*, 132 S. Ct. at 957–61 (Alito, J., concurring). He indicated that he felt that the return to this type of reasoning disregards the functioning precedent and the reasons for its implementation. *Id.*

<sup>460</sup> He noted that property law varies from state to state, and that the new logic did not extend to prolonged visual surveillance or the burgeoning problem of electronic surveillance without physical trespass. *Id.* at 961–62.

<sup>461</sup> *Id.* at 964.

<sup>462</sup> *Id.* at 957–58; see also *infra* Parts V.A.2–4.

<sup>463</sup> *Jones*, 132 S. Ct. at 957–61.

<sup>464</sup> 129 S. Ct. 2079 (2009).

<sup>465</sup> 556 U.S. 332 (2009).

<sup>466</sup> *Michigan v. Jackson*, 475 U.S. 625 (1986) (holding invalid any waiver of defendant's

interrogation.<sup>467</sup> Justice Alito joined in the judgment, but wrote an especially scathing concurrence criticizing the *Montejo* dissenters for supporting the same arguments they had dismissed when deciding *Gant*.<sup>468</sup> In dissent to *Gant*, Justice Alito had strongly objected to the majority decision, citing the interests of law enforcement, their history of reliance on precedent, and stare decisis.<sup>469</sup> The dissenters in *Montejo* based their arguments on similar reasoning.<sup>470</sup> Because some of the same Justices who dissented in *Montejo* had agreed with the majority in *Gant*,<sup>471</sup> Justice Alito took issue with their arguments in *Montejo*.<sup>472</sup> One of the most memorable quotes in Justice Alito's body of work is presented in this context:

The dissent, finally, invokes *Jackson*'s<sup>473</sup> antiquity, stating that "the 23-year existence of a simple bright-line rule" should weigh in favor of its retention. But in *Gant*, the Court had no compunction about casting aside a 28-year-old bright-line rule. I can only assume that the dissent thinks that our constitutional precedents are like certain wines, which are most treasured when they are neither too young nor too old, and that *Jackson*, at 23, is in its prime, whereas *Belton*,<sup>474</sup> at 28, had turned brownish and vinegary.<sup>475</sup>

His rationale for concurring with *Montejo* is similarly telling: he was complying with the rationale that had become binding precedent in *Gant*.<sup>476</sup>

The concurrence in *Montejo* is easily one of the least academic, yet most passionate, opinions in Justice Alito's repertoire.<sup>477</sup> Based on the principles he advocated in *Gant*, it seems more likely he would have resisted overruling precedent in *Montejo*.<sup>478</sup> However, he concurred, basing his concurrence on the manner in which the majority decided *Gant*.<sup>479</sup>

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right to counsel at a police-initiated interrogation following defendant's assertion of his right to counsel in court).

<sup>467</sup> *Montejo*, 129 S. Ct. 2079.

<sup>468</sup> *Id.* at 2093–94 (Alito, J., concurring).

<sup>469</sup> *Gant*, 556 U.S. at 358–65 (Alito, J., dissenting).

<sup>470</sup> *Montejo*, 129 S. Ct. at 2093 (Alito, J., concurring).

<sup>471</sup> *See generally Gant*, 556 U.S. 332.

<sup>472</sup> *Montejo*, 129 S. Ct. at 2093 (Alito, J., concurring).

<sup>473</sup> *See generally Michigan v. Jackson*, 475 U.S. 625 (1986).

<sup>474</sup> *See generally New York v. Belton*, 453 U.S. 454 (1981).

<sup>475</sup> *Montejo*, 129 S. Ct. at 2093 (Alito, J., concurring) (citations omitted). The rest of the concurrence is similarly harsh, again criticizing the decision in *Gant*, as well as criticizing Justice Scalia's role in that decision. *Id.* at 2092–94.

<sup>476</sup> *Id.* at 2092.

<sup>477</sup> *See id.* at 2092–94.

<sup>478</sup> *See generally Montejo*, 129 S. Ct. 2079; *Arizona v. Gant*, 556 U.S. 332, 358–65 (2009) (Alito, J., dissenting).

<sup>479</sup> *Montejo*, 129 S. Ct. at 2092 (Alito, J., concurring); *see generally Gant*, 556 U.S. 332.

By doing so, Justice Alito merely applied his rule regarding stare decisis, taken to its logical extreme.<sup>480</sup> What other factors affected his decision remain unknown.<sup>481</sup> His scathing concurrence to *Montejo* was certainly uncharacteristically vehement, but in context of his character, his conclusions do make sense.<sup>482</sup> Almost all of Justice Alito's opinions work through a given issue on the basis of a thorough examination of precedent and controlling authority. The Court's seemingly fickle disregard of precedent in these instances, such as *Gant*, must have seemed to him dangerous judicial overreaching.<sup>483</sup>

Although Justice Alito's opinion in *Montejo* is not one of his most precise works of legal analysis, it is notable because it demonstrates not only his profound personal commitment to the issue of criminal justice, but more importantly, it shows his consistent commitment to his principles of jurisprudence (in this case, stare decisis) despite his personal feelings.<sup>484</sup>

