

2014

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Recommended Citation

Brennan-Marquez, Kiel (2014) "The Philosophy and Jurisprudence of Chief Justice Roberts," *Utah Law Review*: Vol. 2014 : No. 1 , Article 4.

Available at: <http://dc.law.utah.edu/ulr/vol2014/iss1/4>

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THE PHILOSOPHY AND JURISPRUDENCE OF CHIEF JUSTICE ROBERTS

Kiel Brennan-Marquez*

Abstract

*A thicket of commentary has blossomed around the figure of Chief Justice Roberts. The bulk of it, however, has either focused exclusively on his role in the 2011 term or has lumped him in uncritically with the Court's conservative wing. In response, this Article takes a wider view of his tenure, arguing that Chief Justice Roberts is best understood as an idealist, a true believer in the rule of law, with a special sensitivity toward issues of constitutional structure. In the first Part of the Article, I explore Chief Justice Roberts's penchant for infusing his opinions with "teaching moments"—a tendency certainly on display in *National Federation of Independent Business v. Sebelius*¹ (NFIB), but discernable in many other opinions as well. In the second Part, I revisit Chief Justice Roberts's much-maligned umpire metaphor. Commentators have unfairly caricatured the metaphor as right-wing wordplay. I argue, by contrast, that the metaphor conveys the same constitutional philosophy as his teaching moments: one in which law is dialectically structured, simultaneously limited and limiting, and it is precisely because of law's limitations that judges stand on legitimate ground when setting the limits of state action. With this formal picture of judging established, the final Part asks how Chief Justice Roberts's theory of constitutional judging maps onto his actual jurisprudence. Although Chief Justice Roberts is certainly a judicial conservative—and emphatically not a swing vote—I argue that he does have a notable "federalist streak." NFIB is certainly one example of this, but a better example is *Arizona v. United States*² in which Chief Justice Roberts banded with the Court's liberals to outline an expansive vision of federal immigration power. I close by highlighting a few other instances of Chief Justice Roberts's "federalist streak" and by suggesting that they flow from his sensitivity toward constitutional structure, as outlined in the first two Parts.*

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¹ 132 S. Ct. 2566 (2012).

² 132 S. Ct. 2492 (2012).

*Law has its limits.*³

INTRODUCTION

What a difference a year can make. In June 2012, with *NFIB* fresh off the press, commentary began to unfurl around Chief Justice Roberts. Some called him a traitor,⁴ others, a pragmatist.⁵ *Perhaps*—we thought to ourselves—*this is not the conservative we thought we knew.*⁶ But the tenor of this thought was cautious, bemused. For the true motivations of Chief Justice Roberts—the Court’s second youngest Justice, but also its elusive leader—bore the transparency of a sphinx’s grin.

Flash forward to June 2013: at the close of a term that will surely be tallied among the most historic of his tenure, discussion of Chief Justice Roberts once again began to crackle. But there was no such mystique as the year before.⁷ Gay

³ *CSX Transp. Inc. v. McBride*, 131 S. Ct. 2630, 2652 (2011) (Roberts, C.J., dissenting).

⁴ *See, e.g.*, John Yoo, *Chief Justice Roberts and His Apologists*, WALL ST. J., June 30, 2012, at A15 (calling Chief Justice Roberts an unfit model for whom a Republican President should appoint); Clint Bolick, *The Supreme Court Stakes in 2012*, WALL ST. J. (July 9, 2012, 7:48 PM), <http://online.wsj.com/news/articles/SB10001424052702304141204577509250108648814> (arguing that Chief Justice Roberts is not a “solid conservative” and that he might even be the new “swing justice”).

⁵ *See, e.g.*, Linda Greenhouse, *Is It The Roberts Court?*, in *THE HEALTHCARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS* 186, 188–89 (Nathaniel Persily et al. eds., 2013) (suggesting that Chief Justice Roberts was partly motivated in *NFIB* by the practical exigencies of his role as Chief, rather than Associate, Justice); Wilson Huhn, *Realism Over Formalism and the Presumption of Constitutionality: Chief Justice Roberts’ Opinion Upholding the Individual Mandate*, 46 AKRON L. REV. 117 (2013) (presenting the *NFIB* opinion as a “realist” concession to congressional power and to political reality). *Cf.* Erwin Chemerinsky, *It’s Now the Roberts Court*, 15 GREEN BAG 2D 389 (2012) (arguing that Chief Justice Roberts’s opinion in *NFIB* manifested pragmatism in spite of his generally ideological commitments).

⁶ Some have argued that a new era of constitutional law—the “Roberts Court”—has dawned. *See generally, e.g.*, Chemerinsky, *supra* note 5. *Cf.* Adam Liptak, *Roberts Shows Deft Hand as Swing Vote on Health Care*, N.Y. TIMES, June 28, 2012, at A1 (suggesting that *NFIB* underscored the power of “the Chief Justice’s leadership”). Others, maintaining that the Chief Justice’s words echoed something of Chief Justice Marshall’s legendary finesse from *Marbury v. Madison*, have predicted that it will be his background Commerce Clause holding, not his vindication of Affordable Care Act on other grounds, that would ultimately define his—and the case’s—legacy. *See, e.g.*, Randy Barnett, *We Lost on Health Care. But the Constitution Won*, WASH. POST, July 1, 2012, at B1 (calling *NFIB* a victory from the vantage point of constitutional structure).

⁷ *Compare* Linda Greenhouse, *The Mystery of John Roberts*, N.Y. TIMES, (July 11, 2012, 9:00 PM), <http://opinionator.blogs.nytimes.com/2012/07/11/the-mystery-of-john-roberts/> [hereinafter *Mystery*], with Linda Greenhouse, *The Real John Roberts Emerges*, N.Y. TIMES, June 30, 2013, at SR1.

marriage,⁸ affirmative action,⁹ voting rights:¹⁰ by all accounts, the mask was off. And so we arrived back where we stood before the *NFIB* rigmarole, when two digestible snapshots of the Chief Justice were on offer, their silhouettes perfectly clear. Chief Justice Roberts: the straight-laced conservative.¹¹ And Chief Justice Roberts: the backroom operator, ever so sly.¹²

⁸ See *United States v. Windsor*, 133 S. Ct. 2675, 2696–97 (2013) (Roberts, C.J., dissenting) (arguing that the Defense of Marriage Act should have been held constitutional under rational basis and that, in any event, the Court lacked jurisdiction to hear the certiorari appeal).

⁹ Although the *Fisher* Court did not end up issuing much in the way of an opinion on affirmative action—opting, instead, to kick the issue back to the Fifth Circuit, see *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421–22 (2013)—the *Fisher* arguments nonetheless stand as a testament to how fervently the Chief Justice frowns upon race-conscious laws. Usually a model of composure during oral argument, he joined Justice Scalia in essentially sandbagging Greg Garre’s argument for the University of Texas with irrelevant and elliptical questions. See Transcript of Oral Argument at 32–40, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) (“Counsel, before—I need to figure out exactly what these numbers mean. Should someone who is one-quarter Hispanic check the Hispanic box or some different box?”).

¹⁰ See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (Chief Justice Roberts, writing for the Court, holding section 4 of the Voting Rights Act unconstitutional).

¹¹ At a descriptive level, the attempt to lump Chief Justice Roberts in with the Court’s other conservatives finds support on both sides of the aisle. For an example of conservative accounts that group Chief Justice Roberts in with the rest of the judicial right, see Douglas W. Kmiec, *Overview of the Term: The Rule of Law and Roberts’s Revolution of Restraint*, 34 PEPP. L. REV. 495, 496 (2007) (arguing that the conservative wing of the Roberts Court is defined by “humility, unanimity, and fidelity to the written law”); see also Henry T. Scott, *Burkean Minimalism and the Roberts Court’s Docket*, 6 GEO. J.L. & PUB. POL’Y 753, 754, 760 (2008) (arguing that the conservative wing of the Court has demonstrated an interest in judicial minimalism with respect to cases involving “business interests”).

For examples of liberal commentators who view Chief Justice Roberts in a similar light (but, as expected, take a very different *normative* view), see generally Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947 (2008) (discussing the four conservative Justices as a group, noting the themes of ideological harmony among them, and picking out Justice Kennedy as the Court’s main distinctive voice); Steven L. Winter, *John Roberts’s Formalist Nightmare*, 63 U. MIAMI L. REV. 549, 555 (2009) (describing the Chief Justice as a “formalist” and using *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), to argue that Chief Justice Roberts’s “formalism” has the effect of “deform[ing] his critical capacities”).

¹² See generally Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertance: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779 (2012) (exploring the ways in which the Roberts Court, and especially the Chief Justice himself, has used an intricate web of “invitations,” and other signaling devices, to tee up future litigations); see also JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* 295 (2012) (arguing that Chief Justice Roberts is driven, first and foremost, by an agenda for which he is willing to steer outcomes behind the scenes). On the whole, Toobin is very comfortable applying monikers customarily associated with bureaucrats and politicians to the Chief Justice (for example, referring to his opinion in

The trouble with this story—or, I should say, these many stories—is how little attention they have paid to the actual record. Yes, Chief Justice Roberts is unquestionably a judicial conservative. And yes, his institutional hand is deft beyond dispute. But we have allowed the most prominent trees, ravishing as they are, to distract us from the larger forest. This Article responds by taking the opposite tack. In what follows, I comb back through eight terms’ worth of Chief Justice Roberts’s handiwork in search of broader jurisprudential trends.

This effort yields a rather different portrait of the Chief Justice than previous commentary has managed. It is the portrait of an idealist, a true believer in the rule of law, with a constitutional philosophy defined by overlapping, mutually constitutive visions of constraint: on the one hand, the way judges constrain political branches by enforcing constitutional limits; on the other, the way that law, as a “system of rules,”¹³ constrains the power of judges. In Chief Justice Roberts’s view, I argue, the judiciary stands on legitimate ground to constrain other state actors only because its enterprise—law—is in the first place constrained. It is because the rule of law is limited that it can remain the rule of law. This constitutional philosophy is certainly not new.¹⁴ Nor is it necessarily correct. My aim is not to defend Chief Justice Roberts’s constitutional philosophy on the merits. My aim is instead to suggest that his philosophy differs, in both formal composition and practical implication, from the caricatures that have emerged thus far.

The Article is tripartite. Part I explores Chief Justice Roberts’s penchant for infusing his opinions with “teaching moments.” These are divisible into two strands. One strand emphasizes the structural principles that empower the judiciary to constrain the latitude of political branches. The second strand emphasizes the boundaries that separate law from the larger normative world, thereby constraining the scope of the judicial function. In tandem, these lessons sketch a nuanced, dialectical theory of judging, one in which the judiciary, as guardian of law’s rule, is at once an agent and an object of constraint.

Part II suggests that this conception of judging maps elegantly on to Chief Justice Roberts’s widely derided umpire metaphor—an image that commentators

NFIB as “strategic genius”). *Id.* at 295; see also Jeffrey Toobin, *Money Unlimited*, THE NEW YORKER, May 21, 2012, at 36 (arguing that the Chief Justice engineered the rehearing of *Citizens United*).

¹³ See *Dolan v. United States*, 130 S. Ct. 2533, 2549 (2010) (noting that adverse consequences are the “unavoidable result of having a system of rules”).

¹⁴ In fact, it reaches back to the very origins of our constitutional system, to Chief Justice Marshall and *Marbury v. Madison*, two of Chief Justice Roberts’s favorite sources of inspiration. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1807) (describing the American constitutional system as “a government of laws, not of men”); see also Jeffrey Rosen, *Roberts’s Rules*, THE ATLANTIC (Jan. 1, 2007), http://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/?single_page=true (recounting an interview comparing Chief Justice Roberts to Chief Justice Marshall and recounting an interview in which Chief Justice Roberts spoke at length about his reverence for Chief Justice Marshall).

have misconstrued, in my view, by roughly 180 degrees. I argue that dominant interpretations of the metaphor—understanding it to codify an anemic, reactionary view of judging¹⁵—pluck Chief Justice Roberts’s words out of context and, in doing so, fail to appreciate the full arc of his remarks before the Senate Judicial Committee.¹⁶ In fact, Chief Justice Roberts conjured the umpire image to tell a larger story about the hallowed role that judges play in safeguarding the rule of law. The resultant theory of judging is dialectical in the same manner suggested by his teaching lessons: although judicial power is constrained—the judge, as umpire, is emphatically not a player—it also acts *to* constrain. And for Chief Justice Roberts, the latter aspect of judging predominates over the former. His theory is one of judicial supremacy, not judicial minimization.

With these snapshots in tow, Part III turns to the Chief Justice’s jurisprudence, exploring what difference his abstract sensitivity to the boundaries and structure of law makes in practice. After setting out a number of Chief Justice Roberts’s foundationally conservative viewpoints, I close by highlighting two aspects of his jurisprudence that, in my view, best reflect his constitutional idealism. The first is that he has a notable, and notably intricate, “federalist streak.” His *NFIB* opinion is certainly one example. A better example, however, is *Arizona v. United States*, which was largely overshadowed by *NFIB*, but whose result is in many ways more remarkable. In *Arizona*, the Chief Justice forged a coalition with the Court’s liberals to outline an expansive, principled vision of federal dominion over immigration. This decision harmonizes, I argue, with past instances when Chief Justice Roberts has swerved to the defense of federal power, to the lasting dismay of his conservative colleagues. The second aspect of Chief Justice Roberts’s jurisprudence worth noting is an attribute whose presence is as enlivening as its rarity is grim: approaching difficult cases as a lawyer, not a partisan. In cases that present extreme or idiosyncratic facts, Chief Justice Roberts

¹⁵ See Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1050–55 (2006); see also Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709, 1710–11 (2007); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 702–12 (2007); Vaughn R. Walker, *Moving the Strike Zone: How Judges Sometimes Make Law*, 2012 U. ILL. L. REV. 1207, 1210–11 (2012); Kim M. Wardlaw, *Umpires, Empathy, and Activism: Lessons from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629, 1644 (2010); Aaron S. J. Zelinsky, *The Justice as Commissioner: Bunching the Judge-Umpire Analogy*, 119 YALE L. J. ONLINE 113, 114–17 (2010). But see Michael P. Allen, *A Limited Defense of (at Least Some of) the Umpire Analogy*, 32 SEATTLE U. L. REV. 525, 527 (2009); William H. Pryor Jr., *The Perspective of a Junior Circuit Judge on Judicial Modesty*, 60 FLA. L. REV. 1007, 1009–14 (2008) (praising the umpire metaphor as a defense of judicial restraint).

¹⁶ Interestingly, Charles Fried has recently published an essay along similar lines, attempting to recontextualize the umpire metaphor. In my view, however, his recontextualization focuses on the wrong part of the context. See Charles Fried, *Balls and Strikes*, 61 EMORY L. REV. 641, 642 (putting Chief Justice Roberts’s well-known quip about “calling balls and strikes” in conversation with his commitment to approaching cases without an agenda).

is willing to break rank from the conservative bloc, inspiring him to agree, on narrow grounds, with outcomes that run counter to his general commitments.

In one sense, it might seem strange—given the scholarly forum—to take seriously how Chief Justice Roberts *represents* his approach to judging (in the first two Parts), quite apart from how he actually judges (in the third). The former might be described, charitably, as mere rhetoric, and less charitably, as eloquent lies. But my effort here is deliberate, for the Article’s ambitions are as much appreciative as they are analytical. In fact, I am skeptical that the two can be kept distinct. It is only by adopting an internal viewpoint, which requires some measure of appreciation, that Chief Justice Roberts’s orientation toward his own post can be properly grasped. In this sense, my hope is that the two halves of the Article, though seemingly disconnected, will, over its full course, dissolve into one.

I. THE PHILOSOPHY OF CHIEF JUSTICE ROBERTS

The Chief Justice has a penchant for suffusing his opinions with two distinct, but complementary, teaching moments. Both educate the reader about the shape of our legal order. But they differ in their approach to that enterprise. The first batch of lessons traces law’s inner striations. They help acquaint the reader with the complicated distributions of power and authority that comprise our constitutional system. Chief Justice Roberts’s exhortation of federal structure from the *NFIB* opinion hails from this category. But so do some of Roberts’s lesser-known opinions. In what follows, I profile three examples (in addition to *NFIB*): two of his opinions for the Court (*Stern v. Marshall*¹⁷ and *Free Enterprise Fund v. Public Co. Accounting Board*¹⁸) and one concurrence (in *Citizens United v. FEC*¹⁹).

The second batch of lessons explores the external boundaries that separate law from the rest of the normative world. Hallmark examples include *Snyder v. Phelps*,²⁰ *Miller v. Alabama*,²¹ and *Boumediene v. Bush*,²² although these are plucked from an innumerable many. Chief Justice Roberts, it turns out, is very fond of punctuating his opinions with meditations about law’s limitations. These lessons take a more cautionary form. The proposition they enunciate—that even when law works perfectly, there are many things it *cannot* accomplish, many tradeoffs it cannot overcome—is not always an easy thing to countenance. But for the sake of understanding our constitutional world, Chief Justice Roberts seems to say, it must be confronted.

What both sets of lessons have in common is their formal character. The lessons are not unrelated, of course, to the substantive conclusions that Chief Justice Roberts draws in each case. But neither do they determine those conclusions as a matter of law or logic. In this sense, the lessons occupy an

¹⁷ 131 S. Ct. 2594 (2011).

¹⁸ 130 S. Ct. 3138 (2010).

¹⁹ 558 U.S. 310 (2010).

²⁰ 131 S. Ct. 1207 (2011).

