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The Style of a Skeptic: The Opinions of Chief Justice Roberts

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President George W. Bush's nomination of John G. Roberts, Jr. to fill retiring Justice Sandra Day O'Connor's Supreme Court seat unleashed a storm of speculation about the likely substance of his jurisprudence. That storm intensified when, following the death of Chief Justice William Rehnquist, Roberts was designated to fill the center seat instead. Although Roberts's résumé, including his experience as a White House counsel and Deputy Solicitor General in two Republican administrations, clearly marked him as a conservative, it was generally agreed that his opinions as a circuit court judge provided few clues to his positions on the most divisive issues likely to come before the Supreme Court. Overlooked,
however, in the speculation about the direction of the nominee's future jurisprudence was another aspect of his performance on the bench, one on which his lower court record would have been surprisingly illuminating: Roberts's judicial personality.

As I have elsewhere used the term, \(^3\) a judicial personality is the voice that a judge crafts from a range of rhetorical choices including—among numerous other elements—diction, metaphor, syntax, allusion, and tone. In this era of opinion drafting by multiple law clerks, it is far rarer than it once was for a judge to develop a distinctive voice that expresses a consistent attitude toward the business of decision making. Roberts, however, is one of those infrequent exceptions. From his first opinion on the Court of Appeals for the District of Columbia Circuit, Roberts has emerged as a confident stylist who deliberately selects the word, the image, the tone that will convey not just a legal position but a personal perspective as well.

In his court of appeals opinions, most of them unanimous rulings on relatively narrow issues of statutory interpretation, Roberts favors informal diction and a lightly ironic tone that tend to humanize otherwise dry institutional issues. He engages the reader through a range of strategies, from figurative language to syntactical asides, suggesting that even the technical subject of administrative law is rooted in human experience as well as regulatory doctrine. The Supreme Court docket has provided Roberts with a richer and more varied set of legal problems, and in his first term he seems at times to be feeling his way toward a voice that retains some of the conversational qualities of his earlier opinions while acknowledging the added dignity of the high court. It is principally in his dissents and concurrences that Roberts has expressed most fully his judicial personality, countering the majority's abstract theories with his own perspective on law as a reflection of the realities of human experience.

This Article will analyze Roberts's rhetorical choices, first in his court of appeals opinions and then in the opinions from his first Supreme Court term. That analysis reveals the new Chief Justice as a careful and detached stylist who favors experience over theory in his opinions and who locates himself as the heir to a distinguished tradition of judicial skepticism.

I. SHAPING A JUDICIAL PERSONALITY: ROBERTS AS CIRCUIT COURT JUDGE

When Roberts joined the Supreme Court as its seventeenth Chief Justice on September 29, 2005, he brought with him slightly more than two years of judicial experience as a member of the Court of Appeals for the District of Columbia Circuit. \(^4\) In that brief tenure, Roberts authored forty-eight opinions: forty-three for his court, two concurrences, two dissents, and one hybrid—an opinion both concurring and dissenting in part. Most of those opinions were relatively brief, and many involved narrow issues of administrative law under specialized statutes. All but four of Roberts’s majority opinions were written for unanimous panels, \(^5\) and

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one of his two dissents was a brief rejection of the majority’s denial of a rehearing en banc. His judicial record thus provided little ideological sustenance for either his supporters or his detractors as they prepared for his confirmation hearing, and Roberts subsequently faced few questions about the substance of his appellate jurisprudence.

Despite this seemingly unpromising paper trail, Roberts’s circuit court opinions do provide some intriguing clues to his approach to the business of writing appellate opinions. In fact, the absence of strong ideological content, reflected in Roberts’s almost invariable agreement with his judicial colleagues, illuminates his craftsmanship. These are, in many instances, opinions rejecting litigants’ arguments for further review that are more hopeful than compelling. In each case, however, Roberts provides clear, detailed, and orderly responses to those arguments, giving each petitioner his full—and fully informed—attention. This may reflect Roberts’s experience of seventeen years as a Washington appellate attorney who himself argued thirty-nine cases before the Supreme Court. He knows what counsel and client want to see from the court reviewing their claims, even if they have only limited expectations of success, and he seems to regard it as part of his judicial duty to take all arguments seriously, if only in the moment before he rejects them, and to provide an explanation accessible to attorneys and often to lay persons as well.

Read together, Roberts’s circuit court opinions hint at the emergence of a judicial personality, a recognizable voice that consistently expresses a distinctive attitude. Although these early opinions lack the heft to establish definitively the elements of Roberts’s jurisprudence, they do contain stylistic tendencies that point the way toward the future evolution of an identifiable voice that “draw[s] on emotion and experience, as well as intellect, in shaping . . . judicial responses.” As a stylist, Roberts already seems intent on finding ways to leaven his utilitarian prose with personalized elements of diction, metaphor, allusion, syntax, and tone. It is these elements that convey to the reader a particular judicial persona, someone whose legal conclusions are informed not only by his mastery of the law but also by his reading, his interest in the expressive capacity of language, and his perceptions of human behavior.

A. The Right Word

Explaining his skepticism toward the majority’s use of the canons of statutory interpretation, Roberts announced in one of his few concurrences that “at the end of

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7. According to the Supreme Court Web site’s biographical summary, Roberts was in private practice from 1986 to 1989 and again from 1993 to 2003. During the interval from 1989 to 1993, he served as Principal Deputy Solicitor General. Supreme Court Biographies, supra note 1. As a practitioner, he argued thirty-nine cases before the Supreme Court. Adam Liptak, Court in Transition: The Record; A Career Largely on One Side of the Bench and Involving a Wide Variety of Issues, N.Y. TIMES, July 20, 2005, at A17.

the day I find greater solace in the words themselves." His choice of diction makes clear that he is drawn to "words themselves" for more than solace. From his earliest opinions, Roberts has shown an affinity for the mot juste, the single word that will sharpen a sentence by identifying precisely how someone has acted or what is at stake, often in surprising ways. His use of adverbs is illustrative. A challenge to the court's jurisdiction need only be "meekly noted" in order to be taken seriously. A relevant precedent "establishes (unremarkably)" a litigant's right to appeal on an issue. Congress would have acted "quite elliptically" if the appellants' strained reading of its intent were accurate. And a car theft victim might remain "blissfully unaware" of his loss until the next morning.

