

ARTICLES

THE ROBERTS COURT AND *HOW TO SAY* WHAT THE LAW IS

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I. INTRODUCTION

John Roberts took office as the Chief Justice of the United States on September 29, 2005.¹ The first five years of the “Roberts Court” have been eventful, as the Court has welcomed four new members during that period, including Chief Justice Roberts himself.² Not surprisingly, the Court has handed down scores of significant decisions, many of which have generated public acclaim, disdain, or both.³ And the Court has, at times, found itself used as a prop in political debates about the role of courts in American democracy.⁴

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1. U.S. S. Ct., *Biographies of Current Justices of the Supreme Court*, <http://www.supremecourt.gov/about/biographies.aspx> (accessed Apr. 20, 2011).

2. *Id.* Justice Samuel Alito took his seat on January 31, 2006, Justice Sonia Sotomayor took office on August 8, 2009, and Justice Elena Kagan joined the Court on August 7, 2010. *Id.*

3. *E.g.* *Citizens United v. Fed. Election Commn.*, 130 S. Ct. 876 (2010); *Boumediene v. Bush*, 553 U.S. 723 (2008); *D.C. v. Heller*, 554 U.S. 570 (2008); *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gonzales v. Carhart*, 550 U.S. 124 (2007). No doubt different observers would be able to craft lists of such decisions, although the placement of decisions in the “best” and “worst” categories would likely vary. For additional information, consult *infra* Part III.

4. Most prominently, perhaps, during his 2010 State of the Union address, President Obama criticized the Supreme Court’s recent decision allowing greater spending by corporations in connection with elections, a situation made rather dramatic because several Justices were in attendance. See Adam Liptak, *Supreme Court Gets a Rare Rebuke*, in

Much reflection concerning the Roberts Court has, understandably, focused on the substance of the Court's decisions.⁵ That is not surprising given the often controversial nature of the subject matter the Court has addressed, including race, abortion, terrorism, gun control, and the role of money in politics to name a few.⁶ Moreover, the political dimension of the Court has garnered attention. For example, a recent *New York Times* article focused on the conservative movement of the Court under John Roberts.⁷ Clearly, such discussions considering the Court's substantive decisions and political composition are important. This Article, however, concerns a different aspect of the Roberts Court's decisions. Specifically, I focus attention on decisions establishing the rules by which the Court will make its constitutional decisions.

To understand where this Article fits into a broader discussion of the Roberts Court, one should step back and consider what the Court does when it renders a constitutional decision. There is a three-step process, although the steps certainly overlap. The starting point is the oft-cited but nevertheless central concept that "[i]t is emphatically the province and duty of the judicial department to say what the law is."⁸ *Marbury's* statement is directed to the first-order question of constitutional interpretation: who is the decisionmaker?

The second-level question concerns *how* the designated decisionmaker makes its decision. This issue deals with interpretative techniques. When the Court is confronted with, for example, a claim that an executive action is beyond the scope of the President's powers, what tools will the Court use to determine the outer bounds of Article II? The articulation of such interpretative principles is important beyond the specific case the Court is con-

Front of a Nation, N.Y. Times A12 (Jan. 29, 2010) (available at <http://www.nytimes.com/2010/01/29/us/politics/29scotus.html?scp=1&sq=Supreme%20Court%20Gets%20a%20Rare%20Rebuke,%20in%20Front%20of%20a%20Nation&st=cse>) (noting that six Supreme Court Justices were present at the State of the Union address, a fairly high number by recent standards). The decision that sparked the controversy was *Citizens United*, 130 S. Ct. 876, discussed *infra* Part III(B)(2).

5. For a recent example in the popular media, see Barry Friedman & Dahlia Lithwick, *Watch as We Make This Law Disappear: How the Roberts Court Disguises Its Conservatism*, <http://www.slate.com/id/2269715/> (updated Oct. 4, 2010, 6:41 a.m. ET).

6. See *supra* n. 3 (listing various controversial Supreme Court cases).

7. Adam Liptak, *Court under Roberts Is Most Conservative in Decades*, N.Y. Times A1 (July 24, 2010) (available at <http://www.nytimes.com/2010/07/25/us/25roberts.html>).

8. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

sidering. Those principles will set the stage by which decisions will be made in the future.

The final step is what the constitutional decision will be. Is the President's action unconstitutional? Of course, the final step is in many respects the most important. We want the answers to the important questions the Court decides to address. But it is not the whole story.

This Article focuses on the second step of the process, the part of the analysis concerning the rules of constitutional interpretation.⁹ As I will discuss, there have been a number of decisions over the past five years in which the Roberts Court has included within its opinions discussion not simply of what a particular rule of constitutional law will be, but also what interpretative rule the Court will use in similar constitutional cases. Such a conscious articulation of interpretive principles is normatively desirable and, indeed, is a responsibility concomitant with the power of judicial review itself. Whether the Roberts Court has been successful in its interpretative-articulation endeavor is more debatable, but I leave that discussion for later.¹⁰

It is also perhaps somewhat fitting that the Court over which Chief Justice Roberts presides has been so consciously active in establishing the rules of interpretation.¹¹ Chief Justice Roberts rather famously compared judges to umpires during his confirmation hearings.¹² There was much debate about the accuracy and usefulness of his use of the umpire analogy.¹³ One might say that

9. As I mentioned above, the three steps of the process overlap in some sense. So, for example, when the Court makes a decision about whether a given matter is a non-justiciable political question, it will be using tools of constitutional interpretation, a second-step matter, to identify the proper decisionmaker, a first-step inquiry. Despite a certain degree of artificiality, the division of constitutional decisionmaking can be useful in focusing attention on various parts of the process.

10. See *infra* pt. IV (evaluating the Court's performance in articulating interpretative principles for constitutional decisions).

11. See *infra* pt. III (providing examples of the way by which the Roberts Court has engaged in conscious efforts to articulate interpretative principles).

12. Sen. Jud. Comm., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States*, 109th Cong. 55 (Sept. 12–14, 2005) (statement of John G. Roberts, Jr.) (available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/52-55.pdf>) (“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.”) [hereinafter *Confirmation Hearing*].

13. See generally Michael P. Allen, *A Limited Defense of (at Least Some of) the Umpire*

a conscious focus on explaining the way in which rules will be interpreted is also consistent with what an umpire does, at least in some broad sense.¹⁴ But whatever the merits of the umpire and judge comparison, one can learn something important by considering the Roberts Court's decisions concerning interpretative techniques.

Before providing a roadmap for what will follow, there are two caveats about this Article's scope that are important to set out clearly. First, I am not asserting that the Roberts Court has been more active in interpretive matters than Courts under other Chief Justices. Such a comparative effort would be fodder for much discussion. For example, if the Roberts Court has engaged in such decisionmaking more often than the Supreme Court in other eras, why might that be? Could it be because of a conscious effort to articulate broad interpretative principles for some ideological purpose? Or could it be the result of the times?¹⁵ It may be that the time will come when such a comparative exercise will be on the table and these questions can be addressed. But for now, such questions must wait for another day.