### 3. The Fifth Amendment: Due Process and *Miranda*

Because of the adamant and unrelenting nature of his opinions in every area of criminal justice, Justice Alito has earned a reputation as a harsh and vocal critic when he disagrees with the Court.<sup>485</sup> In the area of due process, Justice Alito recently strongly dissented to the groundbreaking decision in *J.D.B. v. North Carolina*, in which the majority introduced a subjective element of analysis—a child's age—into the formula for determining custody for purposes of *Miranda* warnings.<sup>486</sup> Previously, law enforcement officials were only required to Mirandize a suspect of any age if an objective “reasonable person” would have felt himself to be in police custody and unable to leave at will.<sup>487</sup> The majority in *J.D.B.* held that, “so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.”<sup>488</sup>

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<sup>480</sup> *Montejo*, 129 S. Ct. at 2092–94 (Alito, J., concurring).

<sup>481</sup> However, he does state that the decision in *Gant* supports the treatment of precedent in *Montejo*, and he has stated that he disagrees with the decision in *Gant*. *Id.*; see generally *Gant*, 556 U.S. 332. Whether he intended it to logically follow that *Montejo* was also poorly decided is unclear, although if those were truly his thoughts it seems peculiar to vote in concurrence on that basis. *Montejo*, 129 S. Ct. at 2092–94 (Alito, J., concurring).

<sup>482</sup> See *Montejo*, 129 S. Ct. at 2092–94 (Alito, J., concurring).

<sup>483</sup> See, e.g., *Gant*, 556 U.S. at 358–65 (Alito, J., dissenting).

<sup>484</sup> *Montejo*, 129 S. Ct. at 2092–94 (Alito, J., concurring).

<sup>485</sup> See, e.g., Elliot Davis, Note, *The Newer Textualism: Justice Alito's Statutory Interpretation*, 30 HARV. J.L. & PUB. POL'Y 983 (2007).

<sup>486</sup> *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2408–18 (2011) (Alito, J., dissenting).

<sup>487</sup> *Id.* at 2397 (majority opinion).

<sup>488</sup> *Id.* at 2406.



Justice Alito's primary argument against the holding in *J.D.B.* revolved around the clarity and ease of applicability of *Miranda v. Arizona*<sup>489</sup> for law enforcement officials.<sup>490</sup> Although he admitted some margin of error for those who fell outside the standard of the typical "reasonable person" used for purposes of objectively determining custody, Justice Alito felt that the margin was anticipated and is acceptable in exchange for the "one-size-fits-all" element that made *Miranda* so valuable.<sup>491</sup> While he never explicitly refers to any disrespect for earlier case law, his dissent, like his dissent in *Gant*,<sup>492</sup> stands for the proposition that the majority transformed a clear and valuable precedent into a highly subjective and confusing new standard of the sort that *Miranda* was enacted to overcome.<sup>493</sup>

*J.D.B.* was so troubling to Justice Alito because of the implications of such a subjective standard.<sup>494</sup> He wrote his dissent in part to record his fear of a slippery slope that would inevitably mandate consideration of unknowable factors like intelligence and education in *Miranda* analysis.<sup>495</sup> Although this is not one of his more ardent opinions, his tone is far from forgiving and indicates his sincere concerns.<sup>496</sup> He opens by referring to the majority's opinion as immodest and insensible, but then attends to his arguments without further ado, primarily centering on the confusing impact of the case on law enforcement.<sup>497</sup> Because of this, *J.D.B.* most clearly demonstrates Justice Alito's concern with clarity and general applicability, another principle that is key to his jurisprudence.<sup>498</sup>

#### 4. The Eighth Amendment: Cruel and Unusual Punishment

The Court should not produce a *de facto* ban on capital punishment by adopting method-of-execution rules that lead to litigation gridlock.<sup>499</sup>

Justice Alito is also supportive of constitutional state sovereignty and separation of powers, and he has been known to approve of the death penalty in extreme cases.<sup>500</sup> For instance, he authored a dissent to *Kennedy v. Louisiana*,<sup>501</sup> a case holding that

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<sup>489</sup> 384 U.S. 436 (1966).

<sup>490</sup> *J.D.B.*, 131 S. Ct. at 2408–18 (Alito, J., dissenting).

<sup>491</sup> *Id.* at 2409.

<sup>492</sup> *Arizona v. Gant*, 556 U.S. 332, 358 (2009) (Alito, J., dissenting).

<sup>493</sup> *J.D.B.*, 131 S. Ct. at 2409 (Alito, J., dissenting).

<sup>494</sup> *Id.* at 2414–15.

<sup>495</sup> His dissent continued on to predict a flood of litigation attempting to apply the rule crafted in *J.D.B.* to a wide array of defendant characteristics. *Id.*

<sup>496</sup> *See id.* at 2408.

<sup>497</sup> *Id.* at 2408–09.

<sup>498</sup> *See id.* at 2408–18.

<sup>499</sup> *Baze v. Rees*, 553 U.S. 35, 71 (2008) (Alito, J., concurring).

<sup>500</sup> *Id.* at 63.