As a deliberate stylist, Roberts appreciates the power of adjectives to both illuminate and conceal. Comparing district court and magistrate judge opinions in the same case, he finds that "[t]he former's opinion lacks the adjectives that populate the latter's," and thus the first judge acknowledges the difficulty of the issue at hand while the second attempts to evade it. In his own choice of adjectives, Roberts likes to use an unexpectedly literary modifier—sometimes in contrast to less elevated diction—to underscore a point. Thus, a litigant claims that it made "herculean efforts" but nonetheless "could not come up with the goods" in time. The Supreme Court "observed, with blithe understatement," that "[c]ompetition among utilities was not prevalent." There is an "exquisite variety of academic institutions across the country," requiring the National Labor Relations Board to develop a substantial body of case law applying a single Supreme Court precedent. And, choosing to concur rather than join the majority's unnecessarily broad holding, he "cannot go along for that gratuitous ride." Such usages, planted in the middle of otherwise conventional legal prose, have the effect of expanding the reader's perspective on the case. The "gratuitous ride," for example, plays off

10. According to those who have worked with him, Roberts's interest in language manifests itself in several ways. As a White House attorney, he apparently chose to answer a routine letter because, he wrote to his superior, "[a]nyone who can quote inspiring passages from Plato and Webster, however, and use a word like "slumgullion," deserves a reply." Anne E. Komblut, In Re Grammar, Roberts's Stance is Crystal Clear, N.Y. TIMES, Aug. 29, 2005, at A1. Sources describe Roberts as both a dedicated grammarian and a lover of the unusual word: "A cheerfully ruthless copy editor over the years, Judge Roberts has demanded verbal rigor from his colleagues and subordinates, refusing to tolerate the slightest grammatical slip, and boasting an exceptional vocabulary and command of literature himself." Id.
the Latin root of the adjective ("gratuit," meaning free) to suggest a dual meaning: the majority's broad holding is not only "assumed without any good ground or reason" but also, in the primary definition, "[f]reely bestowed or obtained," the proverbial free ride that allows the court to take advantage of this case to make an unearned point.20

B. The Right Comparison

"Gratuitous ride" is also a figurative use of language, in this instance a metaphor masked by the rejection of the usual adjective "free" in favor of the more formal "gratuitous." That deliberate change suggests what Roberts's other opinions confirm: his serious interest in the possibilities of figurative language as a stylistic tool. Many of his metaphors are drawn from common usage and add a comfortably familiar note to his legal prose. In his first published circuit court opinion, Roberts produced his first judicial metaphor, his observation that "diligence . . . should begin as soon as the ball is in the FAA's court."21 In other opinions, the reader finds "jurisdictional speed bumps,"22 "a rhetorical sleight of hand,"23 "an obvious end-run around" a rule,24 and "the backbone of software programs."25 Roberts is also fond of invoking homely adages to clarify or emphasize a complicated point. Thus, the FCC is "not crying wolf" in anticipating a technical problem;26 it is a "fundamental precept of Anglo-American jurisprudence that you cannot have your cake and eat it, too" by suing an individual government official and simultaneously treating him as a nation state;27 a jurisdictional requirement must be upheld "because it is easy enough to spin out 'for want of a nail' scenarios from any set of facts that could eventually lead to this court";28 and, in a highly technical case dealing with the sale of power transmissions, "OPG thus would be cutting off its nose to spite its face by congesting an intertie out of Ontario."29 Occasionally, Roberts explicates an adage to sharpen his focus. Rejecting the argument of a fired government employee that he is protected by a whistle-blower statute, Roberts makes extended use of a common expression to explain the flaw in the appellant's position:

This reasoning fails to take into account the cumulative effect of Koszola's misconduct. The adage about the straw breaking the camel's back is familiar

20. 6 THE OXFORD ENGLISH DICTIONARY 779 (2d ed. 1989). I am indebted for this reading of "gratuitous" to Philip Ray.
22. Midwest ISO, 373 F.3d at 1368.
24. AT&T Corp. v. FCC, 394 F.3d 934, 938 (D.C. Cir. 2005).
because of the truth it conveys. Koszola was fired not simply because of the misreporting episode, which in any event was no mere straw. That episode was simply the latest in an accumulation of incidents that exhausted the patience of Koszola's supervisors and left them with no confidence in him.\textsuperscript{30}

The visual image of a supervisory camel increasingly burdened by the employee's transgressions until it collapses under the weight of misconduct renders the appellant's position both untenable and absurd.

Roberts does on occasion go beyond the familiar in his use of figurative language. He twice employs a submerged religious metaphor to suggest the majority's skeptical but open-minded avoidance of an unnecessary issue. Thus, he insists that "we can remain agnostic on the question whether Congress intentionally left the presentment requirement in Section 3729(a)(1) or simply forgot to take it out."\textsuperscript{31} Speaking again in the first person, he sidesteps another unresolved issue: "We persist in our agnosticism on the appropriate standard of review in this case" because the parties failed to brief and argue the point.\textsuperscript{32} Roberts can also take pleasure in the perfect aptness of a particular metaphor, as when he describes the San Juan Basin as "a prolific source of natural gas, connected by pipeline to southern California and literally helping to fuel the dramatic growth of that region."\textsuperscript{33} That pleasure in metaphoric possibilities can lead Roberts astray, as when he mixes knitting and botanical images in a single sentence: "The district court did not unravel 'a highly integrated' complex of interlocking illegal provisions . . . but rather removed a punitive damages bar that appears to have been grafted onto an intact and functioning framework . . . ."\textsuperscript{34} Most often, however, he is adept at finding and developing his own metaphors. When, writing in concurrence, he wants to pursue one but not all of the implications of the majority's holding, he introduces his analysis with an amusingly apt image: "Not to chase down every rabbit spooked by the majority's alternative holding . . . ."\textsuperscript{35}

The recurrence of figurative language suggests something more than Roberts's literary taste. It also suggests that he tends to think and write in analogical terms when confronting a complex case. The clearest example of this tendency appears in

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34. Booker v. Robert Half Int'l, Inc., 413 F.3d 77, 85 (D.C. Cir. 2005). In another mixed metaphor, Roberts shifts from "a logjam . . . blocking the development of DTV" to "evidence of this diagnosis." Consumer Elecs. Ass'n v. FCC, 347 F.3d 291, 300 (D.C. Cir. 2003). Roberts is, however, perfectly capable of extending a metaphor without mixing it. Faced with the issue of the severability of an arbitration agreement provision, he observes that "[i]f illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, . . . the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." Booker, 413 F.3d at 84-85. See also Bloch v. Powell, 348 F.3d 1060, 1069 (D.C. Cir. 2003) ("Bloch's argument runs headlong, however, into a line of precedent."); United States v. Stanfield, 360 F.3d 1345,1353 (D.C. Cir. 2004) ("[W]e need more solid footing before deciding where we stand.").
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Midwest ISO Transmission Owners v. Federal Energy Regulatory Commission, a case dealing with the complicated rules governing access to power transmission facilities. Twice in his majority opinion Roberts resorts to analogies to untangle the issues before the court. The first analogy briskly disposes of FERC’s argument that the petitioners lacked standing because they failed to show that they could not eventually recoup their challenged losses. Roberts once more finds a domestic comparison to underscore the weakness of FERC’s position: “FERC’s argument is tantamount to contending that a homeowner whose house is destroyed by arson has not been injured by the arsonist, if the house was adequately insured.”36 Having found standing, Roberts goes on to reject one of the petitioners’ arguments—that they should not have to pay the costs of an administrative system that they are not using—by an extended analogy demonstrating that they nonetheless benefit from the existence of the system:

In this sense, MISO is somewhat like the federal court system. It costs a considerable amount to set up and maintain a court system, and these costs—the costs of having a court system—are borne by the taxpayers, even though the vast majority of them will have no contact with that system (will not use that system) in any given year. The public nevertheless benefits from having a system for the prompt adjudication of criminal offenses and the orderly resolution of civil disputes. Litigants bear some of the costs of using this system through the payment of filing fees and court costs. They, like utilities transmitting power under the MISO open access tariff who pay according to Schedule 1, are paying for the specific benefit of using the court system. The MISO Owners’ position is tantamount to saying that if they are not a litigant, they should not be made to pay for any of the costs of having a court system. Since the MISO Owners do, in fact, draw benefits from being a part of the MISO regional transmission system, FERC correctly determined that they should share the cost of having an ISO.37