Second, this Article does not discuss whether any of the various interpretative methodologies the Court has discussed are normatively desirable. My point is not to support, or oppose, any particular approach to interpreting the Constitution. Rather, the focus is on the exercise of describing such interpretive approaches as a part of the responsibility to "say what the law is."

The Article proceeds as follows. Part II discusses the process of articulating rules of constitutional interpretation and why that process is normatively a good one. Part III explores several exam-

Analogy, 32 Seattle U. L. Rev. 525 (2009) (collecting discussions of the umpire analogy).

14. For example, one might compare a judge laying out the means by which a constitutional provision will be interpreted to an umpire explaining his or her understanding of the ground rules of a particular venue. Or perhaps this is more akin to what my colleague Marco Jimenez discussed with me as the baseball commissioner's authority over rules. Another commentator has written that the commissioner comparison is more accurate than the umpire comparison, at least when the judge is a Supreme Court Justice. Aaron S.J. Zelinsky, *The Judge as Commissioner: Benching the Judge-Umpire Analogy*, 119 Yale L.J. Online 113 (2010) (available at <http://www.yalelawjournal.org/images/pdfs/865.pdf>).

15. For example, there is no question that during the time when John Marshall served as Chief Justice, there was a clear effort to articulate rules of constitutional interpretation. *E.g. Gibbons v. Ogden*, 22 U.S. 1 (1824); *McCulloch v. Md.*, 17 U.S. 316 (1819); *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816); *Marbury*, 5 U.S. 137. Such an effort made perfect sense because the Republic was young, and the Constitution represented, in many respects, uncharted territory.

ples of how the Roberts Court has announced decisions that include important principles of constitutional interpretation—matters that go significantly beyond merely deciding the case before the Court. Part IV turns from the descriptive to the evaluative. It provides certain observations about how successful the Roberts Court has been in articulating interpretative rules. Finally, Part V sets forth a brief conclusion.

II. THE RESPONSIBILITY TO SAY HOW ONE DETERMINES WHAT THE LAW IS

This Article is generally not about answers to constitutional questions—much transpires before one reaches the ultimate answer to a constitutional question. The process begins by considering which actor is the relevant decisionmaker. Depending on the nature of the particular question, different actors may be the decisionmaker. For example, subject only to the possibility of congressional override, the President is the ultimate constitutional decisionmaker when he or she decides to veto a piece of legislation because he or she believes it to be unconstitutional.¹⁶ Similarly, if a senator decides to vote against a piece of legislation because he or she believes it is unconstitutional, then that senator is the ultimate authority in that context. But in a great many situations, it is the judiciary that is the ultimate constitutional decisionmaker.

The power of judicial review is unquestionably a central component of American constitutional law, forming one of the core principles that define the unique system of government in the United States.¹⁷ But the power of judicial review includes certain responsibilities, one of which is to articulate clearly the rules by which a court will “say what the law is.”¹⁸ This is the second step of the structure of constitutional decisionmaking described above.

16. U.S. Const. art. I, § 7, cl. 2.

17. One indication of the centrality of this concept can be seen in the textbooks American law students use to learn about constitutional law, where judicial review is almost universally discussed at the very beginning of these texts. *E.g.* William D. Araiza et al., *Constitutional Law: Cases, History, and Dialogues* 1–13 (3d ed., LexisNexis 2006); Charles A. Shanor, *American Constitutional Law: Structure and Reconstruction* 17–31 (4th ed., West 2009); Russell L. Weaver et al., *Constitutional Law: Cases, Materials, and Problems* 1–11 (Aspen Publishers 2006).

18. *Marbury*, 5 U.S. at 177.

This Part articulates in more detail what this second step of constitutional decisionmaking entails. It then argues normatively that courts should focus seriously on this second-level decision on the way to making the ultimate determination of the constitutional issue presented.

A. What Does It Mean to Articulate Interpretative Principles?

There is certainly an overlap between articulating interpretative principles and making a determination concerning the constitutional issue presented in a case. But these step-two and step-three considerations are distinct. At step two, a court is not necessarily concerned with the outcome of the case before it. Rather, the court trains its attention on how a decision will be made, significantly *both* in the case at hand *and* in future cases.

Since John Roberts made his case for his current job with a sports analogy,¹⁹ it seems appropriate to turn to athletics to illustrate the distinction between the second and third steps. As I write this, baseball season has ended. Thus, it may be fair play to turn to another sport.

In football, “pass interference” is a penalty involving either an offensive or defensive player inappropriately impeding another player from attempting to catch a pass.²⁰ The written rules concerning what constitutes pass interference are complex.²¹ A decision whether Jets’ cornerback Darrelle Revis interferes with Patriots’ wide receiver Deion Branch is an example of the third-level question. In contrast, if the game officials explained that they would call pass interference if a defensive player placed a hand on an offensive player’s back, the officials will have engaged in second-level decisionmaking, explaining how they will interpret the rule.

The second step of constitutional decisionmaking, then, is focused on how a decision will be made. It provides guidance both for the participants in the current case and for the participants in future matters. In a sense, it involves the articulation of a broad-

19. *Confirmation Hearing*, *supra* n. 12, at 55; Allen, *supra* n. 13.

20. National Football League, *NFL Rules Digest: Pass Interference*, <http://www.nfl.com/rulebook/passinterference> (accessed Apr. 22, 2011) (defining pass interference and listing examples).

21. *Id.*

based principle meant to be applied in other contexts. But a caveat is important before discussing why such a focus is a normatively good thing. It is possible to have a broad-based ruling at the second step while making a narrow ruling on the merits at step three. In other words, one need not categorically reject judicial minimalism by supporting a focus on interpretive techniques.²²

B. Why Is It a Good Thing to Focus on Interpretative Principles?

A considered focus on the second step of constitutional decisionmaking is an important part of the exercise of judicial review. I discuss three reasons, some overlapping, all of which are in some way related to the role of the judiciary in American constitutional government.²³ The reasons concern judicial legitimacy, the courts' role in a democracy, and enhancement of the predictability and efficiency of the decisionmaking process.

First, an explanation of interpretive techniques is important as a means of legitimizing the role of the judiciary. The Framers created a system of government in which the federal judiciary played a unique role. The judicial department under Article III was a coordinate branch of the newly established national government.²⁴ Moreover, within its jurisdictional ambit,²⁵ the judicial branch would wield significant power through the exercise of judicial review.²⁶ Yet, federal judges would be insulated from direct political control by life tenure and salary protection.²⁷ Thus, we reach the so-called "counter-majoritarian difficulty."²⁸

22. For a discussion of "judicial minimalism," see Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard U. Press 1999).

23. There are also important reasons for laying out interpretative techniques in connection with the resolution of a particular constitutional case. For example, the parties deserve to know the reason they won or lost. An interpretative technique can often provide a significant component of that reason. The discussion in the text focuses on more systemic benefits of the articulation of interpretative techniques.

24. U.S. Const. art. I–III.

25. *Id.* at art. III, § 2.