<sup>501</sup> 554 U.S. 407, 447 (2008) (Alito, J., dissenting).

the death penalty could not constitutionally be applied to perpetrators of child rape.<sup>502</sup> He advocated cogently and at length against each of the majority's arguments, disputing interpretation of precedent and advocating for the ability of state legislatures to develop responses to child rape as they found fitting.<sup>503</sup> He contended that the Court was substituting its own judgment for that of the people and the states.<sup>504</sup> He also indicated agreement with the people and the states that some non-homicidal cases are so heinous that they warrant the death penalty.<sup>505</sup> Finally, he primarily argued that the plurality's opinion was groundless, stating, "The Court provides no cogent explanation why this legislative judgment should be overridden. Conclusory references to 'decency,' 'moderation,' 'restraint,' 'full progress,' and 'moral judgment' are not enough."<sup>506</sup>

Similarly, Justice Alito joined in part the dissent to *Graham v. Florida*,<sup>507</sup> a 2010 case where a majority of the Court determined that a life sentence without parole was unconstitutional in the case of juvenile non-homicide offenders.<sup>508</sup> Justice Thomas's dissent, like Justice Alito's earlier dissent in *Kennedy*,<sup>509</sup> argued against judicial overreaching, opining that non-elected justices of the Court are not uniquely qualified to undermine a sentencing determination that juries across America regularly impose on the worst offenders.<sup>510</sup> Justice Alito also wrote a terse individual dissent pointing out that the holding banned only sentences of life without parole,<sup>511</sup> and that a sentence of a term of years without parole would likely technically be acceptable instead (he specifically proposes a term of forty years without parole for such cases).<sup>512</sup>

Some critics may say that Justice Alito's opinion in *Kennedy* seems, more than anything, to embody a harsh perspective toward convicted criminals who attempt to circumvent the system or avoid their punishment, as well as a willingness to construe criminal-friendly laws creatively to ensure that justice is served.<sup>513</sup> However, in joining the dissent, Justice Alito again demonstrates his deference to the sentencing policy of the legislature. His own separate writing, pointing out the problems with the majority reasoning, seems more to embody his disdain for the Court's second-guessing of state legislatures and provides a means to enact the legislation at issue in this case.

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<sup>502</sup> *Id.* at 446–47 (majority opinion).

<sup>503</sup> *See id.* at 447–70 (Alito, J., dissenting).

<sup>504</sup> *Id.* at 460–61.

<sup>505</sup> *Id.* at 467–69.

<sup>506</sup> *Id.* at 469.

<sup>507</sup> 130 S. Ct. 2011 (2010).

<sup>508</sup> *Id.* at 2034.

<sup>509</sup> *Kennedy*, 554 U.S. at 447–70 (Alito, J., dissenting).

<sup>510</sup> *Graham*, 130 S. Ct. at 2043–58 (Thomas, J., dissenting).

<sup>511</sup> *Id.* at 2058 (Alito, J., dissenting). He also pointed out that the ruling was overbroad and reached an issue not properly before the Court. *Id.*

<sup>512</sup> *Id.*

<sup>513</sup> *See, e.g.*, J.M. Kirby, Graham, Miller, & *The Right to Hope*, 15 CUNY L. REV. 149, 161 (2011) (discussing how the system still essentially allows for a term of life).

By advocating for alternative methods of imposing the (formerly) requisite punishment for particularly heinous crimes, Justice Alito has made a clear statement that the Constitution should not be viewed as a free pass for violent criminals. Because of his reliance on *stare decisis*, this disregard for the spirit of binding law may seem unusual. However, upon closer examination, his discussions of precedent and law usually turn on close scrutiny of the language of law and precedent, rather than the creators' intent.<sup>514</sup> Thus, his close scrutiny of and conclusion regarding the letter of the holding in *Graham* is in keeping with his overall jurisprudence,<sup>515</sup> although it might seem to supporters of the majority opinion to border dangerously on judicial activism.

In context, however, Justice Alito was in fact acting in favor of the state legislators and electing populace that initially demanded harsh penalties for the worst juvenile offenders, thus showing his support for both state sovereignty and a separation of powers.<sup>516</sup> Additionally, he acted in keeping with his principles of jurisprudence by delineating a clear standard based on the letter, rather than the debatable spirit, of the holding.<sup>517</sup> Finally, his dissent in *Graham* is indicative of a keen understanding of the effects of crime on victims, which can also be seen in several of his opinions regarding particularly appalling crimes.<sup>518</sup>

Justice Alito's approval in *Baze v. Rees* of a three-stage lethal injection protocol, alleged to be unconstitutional, is also typical of his methodical, punishment-oriented approach to certain areas of criminal justice.<sup>519</sup> However, he warned in his concurrence that courts and legislators should refrain from confusing the issue at hand, the constitutionality of a protocol, with the constitutionality of the death penalty itself.<sup>520</sup> He further wrote to object to the standard proposed by the dissent, which would hold a protocol unconstitutional if it created an "untoward" risk of pain, as too "vague and malleable."<sup>521</sup> This argument is typical of Justice Alito's jurisprudence, where he is often concerned with a clear, fully defined standard.<sup>522</sup>

Based on these cases, it becomes apparent that Justice Alito holds a very narrow view of cruel and unusual punishment in most circumstances, and that his arguments frequently evidence a victim-centric perspective. In 2011, he demonstrated that the

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<sup>514</sup> See, e.g., *Graham*, 130 S. Ct. at 2058–59 (Alito, J., dissenting).