The comparison is of particular relevance to those involved in the government regulatory process, but it also has a commonsensical quality that makes it accessible to outsiders as well.38 Roberts’s characteristic use of italics to emphasize the key elements of his analogy—the difference between having and using a system—seems specifically designed to reach lay readers as well as those well versed in administrative processes. Although the opinion of necessity uses a great deal of technical jargon in resolving the case, this passage suggests what his other

37. Id. at 1371 (emphasis in original).
38. In a case dealing with the National Transportation Safety Board’s random drug testing policy, Roberts used another analogy for a structure of legal rules: a sport such as golf can have a system of rules grounded on the assumption that participants will in good faith call penalties on themselves, but such an approach seems ill-advised when it comes to designing regulations to protect the public from drug use by those in safety-sensitive positions—and in fact that is not the approach reflected in these regulations. Duchek v. Nat’l Transp. Safety Bd., 364 F.3d 311, 316 (D.C. Cir. 2004).
opinions illustrate: that Roberts prizes a clear and simple explanation even when the subject matter at issue is dense and technical.

Roberts employs his metaphors and analogies for two related purposes. Rhetorically, these devices invoke a familiarly rational world in which the losing litigant’s argument, however artfully disguised in abstruse legal terminology, simply makes no sense. Furthermore, the familiarity of the comparisons makes the opinion accessible to attorneys and lay readers—including the losing litigant—alike. For Roberts, clarity seems important not just as a matter of judicial craftsmanship but as a matter of communication as well. By his choice of imagery, he suggests that the audience for judicial opinions should include not only professionals but also the broader universe of people who may, like the MISO petitioners, someday need to use and understand the legal system.

C. The Colloquial Voice

Roberts’s interest in the communicative aspect of his opinions emerges even more distinctly in his use of diction and syntax to strike an occasionally colloquial tone. Embedded throughout his opinions, majority as well as concurring and dissenting, are informal words and structures that speak directly to his audience. In this respect Roberts’s prose is similar to that of Justice Scalia, though in a much less aggressive and confrontational manner. Where Scalia grabs his readers by the lapels to give them an earful on the absurdities of the opposing side’s position, Roberts converses equably with his readers, pointing out to them the bases for the logical conclusions that a calm and fair-minded judge has reached. Where Scalia rhetorically engages in “indignant conversation,” Roberts prefers an explanatory chat which is designed to win the listeners’ confidence rather than elicit their angry agreement.

Like his metaphors and analogies, Roberts’s colloquial voice speaks directly to nonlawyers. At his confirmation hearing, the nominee made clear his belief that Supreme Court opinions should be broadly accessible: “I hope we haven’t gotten to the point where the Supreme Court’s opinions are so abstruse that the educated lay person can’t pick them up and read them and understand them. You shouldn’t have to be a lawyer to understand what the Supreme Court opinions mean.” Roberts’s position differs somewhat from that of Justice Black, who believed that “[w]riting in language that people cannot understand is one of the judicial sins of our times.”

39. Ray, supra note 3, at 226. See also id. at 226–29 (discussing Scalia’s rhetorical strategy).

40. Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary, 109th Cong. (2005) (statement of Judge John G. Roberts, Jr.) [hereinafter Confirmation Hearing]. Roberts singled out the opinions of Justice Jackson, whom he described as “one of the best writers the court has ever had,” as admirable in this respect:

They are not written in jargon or legalese, but an educated person whose life, after all, is being affected by these decisions can pick them up and read them, and you don’t have to hire a lawyer to tell you what it means. I hope we haven’t gotten to a point where that is an unattainable ideal.

Id.

41. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 325 (2d Ed. 1997). See Ray, supra
According to his biographer, Roger Newman, "Black wanted litigants, people in barber shops, 'your momma,' he once told a clerk, to understand his opinions."\(^{42}\) Roberts, in contrast, seeks only to be accessible to "the educated lay person," a reader presumably capable of appreciating his more sophisticated stylistic elements as well as his colloquial diction.

As part of his rhetorical strategy for reaching his target audience, Roberts uses informal locutions seldom found in legal prose. The operator of a helicopter service had to decide "when to spring the drug test" required by law on his employees\(^{43}\) and "was somewhat in a bind" because he was himself subject to the test.\(^{44}\) In a qui tam action under the False Claims Act, "the Government and the relator divvy up" statutory damages.\(^{45}\) The federal government "finally caught on to" an employee's elaborate fraud scheme,\(^{46}\) and her husband could not claim perfect ignorance because "[i]t would not take a rocket scientist to deduce that the electronic equipment Luther was himself using was stolen."\(^{47}\) In a challenge to FERC's order permitting expansion of a marina, "[i]t was obvious from the get-go" that the plan contained no limits on development.\(^{48}\) Roberts also uses informal diction of another kind, the interjection "whatever," more common in speech than in prose, to round off a list and indicate that no variant can change the legal outcome. Thus, petitioners "readily concede that all transmission customers—bundled, unbundled, grandfathered, whatever—benefit from" regulation of the grid.\(^{49}\) In another case, even issues that are "identical, intertwined, closely related, whatever" cannot provide the basis for a stay.\(^{50}\) The deliberate imprecision of "whatever," usually avoided in judicial opinions, here strikes another commonsensical note, indicating the futility of any more inventive alternatives.

Roberts employs one additional strategy of engagement, addressing questions, instructions, and observations directly to the reader. When he admits that an EPA letter is, as petitioner claims, "a statement of 'general or particular applicability,'" he follows up that concession with a rhetorical question—"what isn't?"—before concluding that the point is irrelevant.\(^{51}\) Concurring in part, he restates a section of the majority's opinion and accepts its accuracy—"Fair enough."\(^{52}\) before going on to identify his point of disagreement. In a stop and frisk case, he asks the reader to "[r]ecollect what Officer Phillip knew as he began to frisk Holmes,"\(^{53}\) and in a case involving a search of a suspected stolen car he asks "Why the trunk?"

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Note 3, at 198–201 (discussing Black's rhetorical strategies to make his opinions understandable to a broad lay readership).

42. Newman, supra note 41, at 325.
43. Duchek, 364 F.3d at 312.
44. id. at 313.
46. United States v. Mellen, 393 F.3d 175, 178 (D.C. Cir. 2004).
47. id. at 181.
answering his own question (“[T]he trunk is certainly a convenient place to stash the real tags once they have been removed from the back of the vehicle.”). 54

Sympathizing with the patient reader after a long analysis of the appealability of a judgment, he announces that “we turn (at last) to the merits of Outlaw’s appeal.” 55

Such moments involve the reader in the opinion’s argument, anticipating concerns and meeting them as part of the process of persuasive argument.