26. See *Marbury*, 5 U.S. at 177–178 (expressing the important and fundamental nature of the power of judicial review).

27. U.S. Const. art. III, § 1.

28. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16–23 (2d ed., Yale U. Press 1986) (explaining the "counter-majoritarian difficulty" of judicial review).

One could perhaps endlessly debate the propriety of assigning such an important role in a democracy to an inherently undemocratic institution. But this is not the place for that debate. The point is that the judiciary should be consciously aware that its place in the American constitutional system is one that could be seen by the citizenry as at odds with basic democratic principles. By explaining how it reaches its decisions, a court enhances its legitimacy. Of course, explanations will not prevent criticisms of court decisions. They should, however, serve as at least some defense against claims of “government by judge.”²⁹

Second, articulating interpretative techniques also plays a role in American democracy by sending signals to other political actors about how the Court will exercise the power of judicial review. For example, the Constitution provides that the legislative power set forth in Article I vests in Congress.³⁰ The Court reviews the legality of that body’s legislative actions through judicial review.³¹ If the Court is to remain faithful to its constitutional role, it must provide *ex ante* guidance (to the extent possible) to those other governmental actors whose decisions the judiciary will review. Focusing on interpretative techniques is itself an important part of the American system of separated powers because it supports the ability of political actors to carry out their constitutional responsibilities.

Finally, focusing on interpretative techniques increases the predictability of decisionmaking and, therefore, its efficiency. The judicial power applies only in “cases” and “controversies.”³² Thus, there must be an adversarial contest that triggers a court’s power. The more information litigants have concerning the arguments that are important to a court, the more those litigants can realistically assess the outcome of litigation. And if litigation is necessary, a sense of the interpretative rules will allow those litigants to prepare their arguments in a way most useful to the decisionmaker.

29. Many of these arguments concerning the nature of the judiciary were famously addressed by Alexander Hamilton in arguing for the ratification of the Constitution. See Alexander Hamilton, *The Federalist No. 78* (George W. Carey & James McClellan eds., Liberty Fund, Inc. 2001) (examining judiciary authority).

30. U.S. Const. art. I, § 1.

31. *Marbury*, 5 U.S. at 177–178.

32. U.S. Const. art. III, § 2.

In sum, a focus on interpretative techniques is normatively desirable for both public and private reasons. It is most consistent with American democracy. It is also most conducive to efficient resolution of constitutional disputes.

III. THE ROBERTS COURT AND INTERPRETATIVE GUIDANCE

Part II of this Article was normative, focusing on why attention to the articulation of interpretative rules is to be desired. This Part is descriptive. It considers examples of how the Roberts Court has attempted to provide such interpretative guidance over the past five years.³³ I have not attempted to assess the success of the Roberts Court in this endeavor. Part IV turns to that more evaluative enterprise.

One could categorize constitutional decisions in any number of ways. This Part discusses the Roberts Court's interpretive decisions in two groups: (1) decisions concerning separation of powers, federalism, or both; and (2) decisions concerning individual rights. In each of these groups, one can find decisions that display a conscious attempt to describe rules by which the Constitution will be interpreted. I recognize that the division between these categories is artificial. After all, the division of responsibility between different centers of political authority represented by federalism and separation of powers is designed to protect individual rights.³⁴ Nonetheless, dividing cases in this manner is a useful means to underscore the importance and wide-ranging activity of the Roberts Court's articulation of constitutional interpretive techniques.

One final point is worth underscoring. The various decisions I discuss in this Part are ones worthy of entire articles on their

33. Many of the examples I discuss in this Part of the Article are opinions written by Chief Justice Roberts. But I did not limit my discussion to only those decisions in which Chief Justice Roberts authored an opinion. My focus is on the Court that Chief Justice Roberts leads. Thus, some examples I discuss are cases in which Chief Justice Roberts is silently in the majority. In others, the Chief Justice dissents.

34. James Madison, *The Federalist No. 47* 249–250 (George W. Carey & James McClellan eds., Liberty Fund, Inc. 2001) (“[P]reservation of liberty requires, that the three great departments of power should be separate and distinct.”); see also Michael P. Allen, *George W. Bush and the Nature of Executive Authority: The Role of Courts in a Time of Constitutional Change*, 72 *Brook. L. Rev.* 871, 883 n. 47 (2007) (listing various sources that defend the “liberty-protecting function” of federalism and separation of powers).

own. I do not purport, nor have I made any attempt, to be comprehensive in my discussion of these significant decisions. I have tried to provide enough information about the decisions to put them in context while using parts of the Court's opinions to make the broader point concerning the focus on interpretative approaches.

A. Federalism and Separation of Powers

This Sub-Part highlights five examples of cases involving federalism, separation of powers, or both, in which the Roberts Court has rendered decisions that contain focused discussions of constitutional interpretative techniques. Each of these decisions is discussed separately.

1. *United States v. Comstock*³⁵

In May 2010, the Court announced its decision in *Comstock*, in which it held that Congress had the constitutional authority to enact Title 18 U.S.C. Section 4248, authorizing “the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released.”³⁶ The key to the Court's decision was its interpretation of Congress' constitutional power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”—the Necessary and Proper Clause.³⁷

The classic articulation of the scope of congressional authority under the Necessary and Proper Clause comes from *McCulloch v. Maryland*.³⁸ The *Comstock* Court did not recede from the basic outline of congressional power under the Clause.³⁹

35. 130 S. Ct. 1949 (2010).

36. *Id.* at 1954.

37. U.S. Const. art. I, § 8, cl. 18; *Comstock*, 130 S. Ct. at 1954.

38. 17 U.S. at 421 (“Let the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the [C]onstitution, are constitutional.”).

39. For example, the Court repeatedly cited to *McCulloch* to support its decision. *Comstock*, 130 S. Ct. at 1956–1965. Justice Clarence Thomas disagreed, suggesting that the Court did fundamentally depart from *McCulloch*. *Id.* at 1975 (Thomas, J., dissenting).

But there is no question that the Court provided more detailed guidance about the way it would evaluate whether *McCulloch*'s borders had been exceeded. For example, writing for the majority, Justice Stephen Breyer set forth a five-part, multi-factor inquiry that provided the ultimate foundation for the Court's conclusion.⁴⁰ To be sure, the discussion of many of these factors was trained on the statute before the Court.⁴¹ For example, the Court specifically considered as its second factor that "the civil-commitment statute before us constitutes a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades."⁴² But this specific comment has more general interpretative ramifications because, as the Court also noted, a "history of involvement" is an important consideration in judging the constitutionality of a statute under the Necessary and Proper Clause.⁴³

The Court's discussion of its fourth factor is similar. There, the Court concluded that the statutory scheme before it "properly accounts for state interests" by, among other things, making federal detention in part dependent on a state's refusal to take custody of the prisoner.⁴⁴ The broader interpretative point is that the Court will make its own determination whether a given piece of legislation strikes an appropriate balance between state and federal authority. The Court most certainly is asserting its role as the guardian of federalism, instead of leaving that matter primarily in the hands of the political branches.⁴⁵ In so doing, the Court is signaling to the other branches about how future determinations will be made.