²¹ 132 S. Ct. 2455 (2012).

²² 553 U.S. 723 (2008).

unusual gray space between holding and dictum: they communicate something enduring about Chief Justice Roberts's conception of judging, and they underscore his broader constitutional sensibilities.²³ Even if they are marginal to the particular holdings in each case, they are anything *but* marginal to the deeper jurisprudential orientation that informs those holdings. And in this respect, the lessons cast light on Chief Justice Roberts's broader propensities as a jurist.

A. *Law's Inner Striations*

"In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder."²⁴ So begins the Chief Justice's exhortation of constitutional structure in *NFIB*. The opinion continues this way, outlining elementary distinctions, for several pages.²⁵ Early on, we learn that the "Federal Government is acknowledged by all to be one of enumerated powers."²⁶ And in the next sentence, the Chief Justice explains what "enumeration" means: "[R]ather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers. Congress may, for example, 'coin Money,' 'establish Post Offices,' and 'raise and support Armies.' The enumeration of powers is also a limitation of powers, because '[t]he enumeration presupposes something not enumerated.'"²⁷

Next, we find out that the same constraint—enumeration—does not apply to state governments "because the Constitution is not the source of their power."²⁸ Instead, state governments are left in charge, by default, of the myriad functions that make up everyday governance, such as "punishing street crime, running public schools, and zoning property for development," known collectively as "the police power."²⁹ Having distinguished the source and substance of federal power from that of state power, the Chief Justice frames the legal question: Did the Patient Protection and Affordable Care Act (PPACA) overextend Congress's constitutional authority? And he expounds on what role the judiciary ought to play in resolving that question. "Members of [the Supreme] Court," Chief Justice Roberts writes, "are vested with the authority to interpret the law;" but they "possess neither the expertise nor the prerogative to make policy judgments," which have for that reason been "entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them."³⁰ At the same time,

²³ See *infra* Part III.

²⁴ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577 (2012).

²⁵ *Id.* at 2577–80.

²⁶ *Id.* (internal citations omitted).

²⁷ *Id.* (quoting U.S. CONST. art. I, § 8, cls. 5, 7, 12; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824)).

²⁸ *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2578.

²⁹ *Id.* (internal quotation marks omitted).

³⁰ *Id.* at 2579.

this observation—which a theorist might call “countermajoritarian,”³¹ but which Chief Justice Roberts limns with simpler language—in no way attenuates the Court’s power to enforce “the limits on federal power by striking down acts of Congress that transgress those limits.”³² As to that role, there “can be no question.”³³ It is one the Court must play; it cannot be “abdicate[d].”³⁴ With that, Chief Justice Roberts moves on to the substantive analysis, though not before admonishing the reader to keep in mind “the background of these basic principles.”³⁵

To whom is this lecture—pitched at the level of a “schoolchild”³⁶—aimed? Not advocates, at least not in any straightforward sense. I cannot believe that Chief Justice Roberts thinks any lawyer, however in need of tuning on the finer points of constitutional doctrine, would find this explanation of federal and state power enlightening. By the same token, it seems equally unlikely that judges are his intended audience. They, too, know at least this much about constitutional structure. Perhaps, then, the point is to speak directly to the “public,” either in the sense of the present-day public—Chief Justice Roberts had sound reason to believe that laypeople would be likely to read the *NFIB* opinion—or in the sense of a future public, poised to learn from constitutional experience. Either way, the idea would be some species of “democratic constitutionalism” or “demosprudence”: an attempt by the Chief Justice to engage directly with the people, in a less mediated fashion than usual.³⁷

To some extent, certainly. But even if this is Chief Justice Roberts’s purpose, it does not fully explain his specific choice of subject matter and exposition. There are many stories to be told about our constitutional world. That Chief Justice Roberts chose to emphasize the structural underpinnings of law making, and the limits those structures impose, suggests that he identifies something profound and everlasting in these themes. Thus, even if from one perspective, we know that the audience of Chief Justice Roberts’s civics lesson in *NFIB* was the public, from another perspective, the lesson is also aimed to no audience in particular and,

³¹ See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16–23 (1962). For a helpful overview of dominant responses to Bickel’s “countermajoritarian challenge,” see JED RUBENFELD, *FREEDOM AND TIME* 10–16, 51–52, 66–73, 168 (2001).

³² *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2579–80.

³³ *Id.* at 2579.

³⁴ *Id.*

³⁵ *Id.* at 2580.

³⁶ See *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (“As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.”).

³⁷ See Lani Guinier, *Foreward: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 15–16 (2008) (coining the term “demosprudence” to refer to the style and rhetoric that dissenting Justices often employ to foment social and political mobilization); see also Laura K. Ray, *The Style of a Skeptic: The Opinions of Chief Justice Roberts*, 83 IND. L.J. 997 (2008) (analyzing Chief Justice Roberts’s opinions on the D.C. Circuit to argue that he writes with popular engagement in mind).

simultaneously, to every possible audience. It is a timeless lesson, applicable to every constitutional case, even when the interaction of state and federal power, as such, is not the main site of dispute. And it is also a highly formal lesson, one that does not *resolve* the question of where the PPACA stands so much as it illuminates the question's contours. To accede to the Chief Justice's view of state and federal power, however uncontroversial it may seem, is to recognize the parameters of our constitutional system. His words remind us that Congress's authority is not unbounded; that even in a doctrinal setting which has provided for major expansions of federal power over time—including the regulation of wheat grown in one's own backyard—there are still limits on what can be done.³⁸

These limits are widely “known,” of course, in the sense that propositionally, every constitutional lawyer and judge (and probably many members of the public) would agree they exist. But in another sense, it is precisely *because* they are known that it is easy, as with all essential truths, to disregard them. In addition to his democratic-constitutionalist impulse, then, the Chief Justice is also motivated by a *fundamentalist* spirit. His words call forth basic tenets. They remind the reader that behind the doctrinal complexity and factual messiness, constitutional law exhibits a basic and enduring architecture. Again, this architecture is not necessarily novel. But the reminder of its existence can nonetheless be profound.

A similar dynamic emerged in *Stern v. Marshall*,³⁹ a 2011 case about the power of bankruptcy judges to issue final judgments about common law tort claims arising out of the underlying bankruptcy proceedings. Although bankruptcy judges are statutorily authorized to issue such judgments,⁴⁰ the Chief Justice, writing for the Court, held that they were constitutionally barred from doing so. This conclusion was based on a simple principle: for separation of powers reasons, non-Article III judges are disallowed from hearing claims that arise under state or federal law, with an exception for certain kind of “public rights” that arise “in connection with the performance of the constitutional functions of the executive or legislative departments” and whose adjudication the executive or legislative bodies may accordingly oversee.⁴¹ In *Stern*, the “public rights” exception did not apply; so the adjudication of the state tort claim was illegitimate under Article III.⁴²

³⁸ See *Wickard v. Filburn*, 317 U.S. 111, 114–15, 128–29 (1942). This holding comes back in the substance of the *NFIB* opinion as well, constituting the outer limit, analytically, of what the Commerce Clause authorizes. See 132 S. Ct. at 2588 (“*Wickard* has long been regarded as perhaps the most far reaching example of Commerce Clause authority over intrastate activity, but the Government’s theory in this case would go much further.”) (citation and internal quotation marks omitted).

³⁹ 131 S. Ct. 2594 (2011).

⁴⁰ 28 U.S.C. § 157(b)(2) (2012).

⁴¹ 131 S. Ct. at 2610 (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67–68 (1982)).

⁴² *Id.* at 2611; see also *Danforth v. Minnesota*, 552 U.S. 264, 291–311 (2008) (Roberts, C.J., dissenting) (articulating a principled defense of the dominion that Article III courts have over disputed questions of federal law).

Before arriving at this conclusion, however, the Chief Justice spends a few pages outlining the history and purpose of Article III. Its mandate is, first and foremost, one of judicial independence and integrity: it is “‘an inseparable element of the constitutional system of checks and balances’ that ‘both defines the power and protects the independence of the Judicial Branch.’”⁴³ From this commitment to judicial independence, it follows that power between the judiciary, on the one hand, and the political branches, on the other, has to be strictly collocated: each branch enjoys a unique scope of authority vis-à-vis the others.⁴⁴ At the same time, “the three branches are not hermetically sealed from one another.”⁴⁵ Adjudicating separation of powers disputes is a matter, therefore, of discerning the “basic limitations” of each branch’s authority and of determining whether those limitations have been “transgress[ed].”⁴⁶

Throughout all of this, Chief Justice Roberts makes sure to emphasize the deeper *purpose* of power separation. It is not just some constitutional Rubik’s Cube for jurist and academics to puzzle over; it is a source of individual liberty, a prophylactic against abuse.⁴⁷ For evidence to this point, Chief Justice Roberts reaches backward in time, past even the ratification history of Articles I, II, and III, to a time when “colonists had been subjected to judicial abuses at the hand of the

⁴³ *Stern*, 131 S. Ct. at 2608 (citing *N. Pipeline*, 458 U.S. at 58).

⁴⁴ *Id.* (“Under ‘the basic concept of separation of powers . . . that flow[s] from the scheme of a tripartite government’ adopted in the Constitution, ‘the judicial Power of the United States . . . can no more be shared’ with another branch than ‘the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.’” (quoting *United States v. Nixon*, 418 U.S. 683, 704 (1973))); *see also* U.S. CONST. art. III, § 1.

⁴⁵ *Stern*, 131 S. Ct. at 2609.

⁴⁶ *Id.* at 2608.

⁴⁷ A similar sentiment came through in Chief Justice Roberts’s dissent in *City of Arlington v. FCC*, 133 S. Ct. 1863, 1877–79 (2013) (Roberts, C.J., dissenting). The *Arlington* Court held that *Chevron* deference applies to the threshold question of whether the agency has jurisdiction over the relevant legal issue; in other words, the agency is entitled to reasonableness deference as to its decision about whether it has authority to decide the question before it. *Id.* at 1874–75. In Chief Justice Roberts’s view, however, this result unduly delegates to an agency what “must be decided by a court.” *Id.* at 1877. This undue delegation, moreover, is more than just an idle concern; in effect, it “leave[s] it to the agency to decide when it is in charge,” fundamentally running afoul of Article III and surrounding principles of constitutional power separation. *Id.* at 1880, 1886.

On the other side, it is clear that the Chief Justice takes very seriously the justiciability constraints that Article III imposes on the federal judiciary. The limitations on the federal judicial power, no less than its emboldenment, serve an important prophylactic function in our constitutional system. *See* *Already, LLC v. Nike*, 133 S. Ct. 721 (2013) (holding that no controversy exists, on mootness grounds, when one party has pledged a covenant never to raise the relevant legal claim); *Massachusetts v. EPA*, 549 U.S. 497, 535–49 (2007) (Roberts, C.J., dissenting) (arguing that under Article III, state officials have no standing to contest the EPA’s interpretation of the Clean Air Act); *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332 (2006) (holding that no taxpayer standing exists to contest changes to in-state tax policy to make the latter more business friendly).

Crown,” a state of affairs ascribable to the confusion of judicial and political power.⁴⁸ For Chief Justice Roberts, it was precisely this experience of abuse that inspired the Framers to adopt Article III in the first place, the goal of which was (and is) to guarantee that judges should be motivated by service to the law rather than favor to those in power.⁴⁹ It would disserve this principle, Chief Justice Roberts reasons, to allow the government to freely “confer . . . ‘judicial Power’ on entities outside Article III,” like the bankruptcy jurisdiction out of which *Stern* arose.⁵⁰ Thus, he concludes that “[w]hen a suit is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789, and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts.”⁵¹ Again, just as in *NFIB*, this lesson does not resolve the central issue in *Stern*. But it frames the case, clarifying the elementary distinction between judicial power and political power on which the controversy turns.⁵²

A third example of the Chief Justice’s pedagogical impulse came in *Citizens United v. FEC*,⁵³ the path-breaking campaign finance case from 2010. There, Chief Justice Roberts did not write for the Court, but he concurred in the judgment—and used that as a platform to mold the case’s legacy. This time around, the civics lesson is not about competing sources of constitutional power, but rather about *stare decisis* and the upheaval of precedent. The Chief Justice’s exposition closely resembles that of *NFIB*, unfolding in a similar minuet of observations—on the one hand, this; on the other hand, that. First, we learn that “[f]idelity to precedent—the

⁴⁸ *Stern*, 131 S. Ct. at 2609.

⁴⁹ *Id.* (“By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the ‘[c]lear heads . . . and honest hearts’ deemed ‘essential to good judges.’” (quoting 1 WORKS OF JAMES WILSON 363 (J. Andrews ed., 1896))).

⁵⁰ *Id.* at 2609.

⁵¹ *Id.* (internal quotation marks omitted). For a similar view about what cautionary lessons the Framers took from their common law experience—this time in the Establishment Clause setting—see *Hosanna-Tabor Evangelical v. EEOC*, 132 S. Ct. 694, 702–04 (2012). In his opinion for the Court, Chief Justice Roberts launches into an involved narrative about religious repression through many centuries of English life, since the adoption of the Magna Carta. *Id.*

⁵² The case’s larger context casts something of an ironic shadow over these issues. *Stern* is a long and tortured litigation, originating almost twenty years before this specific issue about Article III came before the Court, in connection to the infamous “Anna Nicole Smith bankruptcy,” which commenced when twenty-seven-year-old ex-Playboy model Vickie Marshall (aka Anna Nicole Smith) brought proceedings to take a share of the estate of her late husband, Howard Marshall, who married Mrs. Marshall when he was sixty-three years her senior. The juxtaposition between these background facts and the highfalutin lesson in constitutional history is striking, to say the least. For more about the Anna Nicole Smith bankruptcy, see generally *Marshall v. Marshall*, 547 U.S. 293 (2007).

⁵³ 558 U.S. 310 (2010).

policy of *stare decisis*—is vital to the proper exercise of the judicial function . . . because it promotes the evenhanded, predictable, and consistent development of legal principles, [and] fosters reliance on judicial decisions. . . . At the same time, *stare decisis* is neither an inexorable command nor a mechanical formula of adherence to the latest decision, especially in constitutional cases.”⁵⁴ Sometimes, bad precedents cry out for transformation. Many of our most cherished constitutional rulings have stemmed from the Court’s *disregard* of precedent. Were that impossible, Chief Justice Roberts plaintively reminds us, “segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants.”⁵⁵

Not surprisingly, the two principles comprising this double helix—on the one hand, the need to respect precedent, and on the other hand, the need to reform incorrect decisions—prove difficult to reconcile. To decide which to favor, Chief Justice Roberts tells us, the Court must “balance the importance of having constitutional questions *decided* against the importance of having them *decided right*,” an inquiry that every point serves one “constitutional ideal—the rule of law.”⁵⁶ In this respect, although in most cases the rule of law is best served by following precedent, in some cases, “abrogating the errant precedent . . . might better preserve the law’s coherence and curtail the precedent’s disruptive effects.”⁵⁷ Like *NFIB* and *Stern*, the lesson here is purely formal. Chief Justice Roberts’s narrative is a cautionary one, designed to cultivate appreciation for the competing interests that inform difficult decisions about when to upend precedent—not to provide a practical heuristic for navigating it. The point of the lesson, in other words, is to remind the reader that care must be taken. But it does not justify the direction in which the care, once taken, militates.⁵⁸

A fourth example is *Free Enterprise Fund v. Public Co. Accounting Oversight Board*.⁵⁹ The question presented was whether Sarbanes-Oxley encroached on the President’s Article II removal power by limiting the dismissal of Oversight Board

⁵⁴ *Id.* at 377 (Roberts, C.J., concurring) (citations and internal quotation marks omitted).

⁵⁵ *Id.* (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896)), *overruled by* *Brown v. Board of Ed.*, 347 U.S. 483 (1954); *Adkins v. Children’s Hospital of D.C.*, 261 U.S. 525 (1923), *overruled by* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Olmstead v. United States*, 277 U.S. 438 (1928), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967)).

⁵⁶ *Id.* at 377.

⁵⁷ *Id.* at 378.

⁵⁸ See generally Frank B. Cross, *Chief Justice Roberts and Precedent: A Preliminary Study*, 86 N.C. L. REV. 1251 (2008) (analyzing a wide swath of cases to argue that Chief Justice Roberts “has an apparent commitment to *stare decisis*, not in the sense that he feels tightly bound by the directions of past cases, but in the sense that he is influenced by those cases and uses them to project his own influence on future decisions”).

⁵⁹ 130 S. Ct. 3138 (2010).

members to “for-cause” actions.⁶⁰ Writing for the Court, Chief Justice Roberts held the Sarbanes-Oxley regime unconstitutional because it erected dual layers of insulation between administrative officers and the President. This ran afoul of the Take Care Clause, Chief Justice Roberts reasoned, because it would allow administrative decisions more than one degree removed from executive oversight—that is, it would not only prohibit the President from dismissing underlings, as is already the case in certain administrative contexts, but also it would prohibit the President from dismissing the officers *in charge* of dismissing underlings, thereby stripping the President of true removal power.⁶¹

The opinion begins with, and returns to, a lesson about the nature and history of removal power. The power, we learn, is an implication of two facts: first, the constitutional fact that “Article II vests ‘[t]he executive Power . . . in a President of the United States of America, who must ‘Take Care that the Laws be faithfully executed’”;⁶² second, the pragmatic fact that one person cannot be expected to perform every state duty individually, and so may delegate his or her power to others.⁶³ From this, it follows that the President retains the power to remove appointed officials from office, should he determine that their decisions have failed to advance the ideal embodied by the Take Care Clause.