Perhaps the most informal and engaging moment in Roberts’s opinions appears in a dissent, where he exercises the greatest latitude in writing style. The defendant, convicted of being a felon in possession of a firearm, challenged on appeal the police officers’ decision to arrest him without further investigating his claim that the car he was driving—in which the firearm was found—was in fact borrowed from his girlfriend. Roberts chooses to reject that challenge by invoking an excuse that has attained legendary status in American popular culture: “Sometimes a car being driven by an unlicensed driver, with no registration and stolen tags, really does belong to the driver’s friend, and sometimes dogs do eat homework, but in neither case is it reasonable to insist on checking out the story before taking other appropriate action.” 56

It would presumably have been possible to identify precedents in which police officers faced with similar claims also prevailed on appeal. Roberts’s decision to invoke instead the most celebrated childhood excuse once again roots his jurisprudential style in the shared universe of legal doctrine and human experience. Judges, he implies, ground their decision making in the same reality that teachers and parents do, and their conclusions are not confined to a realm of rarefied abstractions.

D. Repetition and Balance

Although such use of domestic metaphors and informal diction may seem like the artless choices of a relatively unsophisticated writer, in Roberts’s case that assumption is proven inaccurate by several of his other stylistic choices. He displays his ear for language in his penchant for the occasional alliterative phrase: “subpoena spat,” 57 “crabbed construction,” 58 “careful caveat,” 59 and—most exuberantly—“reticulated remedial regime.” 60

He also likes the sound of deliberate repetition as a means of emphasis, as when he resolves a jurisdictional claim by concluding that “as a constitutional matter, there is no constitutional matter.” 61

The same device recurs, sometimes in shorter form (when he refers to a model “for

56. Jackson, 415 F.3d at 105 (Roberts, J., dissenting).
60. Fornaro v. James, 416 F.3d 63, 66 (D.C. Cir. 2005).
determining when some skew becomes too much skew62), and sometimes at
greater length (when he observes that “an officer cruising the streets cannot readily
identify a particular Mercury Marquis as the stolen Mercury Marquis”63). Roberts’s
most elaborate use of repetition comes when he dismisses a district court opinion
that relied on two concurrences: “Well reasoned, to be sure, and perhaps ultimately
persuasive, but—to paraphrase the Supreme Court’s dismissal of nonmajority
views in another case—the comments in the concurring opinions are just that:
comments in concurring opinions.”64 The case paraphrased is United States
Railroad Retirement Board v. Fritz,65 with a majority opinion written by then
Associate Justice Rehnquist, for whom Roberts was clerking at the time.66 Fritz
was argued on October 6, 1980, at the very beginning of Roberts’s clerkship year,
and it might even have been the first case assigned to him by Rehnquist, whose
clers prepared first drafts of his assigned cases.67 If so, we might be seeing a rare
phenomenon: a circuit court judge citing a Supreme Court opinion drafted almost a
quarter century earlier by himself.

Whether Fritz is a precursor of Roberts’s later style or a mentor’s model, it
reflects his penchant for carefully shaped sentences that aim at balance by repeating
or pairing words or concepts. Thus, he finds “good sense” in the court’s “reopenning
doctrine” for administrative regulations: “Just as it would be folly to allow parties
to challenge a regulation anew each year upon the annual re-publication of the
Code of Federal Regulations, so too it is silly to permit parties to challenge an
established regulatory interpretation each time it is repeated.”68 The paired terms,
“folly” and “silly,” also echo one another, further reinforcing the parallel. Roberts
makes clear his awareness of the shape of his opinions when, in two instances, he
claims a circular structure as well as a victory over the dissent. In the first, he
compares his opinion for the court with his misguided colleague’s effort: “The
dissent literally begins and ends with legislative history. . . . [W]e will end as we
began, too, but with the statutory language.”69 In the second instance, he opens his
concurrence with an elegantly varied repetition worthy of Justice Jackson by citing
“the cardinal principle of judicial restraint—if it is not necessary to decide more, it
is necessary not to decide more,”70 a formulation he liked well enough to use again

Comm’n, 397 F.3d 1004, 1011 (D.C. Cir. 2005).
(emphasis in original).
65. 449 U.S. 166 (1980).
66. Rehnquist was referring to the dissenting opinions cited by Justice Brennan in his
own dissent from the Court’s announced rational basis standard for equal protection review.
Id. at 177 n.10.
2004) (Roberts, J., concurring in part and in the judgment). Jackson’s prose was
characterized by the use of repetition in the form of inversions; the best known is his
observation about the Supreme Court that “[w]e are not final because we are infallible, but
we are infallible only because we are final.” Brown v. Allen, 344 U.S. 443, 540 (1953)
in his commencement address to students at Georgetown University. 71 Roberts then concludes with an emphasis on the inevitable shape of his opinion: “I end where I began—with regret that the majority feels compelled to address far-reaching questions on which we disagree, when they are wholly unnecessary to the disposition of the case.” 72

E. Allusions and Role Models

These carefully shaped sentences are not the only reflection of Roberts’s literary sensibility. His brief body of opinions contains only a handful of direct literary allusions, but that handful is sufficient to suggest the range of his reading. In an early opinion, he endorses the FCC’s denial of a waiver with a bilingual flourish: “Enforcement of the default penalty rule was appropriate, to borrow from Voltaire, ‘pour encourager les autres.’” 73 No specific work is cited, and no translation is provided. 74 Instead, the reference suggests that his readers are either familiar with the quotation or sufficiently conversant with French to translate for themselves, a reasonable assumption in light of the passage’s cognates. Roberts has no difficulty turning from a rationalist to a transcendentalist source when it serves his purpose. Chastising a lower court for ignoring cases in which it had decided a similar issue differently, Roberts cites Emerson to explain the court’s remand for clarification: “Emerson’s advice to preachers—‘emphasize your choice by utter ignoring of all that you reject,’ RALPH WALDO EMERSON, The Preacher, reprinted in 10 LECTURES AND BIOGRAPHICAL SKETCHES 215, 235 (1904)—will not do for administrative agencies.” 75 This time, however, the source is part of the problem, not part of the solution, and Roberts’s inclusion of the title of Emerson’s work—The Preacher—in the text obliquely underscores the difference between legal and inspirational rhetoric.

(Jackson, J., concurring). For a discussion of Jackson’s prose style, including his use of inversions, see Ray, supra note 3, at 208–11.

71. Chief Justice Says His Goal is More Consensus on Court, N.Y. TIMES, May 22, 2006, at A16. The passage in the speech varied slightly from the original version in the opinion: “If it is not necessary to decide more to a case, then in my view it is necessary not to decide more to a case.” Id.

72. PDK Labs. Inc., 362 F.3d at 809 (Roberts, J., concurring in part and in the judgment).

73. BDPCS, Inc. v. FCC, 351 F.3d 1177, 1182 (D.C. Cir. 2003) (emphasis in original).

74. The passage is from Voltaire’s Candide, and its original use suggests that Roberts has deliberately omitted the citation. When the traveler Candide sees a man executed on the deck of a warship and asks for an explanation, he learns that the victim is an admiral who failed to draw close enough to engage a French admiral’s ship in combat:

“But,” said Candide, “the French admiral was just as far from the English Admiral as the English Admiral was from him!” “Of course,” someone said. “But in this country it’s a good thing to kill an admiral, from time to time, to spur on the others.”

VOLTAIRE, CANDIDE OR OPTIMISM 95 (Burton Raffel trans., 2005). Roberts’s shortened version of Voltaire’s joke suggests that the FCC’s denial of the penalty waiver will similarly encourage greater compliance without referring to the steep price paid for that encouragement in the original text.