In his dissent, Thomas described *Comstock* as a "shift" from the *McCulloch* approach. *Id.*; see *infra* pt. IV(B) (discussing potential critiques of the Court's approach).

40. *Comstock*, 130 S. Ct. at 1956–1965.

41. *Id.* at 1954–1965.

42. *Id.* at 1958.

43. *Id.*

44. *Id.* at 1962–1963.

45. Of course, debates about the role of courts in preserving federalism limitations are long-standing. See e.g. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954) (discussing the importance of the states in a federalist system).

2. *Medellin v. Texas*⁴⁶

One can also see the Court's interpretative focus in *Medellin*, which concerned two issues related to a judgment of the International Court of Justice (ICJ) that the United States had violated the Vienna Convention.⁴⁷ The Court held that the ICJ's decision did not have domestic legal effect without congressional action and that the President's attempt to enforce the decision through an executive memorandum was not enforceable against the states.⁴⁸ These holdings were clearly important on the merits of the case. But the Court's opinion, written by the Chief Justice, is also significant for what it says concerning constitutional interpretation.

As an initial matter, it is worth noting that Chief Justice Roberts recognized that the Court was doing more than simply deciding the case before it. An entire section of his opinion is devoted to defending the Court's "interpretative approach" concerning treaty interpretation against the dissent's criticisms.⁴⁹ The portion of the opinion dealing with the President's power to enforce the ICJ judgment domestically also reflects a conscious understanding of the decision's broader impact when the Chief Justice discusses "first principles."⁵⁰

The core interpretative insight from *Medellin* is a preference for formalism over functionalism.⁵¹ When deciding when a treaty will be deemed self-executing, and therefore domestically enforceable without further action, the majority placed great reliance on the treaty's text.⁵² And Chief Justice Roberts specifically rejected the dissent's preferred approach, which he described as a "multi-factor, judgment-by-judgment analysis."⁵³

46. 552 U.S. 491 (2008).

47. *Id.* at 497–498.

48. *Id.* at 498–499.

49. *Id.* at 514–516.

50. *Id.* at 524.

51. I discuss this general issue in more detail *infra* Part IV in evaluating the Roberts Court's interpretive work. See also Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. Chi. L. Rev. 123, 125–126 n. 9 (1994) (collecting sources concerning the debate surrounding formalist and functional interpretations of constitutional separation-of-powers issues).

52. *Medellin*, 552 U.S. at 506–510.

53. *Id.* at 514.

Finally, *Medellin* is also instructive in terms of what a focus on interpretative technique is not. It does not mean—at least not necessarily—that a court will be inclined to sweep away precedent that might be at odds with its objectively preferable approach. I will discuss *stare decisis* specifically in the next Sub-Part.⁵⁴ But one can see the point played out in the two sections of Chief Justice Roberts' majority opinion in *Medellin*. As I just mentioned, when discussing the domestic enforceability of treaties, the Court's approach was on the formal end of the formal-versus-functional spectrum. This is consistent with the Court's other decisions I discuss in this Part. But when dealing with the issue of the President's power at play in *Medellin*, the Court was content to apply a more functional analysis.⁵⁵ Why? The answer is that in that context, the Court had well-established precedent that required it to assess the matter using a functional analysis—what the Court described as “Justice Jackson's familiar tripartite scheme” from the *Steel Seizure Case*.⁵⁶ The Court was content to follow precedent even as it staked out broad interpretative principles that prior decisions had not foreclosed.

3. Free Enterprise Fund v. Public Company Accounting Oversight Board⁵⁷

The Roberts Court's interpretative preference for formalistic interpretations of constitutional provisions that deal with divisions of power was also on display in *Free Enterprise Fund*. That case dealt with the Public Company Accounting Oversight Board (Board) created by the Sarbanes-Oxley Act of 2002, which had been enacted after several highly publicized accounting scandals.⁵⁸ The specific issue the Court confronted concerned the limited ability of the President to remove Board members.⁵⁹ The Board is under the oversight of the Securities and Exchange

54. See *infra* pt. III(B)(2) (discussing the role of *stare decisis* in *Citizens United*).

55. 552 U.S. at 523–532.

56. *Id.* at 524–525 (discussing the framework for evaluating executive action from Justice Robert Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

57. 130 S. Ct. 3138 (2010).

58. *Id.* at 3147.

59. *Id.*

Commission (SEC).⁶⁰ Board members could be removed only “for good cause” by the SEC.⁶¹ In addition, the Court assumed that the President could remove SEC Commissioners themselves only on the limited grounds of “inefficiency, neglect of duty, or malfeasance.”⁶² Accordingly, the issue amounted to whether this double layer of protection from removal was consistent with the President’s constitutional authority. The Court held that it was not.⁶³

Three interpretive points are particularly noteworthy in *Free Enterprise Fund*. First, the Court again displayed a preference for formalist interpretations in power allocation matters. Chief Justice Roberts spent a section of his majority opinion refuting the more functional approach that Justice Breyer advocated in dissent.⁶⁴ The dissent argued that the majority was incorrect because the Court in the past had “looked to function and context, and not to bright-line rules.”⁶⁵ But the Court rejected such notions in *Free Enterprise Fund* in favor of what Chief Justice Roberts described as “a clear and effective chain of command.”⁶⁶

Second, in another connection to other cases in this period, the Court heavily relied, in its interpretative endeavor, on the intention and understanding of the Framers.⁶⁷ For example, in rejecting the dissent’s arguments concerning the importance of the nature of the modern administrative structure of government on the issues in the case, the Court commented that “[t]he Framers did not rest our liberties on such bureaucratic minutiae.”⁶⁸ And the Court considered both the structure of government the Framers created and their justifications for doing so as further support for its holding in *Free Enterprise Fund*.⁶⁹ The overarching point is that the Court’s decision reflects a broad interpretative

60. *Id.* at 3148 (citing 15 U.S.C. § 7217(b)–(c) (2006)).

61. 15 U.S.C. § 7211(e)(6) (2006).

62. *Free Enter. Fund*, 130 S. Ct. at 3148–3149 (quoting *Humphrey’s Executor v. United States*, 295 U.S. 602, 620 (1935)).

63. *Free Enter. Fund*, 130 S. Ct. at 3147 (“We hold that such multilevel protection from removal is contrary to Article II’s vesting of the executive power in the President. The President cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them.”).

64. *Id.* at 3155–3157.

65. *Id.* at 3167 (Breyer, Stevens, Ginsburg & Sotomayor, JJ., dissenting).

66. *Id.* at 3155 (majority).

67. *Id.* at 3151–3152, 3156–3157.

68. *Id.* at 3156.

69. *Id.* at 3157 (citing portions of *The Federalist*).

approach centered—perhaps not surprisingly—on originalist viewpoints, at least concerning structural matters.