<sup>515</sup> See *id.*

<sup>516</sup> See *id.* at 2043–58 (Thomas, J., dissenting); *id.* at 2058 (Alito, J., dissenting).

<sup>517</sup> See *id.* at 2058 (Alito, J., dissenting).

<sup>518</sup> See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 467 (Alito, J., dissenting) ("I have no doubt that, under the prevailing standards of our society, robbery . . . does not evidence the same degree of moral depravity as the brutal rape of a young child. Indeed, I have little doubt that, in the eyes of ordinary Americans, the very worst child rapists—predators who seek out and inflict serious physical and emotional injury on defenseless young children—are the epitome of moral depravity.").

<sup>519</sup> See *Baze v. Rees*, 553 U.S. 35, 63–71 (2008) (Alito, J., concurring).

<sup>520</sup> *Id.* at 63.

<sup>521</sup> *Id.* at 70–71.

<sup>522</sup> See also *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2408–18 (Alito, J., dissenting).

issue of prison reform is no different.<sup>523</sup> In *Brown v. Plata*, the Court upheld a Ninth Circuit decision releasing 46,000 criminals from prison prematurely in order to remedy a number of prison deficiencies partially attributed to overcrowding.<sup>524</sup> Justice Alito authored an ardent dissent objecting to the ruling on the grounds that it was overbroad and based on outdated evidence.<sup>525</sup> Particularly, he felt that the case, which was brought on behalf of prisoners with mental health and specialized medical needs, did not justify the premature release into the public of a broad population of prisoners without those needs.<sup>526</sup> Notably, he opined that it seemed implausible that “exam tables and counter tops cannot properly be disinfected” without the “radical and dangerous step” of releasing prisoners.<sup>527</sup> This is exemplary of Justice Alito’s overall theory of criminal justice, which is both supportive of law enforcement and unyielding in regard to punishment once a defendant is properly found guilty of a crime.

*B. Government Authority: Articles I, II, and III of the U.S. Constitution*

Although Justice Alito is not usually vocal in cases dealing with the branches of government and their respective powers, he generally joins in decisions based on principles of deference and separation of powers.<sup>528</sup> The most notable opinion he has written in this area of law primarily considered an issue of precedent rather than any constitutional concern.<sup>529</sup> As such, his work in the area of government authority is best judged first by consideration of one of his early opinions regarding congressional authority and the Commerce Clause, and then by his voting record in the areas of executive and judicial authority.

First, in the area of congressional authority, Justice Alito authored a key opinion regarding the Commerce Clause when he dissented to *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*.<sup>530</sup> His primary concern was, typically, precedent.<sup>531</sup> The majority in the case distinguished as acceptable flow-control ordinances in favor of government from those in favor of private industry (previously deemed unconstitutional in 1994).<sup>532</sup> This case was early in Justice Alito’s career on the Court,<sup>533</sup> and the opinion maintains a very formal, respectful tone with none of

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<sup>523</sup> See *Brown v. Plata*, 131 S. Ct. 1910, 1959–68 (2011) (Alito, J., dissenting).

<sup>524</sup> See *id.* at 1928, 1947 (majority opinion).

<sup>525</sup> *Id.* at 1959–61 (Alito, J., dissenting).

<sup>526</sup> *Id.* at 1962–63.

<sup>527</sup> *Id.* at 1963.

<sup>528</sup> See, e.g., *Medellin v. Texas*, 552 U.S. 491, 496 (2008); see also *infra* note 540 and accompanying text.

<sup>529</sup> See *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 356–71 (2007) (Alito, J., dissenting).

<sup>530</sup> *Id.*

<sup>531</sup> *Id.*

<sup>532</sup> *Id.* at 347 (majority opinion).

<sup>533</sup> The case was decided approximately fifteen months after his confirmation. See *id.* at 330; Jane Roh, *Alito Sworn in as Nation’s 110th Supreme Court Justice*, FOX NEWS (Jan. 31,

the heat of later criminal-justice dissents. He proceeded through his analysis of precedent in the thorough, methodical manner that is his trademark of review and concluded that it was indistinguishable from the case at hand.<sup>534</sup> Because this dissent was really about his devotion to precedent rather than his analysis of the Commerce Clause, his opinion should not necessarily be taken as highly indicative of his thoughts on the Clause.<sup>535</sup>

Further, Justice Alito's voting record is generally supportive of executive authority, although he rarely writes on the issue. He joined in both dissents to *Boumediene v. Bush*, opposing the grant of additional due process rights to enemy-combatant detainees.<sup>536</sup> He similarly joined in the majority to *Munaf v. Geren*—denying judicial relief to U.S. citizens whom the government had scheduled for transfer to Iraqi custody for trial—which relegated such matters of foreign policy to the executive.<sup>537</sup> In both cases, Justice Alito joined in advocating against judicial overreaching, preferring to entrust the executive with decisions regarding foreign policy.<sup>538</sup> In the same vein, he joined in the majority in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, declaring that Congress cannot restrict the power of the executive over executive officers by enacting multilevel protections preventing removal of those officers.<sup>539</sup> *Medellin v. Texas* is the only outlier in these cases, in which Justice Alito joined the majority in declaring limits on the executive power and reserving the rights of federal and state courts when necessary.<sup>540</sup>