75. Lemoyne-Owen Coll. v. NLRB, 357 F.3d 55, 61 (D.C. Cir. 2004).
Even when Roberts employs a familiar literary source, he tends to give the allusion a surprising spin. Dickens' *Bleak House* is often invoked for the novel's depiction of an endless and destructive estate matter, and Roberts makes a similar reference in resolving a probate case: "The roots of this real-life *Bleak House* saga doubtless stretch further back in time, but the precipitating event was the death of Lew Gin Gee Jung (Mother Jung) in January 1995."76 A page later, after describing the family dispute and the probate court's decision, he updates the novel in a footnote: "Even Dickens would have been impressed by the modern twist in this chapter of the Jung family's *Bleak House*: the Probate Division ordered the exhumation of Mother Jung's body for DNA testing to settle the heirship dispute."77 Roberts uses another classic work, this time *The Odyssey*, as a foil for an opinion's outcome. Reviewing the appellant's conspiracy conviction for involvement in his wife's theft of government property, Roberts distinguishes between Homer's celebration of marriage and the more skeptical attitude of the law:

Homer thought there was "nothing greater and better than this—when a husband and wife keep a household in oneness of mind," *The Odyssey*, bk. VI, l. 180, but there is no evidence that the drafters of the Sentencing Guidelines assumed such an ideal could substitute for proof of an agreement to participate in a conspiracy.78

The Homeric ideal is rejected in favor of a close reading of the record, which shows no consultation of husband and wife. Roberts concludes with a simple statement of the marital situation in this case: "The fact that he knew what she was doing does not mean he agreed to it."79

Even Roberts's less complicated literary references contain some surprises. He invokes *Macbeth* not in the context of a criminal appeal but instead in a challenge by film studios to the denial of royalties by the Copyright Office. Upholding the regulatory requirement of a postmark to establish timeliness, he explains that "[t]he express exclusion of the sort of evidence most likely to be submitted in lieu of a receipt—far from opening the door to other evidentiary submissions—was simply a way to 'make assurance doubly sure.'" WILLIAM SHAKESPEARE, *MACBETH* act 4, sc. 1.80 Granting a petition for review of an FCC order concerning resales of telephone service, Roberts quotes from George Eliot's celebrated novel as he rejects the Commission's proposed analogy as unpersuasive:

George Eliot has written that "the world is full of hopeful analogies," *MIDDLEMARCH* 83 (Penguin Classics 1994) (1872), and this must be one of them, but likening the transfer at issue to a different arrangement, and then analyzing how *that* arrangement would fare under Section 2.1.8, does not advance the FCC's position very far.81

77. Id. at 431 n.1.
78. United States v. Mellen, 393 F.3d 175, 185 (D.C. Cir. 2005).
79. Id.
81. AT&T Corp. v. FCC, 394 F.3d 933, 938 (D.C. Cir. 2005) (emphasis in original).
The quotation is apt, but a reader may be forgiven for wondering if its appearance reflects as well a fondness for a novel never before or since cited in any federal court opinion. A common thread in many of these literary allusions is the negative use of the source to illustrate the wrong way to address the issue at hand. The right way turns out to be simple, commonsensical, and rooted in the particularities of the case rather than in complicated idealized approaches. Roberts presents Eliot’s “hopeful analogies,” with their appealing optimism, only to reject them in favor of the realities before the court.

There is a second set of allusions in Roberts’s opinions that sheds even more light on his sense of himself as an appellate judge—allusions to the writings of other judges. It is surely no coincidence that the first words of his first judicial opinion were “Learned Hand,” widely considered to be among the greatest American judges and probably the greatest of those judges never to sit on the Supreme Court. The case, Ramaprakash v. Federal Aviation Administration, was a routine challenge to a National Transportation Safety Board order on the grounds of inconsistency, but Roberts’s first appellate sentence was scarcely routine:

Learned Hand once remarked that agencies tend to “fall into grooves, . . . and when they get into grooves, then God save you to get them out.” Judge Hand never met the National Transportation Safety Board. In this case, we grant the petition for review because the Board has failed adequately to explain its departures from its own precedent in no fewer than three significant respects.

82. Perhaps the least surprising of Roberts’s literary allusions appears in a quotation from a Supreme Court opinion, Harrison v. PPG Industries, rejecting an argument based on the absence of legislative history: “In ascertaining the meaning of a statute,” the Court stated, “a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.” 446 U.S. 578, 592 (1980). The reference by Justice Stewart is to Arthur Conan Doyle’s short story, The Silver Blaze, in which Holmes deduces from the dog’s failure to bark that the culprit in the theft of a valuable horse was known to the dog and was in fact the horse’s trainer. ARTHUR CONAN DOYLE, Silver Blaze, in THE MEMOIRS OF SHERLOCK HOLMES 3, 27 (Christopher Roden ed., 1993). Harrison was decided in May 1980, shortly before Roberts began his clerkship with Rehnquist, who also alluded to the story in his Harrison dissent. 446 U.S. at 596 (Rehnquist, J., dissenting). As a former Rehnquist clerk as well as a reader of Supreme Court opinions, Roberts would have had reason to be familiar with the allusion and its usefulness in debates over statutory interpretation. See also Acree v. Republic of Iraq, 370 F.3d 41, 42 (D.C. Cir. 2004) (Roberts, J., concurring in part and in the judgment) (including Roberts’s quotation from Harrison).


84. Gerald Gunther opens his biography of Hand by placing him in the pantheon of American judges:

Learned Hand is numbered among a small group of truly great American judges of the twentieth century, a group that includes Oliver Wendell Holmes, Jr., Louis Brandeis, and Benjamin Cardozo. Yet among these judges, only Hand never sat on the Supreme Court.


85. Ramaprakash, 346 F.3d at 1122 (footnote omitted).
This passage, his only cite to Hand, nonetheless suggests Roberts's invocation of the Second Circuit Judge as both role model and muse. Hand's style anticipates Roberts's own preference for figurative language ("fall into grooves") and a colloquial tone ("God save you to get them out"), just as Hand's insistence on judicial restraint finds echoes in Roberts's jurisprudence. But Hand turns out to be only one in a line of great American judges that Roberts invokes. Just as Ramaparakash opens with a quote from Hand, it closes with a quote from one of Hand's admirers, Oliver Wendell Holmes: "We have it on high authority that 'the tendency of the law must always be to narrow the field of uncertainty.' O.W. Holmes, *The Common Law* 127 (1881). The Board's unexplained departures from precedent do the opposite." As Roberts himself might say, he ends as he began, with a quote from another great judge, one whose epigrammatic style influences Roberts's later opinions.