Finally, *Free Enterprise Fund* is also instructive in terms of underscoring the point that focusing on broad interpretative rulings does not necessarily undermine preexisting precedent, even when that precedent may not be entirely consistent with the Court's current holding. In this case, the Court did not reach out to question its precedents allowing restrictions on the President's authority to remove inferior officers. As the Chief Justice noted, "The parties do not ask us to reexamine any of these precedents, and we do not do so."⁷⁰ Of course, the Court could have done so even though the parties did not ask to pursue that course of action. The fact that the Court did not reconsider these earlier cases, but still made broad interpretative pronouncements, demonstrates that one need not overrule cases to sketch out a different means to interpret constitutional provisions in the future.

4. *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*⁷¹

United Haulers provides another example of the Court articulating basic interpretative principles, again in an opinion the Chief Justice authored. This case concerned the validity under dormant Commerce Clause principles of an ordinance requiring all trash haulers to deliver waste to a government-owned facility.⁷² The Court held that the ordinance did not run afoul of the dormant Commerce Clause doctrine.⁷³

What is significant for present purposes is the Court's explanation for how it reached this conclusion. The Court began its substantive analysis with a recitation of the foundational rule in dormant Commerce Clause doctrine that a law that is facially discriminatory with respect to in-state commerce was "subject to a 'virtually *per se* rule of invalidity."⁷⁴ The Court had previously applied this rule to strike down an ordinance requiring trash

70. *Id.* at 3147.

71. 550 U.S. 330 (2007).

72. *Id.* at 334.

73. *Id.*

74. *Id.* at 338 (quoting *Phila. v. N.J.*, 437 U.S. 617, 624 (1978)) (emphasis in original).

haulers to deliver all their waste to a privately owned facility.⁷⁵ Justice Samuel Alito argued in dissent that *United Haulers* presented essentially the same situation and, therefore, the ordinance could not stand.⁷⁶

Writing for the Court, Chief Justice Roberts disagreed. He concluded that the differences between discriminating in favor of a private enterprise and a government operation were constitutionally significant.⁷⁷ The majority ultimately concluded that the ordinance should be subjected to the lowest level of scrutiny under the dormant Commerce Clause, a situation in which the court balances the legitimate benefits of the ordinance against the burdens it imposes on interstate commerce.⁷⁸ The ordinance easily passed this test.⁷⁹

It is the rationale the Court used to reach this conclusion that is significant for this Article. First, the Court greatly emphasized the purpose behind the dormant Commerce Clause doctrine—avoidance of economic protectionism.⁸⁰ According to the Court, that purpose was simply not relevant when dealing with a government entity.⁸¹ Second, and related to the first point, the government here was acting in an area of traditional state responsibility, an arena in which concerns about protectionism were at their lowest ebb if they existed at all.⁸² Thus, the Court made clear in *United Haulers* that tradition matters in interpretation, and that the purpose behind a doctrine can inform how that doctrine will grow.

Before moving from this decision, one other point is noteworthy for its broader interpretative implications. The Chief Justice supported the Court's conclusion in part by reference to broader principles concerning the role of courts in a democracy. He wrote that "treating public and private entities the same under the dormant Commerce Clause would lead to unprecedented and

75. *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 383 (1994).

76. 550 U.S. at 356 (Alito, Stevens & Kennedy, JJ., dissenting) ("Because the provisions challenged in this case are essentially identical to the ordinance invalidated in *Carbone*, I respectfully dissent.").

77. *Id.* at 342–344.

78. *Id.* at 346–347.

79. *Id.*

80. *Id.* at 342–343.

81. *Id.*

82. *Id.* at 342–344.

unbounded interference by the courts with state and local government.”⁸³ He continued by commenting that “[t]he dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition.”⁸⁴ In other words, structural considerations concerning the role of courts with respect to other government actors are relevant interpretative guideposts under the Constitution.

5. *Boumediene v. Bush*⁸⁵

Continuing its foray into the war on terror,⁸⁶ the Supreme Court held in *Boumediene* that non-citizen detainees held at the United States Naval Station at Guantanamo Bay, Cuba were subject to the protections of the Constitution’s Suspension Clause.⁸⁷ Clearly, *Boumediene* is highly significant both for its constitutional holding as well as its connection with the contemporary debate about the way the United States should deal with the threats of global terrorism. It is also an interesting decision regarding the articulation of interpretative principles.

As I will discuss in Part IV, *Boumediene* is in some measure a counterexample to the general trend in the Court’s interpretative decisions. For now, I largely confine the discussion to an explanation of what the Court did, leaving most comparative commentary until later.

Three main interpretative principles are significant in *Boumediene*. First, the Court continued to signal that the Framers’

83. *Id.* at 343.

84. *Id.*

85. 553 U.S. 723.

86. See e.g. *Munaf v. Geren*, 553 U.S. 674 (2008) (discussing habeas corpus rights of American citizens who allegedly committed crimes in Iraq and were held in an overseas detainee camp operated by a multinational coalition); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (discussing habeas rights of suspected terrorists detained by the United States in Guantanamo Bay, Cuba); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (discussing habeas rights of a United States citizen detained as an enemy combatant); *Rasul v. Bush*, 542 U.S. 466 (2004) (discussing the legality of confinement of a suspected terrorist at a United States Naval base at Guantanamo Bay, Cuba); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (discussing habeas rights of a United States citizen detained as an enemy combatant).

87. 553 U.S. at 732. The Suspension Clause provides, “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. Const. art. I, § 9, cl. 2.

views play an important role in constitutional interpretation.⁸⁸ Second, history more generally is also significant.⁸⁹ But with respect to both of these points, *Boumediene* stands as somewhat of an outlier in the Roberts Court because neither the views of the Framers nor the historical record are treated as dispositive in any sense. A prime illustration of this point is Justice Anthony Kennedy's conclusion for the majority that the historical record did not establish that the writ of habeas corpus had been used by non-citizens held outside the sovereign territory of the relevant nation at the time of the Constitution's framing.⁹⁰ For the majority, that fact was merely something to consider and ultimately did not bear much weight.⁹¹ In contrast, Justice Antonin Scalia in dissent believed it was a dispositive fact.⁹² But the dispute concerning the extent to which history and the Framers' views are dispositive in some measure can distract from the more general interpretative proposition that these matters are at least relevant.

The third interpretative point from *Boumediene* concerns the way values underlying the Constitution's structure play an important interpretative role. Similar to the manner in which the Court has, in other cases,⁹³ used the values underlying certain constitutional provisions as interpretative tools, Justice Kennedy in *Boumediene* invoked the values secured by separated governmental powers as support for the Court's interpretation of the Suspension Clause.⁹⁴ Thus, structure and interpretation are linked in judicial review.

88. *Boumediene*, 553 U.S. at 739 ("The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.").

89. *Id.* at 739–742, 746–752.

90. *Id.* at 752.

91. *Id.* ("We decline, therefore, to infer too much, one way or the other, from the lack of historical evidence on point.").

92. *Id.* at 832 (Scalia, J., dissenting) ("[T]he Court's conclusion that 'the common law [does not] yiel[d] a definite answer to the questions before us,' leaves it no choice but to affirm the Court of Appeals. The writ as preserved in the Constitution could not possibly extend farther than the common law provided when that Clause was written." (alterations in original, citation omitted)).