### C. Civil Rights: The First, Second, Fifth, Ninth, and Fourteenth Amendments to the U.S. Constitution

Justice Alito has only written, under curious circumstances, to limit free speech, not to uphold it.<sup>541</sup> He has conversely written to uphold the right to bear arms in one of the landmark decisions of the Roberts Court.<sup>542</sup> What his civil rights opinions

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2006), <http://www.foxnews.com/story/2006/01/31/alito-sworn-in-as-nation-110th-supreme-court-justice>.

<sup>534</sup> *United Haulers*, 550 U.S. at 370–71 (Alito, J., dissenting).

<sup>535</sup> *Id.*

<sup>536</sup> *Boumediene v. Bush*, 553 U.S. 723, 801–26 (2008) (Roberts, C.J., dissenting); *id.* at 826–49 (Scalia, J., dissenting).

<sup>537</sup> *Munaf v. Geren*, 553 U.S. 674, 689–92 (2009).

<sup>538</sup> *See id.*; *Boumediene*, 553 U.S. at 804 (Roberts, C.J., dissenting).

<sup>539</sup> *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3146 (2010).

<sup>540</sup> In *Medellin*, he joined the majority in refusing to give deference to a presidential memorandum regarding the decision of the International Court of Justice requiring consular notification for aliens accused of a crime and determining that state procedural default rules took precedence. *Medellin v. Texas*, 552 U.S. 491, 496–522 (2008); *see supra* notes 271–83 and accompanying text.

<sup>541</sup> *Morse v. Frederick*, 551 U.S. 393, 422 (2007) (Alito, J., concurring).

<sup>542</sup> *McDonald v. Chicago*, 130 S. Ct. 3020 (2010).

mostly seem to indicate is that his views on civil rights are considered in light of applicability and impact rather than pure idealism. That is, when Justice Alito does author a civil rights opinion, he normally endeavors to protect citizens from being victimized by what he regards as unlawful conduct.<sup>543</sup> He has yet to author an opinion based on the moral or philosophical impropriety of a fundamental rights issue; those civil rights issues that draw his attention do so, it appears, because of their potential to avert violence and crime.

Justice Alito has written most notably in the areas of free speech and association, and also the right to bear arms. In both cases his arguments generally take a very practical approach, with an eye toward the decision's implementation. His arguments also often evidence a somewhat victim-centric perspective, similar to those seen in his criminal procedure opinions.<sup>544</sup>

### 1. The First Amendment

In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims . . . .<sup>545</sup>

#### *a. Freedom of Speech*

Justice Alito wrote the sole dissent in *Snyder v. Phelps*,<sup>546</sup> in which the Court extended First Amendment protection to the commentary of religious picketers while they had picketed near a military funeral.<sup>547</sup> The plaintiff in the original case, who had sued the picketers for intentional infliction of emotional distress, was the father of the deceased service member for whom the funeral was being held.<sup>548</sup> *Snyder*, like *Gant*,<sup>549</sup> may be one of the most telling cases of Justice Alito's career—it is certainly one of the most notable.<sup>550</sup> Justice Alito argued that the father of the deceased ought to have been allowed recovery, as he had suffered precisely the wrongs that the tort was created to recognize.<sup>551</sup> He opined that the speech was private, rather than an issue of public concern, due to the personal nature of the attacks on the deceased's character, and argued

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<sup>543</sup> See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207, 1229 (2011) (Alito, J., dissenting).

<sup>544</sup> See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 467 (2008) (Alito, J., dissenting).

<sup>545</sup> *Snyder*, 131 S. Ct. at 1220.

<sup>546</sup> *Id.* at 1222.

<sup>547</sup> *Id.*

<sup>548</sup> *Id.*

<sup>549</sup> *Arizona v. Gant*, 556 U.S. 332 (2009).

<sup>550</sup> See *Snyder*, 131 S. Ct. at 1222; see also Robert Barnes, *Alito Stands Alone on Supreme Court's First Amendment Cases*, WASH. POST (Mar. 3, 2011, 7:36 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/03/AR2011030302920.html>.

<sup>551</sup> *Snyder*, 131 S. Ct. at 1222.

that the location of the picketers (on a public street) was irrelevant.<sup>552</sup> These arguments are not as concise as some of his other disagreements with the majority, nor are they founded squarely in precedent.<sup>553</sup> Instead, what Justice Alito conveyed most clearly in his dissent was concern for the victim of what he perceives as an unjust assault: “Respondents’ outrageous conduct caused petitioner great injury, and the Court now compounds that injury by depriving petitioner of a judgment that acknowledges the wrong he suffered.”<sup>554</sup>