Roberts's connection to Hand and Holmes turns out to be mediated by his connection with another distinguished federal appellate judge, Henry J. Friendly, who sat on the Court of Appeals for the Second Circuit from 1959 to 1986 and for whom Roberts clerked from 1979 to 1980. Friendly published a volume of essays, *Benchmarks*, in 1967, and Roberts quotes from it six times in the course of his opinions. Some of these references are secondary. The Hand quote, for example, appears in a Friendly essay, *More Definite Standards of Administrative Action: The Need*, although Roberts cites to *Benchmarks* rather than to the specific essay. Although Roberts omits part of the quotation, Friendly notes that administrative agencies "fall into grooves just as the judges are so apt to..."
When Roberts quotes Felix Frankfurter's celebrated advice on statutory interpretation, he also does so by way of Friendly, who was Frankfurter's student at Harvard Law School: "This calls to mind what Judge Friendly described as Felix Frankfurter's 'threefold imperative to law students' in his landmark statutory interpretation course: '(1) Read the statute; (2) read the statute; (3) read the statute!'" Henry J. Friendly, *Benchmarks* 202 (1967). Roberts cites appreciatively to two other Supreme Court Justices, Brandeis and Cardozo. The reference to Brandeis, for whom Friendly clerked, is a quotation from another *Benchmarks* essay, *Mr. Justice Brandeis—The Quest for Reason*:

> Not all opinions can aspire to what was said of those of Justice Brandeis—that in them "the right doctrine emerges in heavenly glory and the wrong view is consigned to the lower circle of hell," HENRY J. FRIENDLY, *Mr. Justice Brandeis—The Quest for Reason*, in *Benchmarks* 291, 294 (1967).

Even though Roberts quotes directly from Cardozo on the subject of judicial style ("Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it"), it is worth noting that the first words of Friendly's first *Benchmarks* essay, entitled *Reactions of a Lawyer-Newly-Become-Judge*, are "Judge Cardozo." And Holmes, too, is the subject of a *Benchmarks* essay, *Mr. Justice Holmes and the Common Law*, discussing the monumental Holmes book that Roberts cites.

It is thus hard to sidestep the notion that Roberts's true judicial mentor was Judge Friendly, who is connected through his law school experience, his clerkship, and his scholarship to the line of judges that runs from Holmes through Brandeis, Cardozo, and Hand, to Frankfurter. And it also seems evident that what Roberts has drawn from a subset of these judges—Holmes, Frankfurter, and Friendly himself—is an affinity for a core of judicial principles that includes clear standards and close textual readings. Roberts's direct citations to Friendly illustrate the lessons learned. On the subject of statutory interpretation grounded in the text, Roberts quotes Friendly for the proposition that "whatever degree of confidence about congressional purpose one derives from the legislative history, that purpose must find expression 'within the permissible limits of the language' before it can be given effect." And, faced with an argument for a totality of the circumstances test...
for agency decisions, Roberts quotes Friendly's analogy for the need to define standards more precisely: "Lack of definite standards creates a void into which attempts to influence are bound to rush; legal vacuums are quite like physical ones in that respect." In a case on a related issue, Roberts again finds in Friendly a useful image for restraining agency discretion: the need "to canalize the broad stream into a number of narrower ones." Benchmarks seems to have served as a steady source of judicial guidance for Roberts as he made the transition from appellate attorney to appellate judge, linking him not just to Judge Friendly himself but also to the like-minded judges who preceded him on the federal bench.

F. Tone: The Skeptic Speaks

As these assorted rhetorical strategies demonstrate, Roberts is a deliberate and self-conscious stylist who takes pleasure in the expressive possibilities of language even in his briefest and most routine opinions. Roberts as stylist, however, also cultivates a distinctive tone that tends to unify his brief body of work. That tone is genial, never harsh or venomous. But it is also markedly detached, often commenting ironically on the behavior of litigants and decision makers alike. That skepticism is another quality that links Roberts to three of his admired predecessors, Hand, Holmes, and, to a lesser extent, Friendly. Like those judges, Roberts avoids sweeping pronouncements of ideological certitude. Instead, he...
repeatedly identifies two basic principles that shape his jurisprudence: common sense rooted in human experience and a straightforward reading of statutory language. Together, these principles link his style to the substance of his opinions.

Roberts's reliance on both principles surfaces early in his judicial career. In his third opinion, he criticizes an earlier decision of his own circuit for an interpretation that is "contrary not only to common sense, but to the text of Rule 1.4 as well". In a later case, he is skeptical of an NLRB holding, willing to believe that the board "may have an adequate explanation" for its result but requiring more: "We cannot, however, assume that such an explanation exists until we see it."

Roberts is equally open-minded and skeptical toward a litigant's argument: "Totten offers no reason, and we can think of none." The court has done its best for Totten, but he has failed to provide it with what it needs to accept his position. Roberts extends his skepticism more broadly to arguments based on the canons of statutory interpretation, noting parenthetically of opposing canons that "there always seems to be one." Elsewhere, he sums up his approach succinctly: "Give me English words over Latin maxims." This is the voice of the man of reason faced with ingenious but unduly subtle constructs.

In assessing factual contentions, Roberts brings a comparable skepticism to bear on human behavior. Faced with the FAA's curious claim that the operator of a small air service should be required under the regulations to schedule his own random drug test, Roberts pinpoints the psychological absurdity of that position: "The regulations foreclose any assumption that a DER [designated employer representative] who is already using illegal drugs will nonetheless handle his own selection notice with impeccable scrupulousness and truthfulness—to his inevitable and substantial detriment." A defendant arguing in support of a sentence shorter than required by the Sentencing Guidelines has "gamely attempted to rationalize" the district court's decision but fails because the court "was not attempting to apply the Guidelines in this case; it instead seemed intent on defying them—and 18 U.S.C. § 3553(c) to boot." When film studios are unable to produce the receipt needed to secure royalties from the Copyright Office, Roberts notes that "[e]ven at this remove, we can sense the intensity of the searches" for the missing papers but spares little sympathy for the litigants; quite simply, under the regulations "the studios are out of luck." Such passages combine a realistic perception of the

Paul Freund, in id. at 1719. Todd Rakoff, a former clerk to Friendly, concludes that "[w]hat counted with him, always, were legal arguments. Sentiment had no appeal." Todd Rakoff, in id. at 1726.

103. Id.
111. Id. at 1244.
human situation with the judicial detachment to separate that situation from its legal consequences.

That element of detachment sometimes produces epigrammatic statements reminiscent of Holmes. Assessing the amount of time provided by the trial court for a defendant's review of Jencks Act materials, Roberts finds that "a prompt proceeding is good but a fair one is necessary." When a less than diligent employee paraphrases his former employer as objecting that he "had been less than slavish in his attention to the details of some of his duties," Roberts finds that "this simply gives euphemism a bad name." As a dissenter, Roberts "wholeheartedly subscribe[s] to the sentiments expressed in the concurring opinion about the Fourth Amendment's place among our most prized freedoms." He nonetheless finds no Fourth Amendment violation on the facts before the court and concludes with what might be the distillation of his jurisprudence: "But sentiments do not decide cases; facts and the law do." 

Not all of Roberts's ironies are targeted at litigants and decision makers. Occasionally he responds with a whimsical playfulness to some aspect of the case before him. Thus, dissenting from the denial of an en banc hearing for a successful Commerce Clause challenge, Roberts dryly characterizes the issue: "The panel's approach in this case leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating "Commerce . . . among the several States." The toad, hitherto an innocent pawn in the litigation, assumes a sympathetic identity as the inadvertent instigator of serious constitutional litigation. Faced with yet another power transmission case, this one involving regulation of sales by Canadian utilities to customers in the United States, Roberts opens his opinion with a brief meditation on what has brought the case before him:

It was a close thing, but Benedict Arnold's bold plan to capture Canada for the Revolution fell short at the Battle of Quebec in early 1776. As a result, the Federal Energy Regulatory Commission must now decide when affiliates of Canadian utilities—utilities not subject to FERC jurisdiction—may sell power at market-based rates in the United States.