93. One can see this in cases such as *Free Enterprise Fund*, discussed *supra* Part III(A)(3), and *United Haulers*, discussed *supra* Part III(A)(4).

94. 553 U.S. at 742 ("The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to

B. Individual Rights

This Sub-Part concludes this Article's descriptive account of the Roberts Court and interpretive techniques by considering three decisions dealing with the protection of individual rights under the Constitution.

1. *United States v. Stevens*⁹⁵

Stevens dealt with a First Amendment challenge to a federal statute criminalizing “the commercial creation, sale, or possession of certain depictions of animal cruelty.”⁹⁶ In an opinion again by Chief Justice Roberts, the Court held that the statute was “substantially overbroad, and therefore invalid under the First Amendment.”⁹⁷

One of the Government's arguments in support of the statute was that the Court should engage in “categorical balancing of the value of the speech [at issue] against its societal costs.”⁹⁸ The Government's theory was that the result of such balancing would demonstrate that depictions of animal cruelty were not “speech” at all under the First Amendment.⁹⁹ The Court rejected the argument.¹⁰⁰ It also provided important information concerning how the Court would interpret the First Amendment. Simply put, the Court indicated that any relevant balancing had already been done.¹⁰¹ As the Chief Justice put it, “The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.”¹⁰² *Stevens* makes an interpretative point that is, perhaps, narrower than some others discussed in this Article. It is included because it is a good illustration of how useful the articulation of a theory of interpretation can be. No longer should a litigant believe that it will be able to win an interpretive point under the First Amend-

secure individual liberty.”).

95. 130 S. Ct. 1577 (2010).

96. *Id.* at 1582 (characterizing 18 U.S.C. § 48 (2006)).

97. *Id.* at 1592.

98. *Id.* at 1585.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

ment by making an argument about the ad hoc balancing of values.¹⁰³

2. *Citizens United v. Federal Election Commission*¹⁰⁴

Few Supreme Court decisions over the past several years seem to have generated as much public discussion as did *Citizens United*. There would almost certainly have been debate about the decision by virtue of the sensitive nature of the matters under consideration—money and politics. But the level of discourse was increased exponentially by the use of the decision in the President's nationally televised State of the Union address in early 2010.¹⁰⁵

Citizens United is also a prime example of the Roberts Court's focus on constitutional interpretative techniques. The case dealt with certain provisions of federal law that restricted the ability of corporations (and unions) to spend their funds to engage in defined political activities leading up to federal elections.¹⁰⁶ Those restrictions were challenged as violating the First Amendment.¹⁰⁷ The Court ultimately agreed, and along the way overruled certain of its prior precedents.¹⁰⁸

There is much that could be written about *Citizens United*, even if one were to restrict discussion to constitutional interpretation. I highlight only three points. First, the decision is another example of the way the Court is consciously engaged in defining its methods of interpretation. For example, writing for the Court, Justice Kennedy addressed an argument that the nature of the method of communication should affect the constitutionality of a restriction on speech.¹⁰⁹ He wrote that “[w]e must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a

103. *Id.* at 1586 (“But such descriptions [in earlier cases using the language of balancing] are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his [or her] speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute’s favor.”).

104. 130 S. Ct. 876 (2010).

105. Liptak, *supra* n. 4.

106. *Citizens United*, 130 S. Ct. at 887–888 (describing the statutory restrictions).

107. *Id.* at 886.

108. *Id.*

109. *Id.* at 890.

particular speaker.”¹¹⁰ He then went on to support this conclusion with a specific reference to techniques of interpretation: “The interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable.”¹¹¹ Whether one supports or opposes the Court’s ruling in *Citizens United*, such a conscious effort to explain the interpretative process has independent value in a constitutional system that includes judicial review.

The decision also provides another example of the importance in constitutional interpretation assigned to the understanding of a provision at the time of its adoption. As support for the Court’s conclusion that the statutory restrictions at issue ran afoul of the Constitution, Justice Kennedy commented that “[t]here is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations.”¹¹² Thus, those crafting laws in the future, or challenging such laws in court, were put on notice of the types of information the Court would consider important in interpreting the document.

Finally, *Citizens United* is significant for the attention given to the doctrine of stare decisis. The majority discussed the issue,¹¹³ but the most interesting aspect of the decision was Chief Justice Roberts’s concurring opinion, which he described as being focused on “important principles of judicial restraint and stare decisis”¹¹⁴ The concurring opinion articulated an understanding of the role of stare decisis and when that doctrine would yield to other values in constitutional decisionmaking.¹¹⁵ Again, one need not support the Chief Justice’s views in order to praise the fact that the discussion took place. It is precisely this type of discussion that is critical in terms of the Court’s obligation to explain how it will execute its power of judicial review.

110. *Id.* at 891.

111. *Id.*

112. *Id.* at 906.

113. *Id.* at 911–913.

114. *Id.* at 917 (Roberts, C.J., concurring).

115. *Id.* at 919–921. Justice John Paul Stevens disagreed with the Chief Justice in a powerful dissent. *Id.* at 938–939 (Stevens, J., dissenting).

3. District of Columbia v. Heller¹¹⁶

Heller concerned a District of Columbia ordinance that restricted the right of District residents to possess handguns in their homes.¹¹⁷ The Court held that the statute violated the Second Amendment's right to bear arms.¹¹⁸ *Heller* is a particularly interesting case from an interpretative standpoint because the Court was, in many respects, working in untilled constitutional soil; there have been but a few decisions considering the Second Amendment.¹¹⁹ I discuss two points from *Heller* in the balance of this Part.

First, *Heller* emphatically focused on the original understanding of a constitutional provision as *the* interpretative touchstone. Justice Scalia came out of the gate by stating that constitutional text bears the meaning of those who voted to ratify it.¹²⁰ He then went on to canvass sources surrounding the adoption of the Second Amendment to support his conclusion concerning the meaning of the right at issue.¹²¹ It may not be particularly surprising that Justice Scalia took this position in *Heller*.¹²² The point is, however, that in doing so for the majority of the Court, he engaged in an important part of the process of judicial review.

Second, the Court made clear that the structure of constitutional text is also significant in terms of interpretation. Justice Scalia spent time grammatically dissecting the structure of the Second Amendment.¹²³ On one level, the Court's discussion is not

116. 554 U.S. 570 (2008).

117. *Id.* at 573.

118. *Id.* at 635. The Second Amendment provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. While *Heller* dealt with a federal law, the Court has since made the right applicable to the states through the Fourteenth Amendment. *McDonald v. Chi.*, 130 S. Ct. 3020, 3026 (2010).

119. 554 U.S. at 619–628 (discussing relatively few Supreme Court decisions interpreting the Second Amendment).

120. *Id.* at 576. Interestingly, and perhaps somewhat inconsistent with the notion that original understanding is the touchstone for constitutional interpretation, the Court later in its opinion canvassed post-ratification sources to confirm its conclusion. *Id.* at 605–619.