This is very telling in light of Justice Alito’s marked proclivity for criminal justice as well as his apparent unhappiness with numerous decisions of the Court in that area.<sup>555</sup> It is entirely possible that his strength and interest in criminal justice jurisprudence is drawn from a drive to advocate for the victims of crime, and a keen understanding of the impact crime has on individuals. In this context, his dissent here is less surprising—the picketers had committed a “brutal” crime, and a justice-driven society ought to recognize that.<sup>556</sup> The rest of the Court disagreed, emphasizing a seemingly insurmountable dichotomy of ideal versus impact that surrounds many of Justice Alito’s other opinions.<sup>557</sup>

Similarly, Justice Alito concurred in *Brown v. Entertainment Merchants Association*,<sup>558</sup> a case striking down a law that prohibited that sale of violent video games to minors,<sup>559</sup> but nonetheless wrote separately to voice his concerns about violent video games from an impact-based perspective.<sup>560</sup> Having first advocated for judicial avoidance and the right to free speech,<sup>561</sup> Justice Alito expressed concern about the effect of violence on minors, and the necessity for legislation.<sup>562</sup> He noted that the future holds “games that allow troubled teens to experience in an extraordinarily personal and vivid way what it would be like to carry out unspeakable acts of violence.”<sup>563</sup> He then went on to indicate that further, more precise legislation may be constitutional

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<sup>552</sup> *Id.* at 1227.

<sup>553</sup> *Id.*

<sup>554</sup> *Id.* at 1229.

<sup>555</sup> *See, e.g.*, *Montejo v. Louisiana*, 129 S. Ct. 2079, 2092–94 (2009) (Alito, J., dissenting).

<sup>556</sup> *Snyder*, 131 S. Ct. at 1229 (Alito, J., dissenting).

<sup>557</sup> *Id.* at 1220 (majority opinion). Whereby Justice Alito argues for a practical, impact-based solution against arguments often grounded more in ideal. *See, e.g., id.* at 1229 (Alito, J., dissenting).

<sup>558</sup> 131 S. Ct. 2729 (2011).

<sup>559</sup> *Id.* at 2741–42.

<sup>560</sup> *Id.* at 2742–46 (Alito, J., concurring).

<sup>561</sup> First, Justice Alito concurred that the statute was in violation of the First Amendment, stating that “violent video games” were defined with impermissible and dispositive vagueness (thus tending to favor censorship). *Id.* at 2742–43. Second, Justice Alito advocated avoidance, holding that speculation regarding whether a more specific statute regarding video games would survive strict scrutiny on the basis of content was unnecessary. *Id.* at 2746.

<sup>562</sup> *Id.* at 2750.

<sup>563</sup> *Id.*

and reasonable, thus integrating a case-by-case approach with a concern for the well-being of minors.<sup>564</sup>

This precisely mirrors the priorities evidenced elsewhere in Supreme Court jurisprudence by the Chief Justice and might be successfully applied as a method of analysis when approaching a First Amendment case from Justice Roberts's perspective.<sup>565</sup> However, a case-by-case approach is relatively unusual for Justice Alito, who favors rules of general applicability—most especially in the context of enforcement concerns. It may be that he finds the danger of imminent harm to minors to be an exception to this rule. Some support for this may be found in *Morse v. Frederick*, where Justice Alito wrote a concurrence to indicate that he viewed the holding as an extremely limited one,<sup>566</sup> warranted in this case due to the threat of illegal drug use, but not to be interpreted as a general rule that allowed public schools to regulate the speech of students.<sup>567</sup>

*b. Freedom of Religion and Assembly*

Justice Alito wrote a lengthy and involved dissent to *Christian Legal Society of the University of California, Hastings College of the Law v. Martinez*, a 2010 case in which the majority held a law school's refusal to recognize a local chapter of the Christian Legal Society, which denied admission to homosexual applicants, to be constitutionally permissible.<sup>568</sup> He argued that the "university must maintain strict viewpoint neutrality . . . [which] extends to the expression of religious viewpoints," and that any restriction on student speech due to the speaker's religious viewpoint violated substantial Court precedent to this effect.<sup>569</sup> Overall, he found the school's policy requirements for student organizations (as well as the Court's affirmation of that policy) to be contradictory and nonsensical: "In sum, Hastings' accept-all-comers policy is not reasonable in light of the stipulated purpose of the RSO forum: to promote a diversity of viewpoints 'among'—not within—'registered student organizations.'"<sup>570</sup>

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<sup>564</sup> *Id.* at 2751.

<sup>565</sup> See generally *Brown*, 131 S. Ct. 2729; *NAMUDNO v. Holder*, 129 S. Ct. 2504 (2009).

<sup>566</sup> That a public school could restrict a student's speech advocating illegal drug use, because it presented a threat to public safety. *Morse v. Frederick*, 551 U.S. 393, 422 (2007) (Alito, J., concurring).

<sup>567</sup> He was particularly adamant that the holding not be expanded to include regulation of speech on issues of political importance, including legalization of medical marijuana. *Id.*

<sup>568</sup> *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2994–95 (2010). Justice Alito felt that the Court's argument, which rested on the basis of the reasonableness of the school's non-discrimination policy, violated the tenets of First Amendment viewpoint neutrality. *Id.* at 3001 (Alito, J., dissenting).