112. Holmes' celebrated epigrams include "[g]reat cases, like hard cases, make bad law," N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting); "the best test of truth is the power of the thought to get itself accepted in the competition of the market," Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); and "[g]reat Constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine," Mo., Kan. and Tenn. R. Co. v. May, 194 U.S. 267, 270 (1904).

113. United States v. Stanfield, 360 F.3d 1345, 1358 (D.C. Cir. 2004) ("[W]e need more solid footing before deciding where we stand.").


116. Id.


This return to first principles serves as an ironic reminder that even highly technical regulatory matters are connected to the sweep of history and that the outcome of a single battle has placed this perhaps unwelcome case on the court's docket.

G. Case Study: The Crying Child

The case that best illustrates Roberts's use of rhetorical strategies, Hedgepeth v. Washington Metropolitan Area Transit Authority,\(^1\) is unusual among his opinions in its subject matter: two serious constitutional claims arising from a mundane incident. The opening paragraph of Roberts's opinion bears quotation in full for its presentation of the legal and factual aspects of the case in distinct styles:

No one is very happy about the events that led to this litigation. A twelve-year-old girl was arrested, searched, and handcuffed. Her shoelaces were removed, and she was transported in the windowless rear compartment of a police vehicle to a juvenile processing center, where she was booked, fingerprinted, and detained until released to her mother some three hours later—all for eating a single french fry in a Metrorail station. The child was frightened, embarrassed, and crying throughout the ordeal. The district court described the policies that led to her arrest as "foolish," and indeed the policies were changed after those responsible endured the sort of publicity reserved for adults who make young girls cry. The question before us, however, is not whether these policies were a bad idea, but whether they violated the Fourth and Fifth Amendments to the Constitution. Like the district court, we conclude that they did not, and accordingly we affirm.\(^2\)

Roberts's first sentence establishes consensus on the undisputed facts of the case, the arrest of a twelve-year-old for eating her french fry while her friend purchased a fare card at the Metro station. There will clearly be no effort to mitigate or underplay the event. Roberts is unsparing in detailing the unpleasant consequences of that arrest—the "ordeal"—and makes no attempt to present the plaintiff as an adolescent rather than a "child." It is also worth noting that he does not use the plaintiff's first name, a choice that has the effect of distancing the court and the reader somewhat from Ansche Hedgepeth's experience. Nonetheless, Roberts also carefully highlights the disproportion between offense and consequence: the ordeal is "all for eating a single french fry."

Thus far, the facts seem to point toward a victory for Ansche, as does the next sentence, which reports that the district court considered the policies authorizing her arrest "foolish" and that the public reaction prompted their swift reversal. But Roberts's tone now shifts from sympathy to irony, as he points out that "those responsible endured the sort of publicity reserved for adults who make young girls cry." Ansche is no longer a child or even a solitary victim ("young girls"), and government officials are also suffering some consequences. The tone shifts again in the final two sentences of the paragraph as Roberts turns from facts to law. The paragraph turns on "however," the pivot between policy and law, and Roberts defines the issue presented as one of constitutional law in a straightforward

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119. 386 F.3d 1148 (D.C. Cir. 2004).
120. Id. at 1150.
sentence lacking any rhetorical flourishes. Alllying his court with the lower court in
finding no constitutional violation, he ends the paragraph with a conventional
judicial summary: “and accordingly we affirm.” With the uncomfortable facts of
the case acknowledged and now out of the way, Roberts can turn to the legal
analysis that is the sole basis for the decision.

Although the next section of the opinion has a narrative introduction (“It was the
start of another school year . . . .”121), Ansche is no longer the heroine, and Roberts
can resume his detached attitude toward the episode. The Metro’s “zero-tolerance”
policy for food on its premises “had more fateful consequences for children than
for adults,” since under controlling law adults merely received a citation on the spot
while minors were instead taken into custody.122 Ansche’s mother, suing as her
next friend, argues that this difference in treatment violated her daughter’s rights to
equal protection under the Fifth Amendment and to freedom from physical restraint
under the Fourth Amendment. On the equal protection issue, Roberts rejects the
claim that classifications based on youth rather than age merit heightened scrutiny:

Nor are the characteristics that define the young markedly more obvious or
distinguishing than those than define the old. In fact, the characteristics are
simply opposite sides of the same coin—age. Youth is also far less
“immutable” than old age: minors mature to majority and literally outgrow their
prior status; the old can but grow more so.123

The passage has many of his stylistic signatures: the familiar adage, the triple
alliteration of “minors mature to majority,” and the opposition of youth and age
that ends with a wistful epigram. Responding to the argument that the young,
unlike the old, lack political power, he finds that children do “attract the attention
of the legislature.”124 He concludes with another of his carefully crafted repetitions,
again reminiscent of Justice Jackson: “We are rightly skeptical of paternalistic
arguments when it comes to classifications addressing adults, . . . but the concern
that the state not treat adults like children surely does not prevent it from treating
children like children.”125

Having determined that rational basis is the standard of review, Roberts has little
difficulty in finding “that the no-citation policy for minors is rationally related to
the legitimate goal of promoting parental awareness and involvement with children
who commit delinquent acts.”126 That conclusion is supported by empirical
observations about youthful veracity:

A child often will not be carrying a form of identification, and there is nothing
to stop one from giving an officer a false name—an entirely fanciful one or,
better yet, the name of the miscreant who pushed them on the playground that

121. Id.
122. Id.
123. Id. at 1154.
124. Id. at 1155.
125. Id. (citation omitted).
126. Id. at 1156.
morning. In this situation parents would be none the wiser concerning the behavior of their children.\textsuperscript{127}

After rooting his analysis in his perception of childhood reality, Roberts returns to the question of policy versus law already resolved in the opening paragraph: "The district court had and we too may have thoughts on the wisdom of this policy choice—it is far from clear that the gains in certainty of notification are worth the youthful trauma and tears—but it is not our place to second-guess such legislative judgments."\textsuperscript{128} The alliterative reference to "trauma and tears" alludes briefly, with mild irony, to the compelling human aspect of the case, but only to reaffirm the limits of the judicial role.\textsuperscript{129}

Although Roberts avoids mention of Ansche's first name in his opening paragraph, throughout the rest of the opinion he attributes all the legal arguments to her, ignoring the fact that her mother is the named plaintiff. Thus, for example, Ansche "first contends,"\textsuperscript{130} "alternatively argues,"\textsuperscript{131} "reasons,"\textsuperscript{132} and finally "has not made the case that her arrest was unconstitutional."\textsuperscript{133} The convention of attributing counsel's legal arguments to the client in this case contradicts Roberts's earlier reliance on the unreliability of children. By transforming the frightened, crying Ansche, a child likely to mislead a police officer about her name, into the nominal source of serious constitutional arguments, Roberts completes the rhetorical transition from sympathy to legal detachment. The opinion is a rhetorically skillful example, in one of Roberts's adages, of having your cake and eating it too: demonstrating both the compassion of the court for Ansche's painful experience and the judicial obligation to treat Ansche with the same detached professionalism as a litigant twice her age.