Yet this power is “not without limit.”⁶⁴ Under certain circumstances, “Congress can . . . create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause,” and likewise, Congress can impose similar limitations on the removal of underlings by principle officers.⁶⁵ Overall, then, the doctrine surrounding removal power strikes a fragile balance between the complexities of an administrative state and the constitutional requirement that the President “oversee the faithfulness of the officers” who are charged, in practice, with executing the laws.⁶⁶ If Congress could *never* create barriers of insulation between the President, his principle

⁶⁰ See *id.* at 3146–47. For an excellent synopsis of how the PCAOB operated (while it existed), and what role it played in the broader Sarbanes-Oxley regime, see Michael A. Thomason, Jr., Note, *Auditing the PCAOB: A Test to the Accountability of the Uniquely Structured Regulator of Accountants*, 62 VAND. L. REV. 1953, 1954–62 (2009).

⁶¹ *Free Enterprise Fund*, 130 S. Ct. at 3153–55. Analytically, it is not clear that the Court’s holding can be circumscribed to reach only dual (or great) insulation. See, e.g., Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 FORDHAM L. REV. 2541 (2011) (arguing that *Free Enterprise Fund* sets the doctrinal gears in motion for contravening all instances of agency independence).

⁶² *Free Enterprise Fund*, 130 S. Ct. at 3146 (quoting U.S. CONST. art. II, §1, cl. 1, 3).

⁶³ *Id.* (“In light of ‘[t]he impossibility that one man should be able to perform all the great business of the State,’ the Constitution provides for executive officers to ‘assist the supreme Magistrate in discharging the duties of his trust.’” (quoting 30 WRITINGS OF GEORGE WASHINGTON 334 (J. Fitzpatrick ed., 1939))).

⁶⁴ *Free Enterprise Fund*, 130 S. Ct. at 3146.

⁶⁵ *Id.* at 3146–47.

⁶⁶ *Id.* at 3147.

officers, and their underlings, day-to-day administration might fall into disarray.⁶⁷ But the risk on the other side, of allowing too much insulation between the President, his principle officers, and their underlings, is similarly stark: it is the risk, in Chief Justice Roberts's words, of public accountability disappearing; of power being exercised "in the people's name," but without the people's ability to oversee it.⁶⁸

This risk, moreover, cannot be reduced to individual decisions or administrations. It may well be that certain instances of delegation would entail no adverse pragmatic consequences; it may even be the case that a given President would find an "advantage[] in tying his own hands."⁶⁹ For Chief Justice Roberts, that possibility is simply inapposite to the constitutional issue. Separation of powers, he makes clear, "does not depend on . . . whether 'the encroached-upon branch approves the encroachment.'"⁷⁰ The safeguard transcends any individual person, even if that person happens to be the President.⁷¹ Of course, these observations alone no more control the question in *Free Enterprise Fund* than the lesson on federal structure in *NFIB* controls the fate of the PPACA. In both cases—indeed, in all of the cases examined so far—the lessons play a uniform role: they frame, they circumscribe, they instruct.

B. Law's Outer Boundaries

The examples in the last section showcased the Chief Justice's penchant for outlining constitutional lessons—often of a structural nature—before delving into his substantive arguments. These lessons served to preface Chief Justice Roberts's analysis, setting up the stakes of the question in advance of his answer being worked out. This section examines a distinct set of teaching moments, which serve, in both function and form, as a complementary bookend. Instead of prefacing the opinion, they arrive at the opinion's end, and they provide the Chief Justice an opportunity to pan out from the specific holding and ruminate on its larger implications. These lessons, too, stress the limitations of our legal order. But they do so by highlighting law's inability to capture the full complexity of its social context. If the point of the first batch of lessons was that law is structured by internal rules, the point of this batch is that law is also structured by external boundaries—boundaries that often allow deplorable acts to continue.

For example, in *Snyder v. Phelps*,⁷² the Court had to decide whether an aggrieved father, whose son had died on a tour of duty in Iraq, could recover for intentional infliction of emotional distress (IIED) against protestors who showed

⁶⁷ For a discussion of the arguments on both sides of this interest, see generally Rao, *supra* note 61.

⁶⁸ *Free Enterprise Fund*, 130 S. Ct. at 3154.

⁶⁹ *Id.* at 3155.

⁷⁰ *Id.* (citing *New York v. United States*, 505 U.S. 144, 182 (1992)).

⁷¹ *See id.*

⁷² 131 S. Ct. 1207 (2011).

up to protest at the funeral services for his son.⁷³ The protestors hailed from the Westboro Baptist Church of Topeka, Kansas, a congregation that believes America's failure in Iraq (and in other conflicts) is the direct result of our tolerating homosexuality.⁷⁴ The protestors moved to have the IIED claim dismissed on First Amendment grounds, arguing that their demonstration was protected speech under the First Amendment because it spoke to an issue of public concern and was not provably false.⁷⁵ The Court was put in the difficult position of deciding which legal prerogative should win the day: a state tort claim or First Amendment principles. Ultimately, it favored the latter, with Chief Justice Roberts writing. After examining the relevant record as to time, place, and manner, the Chief Justice concluded that "simply put," the protestors "had the right to be where they were."⁷⁶

But this conclusion alone, despite being legally cogent, left much unaccounted for. In a sense, Westboro's garish display pushed the First Amendment to its limit. It forced the Justices to consider the cost, in very hard cases, of remaining committed to the inviolability of free speech.⁷⁷ Recognizing this, Chief Justice Roberts's opinion for the Court concludes by taking a step back and reflecting on what the formal proceedings do *not* adequately capture.⁷⁸ The opinion's final section opens, in this vein, with the following musing: "Westboro believes that America is morally flawed; many Americans might feel the same about Westboro."⁷⁹ Indeed, many might, and probably all of the Justices do. But this does not license punishment. The whole point of the First Amendment, Chief Justice Roberts makes plain, is that regulation must not turn on which viewpoints seem, to certain observers, "morally flawed."⁸⁰ Members of the public must be allowed to express their opinions, however heinous those opinions may be, and however "negligible" their contribution to public discourse.⁸¹ The First Amendment does not necessitate equanimity or indifference. But it does require equal treatment.⁸² Indeed, this is the note on which the opinion ends, in a rare and arresting moment of civic poetry:

⁷³ *Id.* at 1213–14.

⁷⁴ *Id.* at 1213.

⁷⁵ *Id.* at 1213–14.

⁷⁶ *Id.* at 1218.

⁷⁷ In this respect, *Snyder* very much echoes its predecessor *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977), which held that the Nazi Party had the right to demonstrate in a town heavily populated by Jews, notwithstanding the severe emotional damage such a demonstration was likely to cause. 432 U.S. at 43–44.

⁷⁸ See Kiel Brennan-Marquez, *Judging Pain*, 31 QUINNIPIAC L. REV. 233, 244–45, 251 (2013) (arguing that *Snyder* stands among a canon of "tragic cases" in which full resolution is impossible, due to right-remedy misalignment).

⁷⁹ *Snyder*, 131 S. Ct. at 1220.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See *id.* ("Westboro believes that America is morally flawed; many Americans might feel the same about Westboro. Westboro's funeral picketing is certainly hurtful and its contribution to public discourse may be negligible. But Westboro addressed matters of

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.⁸³

Notice the parallels between this lesson and the internal lessons discussed above. Both unfold as narratives of tension. In the last part, the tension was between two structural principles of law—for example, the enumeration of federal power colliding with the autonomy of state governments, or congressional authority running up against the need for judicial independence. Here, the tension is between two normative rather than structural principles: the ideal of free expression clashing with the idealized promise of a world in which members of the civilized public regard one another with mutual respect.⁸⁴ The latter is something to imagine, to idealize, and to work toward. But it is not something that our law guarantees. This is not to say that it would be impossible, in principle, for law to guarantee it—just that our law does not. That it does not is one of our law’s limitations. It may be a *wise* limitation. But it is a limitation nonetheless.

Chief Justice Roberts’s dissent in *Miller v. Alabama*⁸⁵ struck a similar pitch.⁸⁶ The question presented was whether a mandatory sentence of life without parole constitutes “cruel and unusual punishment” as applied to a juvenile convicted of capital murder. Justice Kagan wrote for the Court in an opinion that drew heavily on two related precedents: *Graham v. Florida*,⁸⁷ holding that the Eighth Amendment prohibits sentencing juveniles to life without parole for noncapital offenses,⁸⁸ and *Roper v. Simmons*,⁸⁹ holding that the Eighth Amendment bars

public import on public property, in a peaceful manner, in full compliance with the guidance of local officials.”).

⁸³ *Id.*

⁸⁴ In the jurisprudence, this tension usually resolves in favor of First Amendment protection. But not always. Doctrinally, the most notable exception is the “fighting words” standard, which holds that an act of expression is not protected if “[its] very utterance [tends to] inflict injury or tend[s] to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The doctrine has proven theoretically difficult to justify. *See, e.g.,* Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for its Interment*, 106 HARV. L. REV. 1129, 1133–37 (1993). Nonetheless, it is on a “fighting words” style of theory that Justice Alito hinges his dissent in *Snyder*. *See* 131 S. Ct. at 1222 (Alito, J., dissenting) (calling Westboro’s speech a form of “brutalization” that caused “severe and lasting emotional injury”).

⁸⁵ 132 S. Ct. 2455 (2012).

⁸⁶ *Id.* at 2477–82 (Roberts, C.J., dissenting).

⁸⁷ 130 S. Ct. 2011 (2010).

⁸⁸ *Id.* at 2034. Interestingly, Chief Justice Roberts actually joins with the Court’s liberals in this case—concurring in judgment but not in reasoning. *See id.* at 2036 (Roberts, C.J., concurring in judgment); *see infra* 266.

sentencing juveniles to death.⁹⁰ Building on the “spirit” of these two precedents, Justice Kagan reasoned that the mandatory sentence of life without parole is unconstitutional, even for capital crimes, as applied to juveniles.⁹¹ In dissent, Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, excoriated the majority for blurring, rather than vindicating, the lines that *Graham* and *Roper* drew.⁹² In the Chief Justice’s view, the whole *point* of *Graham* was that noncapital offenses are different from capital offenses.⁹³ Similarly, the point of *Roper* was that the sentence of death is different from the sentence of life without parole.⁹⁴ To interpret these precedents as militating in favor of an Eighth Amendment violation in *Miller*—when the crime *is* a capital offense and the punishment is *not* the death penalty—is simply to abuse the concept of a legal distinction.⁹⁵

I pass no judgment, one way or the other, on Chief Justice Roberts’s view of the substantive Eighth Amendment question. My point is to take note of how his dissent ends. Once again, Chief Justice Roberts concludes by taking stock of what his legal conclusion, in its bare form, fails to capture:

It is a great tragedy when a juvenile commits murder—most of all for the innocent victims. But also for the murderer, whose life has gone so wrong so early. And for society as well, which has lost one or more of its members to deliberate violence, and must harshly punish another. In recent years, our society has moved toward requiring that the murderer, his age notwithstanding, be imprisoned for the remainder of his life. Members of this Court may disagree with that choice. Perhaps science and policy suggest society should show greater mercy to young killers, giving them a greater chance to reform themselves at the risk that they will kill again. But that is not our decision to make. Neither the text of the Constitution nor our precedent prohibits legislatures from requiring

⁸⁹ 543 U.S. 551 (2005).

⁹⁰ *Id.* at 578.

⁹¹ *Miller*, 132 S. Ct. at 2467–70 (Roberts, C.J., dissenting) (arguing, inter alia, that “*Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State’s harshest penalties, a sentencer misses too much if he treats every child as an adult,” and that this also happens under the mandatory life-without-parole regime under review in *Miller*).

⁹² *Id.* at 2477–82.

⁹³ *Id.* at 2480–81.

⁹⁴ *Id.*

⁹⁵ *Id.* (“That *Graham* does not imply today’s result could not be clearer. In barring life without parole for juvenile nonhomicide offenders, *Graham* stated that ‘[t]here is a line between homicide and other serious violent offenses against the individual.’ The whole point of drawing a line between one issue and another is to say that they are different and should be treated differently. In other words, the two are in different categories.” (citations and internal quotation marks omitted)). Interestingly, this didactic turn in Chief Justice Roberts’s rhetoric is not out of keeping with his general teaching impulse. This particular instantiation fits into neither of the categories of pedagogy that I have described here. But it is certainly pedagogical.

that juvenile murderers be sentenced to life without parole. I respectfully dissent.⁹⁶

Here, just as in *Snyder*, the final note is eulogistic rather than analytical. The Chief Justice is not supplementing, or trying to further justify, his legal conclusion. Instead, he is remarking on how difficult that conclusion is to *bear*, despite being inescapable to *reach*. The difference between *Snyder* and *Miller* is that in the former, a law is being curtailed despite the fact that it may be wise, whereas in the latter, a law is being upheld despite the acute possibility that it is wicked. The overarching message, however, is the same. Law is a bounded enterprise. By design, it resolves issues on narrow grounds, meaning that in its wake, many questions are left answered, indeed, unasked, because law is not designed to ask or answer them. And the role of a constitutional judge is correspondingly narrow; no matter how alluring it might be to reach beyond their charge as jurists and give in to human temptation, the allure must be resisted.⁹⁷

A third example, of a distinct flavor but similar rhetorical pattern, is *Boumediene v. Bush*.⁹⁸ After a multiyear jurisprudential saga,⁹⁹ and a prolonged attempt at inter-branch cooperation gone awry,¹⁰⁰ in 2008 the Court confronted the question of extraterritorial detention head-on. In a historic opinion for the Court, Justice Kennedy found that habeas review extends to Guantanamo Bay, due to the United States' "de facto" sovereignty in the region, and in light of the sheer duration of many detainees' otherwise unreviewable sentences.¹⁰¹ Chief Justice Roberts dissented.¹⁰² He offered a variety of arguments against the majority's view—most importantly, that the threshold question in the case, which he thought Justice Kennedy failed to answer, was whether the procedures put in place by

⁹⁶ *Id.* at 2482 (citation omitted).

⁹⁷ *See, e.g.,* Carrington v. United States, 503 F.3d 888, 894–95 (9th Cir. 2007) (Noonan, J., concurring).

⁹⁸ 553 U.S. 723 (2008).

⁹⁹ *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (effectively overturning the Detainee Treatment Act of 2005 as an insufficient procedural protection); Rasul v. Bush, 542 U.S. 466 (2004) (conferring Article III jurisdiction over *habeas* actions in Guantanamo Bay); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (reinforcing the multifactor test for determining the sufficiency of habeas substitutes for American citizens detained at Guantanamo Bay); *see also* Aaron L. Jackson, *Habeas Corpus in the Global War on Terror: An American Drama*, 65 A.F. L. REV. 263 (2010) (tracing a detailed genealogy of the battle over the jurisprudential meaning of Guantanamo Bay from 9/11 until *Boumediene*).

¹⁰⁰ *See generally* Owen Fiss, *The Perils of Minimalism*, 9 THEORETICAL INQUIRIES IN L. 643 (2008) (arguing that the trajectory from *Rasul* and *Hamdi* to *Hamdan* is an example of the shortcomings of popular theories of judicial minimalism and interbranch dialogue).

¹⁰¹ *Boumediene*, 553 U.S. at 771.

¹⁰² *Id.* 801–02 (Roberts, C.J., dissenting).

Congress provided adequate protections to detainees.¹⁰³ For Chief Justice Roberts, the answer was yes.¹⁰⁴

At the end of his dissent, Chief Justice Roberts turned his sights on the larger questions that *Boumediene* evoked. In a rueful tone, he asked what the majority's intervention, however high-minded, had actually accomplished. Exceedingly little, in his view:

So who has won? Not the detainees. The Court's analysis leaves them with only the prospect of further litigation to determine the content of their new habeas right, followed by further litigation to resolve their particular cases, followed by further litigation before the D.C. Circuit—where they could have started had they invoked the [Detainee Treatment Act] procedure. Not Congress, whose attempt to determine—through democratic means—how best to balance the security of the American people with the detainees' liberty interests has been unceremoniously brushed aside. Not the Great Writ, whose majesty is hardly enhanced by its extension to a jurisdictionally quirky outpost, with no tangible benefit to anyone. Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges.¹⁰⁵

Here, as in *Snyder* and *Miller*, the animating idea is that law can only do so much. The majority in *Boumediene* capitalized on the opportunity to extend the territorial scope of Article III in the interest of what it understood to be deeper justice. For Chief Justice Roberts, however, the effort fell flat. It became an overreach of judicial power that disserved not only the principles of wartime power that it flouted, but more importantly, the interests of the detainees it sought to help. As such, *Boumediene* is a better—and more tragic—illustration of law's external limitations than either *Snyder* or *Miller*. In both of those cases, it would be possible to rejoin Chief Justice Roberts by saying, “You are right *in theory*, but in practice, remedial action is so exigent that it requires overriding the limitations you identify.” Not so in *Boumediene*: the whole point of Chief Justice Roberts's dissent is that the majority has achieved, at best, a pyrrhic victory, and it might have achieved no victory at all. Contorted beyond its province, law becomes impotent—or worse.

Chief Justice Roberts's canon is replete with codas like these. Some—following the style of the cases just discussed—strike an elegiac tone. For instance,

¹⁰³ *Id.* at 802–03.

¹⁰⁴ *Id.* at 801–02.