<sup>569</sup> *Id.* at 3009. He also felt that the conduct here was objectionable as discriminatory because the same policy did not require other student groups to accept members who held contradictory beliefs to the organization. *Id.* at 3003.

<sup>570</sup> *Id.* at 3016.



Justice Alito's dissent in *Christian Legal* primarily shows concern for the manner in which the school had dealt with the organization.<sup>571</sup> He found the school's behavior to be discriminatory in light of how it treated other organizations, and motivated improperly by the religious viewpoints of the society.<sup>572</sup> He seemed to feel that the school's response to the allegations was a contradictory rush to justify regulation that was constitutionally impermissible, and that the Court's judgment was fundamentally inapplicable in practice.<sup>573</sup> This is consistent with the guiding principles that can be seen in much of his jurisprudence: concern for those impacted by illegal actions, concern about the practical implementation of any given ruling, and strict adherence to precedent.<sup>574</sup>

## 2. The Second Amendment

Self-defense is a basic right, recognized by many legal systems from ancient times to the present day.<sup>575</sup>

Justice Alito authored the majority opinion in *McDonald v. Chicago*,<sup>576</sup> the landmark 2010 opinion that incorporated the Second Amendment right to bear arms as enforceable against the states under the due process clause of the Fourteenth Amendment.<sup>577</sup> Two years prior, the Court had determined that the Second Amendment protects a federal right to possess handguns in *District of Columbia v. Heller*.<sup>578</sup> Nonetheless, the city of Chicago had subsequently chosen to outlaw handguns in the interests of public safety, arguing that the Second Amendment was not applicable to the states.<sup>579</sup> This case was challenged before the Court in *McDonald*, after homicide and criminal gun violence actually rose following the anti-handgun law, and several

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<sup>571</sup> *Id.* at 3000–12.

<sup>572</sup> *Id.* at 3003.

<sup>573</sup> *Id.* at 3003–06.

<sup>574</sup> Out of similar concern for practicality, Justice Alito authored a separate concurrence in a recent case which upheld the application of a so-called “ministerial exception” to a “called teacher” who had ministerial training and approval as well as job-specific training. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 711, 714 (2012) (Alito, J., concurring). Justice Alito wanted to be explicit in his understanding that the holding, which insulated certain religious institutions from discrimination complaints when they dismissed an employee for reasons based on religious tenets, was applicable to more than just those labeled “ministers.” *Id.* at 711. He wanted to ensure that the exception would be applicable to those who were not labeled minister or who were members of faiths that do not utilize the term, but who performed similar functions or were similarly entrusted by their institutions. *Id.* That is, he advocated a functionally based approach as opposed to a strict “ministers-only” interpretation, so as to ensure that the exception properly protected all religious institutions equally. *Id.*

<sup>575</sup> *McDonald v. Chicago*, 130 S. Ct. 3020, 3026 (2010).

<sup>576</sup> *Id.* at 3020.

<sup>577</sup> *Id.* at 3026.

<sup>578</sup> *Id.* (citing *District of Columbia v. Heller*, 554 U.S. 570 (2008)).

<sup>579</sup> *Id.* at 3026–27.

citizens wished to exercise their constitutional right to bear handguns in their homes as a means of self-defense.<sup>580</sup> Justice Alito, for the majority, held that the Second Amendment was applicable to the states through the Due Process Clause of the Fourteenth Amendment, and thus that the law was unconstitutional.<sup>581</sup>

The basis for Justice Alito's argument was, unsurprisingly, the right to self-defense.<sup>582</sup> Notably, he found the violence rate in Chicago to be persuasive.<sup>583</sup> Further, in order to determine that this right was a fundamental one which warranted incorporation under the Fourteenth Amendment, he cited numerous examples of violence throughout American history which justified the founders' intent that each individual be able to protect himself from lawlessness.<sup>584</sup>

Additionally, Justice Alito eschewed any suggestion that the Second Amendment be subject to unique, "second-class" treatment for public safety or any other reasons.<sup>585</sup> Here, he referred to the issue as one of constitutional liberties and fundamental civil rights; however, the majority of his reasoning and the holding are heavily reliant on the argument for self-defense.<sup>586</sup> From Justice Alito's perspective, the issue seemed to be the impact of crime and violence on victims, and the very reasonable constitutional remedy intended to address this issue.<sup>587</sup> That is, his was an objective, impact-based historical analysis which sought to justify the rationale for the right, rather than a more idealistic approach that focused on the right's constitutional status and consequent moral and legal relevance.<sup>588</sup> Because of this, it seems clear that Justice Alito may be depended on, within reason, to protect the right to bear arms so long as it has any relevance to self-defense and violent crime.

#### *D. Conclusion*

Justice Alito can be depended on to primarily draw his conclusions on the basis of three key factors:

1. Does the decision comport with precedent (*stare decisis*)?<sup>589</sup>
2. Is the decision a clear standard that is easily applied as a rule of general applicability?<sup>590</sup>
3. Is the decision necessary, and does it comport with principles of state sovereignty and separation of powers?<sup>591</sup>

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<sup>580</sup> *Id.*

<sup>581</sup> *Id.* at 3036–50.

<sup>582</sup> *Id.* at 3036–38.