121. *Id.* at 582–583 (discussing definitions of "keep arms" contemporaneous with the amendment's adoption); *id.* at 584 (discussing the meaning of "bear arms"); *id.* at 600–603 (discussing comparable state constitutional provisions at the relevant time).

122. Justice Scalia is firmly on the record as committed to the use of original understanding as the primary tool of constitutional interpretation. *See e.g.* Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 37–41 (Princeton U. Press 1997).

123. *Heller*, 554 U.S. at 577–578.

easily transferable to other parts of the Constitution because the textual structure of the Second Amendment is “unique” in the Constitution.¹²⁴ On another level, however, the point is important because it suggests that when the Court is confronted with constitutional text, it will pay heed to rules of grammar and English composition. In short, the Court provided another interpretative device.

IV. THE ROBERTS COURT AND INTERPRETATIVE GUIDANCE: AN EVALUATION

Part III provided eight examples of the way in which the Roberts Court has engaged in conscious efforts to articulate interpretative principles when rendering constitutional decisions. This Part evaluates the Court’s performance in this endeavor, and does so in two ways. First, it identifies themes that can be drawn from the Court’s guidance. Second, it considers certain critiques concerning the Court’s work thus far.

A. Interpretative Themes

When one considers the Roberts Court’s decisions dealing with constitutional interpretation, it is possible to distill certain themes. Most of them confirm what one would expect from a “conservative” Court. But there are also some mild surprises.

First, regardless of whether the Roberts Court is more engaged in the process of articulating interpretative guideposts than other Supreme Courts in American history, it seems apparent that the Court is conscious of the need to focus attention on such matters. In several of the cases discussed in Part III, the Court makes specific reference to the centrality of interpretative matters.¹²⁵ And even when it does not, the decisions I have highlighted implicitly recognize the importance of the process of interpretation as distinct from the ultimate constitutional decision.

124. *Id.* at 577.

125. See e.g. *Citizens United*, 130 S. Ct. at 891 (rejecting a suggested approach to assessing the law at issue because the “interpretive process” that the approach would necessitate would be inappropriate); *id.* at 919–921 (Roberts, C.J., concurring) (articulating the role of stare decisis in constitutional adjudication); *Medellin*, 552 U.S. at 514–516 (discussing and defending the Court’s “interpretive approach”).

Second, this is a Court for which history matters. It is possible to debate how important history is for any given Justice, but there is no question that the past has non-trivial implications for the future. The cases discussed in Part III are replete with references to the intent of the Framers,¹²⁶ original understanding,¹²⁷ and history in general.¹²⁸ This facet of the Roberts Court's constitutional interpretation is likely not surprising. What is interesting is the extent to which history has taken on such a preeminent place in the interpretative endeavor.

Third, there is a strong tendency toward formalistic reasoning in the Court's decisions, rejecting a more flexible, functionalist approach to constitutional interpretation. One can see this in the Court's focus on text.¹²⁹ More globally, this preference for formalism over functionalism can be seen as a potentially defining feature of how the Roberts Court will address issues going to the divisions of authority under the Constitution. For example, if the Court continues to view the separation of executive authority from other governmental authority as it did in *Free Enterprise Fund*, it could have significant ramifications in constitutional law.¹³⁰

Fourth, while the Roberts Court has been criticized for reversing precedent both openly and in a "stealth" manner,¹³¹ its decisions make clear that a lack of commitment to stare decisis is not a necessary part of a conscious articulation of interpretative techniques. I am not asserting here that the Roberts Court has, in

126. See e.g. *Free Enter. Fund*, 130 S. Ct. at 3151–3152, 3156–3157 (discussing the Framers' views concerning executive power); *Boumediene*, 553 U.S. at 739 (discussing the Framers' views of freedom as related to the availability of the writ of habeas corpus).

127. See e.g. *Citizens United*, 130 S. Ct. at 906 (discussing original understanding of the First Amendment); *Heller*, 554 U.S. at 582–585 (discussing original understanding of the Second Amendment's phrase "to keep and bear arms").

128. See e.g. *Comstock*, 130 S. Ct. at 1958–1961 (discussing the history of the federal government's role concerning mental-health matters regarding federal prisoners); *Boumediene*, 553 U.S. at 739–742, 746–752 (discussing historical uses of the writ of habeas corpus); *United Haulers*, 550 U.S. at 342–344 (discussing the importance of the fact that waste control is a traditional state or local function).

129. See e.g. *Heller*, 554 U.S. at 577–578 (parsing the grammatical structure of the Second Amendment); *Medellin*, 552 U.S. at 506–507 (discussing the importance of the text of a treaty in terms of determining its domestic effect).

130. I discuss *Free Enterprise Fund*'s formalism *supra* Part III(A)(3). One can also see such formalism in *Medellin*, *supra* Part III(A)(2).

131. See Friedman & Lithwick, *supra* n. 5 (commenting on the Roberts Court's ability to use "illusionist" tactics to take "the law for a sharp turn to the ideological right, while at the same time masterfully concealing it").

fact, been reluctant to reverse or undermine precedent. I take no position on that issue. Rather, my point is that a consideration of the Court's interpretative decisions indicates that interpretation, or even reinterpretation, does not go hand-in-hand with a lack of fidelity to prior decisions.¹³²

Finally, and perhaps somewhat surprising for a purportedly conservative Court, several of the interpretative decisions of the Roberts Court can be seen as augmenting the power of the judicial branch, even while seeming to provide additional authority for some other center of political authority. In addition to the move toward formalism I have discussed in this Sub-Part, which can increase a court's power in some sense, the Court's decision in *Comstock* is illustrative of this point.¹³³ One of the five factors the Court considered as part of its Necessary and Proper Clause analysis concerned assessment of the "reasonableness" of Congress in acting in the manner it elected.¹³⁴ While the Court upheld the congressional action at issue, it did so only after making an independent assessment of congressional judgment. Such an independent review provides fodder for enhanced judicial review in cases down the road. *Boumediene* also is unquestionably an example of a judicial-centered approach.¹³⁵ The impact of the Court's decision in that case is that federal district judges are now intimately involved in the federal government's response to global terrorism.¹³⁶ Again, this may be an objectively good thing. But the point is that this reality is the result of the Court's actions flowing, at least in part, from the adoption of a particular interpretative approach to constitutional decisionmaking.

132. See e.g. *supra* pt. III(A)(2) (discussing *Medellin*); *supra* pt. III(A)(3) (discussing *Free Enterprise Fund*).

133. *Supra* pt. III(A)(1) (discussing *Comstock*).

134. *Comstock*, 130 S. Ct. at 1961–1962.

135. See *supra* pt. III(A)(5) (discussing *Boumediene*).

136. In fact, Chief Justice Roberts made this point expressly in his dissent. *Boumediene*, 553 U.S. at 801 (Roberts, C.J., dissenting) ("The majority merely replaces a review system designed by the people's representatives with a set of shapeless procedures to be defined by federal courts at some future date. One cannot help but think, after surveying the modest practical results of the majority's ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants."); *id.* at 826 (commenting that as a result of the decision, the American people "today lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges").