¹⁰⁵ *Id.* at 826 (citation and internal quotation marks omitted).

in *Holder v. Humanitarian Law Project*,¹⁰⁶ a case about the First Amendment implications of an antiterrorism statute, Chief Justice Roberts ends his opinion with a somber invocation of the Preamble to the Constitution, which makes clear that the people of the United States ordained and established that charter of government in part to “provide for the common defence,” difficult as that may be to balance against civil liberties in practice.¹⁰⁷ Another example is *Caperton v. Massey*,¹⁰⁸ a case about whether a state appellate judge violated Due Process when he did not recuse himself from a case in which the defendant was a coal company that had made substantial donations to his judicial campaign. At the end of a dissent that tallies—literally—forty different points of uncertainty that the majority’s view inadvertently introduced into the state appeals process, Chief Justice Roberts closes by observing that he is “sure there are cases where a ‘probability of bias’ should lead the prudent judge to step aside, but the judge fails to do so,” and that this case may be “one of them.”¹⁰⁹ But, he continues, “opening the door to recusal claims under the Due Process Clause, for an amorphous ‘probability of bias,’ will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts.”¹¹⁰ A similar rumination comes at the end of *Dolan v. United States*,¹¹¹ a case about whether a sentencing court may issue a restitution order despite failing to do so within the ninety-day window allotted by statute.¹¹² In the interest of making plaintiffs whole, the majority concluded that the sentencing court was permitted to issue such an order. Chief Justice Roberts, donning his formalist cap, disagreed, fully candid about the fact that denying the court’s restitution power on such technical grounds will mean that, in certain cases—like this one—that “victims may suffer” in light of a “trial court[’s] blunder[.]”¹¹³ And that, of course, is to be lamented. But in Chief Justice Roberts’s view, it is also the “unavoidable result of having a system of rules.”¹¹⁴

There are also times when Chief Justice Roberts takes the opportunity, at opinion’s end, to reiterate law’s limitations through caustic, often quite funny

¹⁰⁶ 130 S. Ct. 2705 (2010).

¹⁰⁷ *See id.* at 2731 (2010) (Roberts, C.J., dissenting) (“The Preamble to the Constitution proclaims that the people of the United States ordained and established that charter of government in part to ‘provide for the common defence.’ As Madison explained, ‘[s]ecurity against foreign danger is . . . an avowed and essential object of the American Union.’ We hold that, in regulating the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations, Congress has pursued that objective consistent with the limitations of the First and Fifth Amendments.”) (citing THE FEDERALIST No. 41 (James Madison)).

¹⁰⁸ 556 U.S. 868 (2009).

¹⁰⁹ *Id.* at 902 (Roberts, C.J., dissenting).

¹¹⁰ *Id.*

¹¹¹ 130 S. Ct. 2533 (2010).

¹¹² *Id.* at 2537; *see* 18 U. S. C. § 3664(d)(5) (2006).

¹¹³ *Dolan*, 130 S. Ct. at 2549 (Roberts, C.J., dissenting).

¹¹⁴ *Id.* at 2549.

rhetoric. One example is *Georgia v. Randolph*,¹¹⁵ in which the Court invalidated a warrantless search that to which one co-occupant of a home consented but the other co-occupant did not.¹¹⁶ Finding this conclusion analytically silly and practically unworkable, Chief Justice Roberts concludes with a smirk:

The majority reminds us, in high tones, that a man's home is his castle but even under the majority's rule, it is not his castle if he happens to be absent, asleep in the keep, or otherwise engaged when the constable arrives at the gate. Then it is his co-owner's castle. And, of course, it is not his castle if he wants to consent to entry, but his co-owner objects.¹¹⁷

Another example is *Brewer v. Quarterman*,¹¹⁸ an Antiterrorism and Effective Death Penalty Act (AEDPA) case about the use of mitigating evidence in which the Court goes—frankly—off the rails in its determination that a Texas capital sentencing statute violated clearly established federal law by preventing the sentencing jury from considering certain forms of mitigating evidence.¹¹⁹ Chief Justice Roberts's dissent is acidic and swift. After demonstrating that at the time of petitioner's capital conviction, the question of federal law on which the majority's reversal turns was manifestly ambiguous—that is, just the *opposite* of “clearly established”—Chief Justice Roberts offers this final thought:

In today's decisions, the Court trivializes AEDPA's requirements and overturns decades-old sentences on the ground that they were contrary to clearly established federal law at the time—even though the same Justices who form the majority today were complaining at that time that *this* Court was changing that “clearly established” law.

¹¹⁵ 547 U.S. 103 (2007).

¹¹⁶ *Id.* at 106.

¹¹⁷ *Id.* at 142 (Roberts, C.J., dissenting). Chief Justice Roberts further glosses his critique with the following memorable passage:

Just as the source of the majority's rule is not privacy, so too the interest it protects cannot reasonably be described as such. That interest is not protected if a co-owner happens to be absent when the police arrive, in the backyard gardening, asleep in the next room, or listening to music through earphones so that only his co-occupant hears the knock on the door. That the rule is so random in its application confirms that it bears no real relation to the privacy protected by the Fourth Amendment. What the majority's rule protects is not so much privacy as the good luck of a co-owner who just happens to be present at the door when the police arrive. Usually when the development of Fourth Amendment jurisprudence leads to such arbitrary lines, we take it as a signal that the rules need to be rethought.

Id. at 136–37.

¹¹⁸ 550 U.S. 286 (2007).

¹¹⁹ *Id.* at 289.

Still, perhaps there is no reason to be unduly glum. After all, today the author of a dissent issued in 1988 writes two majority opinions concluding that the views expressed in that dissent actually represented “clearly established” federal law at that time. So there is hope yet for the views expressed in *this* dissent, not simply down the road, but *tunc pro nunc*. Encouraged by the majority’s determination that the future can change the past, I respectfully dissent.¹²⁰

If this is just snark, it is effective snark. To my mind, however, it seems more than that. Where many of the citations above struck a more soulful tone, these last few verge on acerbic. But their ambition is the same: Chief Justice Roberts is shaping a claim about the limitations of law. However sore the temptation may be to extend law’s boundaries in the pursuit of justice, it must be avoided. The boundaries exist for a reason. They are, simply put, what make law *law*.

II. RESUSCITATING THE UMPIRE METAPHOR

The last Part was designed to showcase the Chief Justice’s penchant for infusing his opinions with lessons about law’s constitutive limitations: its internal structure and its external boundaries. In this Part, I connect Chief Justice Roberts’s civic lessons to another aspect his judicial persona: the infamous umpire metaphor from his confirmation hearing before the Senate Judiciary Committee. I argue that the metaphor aligns, conceptually, with the judicial philosophy that emerged in his civics lessons. Both concern the dialectics of constraint: the way the judge is simultaneously *constrained*—by the parameters of the judicial role—but also *constraining*—in exercising authority over other actors.

This is not how the umpire image has been previously construed. For most skeptical observers, in both academic and popular venues, the metaphor amounts to little more than right-wing wordplay.¹²¹ Indeed, most commentators have dealt with the metaphor in largely cartoonish terms, giving precious little regard to Chief Justice Roberts’s actual words. The goal of this Part is to rectify that unfortunate trend. The trend would not be so unfortunate if the umpire metaphor were not so prominently associated with Chief Justice Roberts’s persona. As it stands, however, many regard the metaphor as an example of the Chief Justice’s mischief. The record deserves to be corrected—if nothing else, to shore up the claim advanced above that Chief Justice Roberts is motivated in some measure by principle, not crass ideology.

¹²⁰ *Id.* at 279–80 (Roberts, C.J., dissenting).

¹²¹ See Katrina vanden Heuvel, *Retiring Chief Justice Roberts’s Umpire Analogy*, WASH. POST (June 28, 2010, 5:16 PM), http://voices.washingtonpost.com/postpartisan/2010/06/retiring_chief_justice_roberts.html (arguing that the umpire metaphor works to erase preexisting biases that inevitably color the judicial process); Jeffrey Toobin, *No More Mr. Nice Guy*, THE NEW YORKER (May 25, 2009), http://www.newyorker.com/reporting/2009/05/25/090525fa_fact_toobin (arguing that Chief Justice Roberts’s voting record during his first four terms casts disconcerting light on the umpire metaphor).

A. Misconstruing the Metaphor

Pejorative accounts of the umpire image typically zero in on the following passage:

Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.¹²²

This passage has aroused criticism for its emphasis on constraint: in Chief Justice Roberts's hands, the judge's occupation becomes unduly narrow and "limited," having only to do with "rule application." This is problematic, according to critics, for three reasons. First, it implies an ideal of objectivity out of synch with the reality of constitutional law.¹²³ Second, it disregards the way Supreme Court Justices *make* rules in addition to applying them.¹²⁴ Third—the reason that overarches the first two—is that despite Chief Justice Roberts's avoidance of the term "judicial restraint," his remarks amount to a tacit defense of right-wing constitutional theory. That is, whatever umpiring *might* mean, Chief Justice Roberts's intended meaning is clear: the umpire is an emblem of judicial power neutered.¹²⁵

Each of these responses contains a kernel of insight. But they overstate the case. A main unifying thread is that umpiring fails to account for the role that extralegal knowledge, personal conviction, and "life experiences" play in judging.¹²⁶ Legal interpretation, the claim goes, necessarily involves "bias,"

¹²² *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) [hereinafter *Roberts Hearing*] (statement of John G. Roberts, Jr.).

¹²³ See, e.g., Wardlaw, *supra* note 15, at 1633–34 (lauding the virtue of infusing jurisprudence with "empathy" and life experience); McKee, *supra* note 15, at 1710 (applying the language of "bias" to judicial decision making).

¹²⁴ See, e.g., Posner, *supra* note 15, at 1051 ("No serious person thinks that the rules that judges in our system apply, particularly appellate judges and most particularly the Justices of the U.S. Supreme Court, are given to them the way the rules of baseball are given to umpires.").

¹²⁵ There is an interesting wrinkle in this form of argumentation: if the analogy to umpiring is formally indeterminate, and only becomes problematic in Chief Justice Roberts's hands, this could be construed as praise rather than critique. The purpose of an analogy, after all, is to draw a formal link between essential characteristics. Cf. Allen, *supra* note 15, at 527 (pointing out the limited explanatory power of analogies as to specific details). We do not typically lambaste analogies for their interpretive instability. Indeed, the possibility of taking an analogy in multiple directions is often evidence of its utility, not its failure.

¹²⁶ See Walker, *supra* note 15, at 1214 (arguing that umpiring is an incomplete metaphor because "[the law] varies according to who is reading it," a proposition for which he cites the growing inconsistency of, and presence of internal schisms in, late twentieth

whereas baseball interpretation does not.¹²⁷ This characterization of umpiring—as perfectly objective, freed from the interpretive baggage of judging—is far from self-evident. In fact, it is more likely false.¹²⁸ For example, Judge Vaughn Walker cites to MLB umpire Ken Kaiser’s first-hand account that “[s]trike zones are like personalities; everybody’s got one, and no two are the same. The strike is probably the most important part of the playing field even though it doesn’t really exist. It’s an imaginary box.”¹²⁹ And Judge Posner makes the same point with a tongue-in-cheek parable about “three umpires” who are asked “to explain the epistemology of balls and strikes,” to which “[t]he first umpire [responds by explaining] that he calls them as they are, the second that he calls them as he sees them, and the third that there are no balls or strikes until he calls them.”¹³⁰ And yet all three are simply calling balls and strikes.¹³¹

These statements of indeterminacy are plainly meant to undermine Chief Justice Roberts’s use of the metaphor.¹³² Analytically, however, they would seem

century law as evidence); Wardlaw, *supra* note 15, at 1633–35. *Cf.* Fried, *supra* note 16, at 643–44 (arguing that if law does not require reliance on experience, it at least requires metarules to discriminate between interpretive frameworks, and these metarules turn on something more personal than formal). Of course, what counts as a rule, and what counts as a metarule, can on occasion become a more difficult problem than first appearances imply. This distinction prefigures my discussion of rules and principles below. *See infra* Part II.A.

¹²⁷ *See, e.g.,* Allen, *supra* note 15, at 533 (arguing that “the [umpire] analogy breaks down because judges will never be able to prevent their life experiences or even overall judicial philosophies from influencing their decisions”); Stephen J. Choi & G. Mitu Gulati, *Ranking Judges According to Citation Bias (As a Means to Reduce Bias)*, 82 NOTRE DAME L. REV. 1279, 1279–80 (2007); McKee, *supra* note 15, at 1712 (arguing that “[t]he umpire metaphor obscures the reality of personal bias”).

¹²⁸ The issue of whether umpires are biased is different, of course, from the issue of the risks that biased umpiring poses. It may be true that analytically, judges and umpires are biased in the same way, but that the *consequences* of bias diverge depending on the setting. In other words, even conceding that umpires and judges employ similar interpretive processes, it is still possible to conclude that judges are more dangerous in virtue of their biases than umpires. *See* Siegel, *supra* note 15, at 712 (outlining the risks associated with taking the umpire metaphor too seriously, given the gravity of the Court’s occupation). But this question—the risks that bias engenders—is distinct from the question that commentators have posed, or least purported to pose, as to whether bias exists in the first place. The latter goes to the *nature* of the interpretive act, the former, to its *consequences*.

¹²⁹ Walker, *supra* note 15, at 1213 (citing KENNETH J. KAISER & DAVID FISHER, *PLANET OF THE UMPs: A BASEBALL LIFE FROM BEHIND THE PLATE* 183–84 (2003)).

¹³⁰ Posner, *supra* note 15, at 1054.

¹³¹ *Id.*

¹³² Judge Posner explicitly “set[s]” the three images of umpiring “against Roberts’s umpire analogy.” *Id.* But it is true for the others as well. Judge Walker, for example, calls the umpire metaphor “inadequate” directly after he finishes sketching the parallel between judges and umpires. Walker, *supra* note 15, at 1215. Professor Siegel, for his part, notes the parallel in passing before dismissing it as irrelevant; the clear implication, however, is that he takes the parallel to weaken Chief Justice Roberts’s claim, because it suggests that Chief

to have the opposite effect. If ball-strike determinations and legal conclusions are both acts of discretion, accountable to an underlying rule but also contingent on individual perspective, then umpiring *adeptly* describes constitutional judging. Either umpiring involves interpretive discretion, or the umpire metaphor fails. One pillar must fall.

Putting the objectivity of umpires to one side, critical responses to the metaphor also rest on a flimsy conceptual distinction between rules and principles. To distinguish ball-strike determinations from constitutional holdings, commentators have suggested that the latter involves a higher-level interpretive process than the former. It requires translating from an abstract concept, like equal protection, to a concrete holding: this, as opposed to calling balls and strikes, which merely involves the application of an already-concrete rule to a just-as-concrete situation. Despite the intuitive appeal of this view, however, it is far from clear that the strike zone—an “imaginary” construct¹³³—is any less abstract than the principle of equal protection. It may well be that the umpire metaphor poorly captures the *institutional role* of Supreme Court Justices.¹³⁴ But from that observation alone, it hardly follows that the metaphor fails to describe the *interpretive task* of constitutional judging.¹³⁵ The two questions are distinct.¹³⁶

Justice Roberts was “wrong about much of baseball” in addition to being wrong, in Siegel’s view, about much of law. Siegel, *supra* note 15, at 707 & n.25.

¹³³ See Walker, *supra* note 15, at 1213–14 (citing KAISER & FISHER, *supra* note 129).

¹³⁴ In this vein, consider Aaron Zelinsky’s creative—and seemingly apt—suggestion that the MLB Commissioner offers a superior baseball analog for the actual occupation of a Supreme Court Justice. See Zelinsky, *supra* note 15, at 112, 118–24. The main evidence is this: commissioners have the power to promulgate high-level regulations—for example, in 1988, when Bart Giamatti decided to “lower[] the strike zone so that more high strikes would be called”—which Zelinsky considers analogous to high-level constitutional decisions. *Id.* at 124 (quoting Charles Siebert, *Baseball’s Renaissance Man: Bart Giamatti*, N.Y. TIMES, Sept. 4, 1988, § 6 (Magazine), at 36).

¹³⁵ Indeed, in Chief Justice Roberts’s hands, the point of the metaphor is largely to distinguish, in the first instance, between referees, whose occupation is to draw and enforce the games boundaries, and players, whose occupation is to participate in the game. See *infra* Part II.B. Unless the point of the commissioner metaphor is that MLB commissioners, in contrast to umpires on the ground, could be said to *participate* in the game—a reading that meets with neither textual evidence nor intuitive support—the commissioner is essentially a referee, relegated, in Chief Justice Roberts’s lexicon, to the role of umpiring rather than playing. Institutionally, the commissioner may be a *superreferee*. But that makes little difference to the question of the interpretive model that underpins his decisions.

¹³⁶ This is where the shortcomings of Zelinsky’s otherwise apt modification become apparent. See *generally* Zelinsky, *supra* note 15. As a model of the institutional role that Justices play vis-à-vis other judicial actors, the “commissioner of baseball” metaphor is certainly superior to the umpire metaphor. But as a model of interpretation—trying to capture the thought process by which Justices reach constitutional holdings—the two metaphors seem to me equivalent. And in a third sense, the *umpire* metaphor could actually be said to be superior in virtue of its simplicity. Namely, if the idea is to capture something about the policing function of the judiciary, ensuring that the other branches act

In this vein, consider Neil Siegel's critique of the umpire image through the lens of *Parents Involved in Community Schools v. Seattle School District No. 1*.¹³⁷ Siegel argues that Chief Justice Roberts, invoking the metaphor, "seemed to be assuming that [interpretive] controversy arises regarding particular instances of rule application . . . not concerning the meaning of the rule itself,"¹³⁸ a view that "presumably rel[ied] on the fact that a hit ball is either foul or fair, and that the baseball rule defining the strike zone seems relatively clear."¹³⁹ The purpose of Siegel's distinction between "clear" and "relatively clear" rules is not to differentiate but to conflate. He wants to suggest (1) that foul-fair determinations and ball-strike determinations, despite their different shades of clarity, are both functionally "clear" and (2) that both differ, in the same sense, from constitutional determinations.