<sup>583</sup> *Id.* at 3026.

<sup>584</sup> *Id.* at 3036–42.

<sup>585</sup> *Id.* at 3044.

<sup>586</sup> *Id.* at 3036, 3050.

<sup>587</sup> *See id.* at 3036–50.

<sup>588</sup> *Id.*

<sup>589</sup> *See supra* Part V.A.1.

<sup>590</sup> *See supra* Part V.A.4.

<sup>591</sup> *See supra* Part V.B.

Should a decision meet these criteria first, then he will take into account other criteria as well as the individual merits. However, many decisions by the Court fail to meet his standards in at least one of these three manners, which then become the common denominator for his frequent dissents, especially in the area of criminal justice. He tends toward a pro-victim and pro-law enforcement perspective, especially in criminal law, so his analysis is often supported by consideration of the impact any decision may have on potential victims or society at large.

The majority of Justice Alito's Supreme Court jurisprudence evidences a thoughtful and deliberate man who relies heavily on precedent and textual analysis. Justice Alito could be characterized as resistant to alteration in precedent, most especially when such a decision seeks to alter an established process that he feels is practically functional and constitutionally acceptable. He is suspicious of arguments that seek to reinterpret the plain text of the Constitution or precedent, and most frequently objects to such interpretations on the grounds of practicality. It might be said that he is opposed to fixing well-reasoned judicial precedent that is not broken, especially when it results in practically effective law enforcement. His primary principles of jurisprudence seem to advocate first, practical, uniform implementation, and second, an impact-based consideration of improper conduct in relation to those affected.

Justice Alito is a fierce proponent of criminal justice, which is in keeping with these principles. He advocates strongly for clear guidance from the Court, which can be easily understood and put into practice by law enforcement. His opinions often consider the impact of a given ruling on innocent members of society. Several of his opinions mention graphic descriptions of violence and crime, which weigh heavily in favor of his impact-based analysis, and seem to somewhat justify his extremely practical concerns about preventing, regulating, and punishing crime.

It might be asserted that Justice Alito errs too far on the side of law enforcement, or weighs too heavily the impact on the victim of the issues before him.<sup>592</sup> It cannot be denied that his strength and his expertise lie in the area of criminal justice, and he is genuinely passionate about deciding these issues correctly. But although his opinions become significantly more lively when he speaks of criminal justice, sometimes perhaps even edging toward indecorum, he rarely abandons a firm grounding in the law. His firm opinions and beliefs are always reliably based in the very principles of *stare decisis* and textual interpretation that guide his innumerable opinions on issues of procedure or transactional law. His judicial philosophy seeks to benefit the victims of crime and society as a whole. He does so via the same methodology that has produced consistent and reliable outcomes in a large and accomplished body of work. His faithful adherence to the same method of careful analysis ensures that a case's outcome is always the result of a considered and principled jurisprudential philosophy.

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<sup>592</sup> See, e.g., Clay Calvert, *Justice Samuel A. Alito's Lonely War Against Abhorrent, Low-Value Expression: A Malleable First Amendment Philosophy Privileging Subjective Notions of Morality and Merit*, 40 HOFSTRA L. REV. 115 (2011).

Overall, Justice Alito clearly believes in the law, and he believes in the beneficial effect of those laws in preventing the harmful impact of criminal behavior. His opinions are habitually well-reasoned and justified with the law, but what is more impressive is his commitment to the real world implementation of rulings that will have a beneficial impact on the protection of the public from crime or imposition on their rights. Justice Alito stands for considered practicality, a perspective that sharply distinguishes him from more idealistic, policy-driven members of the Court.

#### CONCLUSION

Chief Justice Roberts and Justice Alito have served on the Supreme Court for ninety-one and eighty-seven months respectively.<sup>593</sup> While these are relatively brief tenures in a lifetime of service for most justices, there is a sufficient body of work to assess whether President Bush's expectations have been realized and to anticipate how these two men may vote on significant cases in the future.

Judge John Roberts was recommended for appointment based on an extraordinary intellect and an unassuming personality that made us comfortable he would not abuse power. President Bush selected Judge Roberts to be Chief because he sensed someone with the leadership skills necessary to lead the Court and the judiciary, who would look out for the Constitution, and who would protect the Court as an institution.

Judge Samuel Alito was recommended for appointment based on an unmatched record of consistent excellence. His dedication to law and to the United States was evident by his many years of public service. We believed both men had the courage and discipline to apply a consistent philosophy of judging over the course of a long judicial career.

On balance, Chief Justice Roberts and Justice Alito have "delivered as advertised." The Chief Justice has decided cases as an impartial umpire, exercising restraint and respect for the electoral branches of government. Justice Alito has continued his public service with distinction and consistency, adhering to a core set of principles. There have been few instances where these Justices have taken positions inconsistent with their usual pattern of judging. Over the course of a long career and hundreds of opinions, it is to be expected that even the most ardent fan of Roberts and Alito will be disappointed by a decision. However, it is my prediction that history will judge the appointment of these two men to the Supreme Court as one of the most shining and enduring legacies of President George W. Bush.

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<sup>593</sup> *Biographies of Current Justices*, *supra* note 12.