To be sure, the Court has not expressly stated that it is adopting positions that enhance the power of the judiciary. Indeed, at times it has leveled criticisms at dissenting Justices that their views are too “judge-empowering.”¹³⁷ At others, the Court has adopted a specific interpretative approach precisely because it believed a contrary ruling would give too much authority to the judiciary.¹³⁸ Yet, it is difficult not to see a trend in favor of judicial power in many of the interpretative-techniques decisions of the Roberts Court.

B. Potential Critiques

When one steps back and considers the Roberts Court’s work in the interpretative field, it is possible to criticize the manner in which the Court has approached the endeavor. To begin with, there have been times at which the Court has perhaps not done enough in articulating a given interpretative approach. For example, in *Boumediene* the Court did not provide a great deal of guidance to district courts concerning how to adjudicate the habeas corpus petitions they would address.¹³⁹ Similarly, one does not get a particularly concrete vision of precisely how the multi-factor test for assessing congressional action under the Necessary and Proper Clause will apply in future cases.¹⁴⁰

In an ideal world, it would be wonderful if a new interpretative direction were able to spring fully formed from the Court. Justice Breyer is clearly correct that it would be preferable if the *Heller* Court had explained the appropriate level of scrutiny to be applied to laws infringing the Second Amendment’s right to bear arms.¹⁴¹ And Justice Thomas makes a valid point that the *Comstock* Court would have done a service by better articulating how the five factors for assessing the propriety of a law under the

137. *E.g. Heller*, 554 U.S. at 634.

138. *E.g. United Haulers*, 550 U.S. at 343.

139. 553 U.S. at 801–803 (Roberts, C.J., dissenting) (discussing the uncertainty attendant to the majority’s ruling in terms of how the habeas corpus proceedings will develop).

140. *Comstock*, 130 S. Ct. at 1975 (Thomas, J., dissenting) (“At a minimum, this shift from the two-step *McCulloch* framework to this five-consideration approach warrants an explanation as to why *McCulloch* is no longer good enough and which of the five considerations will bear the most weight in future cases, assuming some number less than five suffices.”).

141. 554 U.S. at 719–722 (Breyer, J., dissenting) (criticizing the majority’s failure to indicate the appropriate level of scrutiny).

Necessary and Proper Clause would work together in the future.¹⁴² Nevertheless, I am not convinced that such criticisms are warranted. The reality is that we do not live in a perfect world. When the Court marks out a new or revised interpretative approach, it may not be possible—or even desirable—to provide every conceivable nut and bolt. In the end, it is a balancing act in which the Court must weigh the goals focused on predictability with the need to retain some measure of flexibility as doctrine develops.

Another potential criticism of the Court is that all its members may not, in fact, be pulling in the same interpretative direction. I do not mean here that certain Justices have differing views. That is to be expected. Justice Breyer is a functionalist.¹⁴³ Justice Scalia is a formalist.¹⁴⁴ When one or the other of these Justices is writing an opinion, there is no surprise that the opinion bears at least some hallmark of these differing interpretive approaches.

My critique here is that certain Justices seem to drift from camp to camp with an ease that can undermine some of the benefits that flow from articulating interpretative guidelines. Not surprisingly, perhaps, here I refer most pointedly to Justice Anthony Kennedy. For example, Justice Kennedy was a member of the majority in *Heller* with its strong focus on original understanding as a key factor in constitutional interpretation.¹⁴⁵ Yet, Justice Kennedy authored the Court's opinion in *Boumediene*, in which a lack of historical pedigree did not seem to play such a dispositive role.¹⁴⁶ It is tempting when faced with such shifts to throw up one's hands and disparage the process of articulating interpretative techniques across the board. But that is likely too

142. 130 S. Ct. at 1974–1975 (Thomas, J., dissenting) (contending that the Court's shift from the previous two-step process to the new five-step approach calls for some explanation of how the factors will be applied and weighed in future cases).

143. See e.g. Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 5 (Vintage Books 2005) (“My thesis is that courts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts.”).

144. See e.g. Scalia, *supra* n. 122, at 38 (“What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”); *id.* at 40 (“It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away.”).

145. 554 U.S. at 576.

146. 553 U.S. at 752.

extreme. If there were many examples of such “Kennedy shifts,” that might be the correct assessment; however, the past five years generally do not support a conclusion that the enterprise itself is not worth the effort. It may simply be that one Justice in particular is less concerned with fidelity to a set of interpretative principles.¹⁴⁷

A final point is related to, but distinct from, the one I have just discussed. This potential criticism is that the Court as a whole is not consistent in its interpretative techniques. One could definitely make this point descriptively, at least to some degree. For example, the Court’s approach in *United Haulers* is one that consciously attempts to limit the role of the judiciary.¹⁴⁸ On the other hand, *Boumediene* expressly preserves the role of courts even when dealing with sensitive topics such as military detention.¹⁴⁹ Yet, holding the Court to some single “grand theory of interpretation” is not realistic. The Constitution is a complex document with many components. It may be that the Court has not—at least yet—explained why it adopts different interpretative principles in different cases. But that mere fact alone is not as significant as it may seem at first blush.¹⁵⁰ It does not undermine the importance of focused interpretative decisionmaking.

V. CONCLUSION

Five years is likely a small part of the lifespan of the Roberts Court. John Roberts turned only fifty-six in January 2011.¹⁵¹ It is likely, then, that there will be many more symposia like this one as the years pass. One can only speculate on what a Roberts Court in adolescence or adulthood will look like.

At least on the record to date, the Court John Roberts leads has been active in articulating the principles by which it will

147. It is also possible that one could synthesize Justice Kennedy’s opinions more comprehensively and conclude that, in fact, he has an overall commitment to a set of interpretative principles that may vary depending on some other variable. I have not attempted to do so in this Article.

148. See *supra* pt. III(A)(4) (discussing *United Haulers*).

149. See *supra* pt. III(A)(5) (discussing *Boumediene*).

150. This same point may also serve as a defense for Justice Kennedy in particular. See *supra* n. 145–147 (discussing Justice Kennedy’s apparent inconsistency in his use of interpretative guidelines). I confess, however, that there is a sense that Justice Kennedy may present a different case.

151. *Supra* n. 1.

2011] *The Roberts Court and How to Say What the Law Is* 699

interpret the Constitution. That endeavor is an important part of the Court's role in American democracy. One may quibble with the way in which the Court has fulfilled this aspect of its judicial responsibility, but I believe the Court should be praised for the effort.

We cannot predict if the Court will continue a focus on interpretation in the conscious way that it has during the first five years of John Roberts' stewardship. I hope that it does, because this activity is an important part of American constitutional democracy.¹⁵²

152. I would be remiss if I did not acknowledge the general work of other academic commentators discussing the Court's articulation of interpretative principles in a broader context. For a summary of some of the literature in this area, see Mitchell N. Berman, *Constitutional Decision Rules*, 90 Va. L. Rev. 1, 3–8 (2004).