Siegel's view has some vanishing appeal. The trouble is that the difference between "clear" and "relatively clear" rules is not incidental to constitutional law. It is foundational and generative.¹⁴⁰ Just as in Siegel's example, a foul ball is "clear," whereas the strike zone is "relatively clear," some constitutional rules are "clear," such as the requirement that Presidents be thirty-five years old,¹⁴¹ whereas others, such as the meaning of equal protection, are only "relatively clear." By this, I mean that equal protection determinations, though not self-evident, *do* hew to a consistent set of rules.¹⁴² The Equal Protection Clause has been interpreted to

constitutionally, the umpire provides a more natural metaphor: umpires on the ground, vigilantly ensuring respect for the rules. This stands in contrast to the commissioner, who occupies a much more rarefied position, taking stock of many competing interests, forging compromises, and playing a public relations role.

¹³⁷ See generally Siegel, *supra* note 15 (criticizing the umpire analogy in light of recent cases, including *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007)).

¹³⁸ *Id.* at 707.

¹³⁹ *Id.* Siegel's argument is by no means unique. Indeed, it is illustrative of the scholarly trend. See, e.g., Wardlaw, *supra* note 15, at 1640–52 (making similar arguments with respect to *Safford v. Redding*, 129 S. Ct. 2633 (2009)).

¹⁴⁰ Cf. Kathleen Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 26 (1992) (arguing that Supreme Court Justices can be divided not only by results, but also by methods with a "rules" camp on the one hand and a "standards" camp on the other, cleaving along the same lines as would a "clear" versus "relatively clear" distinction).

¹⁴¹ Wardlaw, *supra* note 15, at 1634.

¹⁴² This proposition, it bears noting, is in no way undermined by the observation that different judges apply the rules differently given the same underlying facts; that much is plainly true of umpiring as well. Nor is it undermined by the observation that in the abstract, equal protection analysis might take many different forms. See, e.g., Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 107–08 (1976); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1472 (2004). Pointing to such exercises, however, as evidence of interpretive indeterminacy would be like citing the opinions of baseball fans or ESPN commentators about *their* views of where the strike zone

require that state actions that employ racial classifications be narrowly tailored to meet an interest that qualifies as “compelling.”¹⁴³ This definition is factually indeterminate, of course—and the Court, alongside the nation, is engaged in a protracted dispute over what its meaning in practice ought to be. But the fact remains: there is widespread agreement about the formal contours of the Clause, and about the type of review it requires.

To put the same point otherwise, for all the controversy that laces equal protection jurisprudence, viewpoints that are bitterly divided as a matter of fact converge as a matter of law. In a case like *Parents Involved*, all agree that (1) racial classifications are inherently suspect,¹⁴⁴ (2) the state has an interest in redressing conditions of segregation,¹⁴⁵ and (3) any effort to do so must be narrowly tailored.¹⁴⁶ In other words, *every single Justice* believes the children in Seattle and Louisville were treated unequally; they disagree only about whether the unequal treatment is justified in light of an overriding state interest.¹⁴⁷ And even here, both sides agree that the Court is charged with undoing conditions of segregation; they disagree only as to what counts as “segregation,” and in particular, whether “segregation,” for Fourteenth Amendment purposes, encompasses only *de jure* segregation, or *de facto* segregation as well.¹⁴⁸ I am not trying to understate the normative salience of this disagreement. Hardly any constitutional issue puts more at stake.¹⁴⁹ My point is that *analytically*, this is a narrow disagreement, a question of how to apply an already-delineated rule in context. It is like a strike on the outside corner—or, depending on one’s view, a ball.

is as evidence of ambiguity when umpires call pitches. As a matter of practice, the lines are drawn—however rich are the possibilities of what might otherwise be.

¹⁴³ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 711–12 (4th ed. 2011).

¹⁴⁴ See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (opinion of the Court); *id.* at 823 (Breyer, J., dissenting).

¹⁴⁵ See *id.* at 720–22 (opinion of the Court); *id.* at 823 (Breyer, J., dissenting).

¹⁴⁶ See *id.* at 733–35 (opinion of the Court); *id.* at 846–49 (Breyer, J., dissenting).

¹⁴⁷ This may, in fact, be a terrible way to conceive of the Equal Protection Clause, because it leaves fundamental rights suspended in the limbo of a balancing test rather than sharply vindicating them. See Jed Rubenfeld, *Affirmative Action*, 107 *YALE L. J.* 427, 436–37 (1997) (“Classificationism cannot properly vindicate equal protection principles.”). But given that analysis *is* conducted this way, the more natural inference is that equal protection is a terrible example for Professor Siegel’s argument.

¹⁴⁸ For a concise summary of the normative stakes involved in this debate, and of the outrage that it can quite rightfully cause, see Winter, *supra* note 11.

¹⁴⁹ This proposition hardly requires a citation; one has only to open a newspaper. But it has not been lost on the commentators. See, e.g., Pamela S. Karlan, *Constitutional Law as Trademark*, 43 *U.C. DAVIS L. REV.* 385, 402–04 (2009) (arguing that *Parents Involved*, and like cases, can be understood as a war over the “trademark” of *Brown*); Scarlet Kim, Note, *Judicial Opinion as Historical Account: Parents Involved and the Modern Legacy of Brown v. Board of Education*, 23 *YALE J.L. & HUMAN.* 159, 163–64 (2011) (arguing that the fractured opinion in *Parents Involved* reflects a tension between judges acting in their dual roles of dispensing justice and giving a truthful account of matters past).

B. Misrepresenting the Metaphor

A larger problem looms. Even if commentators are correct in their assessment of the “calling balls and strikes” image—that, by itself, it imagines an unduly narrow and anemic conception of judging—the image has been plucked out of context. Which means that commentators have told only *half* of the story, eliding the larger narrative about the rule of law that Chief Justice Roberts meant to convey.¹⁵⁰ A fair reading of the metaphor—the *full* metaphor, that is—therefore must begin from renewed attention to Chief Justice Roberts’s actual words. As above, commentary has focused on the following excerpt, with the italicized portions receiving especially lavish attention:

Judges and justices are servants of the law, not the other way around. *Judges are like umpires. Umpires don’t make the rules, they apply them.* The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.¹⁵¹

What has not received lavish attention—indeed, what has received no attention—are the passages that follow this invocation of umpiring. After briefly extolling the judicial virtues of humility, respect for *stare decisis*, and open-mindedness,¹⁵² Chief Justice Roberts launches into a heartfelt parable about “the rule of law.” It is worth quoting in full:

Mr. Chairman, when I worked in the Department of Justice in the Office of the Solicitor General, it was my job to argue cases for the United States before the Supreme Court. I always found it very moving to stand before the Justices and say, “I speak for my country.” But it was after I left the Department and began arguing cases against the United States, that I fully appreciated the importance of the Supreme Court in our constitutional system. Here was the United States, the most powerful

¹⁵⁰ Whether Chief Justice Roberts’s story about judging is, in a propositional sense, *true*, the point is that it is hardly the right-wing totem that critics have made it out to be. In fact, once the dialectical nature of the metaphor emerges (*infra*), it becomes correspondingly clear that the accusation that Chief Justice Roberts was playing right-wing word games is at least as likely to be backwards as it is to be true. In other words, given the dual role served by the metaphor, simultaneously minimizing and lionizing the judicial role, the proposition that Chief Justice Roberts was using the umpire metaphor to communicate, in code, with the political right seems to me as likely to be diametrically wrong as it is to be right. That is, it seems just as likely that he was *fleeing* the right by presenting a metaphor that seems harmonious with right-wing judicial philosophies but is, in fact, celebratory of the federal judiciary in a manner that conservatives customarily are not.

¹⁵¹ *Roberts Hearing*, *supra* note 122, at 55 (emphasis added).

¹⁵² *Id.* at 55–56.

entity in the world, aligned against my client, and yet all I had to do was convince the Court that I was right on the law, and the Government was wrong, and all that power and might would recede in deference to the rule of law.

That is a remarkable thing. It is what we mean when we say that we are a Government of laws and not of men. It is that rule of law that protects the rights and liberties of all Americans. It is the envy of the world, because without the rule of law, any rights are meaningless.

President Ronald Reagan used to speak of the Soviet Constitution, and he noted that it purported to grant wonderful rights of all sorts to people, but those rights were empty promises because that system did not have an independent judiciary to uphold the rule of law and enforce those rights. We do, because of the wisdom of our Founders and the sacrifices of our heroes over the generations to make their vision a reality.¹⁵³

At first blush, this narrative might seem disconnected from the umpire metaphor—but only at first blush. In fact, the two intertwine fundamentally. For Chief Justice Roberts, the umpire metaphor is consonant with the proposition that judges “are servants of the law, not the other way around.”¹⁵⁴ That is, the sense in which judges ought to behave like umpires is the same sense in which they ought to “serve” law. This is a pleasant-sounding ideal; what does it mean? The force of Chief Justice Roberts’s narrative rises and falls on this question, and it is subtler than first appearances might imply. Chief Justice Roberts tells a story of judicial supremacy by focusing on the rule of law ethereally, without emphasizing the actual people, judges—or the actual institution, the Supreme Court—required to make the rule of law real. In this story, judges are lionized as “servants,” but in that capacity, they play a “limited role” that no one wants to “see.” Their role might be noble, but it is by no means grand. What *is* grand, by contrast, is the covenant of maintaining a government “of laws and not of men” and the related ideal of ensuring, via consistent and limited construction, that “rights” remain “meaning[ful].”¹⁵⁵

Something sly underpins these abstractions. The conception of adjudication that Chief Justice Roberts exalts—law as an astral plane where all parties become singularities, required to be “right on the law” and nothing else—is possible only insofar as an institution exists to give it force.¹⁵⁶ As a matter of constitutional structure, of course, this point is obvious. But it also bears an interesting relationship to Chief Justice Roberts’s words: although the judicial role is heartily praised in the abstract, we hear very little about the role or behavior of actual

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 55.

¹⁵⁵ *See id.*

¹⁵⁶ This is a rather painful lesson of constitutional history, one that we are continually reminded of, at any moment that rights and remedies become misaligned. *See* Brennan-Marquez, *supra* note 78, at 233–36; Paul Gewirtz, *Remedies and Resistance*, 92 *YALE L.J.* 585, 628–35 (1983).

judges. Imagine, after all, the myriad other stories that Chief Justice Roberts might have told to make an equivalent point about the sanctity of our constitutional system—for example, a story about *Brown v. Board of Education*,¹⁵⁷ or any other iconic case that for Chief Justice Roberts showcases the primacy of law’s rule; or a story about a historical judge whom Chief Justice Roberts admires as a symbol of judicial integrity;¹⁵⁸ or perhaps a story about how difficult it can be, as a judge, to remain loyal to the rule of law when the temptation to do otherwise sets in.¹⁵⁹

These hypothetical stories would have operated by highlighting the *centrality* of judges, not relegating them to the institutional shadows. Chief Justice Roberts opted for the latter route. Whether Chief Justice Roberts consciously designed his remarks to perform this rhetorical maneuver—extolling the judicial role writ large, even as the concrete figure of the judge disappears from view—or whether it emerged from something altogether more ingenuous is an open question. Either way, the emphasis on the importance of judicial power—as opposed to political power—casts helpful light on the larger structure of Chief Justice Roberts’s metaphor. Against the image of umpiring, he sets up two counter-images: pitching and batting. These stand for the activity of the political branches. When he promises to remember that his only job is to “call balls and strikes,” the idea is that, as a judge, his role is reactive, not proactive. Judges fashion and enforce the parameters of the game, so to speak, but it is the job of legislators and administrators to play. This model does not render the judiciary especially passive, nor does it render the judiciary especially active. Instead, the bifurcation between playing and officiating conveys a broader, structural point about the roles that different state actors occupy. Like the civics lessons examined above, the point is formal pointing nature. It offers no substantive guidance about how state actors ought to *fulfill* their roles. In the same sense that batting and pitching offer no particular dictate, as metaphors, about how laws ought to be drafted, so the umpiring metaphor offers no specific guidance about how judges should review those laws and put them into practice.

But neither is the metaphor empty. It makes clear that lawmakers—players—begin from a space of relative freedom, whereas judges—umpires—are at every moment hemmed in by their roles. Players can be creative; they can achieve spectacular feats. The umpire’s role, by contrast, is fixed, unpretentious, and for

¹⁵⁷ 347 U.S. 483 (1954).

¹⁵⁸ In a way, Chief Justice Roberts *did* tell this story. But it came at the end of the confirmation process, not the beginning. See Brad Snyder, *The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts*, 71 OHIO ST. L.J. 1149, 1231–34 (2010) (noting the ways that Chief Justice Roberts drew on his experience clerking for Henry Friendly during his confirmation hearings). See also John Fabian Witt, *The Secret History of the Chief Justice’s Obamacare Decision—A Commentary by John Fabian Witt ‘99*, BALKINZATION (June 29, 2012, 10:58 AM), <http://www.law.yale.edu/news/15758.htm> (suggesting that Chief Justice Roberts’s connection to Henry Friendly partially explains his realism about the taxing power).

¹⁵⁹ This type of story might have fallen into the same grooves as the second batch of teaching moments discussed above. See *supra* Part I.B.

the most part, thankless. About this much, Chief Justice Roberts is certainly right: no one attends baseball games to see the umpires.¹⁶⁰ Their work becomes prominent only when they err—ESPN maintains no highlight reel of great calls, but a poor call reverberates, and burns with a sense of injustice not unlike the response to a poor judicial decision, for a long time after.¹⁶¹ This, indeed, is why umpires occupy such a difficult post. If they are not active enough, the game dilapidates into anarchy. But if they become overactive, the game loses its basic character. The balance is fragile, uncertain. To umpire properly is not just to enforce rules. It is to enforce the rules in a manner that registers as legitimate in the eyes of the observer-participants who make the game worth playing.¹⁶²

And the same is true, of course, of judging. Law's source materials—subject to tireless interpretive dispute—circumscribe what judges can do, and Chief Justice Roberts's metaphor certainly acknowledges this. But it is not his main emphasis. The metaphor focuses, instead, on the crucial role that judges play in safeguarding the rule of law, the organizing principle that ensures legitimacy in government, just as the rules of baseball ensure the game's coherence. This vision is steadfastly dialectical. The judge's role is constrained, in ways both concrete and amorphous, but when the judge *does* act, discharging his full responsibility requires interpretive courage, a certain boldness of spirit. And it is precisely this capacity for boldness—as judges parse the ultimate meaning of law—that renders constraint necessary in the first place. A similar dynamic governs the political branches. As players, they are, in an obvious sense, empowered. But the rules also constrain them. Far from being above the law, in Chief Justice Roberts's story, they are precisely subordinate to it. And it is their subordination—the assurance that lawmakers will stay within their constitutional bounds—that sustains their empowerment.

Eventually, however, the conceptual symmetry between judge and lawmaker gives way to judicial supremacy. As I read Chief Justice Roberts's narrative, there can be no doubt that it is judges, not political actors, who yield the true, lasting power. This power is not boundless. It is not the power of value creation, as

¹⁶⁰ *But see* Fried, *supra* note 16, at 642–45 (arguing that Roberts may be right about the lack of public interest in umpires, but the analogy applies poorly to judges—especially Supreme Court Justices—whose behavior we often remember, celebrate, denounce, and “[go] to the game to see”).

¹⁶¹ *See, e.g.*, Jayson Stark, *The Pop-Up Heard ‘Round the World*, ESPN (Oct. 7, 2012, 9:35 AM), http://espn.go.com/mlb/playoffs/2012/story/_id/8467979/mlb-infield-fly-rule-c-all-tarnishes-st-louis-cardinals-nl-wild-card-win (discussing an arguably botched infield fly rule call in a playoff game between the Cardinals and Braves). For further legal discussion of the Infield Fly Rule, see Aside, *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474 (1975); Howard M. Wasserman, *The Economics of the Infield Fly Rule*, 2013 UTAH L. REV. 479.

¹⁶² *Cf.* PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 248–49 (1984) (arguing that there are two kinds of activities in constitutional law: the “normal science” of applying the law and responding to the theoretical requirements of legal conceptions).

lawmakers possess. It is the power of referees: formally expansive, but circumscribed by an ethic of servitude. Chief Justice Roberts's narrative poses the United States government—organ of political power *par excellence*—against the ethereal clout of law. Confronting the latter, the former's majesty "recede[s]" in "deference."¹⁶³ The sovereign slinks away, overwhelmed by law's force. It is no accident that Chief Justice Roberts punctuates his narrative with a parable about Soviet Russia and the "wonderful rights" that its constitution "purported" to grant.¹⁶⁴ This cautionary tale exemplifies the danger of *pure politics*: a world of lofty promises that are, at base, "empty"¹⁶⁵ because their effectuation is left up to the goodwill of rulers. The lesson is clear. In the absence of oversight, governments cannot be trusted to act responsibly. Unmoored from law, politics becomes tragicomedy.

Chief Justice Roberts's majority opinion in *United States v. Stevens*¹⁶⁶ poetically reminisces about this point.¹⁶⁷ In *Stevens*, the Court held that a California statute designed to ban depictions of animal cruelty was unconstitutionally overbroad because it reached run-of-the-mill commercial productions, like hunting videos.¹⁶⁸ After enumerating all of its substantive arguments, the government, in a last-ditch effort to save the statute, also offered up the following defense: even if the statute *is* overbroad, "[t]he Executive Branch [has] construe[d] [the statute] to reach only 'extreme' cruelty," and that it "neither has brought nor will bring a prosecution for anything less."¹⁶⁹ Of this, Chief Justice Roberts makes short, icy work. The purpose of the First Amendment, he writes, is to "protect[] *against* the Government," not to "leave us at the mercy of *noblesse oblige*."¹⁷⁰ An unconstitutional statute does not transform just because the government "promise[s] to use it responsibly."¹⁷¹

In fact, as though more proof were necessary, Chief Justice Roberts notes that when the animal cruelty statute was first enacted in 1999, the Executive Branch offered a *different* promise of how its prosecutorial discretion would be exercised—namely, only when "depictions of wanton cruelty to animals [were] designed to appeal to a prurient interest in sex"¹⁷²—a historical fact that casts serious doubt on the limiting power of the executive's new, more expansive,

¹⁶³ *Roberts Hearing*, *supra* note 122, at 56.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ 130 S. Ct. 1577 (2010).

¹⁶⁷ *See id.* at 1588.

¹⁶⁸ *Id.* at 1588, 1602. In this vein, Chief Justice Roberts was especially concerned about the narrowness of the statutory exceptions. For a given act of expression to be exempt, in addition to having "serious value," it would also have to "fall within one of the enumerated categories. Much speech does not. Most hunting videos, for example, are not obviously instructional in nature, except in the sense that all life is a lesson." *Id.* at 1590.

¹⁶⁹ *Id.* at 1591.

¹⁷⁰ *Id.* (emphasis added).

¹⁷¹ *Id.*

¹⁷² *Id.* (internal quotation marks omitted).

bounds of self-regulation. Indeed, for Chief Justice Roberts, the most natural inference to draw from the government's protestation "that it will apply §48 far more restrictively than its language provides" is precisely that it makes the statute constitutionally *worrisome*.¹⁷³ This contention is etched with the same sensibility as Chief Justice Roberts's story about the Soviet constitution. They depart from an equivalent type of skepticism toward political power: a right means nothing if it can be revoked at will; those who hold political power cannot be trusted; and it is judges, therefore, who must ensure the meaning of rights by enforcing—which is to say, serving—the law.

I daresay this all clashes rather sharply with the typical reception of the judge-as-umpire view. That view is undoubtedly conservative, if the term is intended in a literal sense, to mean reverent of existing institutions, deferential to tradition, and, in a certain sense, idealistic about what the rule of law can and ought to mean. These particular conceits, however, are not unique to Chief Justice Roberts. They are not even unique to the judicial right. They voice a commitment that many lawyers and judges share—I should think almost all of them—despite hailing from quite different ideological backgrounds and walks of life. Of course, agreement about the first-order proposition that judges should act with comparative modesty, and should be mindful of interpretive constraints, entails quite little about second-order questions of judicial ideology. To be committed, formally, to judicial supremacy is not necessarily to embrace any particular constitutional vision; judges on the left as well as the right can sincerely marshal rule of law rhetoric to their cause.¹⁷⁴ And just like the civics lessons that bookend many of Chief Justice Roberts's opinions, this is where the real interpretive work begins, not where it ends.

At the same time, it would be inaccurate to say that Chief Justice Roberts's narrative commitment to judicial supremacy lacks force. It is a *formal* claim, yes, but its form is also meaningful. In an age of widespread demystification, against the backdrop of calls for minimalism,¹⁷⁵ and for inter-branch dialogue,¹⁷⁶ to insist on the separation of law and politics is a refreshing, even radical, statement of orthodoxy. In Chief Justice Roberts's words, umpires—judges—play a "critical" role in the system of American government.¹⁷⁷ Even this, however, is an understatement. Their role is more than critical. It is sacrosanct. It does not just guarantee the *functioning* of the system. It promises something more fragile and harder fought: legitimacy.

¹⁷³ *Id.*

¹⁷⁴ See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 6 (1997); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982). And it is along these lines, of course, that most of the disputes with Chief Justice Roberts's analogy have actually fallen. See *supra* Part II.A.

¹⁷⁵ See CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 25–30 (2005).

¹⁷⁶ See Jack M. Balkin & Reva B. Siegel, *Introduction: The Constitution in 2020 in THE CONSTITUTION IN 2020* 6 (Jack M. Balkin & Reva B. Siegel eds., 2009).

¹⁷⁷ *Roberts Hearing*, *supra* note 122, at 55.

III. THE JURISPRUDENCE OF CHIEF JUSTICE ROBERTS

So far, we have examined two data points: Chief Justice Roberts's civics lessons and his umpire metaphor, both of which shed light on his formal understanding of what it is to judge—and presumably, on his self-understanding *as* a judge. The data points, moreover, displayed the same dialectical pattern. In each, law emerged as simultaneously limited and limiting, and the judge emblemized constraint in two senses at once. On the one hand, a judge's interpretive acts unfold within the finite boundaries of law. This dynamic is captured in the idea of “calling balls and strikes” and reflected in the codas with which Chief Justice Roberts occasionally ends his opinions, lamenting law's inability to account for a greater share of the normative world. On the other hand, a judge's interpretive acts also serve an important constraining function. This idea is captured in Chief Justice Roberts's valorization of the ideal that power is ultimately accountable to law (and the role that umpires play in safeguarding that ideal), as well as Chief Justice Roberts's chalkboard lessons emphasizing the bounds of constitutional structure.

In this final Part, I confront the overarching question that has motivated the inquiry from the start: How does Chief Justice Roberts's conception of the judge map onto his actual jurisprudence? Is it possible, beginning from the formal picture drawn so far, to reach any conclusions or make any predictions about Chief Justice Roberts's substantive commitments? This question has lingered, in some form, ever since Chief Justice Roberts arrived on the Court. But the last two terms have lent the question newfound urgency. Cutting to the chase, my answer is that Chief Justice Roberts's appreciation of constitutional structure—and similarly, his specific view of the judicial role—do inform his jurisprudential philosophy. Specifically, they cause him to approach federalism cases in a more “liberal” manner and to vote against the tide of his broader legal principles in cases with particularly straining facts.

Chief Justice Roberts is not an automaton: there would be little sense in suggesting that he is *only* motivated by principle or that he *never* comes under the sway of ideology. He also occupies a singular institutional role, one that undoubtedly requires him to keep track of pragmatic considerations even in cases where he might be naturally inclined otherwise. But we do Chief Justice Roberts a disservice by pretending that his jurisprudence is straightforward. At a more granular level, it is anything but.

A. *His Conservative Median*

To begin, I think it safe to say—if it even needs saying—that Chief Justice Roberts is emphatically *not* a judicial moderate, much less the new swing Justice.¹⁷⁸ In Linda Greenhouse's apt and evocative phrase, Chief Justice Roberts

¹⁷⁸ Buzz to this effect began to surface after the *NFIB* ruling. *See, e.g.*, Editorial, *A Moderate Ruling With Risks Ahead*, N.Y. TIMES (June 28, 2012), http://www.nytimes.com/2012/06/29/opinion/the-medical-care-ruling-risks-ahead.html?_r=0#commentsContainer.

is “conservative to his bones,”¹⁷⁹ a supposition plainly borne out by his voting record. As a statistical matter, Chief Justice Roberts joins his conservative colleagues in approximately 90% of cases.¹⁸⁰ Indeed, *NFIB* is the only opinion—one of about four hundred—in which Chief Justice Roberts has broken path from all four of his conservative colleagues in a 5-4 split.¹⁸¹ By way of contrast, in the same timeframe, Justice Thomas and Justice Alito have accomplished this feat three times,¹⁸² and Justice Scalia, twice.¹⁸³

What is more, Chief Justice Roberts has become the manifest champion of a number of conservative causes. One is election speech. Chief Justice Roberts takes a strong—almost categorical stance—on free expression in general. He has written for the Court in a number of First Amendment cases,¹⁸⁴ including *Snyder* and *Stevens*, both discussed above, and he has joined multiple speech decisions over the dissent of his conservative colleagues.¹⁸⁵ Unlike the Court’s liberals, however,

¹⁷⁹ Greenhouse, *Mystery*, *supra* note 7.

¹⁸⁰ See *Stat Pack for October 2011 Term*, SCOTUSBLOG at 20, http://sblog.s3.amazonaws.com/wp-content/uploads/2013/05/SCOTUSBlog_Stat_Pack_OT11_Updated1.pdf (last visited Jan. 5, 2014); *Stat Pack for October 2010 Term*, SCOTUSBLOG at 19, http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB_OT10_stat_pack_final.pdf (last visited Jan. 5, 2014).

¹⁸¹ Amanda Cox & Matthew Ericson, *Siding with the Liberal Wing*, N.Y. TIMES (June 28, 2012), <http://www.nytimes.com/interactive/2012/06/28/us/supreme-court-liberal-wing-5-4-decisions.html?ref=supremecourt>.

¹⁸² See *Alleyne v. United States*, 133 S. Ct. 2151, 2154–55 (2013); *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2634 (2011); *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 406–07 (2009). Justice Thomas has also parted from the conservative minority. For cases in which Justice Alito parted from the conservative minority, see *Oregon v. Ice*, 555 U.S. 160, 162 (2009); *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 83 (2007); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 4 (2007).

¹⁸³ See *Cuomo v. Clearing House Assn.*, 129 S. Ct. 2710, 2714 (2009); *Spears v. United States*, 555 U.S. 261, 261 (2009) (per curiam).

¹⁸⁴ See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207, 1212 (2011); *United States v. Stevens*, 130 S. Ct. 1577, 1582 (2010).

¹⁸⁵ See, e.g., *Agency for Int’l Dev. v. Alliance for Open Soc’y*, 133 S. Ct. 2321, 2324, 2332 (2013) (Chief Justice Roberts writing for majority—over dissenting votes from Justice Thomas and Justice Scalia—to hold that it violated the First Amendment rights of public health organizations for the government to make federal funding contingent on a formal antiprostitution stance in anti-HIV advocacy efforts); *United States v. Alvarez*, 132 S. Ct. 2537, 2541, 2551 (2012). In *Alvarez*, Chief Justice Roberts joined Justice Kennedy’s majority opinion holding the Stolen Valor Act, which made it illegal to lie about military service, unconstitutional on First Amendment grounds. *Id.* In so voting, Chief Justice Roberts parted ways from his three conservative colleagues, who, swerving to defend the sanctity of military service, criticized the plurality for departing from the longstanding precedent that factually false speech that serves no legitimate interest is unprotected for First Amendment purposes. See *id.* at 2560–63 (Alito, J., dissenting).

What stirred the plurality in *Alvarez*, however, was the rationale behind affording less protection to false speech: it is an exception designed to encourage *more* speech overall, not a conceptual lever for proscribing speech. See *id.* at 2545. In this sense, the holding in

Chief Justice Roberts's commitment to free expression also extends to corporate speech. Part I briefly examines Chief Justice Roberts's opinion in *Citizens United*, which, while only a concurrence, helped set the tone of the Court's holding.¹⁸⁶ More recently, Chief Justice Roberts wrote for the Court in *Arizona Free Enterprise Club v. Bennett*,¹⁸⁷ which reviewed a "matching funds" scheme in Arizona state elections, entitling nonprivately financed candidates to obtain matching public contributions for expenditures made by privately financed candidates in excess of \$350,000.¹⁸⁸ Chief Justice Roberts reasoned that the matching funds scheme unlawfully hampered the ability of privately financed candidates to exercise their First Amendment rights, as the trigger of counterfunding "[would] diminish[] the effectiveness" of a privately financed candidate's speech.¹⁸⁹ This conclusion is noticeably radical. Whereas *Citizens United* involved active constraints on speech—the McCain-Feingold Act prohibited corporations, unions, and other associations from expending money to express political viewpoints—*Bennett* rests on a distinct, and more robust, view of First Amendment harm. On this view, the First Amendment is implicated not only when a speaker's expression is constrained, but also when it is *diluted by the speech of others*,¹⁹⁰ a proposition that ought to raise eyebrows in a doctrinal setting

Alvarez is very much consonant with Chief Justice Roberts's opinion for the Court in *Stevens*, as well as his avowed commitment to the neutral multiplication of speech in *Citizens United*. See *Citizens United v. FEC*, 558 U.S. 310, 373 (2010) (Roberts, C.J., concurring) ("The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer."). But see *Brown v. Merch. Entm't Ass'n*, 131 S. Ct. 2729, 2742, 2746 (striking down a California law that prohibited the sale of violent video games to minors; Chief Justice Roberts joined Justice Alito's tempered concurrence, which would have held the statute unconstitutional on more narrow grounds than the majority).

¹⁸⁶ Furthermore, Chief Justice Roberts's contribution to *Citizens United* cannot be extricated from the controversial backdrop of the case's rehearing, which he is rumored to have orchestrated behind the scenes. See Jeffrey Toobin, *Money Unlimited*, THE NEW YORKER, May 21, 2012, at 36, available at http://www.newyorker.com/reporting/2012/05/21/120521fa_fact_toobin; see also *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 455 (2007); Hasen, *supra* note 12, at 785–86 (analyzing *Wisconsin Right to Life* as a precursor to *Citizens United*).

¹⁸⁷ 131 S. Ct. 2806 (2011).

¹⁸⁸ *Id.* at 2813–18.

¹⁸⁹ *Id.* at 2838 (citing *Davis v. FEC*, 554 U.S. 724, 736 (2008)).

¹⁹⁰ Depending on one's first-order understanding of the First Amendment, of course, this might be no harm at all. See *Davis v. FEC*, 554 U.S. 724, 750–52 (2008) (Stevens, J., concurring in part and dissenting in part) (expounding on the view that campaign expenditure limits should be analogized to time, place, and manner restrictions, not to outright prohibitions on speech); see also *Buckley v. Valeo*, 424 U.S. 1, 264 (1976) (White, J., concurring in part and dissenting in part) (propounding the initial grievance with the *Buckley* Court's equation of campaign finance limits and speech prohibitions).

that typically safeguards the “marketplace of ideas” by *exalting* the proliferation of speech.¹⁹¹

Chief Justice Roberts’s race-based equal protection jurisprudence also tracks politically conservative values. Over his first handful of terms, Chief Justice Roberts has already demonstrated a steadfast commitment to constitutional color blindness. He has voted, at every opportunity, to strike down progressive race-conscious policies.¹⁹² And he has also authored two opinions, a separate opinion in *LULAC v. Perry*,¹⁹³ concurring in part and dissenting in part,¹⁹⁴ and the opinion for the Court in *Parents Involved*,¹⁹⁵ which categorically impugn the use of policies that employ explicit racial labels.

LULAC arose under section 2 of the Voting Rights Act (VRA). Justice Kennedy wrote for the Court, holding, among other things, that the composition of certain electoral districts in Texas effectively “dilut[ed]” Latino voting power.¹⁹⁶ Chief Justice Roberts concurred in part and dissented in part. He agreed, at the threshold, with the Court’s framing of the question; he embraced Justice Kennedy’s construction of what section 2 of the VRA demands.¹⁹⁷ But Chief Justice Roberts cut anchor from Justice Kennedy’s opinion—sharply—as to the proper *application* of section 2.¹⁹⁸ In Chief Justice Roberts’s view, the facts, as found by the district court, made clear that Texas had met its burden under the VRA, so no violation had occurred. Overall, Chief Justice Roberts’s analysis in *LULAC* is measured and staid. It is clear that he disagrees, in a straightforward and respectful way, with the majority’s assessment of the facts. Toward the end of his opinion, however, it *also* becomes apparent that Chief Justice Roberts takes issue with the whole business—aesthetically speaking, one could say—of section 2 review. His conclusion openly bristles at the thought that something *other* than the desire to curb minority vote dilution might be motivating the Court, specifically, the desire to “rejigger[]” what “*mixes* of minority should count for the purpose of forming a majority in an electoral district.”¹⁹⁹ It would understate the point to say that Chief Justice Roberts finds the latter effort unsympathetic. Describing it as one

¹⁹¹ As Justice Kagan points out in dissent, the scheme under review in *Arizona Free Enterprise Club’s Free Club PAC v. Bennett*, 131 S. Ct. 2806 (2011), in a sense produces *more* speech, not less. See 131 S. Ct. at 2830 (Kagan, J., dissenting). In Chief Justice Roberts’s defense, he does make a compelling case that the “dilution” theory of First Amendment harm flows analytically from the Court’s precedent in *Davis v. Federal Election Commission*, 554 U.S. 724 (2008). See *Bennett*, 131 S. Ct. at 2818–24.

¹⁹² See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 410 (2006) (Roberts, C.J., concurring in part and dissenting in part); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 711 (2007); *Ricci v. DeStefano*, 129 S. Ct. 2658, 2664–65 (2009).

¹⁹³ 548 U.S. 399 (2006).

¹⁹⁴ *Id.* at 492–511 (Roberts, C.J., concurring in part and dissenting in part).

¹⁹⁵ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

¹⁹⁶ *Perry*, 548 U.S. at 423–43.

¹⁹⁷ *Id.* at 492–93 (Roberts, C.J., concurring in part and dissenting in part).

¹⁹⁸ *Id.* at 503–08.

¹⁹⁹ *Id.* at 511.

of “divvying us up by race,”²⁰⁰ he sees the effort, in no uncertain terms, as “a sordid business.”²⁰¹

That was 2006, the Chief Justice’s first term. It portended a longer arc. The next term, he assigned himself the majority opinion in *Parents Involved*, which capitalized on every available opportunity to pillory the “suspect,” “odious,” and “demean[ing]”²⁰² aspects of racial sorting and to make clear that in his view, the federal courts should vigilantly root out and strike down such sorting, whatever precise form it takes or name it goes by.²⁰³ Love it or hate it, the *Parents Involved* opinion is the work of a highly principled exponent of color blindness. Its final words will surely remain among Chief Justice Roberts’s most recognizable for decades, perhaps generations, to come: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”²⁰⁴ For Chief Justice Roberts, this is the truth that “history”—with an “h” that cries out for capitalization—“[makes] heard.”²⁰⁵

But conservative as Chief Justice Roberts may be, conservative is certainly not *all* he is. *NFIB* made this clear enough. The risk of focusing too squarely on *NFIB*—unique piece of political theater that it was—is that of obscuring the broader pattern of dissonance that Chief Justice Roberts’s canon, viewed in the proper light, puts on display. In this vein, and with the theme of *limitation* in mind, I want to suggest that *Arizona v. United States*²⁰⁶—another case from the 2011 term, issued just days before the monumental healthcare decision, and largely overshadowed by it—is far more surprising and reveals more about Chief Justice Roberts’s true commitments than *NFIB* does. Having made that point, the Article closes by arguing (1) that *Arizona* and *NFIB* are the cornerstones of a deeper “federalist streak” in Chief Justice Roberts’s jurisprudence and (2) that both cases are of a piece with Chief Justice Roberts’s willingness to stake out counterpartisan positions when context so demands.

²⁰⁰ *Id.*

²⁰¹ *Id.* It was this sensibility, no doubt, that informed Chief Justice Roberts’s decision (and perhaps the other conservatives’ decision as well) to strike down section 4 of the Voting Rights Act. *See Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013). *See also* Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) (an earlier VRA case in which Chief Justice Roberts, writing for the Court, lays out the architecture of what would ultimately become his core rationale in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), regarding the importance of equal respect for state sovereignty).

²⁰² *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 746 (2007).

²⁰³ *Id.* at 732 (“The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from ‘patently unconstitutional’ to a compelling state interest simply by relabeling it ‘racial diversity.’”).

²⁰⁴ *Id.* at 748.

²⁰⁵ *Id.* at 746. For a critical take on this particular turn of phrase, see Goodwin Liu, “History Will Be Heard”: An Appraisal of the Seattle/Louisville Decision, 2 HARV. L. & POL’Y REV. 53–54 (2008) (arguing that Chief Justice Roberts’s opinion for the Court in *Parents Involved* actually instantiated the legacy of *Plessy*, not *Brown*).

²⁰⁶ 132 S. Ct. 2492 (2012).

B. Arizona v. United States

The question presented in *Arizona v. United States* was whether federal law preempted four provisions of S.B. 1070, Arizona’s well-publicized “anti-immigration” reform.²⁰⁷ All four provisions were designed, in one way or another, to empower state officials to enforce the federal immigration laws. They operated as follows:

§ 2(B): requiring police officers to ascertain the immigration status of suspects arrested for non-immigration-related crimes;²⁰⁸

§ 3: making it a misdemeanor, under Arizona state law, for an alien to fail to comply with federal registration requirements;²⁰⁹

§ 5(C): making it a misdemeanor for an unauthorized alien to work or seek employment in the state;²¹⁰ and

§ 6: empowering state and local officials to arrest anyone suspected of committing an offense that makes him or her removable pursuant to the federal immigration laws.²¹¹

Justice Kennedy, writing for the Court, held that federal law preempts section 3, section 5(C), and section 6, since they facially “interfere” with federal immigration enforcement.²¹² As for section 2(B), Justice Kennedy reserved the possibility of an as-applied challenge down the line—should state courts’ interpretation of “ascertainment” requirement end up running afoul of federal law—but he held the section constitutional on its face.²¹³ Justice Alito concurred in part and dissented in part. He agreed with the majority that section 3 was preempted while section 2(B) was not.²¹⁴ But Justice Alito disagreed with the Court about section 5(C) and section 6, neither of which interfered, in his view, with federal immigration enforcement.²¹⁵ Finally, Justice Scalia and Justice Thomas each authored sweeping dissents, both of which would have vindicated the Arizona law in full.²¹⁶

²⁰⁷ *Id.* at 2497.

²⁰⁸ ARIZ. REV. STAT. ANN. § 11-1051(B) (2011).

²⁰⁹ *Id.* § 13-1509 (Supp. 2012).

²¹⁰ *Id.* § 13-2928(C).

²¹¹ *Id.* § 13-3883(A)(5).

²¹² *Arizona*, 132 S. Ct. at 2505.

²¹³ *Id.* at 2509–10.

²¹⁴ *Id.* at 2524 (Alito, J., concurring in part and dissenting in part).

²¹⁵ *Id.* at 2525. In fact, with respect to section 5(C), Justice Alito argued that a restriction on aliens’ ability to seek employment fundamentally regulates *employment*, an area of governance left to the states, which means that not only does section 5(C) not interfere with federal law, but it is not even something federal law *ought* to regulate. *Id.* at 2530–32.

²¹⁶ *Id.* at 2511–22 (Scalia, J., concurring in part and dissenting in part), 2522–35 (Thomas, J., concurring in part and dissenting in part). Their view rests, in essence, on the

I will return, momentarily, to the substance of these positions. First, I want to take a step back and consider the options facing the Chief Justice, as he decided what vote to cast. He had four distinct options:

1. He could have joined Justice Kennedy's opinion of the Court.
2. He could have joined Justice Alito's opinion, concurring in part and dissenting in part.
3. He could have written his own opinion, concurring and dissenting where he saw fit.
4. And finally, he could have signed on to either Justice Scalia's or Justice Thomas's blanket dissents.

To begin with, it is not surprising that Chief Justice Roberts eschewed route four. The Justice Scalia and Justice Thomas view is certainly not the kind of narrow, lawyerly opinion to which Chief Justice Roberts is partial. More than that, Justice Kagan took no part in the case, so the Court was voting as an eight-person bloc. For Chief Justice Roberts to join Justice Scalia and Justice Thomas would have left the Court in the equipoise of four versus four, an outcome that would not have transformed the practical result,²¹⁷ but that certainly would have provided less in the way of guidance.

What is more surprising is that Chief Justice Roberts decided against routes two and three. First, the decision against route three is striking insofar as *Arizona* offered Chief Justice Roberts an opportunity to put his personal imprint on a vital and evolving area of constitutional law. Because it was a preemption case dealing with four independent provisions of state law, Chief Justice Roberts could have handpicked which of the Court's views he wanted to let stand and which he wanted to retune. In other words, even if Chief Justice Roberts wished for the same *results* as Justice Kennedy's opinion, he had the latitude to shape the *rationales* for those results entirely in his image. Second, the decision not to write on his own is striking because there is precedent for the proposition that Chief Justice Roberts

idea that states have near-infinite latitude to "more effectively" police the borders of the United States, even if doing so interferes with federal enforcement priorities in practice. Justice Scalia's dissent is too vituperative to illuminate much in the way of doctrine. But Justice Thomas's dissent is quite clear on the matter: the default rule is in favor of states; regulations stand as long as they don't expressly contradict the letter of federal law. *See* 132 S. Ct. at 2524 (Thomas, J., concurring in part and dissenting in part) ("[H]ere, the Court holds that various provisions of the Arizona law are pre-empted because they 'stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' I have explained that the 'purposes and objectives' theory of implied pre-emption is inconsistent with the Constitution because it invites courts to engage in freewheeling speculation about congressional purpose that roams well beyond statutory text." (citation omitted)).

²¹⁷ The Ninth Circuit panel opinion below was virtually identical in result to the opinion for the Court. *See* *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (differing from Justice Kennedy's eventual opinion only with respect to section 2(B)).

takes a narrower view of preemption, in the arena of immigration enforcement, than the Court's liberals. Chief Justice Roberts wrote for Court in *Chamber of Commerce v. Whiting*,²¹⁸ a 2010 precursor to *Arizona* that upheld the Legal Arizona Workers Act of 2007—a law conferring to state regulators the authority to revoke the business licenses of firms that knowingly hire undocumented immigrants—as nonpreempted.²¹⁹ Finally, it is also surprising that Chief Justice Roberts decided against route two. Chief Justice Roberts and Justice Alito converge more than any other pair of Justices, approximately 90% of the time.²²⁰ And their minds seem to work similarly: they often band together when concurring.²²¹ Second, as I will discuss momentarily, Justice Alito's view of the case is crisper, analytically, than the majority's view. His conception of federal-state interaction with respect to immigration enforcement has the precise style of narrowness that frequently attracts Chief Justice Roberts's vote.

But Chief Justice Roberts opted for route one, joining Justice Kennedy's opinion for the Court in full. And what Chief Justice Roberts signed on to, in making that decision, was a broadly deferential view of federal power over the administration of immigration law, particularly with respect to section 6, the provision empowering state law enforcement to make arrests based on the suspicion that an individual has committed a removable offense. Justice Kennedy theorized the interaction of state and federal law as follows: state governments are prohibited from granting authority to police officers to enforce the federal immigration laws if federal law independently restricts the ability of *federal* officials to do the same. As Justice Kennedy put it, "Under state law, officers who believe an alien is removable by reason of some 'public offense' would have the power to conduct an arrest on that basis regardless of whether a federal warrant has issued," a state of affairs that would undermine the "discretion" that the federal government enjoys to steward "the removal process."²²²

The difficulty with this view is that it fails to distinguish—indeed, it rests precisely on the indistinction—between the *content* of federal immigration laws

²¹⁸ 131 S. Ct. 1968 (2011).

²¹⁹ *Id.* at 1973.

²²⁰ See *Stat Pack for October 2011 Term*, SCOTUSBLOG at 20, http://sblog.s3.amazonaws.com/wp-content/uploads/2013/05/SCOTUSBlog_Stat_Pack_OT11_Updated1.pdf (last visited Jan. 5, 2014) (reporting that Chief Justice Roberts agreed with Justice Alito in full, in part, or in judgment in 91% of cases in the 2011 Term); *Stat Pack for October 2010 Term*, SCOTUSBLOG at 19, http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB_OT10_stat_pack_final.pdf (last visited Jan. 5, 2014) (reporting that Chief Justice Roberts agreed with Justice Alito in full, in part, or in judgment in 96% of cases in the 2010 Term).

²²¹ See, e.g., *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1523 (2012) (Roberts, C.J., concurring); *id.* at 1524–25 (Alito, J., concurring); *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1645 (2011) (Roberts, C.J., dissenting).

²²² *Arizona v. United States*, 132 S. Ct. 2492, 2506 (2012); see also *De Canas v. Bica*, 424 U.S. 351 (1976) (outlining the doctrine surrounding "interference" for preemption purposes).

and the means of *enforcing* those laws. Justice Kennedy understands preemption analysis to demand two distinct inquiries at once. First, it requires the Court to ask if the substance of S.B. 1070 conflicts with the substance of federal immigration statutes; second, it *also* requires the Court to ask whether S.B. 1070 *in operation* conflicts with the discretionary enforcement prerogatives of Immigration and Customs Enforcement. But the latter inquiry bears little resemblance to traditional preemption doctrine, which aims to ferret out conflict between the content of state law and the content of federal law,²²³ not to harmonize state law with abstract “objectives” of federal law²²⁴—especially when the latter have to do with political leanings of the contemporaneous administration, not congressional will.²²⁵

Justice Alito’s opinion crystallizes this point. Justice Alito argues that the content of the federal immigration laws—whether a given alien is removable or not—runs perpendicular to the constraints on federal officials’ ability to enforce those laws, and therefore, the latter does not preclude states from enacting looser constraints on their *own* police officers’ enforcement efforts. In Justice Alito’s words, under 8 U.S.C. § 1226, the executive is “*requir[ed]* . . . to take custody of criminal aliens”—and he sees no reason why Congress’s decision to lay out a set of procedures by which federal officers may effectuate that mandate should diminish the ability of state legislatures to lay out different procedures.²²⁶ Indeed, while Justice Alito acknowledges that Arizona’s empowerment of state officials to enforce the immigration laws *could* encroach on federal power, the point is that facially, it does not necessarily do so.²²⁷ As Justice Alito sees it, the cooperation of

²²³ See *Wyeth v. Levine*, 555 U.S. 555, 576 (2009) (noting that preemption inquiry ought to look to the “substance of state and federal law”).

²²⁴ See *id.* at 588 (Thomas, J., concurring) (“Pre-emption analysis should not be ‘[a] freewheeling judicial inquiry into whether a state statute is in tension with federal objectives, but an inquiry into whether the ordinary meanings of state and federal law conflict.’”). Perhaps more importantly, the inquiry also runs afoul of commonsense: only a highly counterintuitive construction of the word “interference” would understand a state’s decision to *enforce* federal law, when the relevant federal enforcement body has chosen not to, to *interfere with* that same body of law. Justice Kennedy’s opinion refers to immigration law and enforcement, in one monolithic bundle, as the “system Congress chose.” 132 S. Ct. at 2503–05. But this is far from self-evident, given the politically controversial way in which the Obama administration has exercised its enforcement power (or more to the point, *not* exercised it). See also U.S. CONST. art. I, § 8, cl. 4.

²²⁵ See *Arizona*, 132 S. Ct. at 2533–35 (Alito, J., concurring in part and dissenting in part) (“[T]he mere fact that the Executive has enforcement discretion cannot mean that the exercise of state police powers in support of federal law is automatically pre-empted. If that were true, then state and local officers could never make arrests to enforce any federal statute because the Executive always has at least some general discretion over the enforcement of federal law as a practical matter.”). This is certainly Justice Alito’s strongest argument. He makes a compelling case, analytically, that the distinction between immigration law and other legal regimes—if there is one—needs to be established on other grounds than what the majority invokes.

²²⁶ *Id.* at 2533–34.

²²⁷ *Id.* at 2532–35.

state officials is as likely to *bolster* federal enforcement efforts as it is to undermine them.²²⁸ Justice Alito would treat section 6, therefore, just as he—and the majority—treats section 2(B): kosher on its face, but possibly unconstitutional in its application.²²⁹

C. A Federalist Streak, and Something More

The foregoing observations, though certainly not fatal to the majority's view in *Arizona*, raise questions about Chief Justice Roberts's decision to join the opinion of the Court. Especially in light of the Chief Justice's own remarks in *Whiting* just one term earlier—explicitly rejecting the argument that Arizona's licensing regime was preempted for “upset[ting] the balance that Congress [had] sought to strike”²³⁰—and the ready-made option to sign on to Justice Alito's more tempered opinion, the question arises naturally: What was Chief Justice Roberts up to? We cannot know for sure, of course. It is possible that the Chief Justice thought it was important, for reasons wholly independent of the case's substance, to maintain a united front on the questions presented in *Arizona*. Given the recent swell of anti-immigrant sentiment in many border states, perhaps Chief Justice Roberts wanted to send a clear message that S.B. 1070 should not become a blueprint for policy elsewhere. But this hypothesis, even if true, is not fully explanatory. A separate opinion with more cabined conclusions—again, in the style of Justice Alito's—could have induced a chilling effect similar to that of the majority opinion, while providing Chief Justice Roberts with an opportunity to make his own imprint on the case. It certainly would not have been the first time that the Chief Justice wrote separately to temper the relatively sweeping conclusions of a Justice Kennedy opinion.²³¹

So in closing, let me propose a simpler alternative: Chief Justice Roberts agrees with the Court's opinion in *Arizona* on principled grounds. And for a straightforward reason: because he takes seriously the proposition that power must operate within the structural limits—a theme, I have argued, to which he has paid various forms of homage over the years, and which causes him to take a more nuanced view toward federalism issues than his conservative colleagues. *Arizona* is evidence for this proposition, as is *NFIB*. But so are a number of comparatively lower profile cases from the last few terms: *United States v. Comstock*²³² from the 2009 term, *Maples v. Thomas*²³³ from the 2011 term, and *Skinner v. Switzer*²³⁴ from the 2010 term. All three are federalism cases in which Chief Justice Roberts

²²⁸ *Id.*

²²⁹ *Id.* at 2532–35 (Alito, J., concurring).

²³⁰ *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1983 (2011).

²³¹ *See, e.g., Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1523 (2012) (Roberts, C.J., concurring); *Citizens United v. FEC*, 558 U.S. 310, 372–73 (2010) (Roberts, C.J., concurring).

²³² 130 S. Ct. 1949 (2010).

²³³ 132 S. Ct. 912 (2012).

²³⁴ 131 S. Ct. 1289 (2011).

joined the Court's liberals, over protestation from the conservatives, just as he did in *Arizona*: silently but entirely.

United States v. Comstock concerned the scope of the Necessary and Proper Clause.²³⁵ The question presented was whether Congress exceeded its constitutional authority by deputizing the Department of Justice to civilly confine sex offenders, after the course of their criminal incarceration, in situations where the relevant state jurisdiction was unwilling “[to] assume the responsibility for [his] ‘custody, care, and treatment.’”²³⁶ It was beyond dispute that Congress had the authority to *criminalize* the sex offenses in question.²³⁷ The issue under dispute was whether Congress also had the authority to arrange for civil confinement in connection with such offenses, after incarceration.²³⁸ Justice Breyer wrote for the Court, upholding Congress's exercise of power on a variety of grounds, including the historical prevalence of “federal prison-related mental-health statutes”²³⁹—such as those initiating postincarceration confinement in the first place²⁴⁰—and the indisputable soundness of the policy objective at stake.²⁴¹ Justice Thomas dissented from this opinion and Justice Scalia joined in part.²⁴² Justice Alito and Justice Kennedy both independently concurred in the judgment, expressing concern about the “breadth” of the majority's reasoning.²⁴³ Of the conservatives, Chief Justice Roberts was the only one to fully endorse the opinion of the Court.

Maples v. Thomas concerned federal habeas jurisdiction under AEDPA.²⁴⁴ The question presented was whether a procedural default is excusable for cause if it was the result of abandonment by plaintiff's counsel.²⁴⁵ Over the course of eleven years, in a “perfect storm of misfortune,”²⁴⁶ multiple attorneys juggled Cory Maples's death row appeal and ultimately left him to hang in limbo, effectively leaving Maples without counsel at the time that he missed his filing deadline.²⁴⁷ Justice Ginsburg wrote for the Court, holding that the behavior of Maples's various attorneys pushed beyond the threshold of ordinary negligence to the realm of constructive abandonment, thereby providing cause to excuse his procedural default.²⁴⁸ This result, in both logic and composition, echoed—and relied on—

²³⁵ *Comstock*, 130 S. Ct. at 1954.

²³⁶ *Id.* at 1969 (Alito, J., concurring) (quoting 18 U.S.C. § 4248(d) (2006)).

²³⁷ *See id.*

²³⁸ *Id.*

²³⁹ *Id.* at 1958.

²⁴⁰ *Id.* at 1961–62.

²⁴¹ *See id.* at 1965 (citing “the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody”).

²⁴² *Id.* at 1970 (Thomas, J., dissenting).

²⁴³ *Id.* at 1968 (Alito, J., concurring); *id.* at 1965 (Kennedy, J., concurring).

²⁴⁴ 132 S. Ct. 912, 917 (2012).

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 929 (Alito, J., concurring).

²⁴⁷ *Id.* at 927.

²⁴⁸ *Id.*

Holland v. Florida,²⁴⁹ a similar case from the 2009 term, where the Court excused a procedural default for cause because the plaintiff's counsel was so negligent in his lack of response and substantive support that it constituted an "extraordinary circumstance" sufficient to trigger equitable tolling under section 2244(d) of AEDPA.²⁵⁰ Both cases exhibited the same 6-3 composition, with Chief Justice Roberts and Justice Kennedy joining the liberal wing. Furthermore, in both cases, Justice Scalia and Justice Thomas dissented,²⁵¹ while Justice Alito concurred in the judgments while substantially limiting their scope (in *Maples*, by cabining the facts,²⁵² and in *Holland*, by narrowing the legal standard²⁵³). Once again, among the conservatives, only Chief Justice Roberts joined the Court's opinion in full.

Skinner v. Switzer concerned federal jurisdiction over a section 1983 due process challenge to obtain DNA evidence for testing on appeal.²⁵⁴ The Texas Court of Criminal Appeals denied petitioner's motion to obtain material DNA evidence after the fact of conviction, finding that he would have been entitled to the evidence during trial, but the decision not to procure it was a "reasonable trial strategy" that could not be "second-guessed" on appeal.²⁵⁵ Petitioner filed a section 1983 action in federal court, seeking to enjoin the district attorney's office to furnish the evidence.²⁵⁶

The Court granted certiorari to determine whether an action for DNA evidence is cognizable under section 1983 or whether habeas review was the exclusive relief available to petitioner.²⁵⁷ Justice Ginsburg wrote for the Court, holding the claim cognizable under section 1983.²⁵⁸ She reasoned, based on the Court's precedent, that section 1983 claims are precluded, and habeas review is the sole mechanism of review, in cases where succeeding on the section 1983 claim would "imply the invalidity" of the incarceration itself.²⁵⁹ In this case, by contrast, a successful section 1983 claim would only result in petitioner's ability to use DNA evidence during appeal; it would not invalidate his incarceration.²⁶⁰

²⁴⁹ 130 S. Ct. 2549 (2010).

²⁵⁰ *Id.* at 2563–65; *see also* 28 U.S.C. § 2244(d) (2006). Among other outrageous examples of the counsels' misconduct, petitioner Holland performed correct legal research while in prison, which he then used to notify his attorney of filing deadlines—only to receive no response at all.

²⁵¹ *See Holland*, 130 S. Ct. at 2569 (Scalia, J., dissenting) (joined by Thomas, J., as to all but Part I); *Maples*, 132 S. Ct. at 929 (Scalia, J., dissenting).

²⁵² *Id.* at 928–29 (Alito, J., concurring) (arguing that the holding in *Maples* effectively produces no precedent due to the rarity of the facts).

²⁵³ 130 S. Ct. at 2568 (Alito, J., concurring) (arguing that equitable tolling under AEDPA should only be triggered if petitioner can show that counsel was "not operating as his agent in any meaningful sense of that word").

²⁵⁴ 131 S. Ct. 1289, 1293 (2011).

²⁵⁵ *Id.* at 1295 (citing *Skinner v. State*, 293 S.W.3d 196, 209 (Tex. Crim. App. 2009)).

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 1293.

²⁵⁸ *Id.* at 1298.

²⁵⁹ *Id.* (internal quotation marks omitted).

²⁶⁰ *Id.* at 1293.

Therefore, the claim should proceed in federal court.²⁶¹ Chief Justice Roberts joined Justice Ginsburg's opinion for the Court without comment.²⁶²

My aim is certainly not to imply that Chief Justice Roberts is a dyed-in-the-wool federalist. When it comes to deference to state courts under AEDPA,²⁶³ for example, or to the Eleventh Amendment,²⁶⁴ the Chief Justice has no bleeding heart for the federal courts or the federal government. At the same time, his views on federal-state relations are significantly more nuanced than those of his conservative colleagues. And this, I have to think, is no accident.

Chief Justice Roberts holds constitutional structure in the highest regard. His civics lessons venerate it; his opinions vindicate it. These background observations might have little predictive power in specific cases. But they *do* have such power when it comes to general trends. Take *Arizona*. Surely it was unknowable in advance exactly how Chief Justice Roberts's veneration of constitutional structure would inspire him to construct each distinct provision of S.B. 1070. But I think it was foreseeable that Chief Justice Roberts would take a more careful and nuanced approach than Justice Alito, Justice Scalia, and Justice Thomas. And it is likewise foreseeable that in the future, when the equivalent of *Arizona* comes around—or the equivalent of *NFIB*, whatever that quite means—Chief Justice Roberts will display a capacity for dissidence that his conservative colleagues often lack.²⁶⁵

²⁶¹ *Id.* at 1299–1300.

²⁶² Of course, it is possible that Chief Justice Roberts's position in *Skinner* has little to do with federalism and, instead, is about the substantive scope of the Fourteenth Amendment. This inference, though admittedly possible, is rendered comparatively implausible by Chief Justice Roberts's professed view on the matter previously. *See* Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 73–74 (2009) (holding that there is no due process right to obtain DNA evidence at a postconviction hearing). In keeping with the theme of conservative Justices breaking rank from their colleagues, it also bears note that Justice Scalia joined the opinion of the Court in *Skinner*.

²⁶³ *See* Renico v. Lett, 559 U.S. 766, 769 (2010) (denying federal appeal under AEDPA on the grounds that the Supreme Court of Michigan had not applied the Sixth Amendment unreasonably); Brewer v. Quarterman, 127 S. Ct. 1706, 1714–23 (2007) (Roberts, C.J., dissenting) (arguing against a federal appeal on the grounds that federal law was not clearly established at the time of the alleged violation, making deference to state courts under AEDPA required *ipso facto*). *Compare* Martinez v. Ryan, 132 S. Ct. 1309, 1315 (2012) (Chief Justice Roberts joining the Court to hold that a procedural default is excused under AEDPA if the state appellate system structurally prohibits defendants from raising an ineffective assistance of counsel claim in a timely manner), *with* Trevino v. Thaler, 133 S. Ct. 1911, 1922–23 (2013) (Roberts, C.J., dissenting) (arguing that *Martinez* should not be extended to cases where ineffective assistance of counsel claims are not structurally prohibited, but only “highly unlikely”).

²⁶⁴ *See, e.g.*, Va. Office for Prot. & Advocacy v. Stewart, 131 S. Ct. 1632, 1645–51 (2011) (Roberts, C.J., dissenting) (arguing that a suit against the State of Virginia by an independent state agency, seeking to secure federal funding for disabilities programs, should be dismissed on Eleventh Amendment grounds).

²⁶⁵ Chief Justice Roberts's capacity for dissidence also seems distinct from—but worth comparing to—Justice Kennedy's capacity for the same, which is not so much dissident as irresolute: making a style out of ambivalence. *See generally* Reva B. Siegel,

Along these lines, I want to make one final observation about Chief Justice Roberts's concern for the law's boundaries. In cases where justice seems to have miscarried due to extreme or idiosyncratic facts, Chief Justice Roberts is willing to arrive at "liberal" outcomes in response. In *Graham v. Florida*,²⁶⁶ for example, Chief Justice Roberts agreed with the Court that in the specific case of Terrance Jamar Graham—convicted of armed robbery, which he committed as a minor, and during which no one was harmed—the sentence of life in prison without parole was unconstitutionally harsh.²⁶⁷ At the same time, however, Chief Justice Roberts emphatically disagreed with Justice Kennedy's conclusion that the sentence of life without parole for nonhomicide offenses, as applied to juveniles, *categorically* violates the Eighth Amendment.²⁶⁸ Instead, Chief Justice Roberts concurred only in the Court's judgment, with an analysis carefully tethered to the particular circumstances of Mr. Graham's case.²⁶⁹ Indeed, Chief Justice Roberts made quite explicit that in a different case—for example, that of "Milagro Cunningham, a 17-year-old who beat and raped an 8-year-old girl before leaving her to die under 197 pounds of rock in a recycling bin"—he would be happy to uphold the sentence of life without parole, despite the nonhomicidal nature of the offense.²⁷⁰ But on the specific facts of *Graham*, he was not.

A second example is *Cone v. Bell*,²⁷¹ a federal habeas case with the same vote split as *Graham*. In *Cone*, the Court had to decide whether petitioner's claim that witness statements had been suppressed gave rise to a *Brady* claim sufficient to obtain federal habeas review under AEDPA.²⁷² The case had been dismissed for lack of subject matter jurisdiction, on the theory that the Tennessee Supreme Court's rejection of petitioner's appeal had rested on independent and adequate grounds in state law.²⁷³ Writing for the Court, Justice Stevens reversed and remanded, arguing that petitioner had properly preserved and exhausted his *Brady* claim in state court, meaning that it was not waived for federal habeas purposes.²⁷⁴ Chief Justice Roberts concurred, stipulating in the first line of his opinion that *Cone* "is grounded in unusual facts that necessarily limit its reach."²⁷⁵ In particular, Chief Justice Roberts thought the case had a "unique procedural posture," since the *Brady* claim was "neither barred under state rules for failure to raise it nor

Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart, 117 YALE L.J. 1694 (2008) (analyzing the contours of Justice Kennedy's avowed interest in "dignity" and examining how it pulls in competing directions at once). The Chief Justice, by contrast, has clear commitments; they just get easily lost in the noise.

²⁶⁶ 130 S. Ct. 2011 (2010).

²⁶⁷ *Id.* at 2036–37 (Roberts, C.J., concurring).

²⁶⁸ *Id.* at 2036–38.

²⁶⁹ *Id.* at 2039.

²⁷⁰ *Id.* at 2041.

²⁷¹ 556 U.S. 449 (2009).

²⁷² *Id.* at 451–52.

²⁷³ *Id.*

²⁷⁴ *Id.* at 452.

²⁷⁵ *Id.* at 476 (Roberts, C.J., concurring).

[previously] decided in the state system.”²⁷⁶ Inasmuch, Chief Justice Roberts joined the Court’s holding—unlike Justice Alito, Justice Thomas, and Justice Scalia—but he also took care to reiterate that the question presented on remand is a “fact-specific determination” about whether the suppressed witness statements are material, per *Brady*, to the petitioner’s death sentence.²⁷⁷ In Chief Justice Roberts’s view, *Cone* ought to hold no more than that.²⁷⁸

In both of these cases, Chief Justice Roberts’s role is hesitant, and his legal conclusion narrow: perhaps to the point of singular. Just like the federalism cases discussed above, and like the civics lessons and umpire metaphor examined in previous Parts, these cases make it difficult to predict how Chief Justice Roberts will respond to specific cases in the future. But they make it easy—almost unassailable—to conclude that he responds with an admirable openness toward specific factual circumstances and doctrinal settings. Sensitive to limits, skeptical of overreach, and painfully aware of what law, in spite of its better nature, *cannot* accomplish, Chief Justice Roberts is certainly a judicial conservative. The point is simply that the story of his tenure cannot be left there.

In close, perhaps the best way to summarize Chief Justice Roberts’s approach to the judicial post is in his own words. Consider *Armour v. Indianapolis*,²⁷⁹ a 2012 case presenting the question of whether it violated the Equal Protection Clause for the City of Indianapolis to charge particular residents thirty times more than others for the same plumbing services, due to an administrative idiosyncrasy.²⁸⁰ Justice Breyer, writing for the Court, held that it did not.²⁸¹ Departing from the principle that “[a]s long as the City’s distinction [between residents] has a rational basis, [it] does not violate the Equal Protection Clause,”²⁸² Justice Breyer argued that the unequal treatment was justified by “administrative considerations.”²⁸³ Refunding the money, on top of being difficult and potentially costly, also ran the risk of engendering resentment among residents—perhaps to the point of inspiring *further* lawsuits—in connection with other city projects.²⁸⁴ For these reasons, Justice Breyer, applying rational basis review, upheld the City’s decision.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 477.

²⁷⁸ *Id.* at 477–78.

²⁷⁹ 132 S. Ct. 2073 (2012).

²⁸⁰ *Id.* at 2077.

²⁸¹ *Id.*

²⁸² *Id.* at 2079–81. This is a noticeably lenient principle. In Justice Breyer’s words, all that is needed is a plausible reason for the law, and “there is such a plausible reason if ‘there is any reasonably conceivable state of facts that could provide a rational basis for the classification.’” *Id.* at 2080 (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993)).

²⁸³ *Id.* at 2081.

²⁸⁴ *Id.* at 2082 (“Finally, the rationality of the distinction draws support from the fact that the line that the City drew—distinguishing past payments from future obligations—is a line well known to the law. Sometimes such a line takes the form of an amnesty program, involving, say, mortgage payments, taxes, or parking tickets.”).

Chief Justice Roberts dissented, remarking with some dismay that in this area of law, “[the Court’s] precedents do not ask for much from government . . . only rough equality.”²⁸⁵ Indeed, for Chief Justice Roberts, many of the City’s arguments—for example, that it would be “administratively difficult” to issue checks to the aggrieved residents, or that the City could not provide recompense because it has already *spent* the money²⁸⁶—did not merit the proverbial time of day. They “[gave] euphemism a bad name.”²⁸⁷ Nor did the majority’s administrative deference theory fare better. “The Court,” Chief Justice Roberts wrote, is “willing to concede that administrative considerations could not justify . . . an unfair system in which a city arbitrarily allocate[s] taxes among a few citizens while forgiving many others on the ground that it is cheaper and easier to collect taxes from a few people than from many.”²⁸⁸ But to what end? For Chief Justice Roberts, this concession was “[c]old comfort,” since, if “the [arbitrary allocation] language does not accurately describe this case,” he was “not sure what it would reach.”²⁸⁹ Finally, the Chief Justice also balked at the Court’s assurance that *Armour*, like its predecessor *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia*,²⁹⁰ is a “rare case” and ought to be less worrisome for it.²⁹¹ For Chief Justice Roberts, the shortcoming of this view could hardly be clearer: it is precisely the rare cases, in which the violations are clearest, that ought to disturb us most intimately. Or in his words:

The Court reminds us that *Allegheny Pittsburgh* is a “rare case.” It is and should be; we give great leeway to taxing authorities in this area, for good and sufficient reasons. But every generation or so a case comes along when this Court needs to say enough is enough, if the Equal Protection Clause is to retain any force in this context. *Allegheny Pittsburgh* was such a case; so is this one. Indiana law promised neighboring homeowners that they would be treated equally when it came to paying for sewer hook-ups. The City then ended up charging some homeowners *30 times* what it charged their neighbors for the same hook-ups. The equal protection violation is plain.²⁹²

²⁸⁵ *Id.* at 2087 (Roberts, C.J., dissenting) (internal quotation marks omitted).

²⁸⁶ *Id.* (“The Court wisely does not embrace the City’s alternative argument that the unequal tax burden is justified because ‘it would have been fiscally challenging to issue refunds.’ . . . One cannot evade returning money to its rightful owner by the simple expedient spending of it.”(citations omitted)).

²⁸⁷ *Id.*

²⁸⁸ *Id.* (internal citations and quotation marks omitted).

²⁸⁹ *Id.*

²⁹⁰ 488 U.S. 336 (1989). In *Allegheny Pittsburgh Coal*, the Court held that a municipal government violated the Equal Protection Clause by assessing taxes of thirty-three times greater magnitude on one parcel of property than it assessed on equivalent parcels in the region. *Id.* at 343.

²⁹¹ *Armour*, 132 S. Ct. at 2087.

²⁹² *Id.*

Rare interventions; measured tones; the wisdom to know when the right case has, indeed, come along. The rule of law is very often no more than this. But it *is* this—and in Chief Justice Roberts’s hands, sublimely.