\section*{II. REFINING A JUDICIAL PERSONALITY: ROBERTS AS CHIEF JUSTICE}

A single term on the Supreme Court, less than half the length of his brief service on the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals"), is scarcely sufficient to define the style or substance of the new Chief Justice's jurisprudence. Nonetheless, the first Roberts opinions—eight for the Court, two concurrences, one dissent, and two opinions concurring in part and dissenting in part—show a noticeable continuity with his earlier work, especially in the judicial voice that he employs. Virtually all of his favorite stylistic devices appear in some form, and the perspective on human behavior reflected in \textit{Hedgepeth} informs several Supreme Court opinions as well. Observers noted that Chief Justice Roberts showed no hesitation in assuming the leadership of the Court.

\begin{footnotesize}
\begin{itemize}
\item[127.] \textit{Id.}
\item[128.] \textit{Id.} at 1156–57.
\item[129.] \textit{Id.} at 1157. The Fourth Amendment issue gives Roberts less difficulty. He finds that a recent precedent, \textit{Atwater v. City of Lago Vista}, permits a police officer who has witnessed a criminal offense to arrest the offender without being subjected to a reasonableness test. \textit{Id.} at 1157–59 (citing \textit{Atwater v. City of Lago Vista}, 532 U.S. 318, 354 (2001)).
\item[130.] \textit{Id.} at 1153.
\item[131.] \textit{Id.} at 1155.
\item[132.] \textit{Id.} at 1157.
\item[133.] \textit{Id.} at 1159.
\end{itemize}
\end{footnotesize}
from his first day in the center chair, and his earliest opinions show a similar confidence in his distinctive execution of the opinion form.

A. Diction and Metaphor

Although Roberts's diction is somewhat more restrained than in his work on the Court of Appeals, particularly in his first opinions for a unanimous Supreme Court, by the spring of 2006 his pleasure in unexpected language reemerged. Writing for an almost unanimous Court in a case that hinges on a struggle between several adults and a juvenile, Roberts offers an assortment of synonyms for the main event: "melee," "tumult," and "fracas." He enhances his vivid diction with a narrative in the present tense: "A juvenile, fists clenched, was being held back by several adults. As the officers watch, he breaks free and strikes one of the adults in the face, sending the adult to the sink spitting blood." The immediacy of the scene, with its bloody conclusion, provides rhetorical support for the position that the police have both a right and a duty to intervene. In another almost unanimous opinion issued a week earlier, Roberts refers to "[t]he animating principle" of several cases "announced in their progenitor" and the "hollow rhetoric" of standing doctrine that would result from the extension of jurisdiction to the plaintiffs' case. In an echo of his earlier fondness for unusual adverbs, he observes in dissent that "[t]he majority aphoristically states that '[w]hen identity is in question, motive is key.'"

Roberts's taste for metaphor and analogy also reappears. Some of these usages are drawn from familiar expressions: a weak government presentation "cannot carry the day"; a court exercising its discretion is not "writing on an entirely clean slate"; and a statute's discretionary fee provision places "no heavy

134. Linda Greenhouse has observed of Roberts that "there is no doubt that he is in charge of the courtroom." Linda Greenhouse, Supreme Court Memo: In the Roberts Court, More Room for Argument, N.Y. TIMES, May 3, 2006, at A19.
135. Brigham City v. Stuart, 547 U.S. 398, 398 (2006). The case was argued on April 24 and decided on May 22. Id. Justice Stevens wrote a brief concurring opinion calling this "an odd flyspeck of a case" to which the Court should not have granted certiorari. Id. at 407-408 (Stevens, J., concurring). Nevertheless, Stevens did not quarrel with the substance of Roberts's majority opinion. See id. at 407-409.
136. Id. at 400.
137. Id. at 401, 406.
138. Id. at 406.
139. Id.
140. Id.
141. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 343 (2006). The case was decided on May 15. Id. at 332. Justice Ginsburg concurred in part and in the judgment. Id. at 354 (Ginsburg, J., concurring).
142. Id. at 353.
congressional thumb on either side of the scales."\textsuperscript{146} Occasionally, Roberts chooses a more original and resonant metaphor, as when he rejects the majority's application of the actual innocence exception to the usual procedural bar for habeas claims. After painstakingly reviewing the evidence introduced at trial, he observes ironically that "[a]ccording to the majority, House has picked the trifecta of evidence that places conviction outside the realm of choices any juror, acting reasonably, would make."\textsuperscript{147} Under the majority's analysis, he suggests, the judicial factfinding process has become instead a lucky bet.

Roberts also seems intrigued by the comparison of the legal system with athletic competitions. Endorsing the right of police officers to enter a home when they see a potentially injurious fight in progress, he chooses a simile to distinguish law enforcement from sport: "The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided."\textsuperscript{148} The parenthetical reference to hockey is a characteristically playful touch that expands the image to include the accepted pervasiveness of violence in that sport, suggesting that such tolerance is not appropriate in law enforcement. The image also evokes another sports simile Roberts employed in his opening statement at his confirmation hearing, this time linking judges to umpires: "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."\textsuperscript{149} This time the comparison is one of constraint rather than empowerment; where police officers may intervene in events on the ground, judges must remain on the sidelines with only the authority provided by the rules. The second image is less effective than the first—judges do in fact have more latitude in their courtrooms than umpires on the field of play—but both reflect Roberts's affinity for metaphoric modes of thought.

That same affinity appears when Roberts constructs elaborate analogies to make his point. Finding insufficient notice to satisfy due process in a state's reliance on tax notices sent by certified mail and returned unopened, he offers a striking visual image:

\begin{quote}
If the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again.\textsuperscript{150}
\end{quote}

The analogy exaggerates the challenged policy just enough to clarify why the state's refusal to make additional efforts to contact delinquent homeowners ignores the potential contingencies of the postal service.\textsuperscript{151} When he dissents from the

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\item \textsuperscript{146} Martin v. Franklin Capital Corp., 546 U.S. 132, 139 (2005).
\item \textsuperscript{147} House, 547 U.S. at 566 (Roberts, C.J., concurring in part and dissenting in part) (emphasis in original).
\item \textsuperscript{148} Brigham City v. Stuart, 547 U.S. 398, 406 (2006).
\item \textsuperscript{149} Confirmation Hearing, supra note 40, at 55 (opening statement of nominee).
\item \textsuperscript{150} Id. at 229.
\item \textsuperscript{151} Roberts provides another less exaggerated analogy to make the same point: "It
Court's holding in *Georgia v. Randolph* that one resident of a shared dwelling may withhold consent to a warrantless search, Roberts again translates doctrine into ordinary experience, explaining that the majority position "simply leads to the common stalemate of two gentlemen insisting that the other enter a room first." The visual image places the two residents—one willing to permit a search, the other resistant—on equal footing, with equal rights to control the situation.

Roberts's dissent in *Georgia v. Randolph* also contains his most elaborate—and playful—use of figurative language as he rings changes on the familiar adage that a man's home is his castle, first introduced in Justice Souter's majority opinion, to build the counter argument. The majority's position, Roberts argues, protects only an objecting resident who has the good fortune to be at the door when the police arrive, and "[i]t seems a bit overwrought to characterize [the majority's] approach as affording great protection to a man in his castle." Roberts then reminds the majority that its rule will have possibly threatening or dislocating practical consequences for the consenting resident, especially, as in this case, when it is the wife who wishes to admit the police to find evidence of her husband's criminal activity. "The majority would afford the now quite vulnerable consenting co-occupant sufficient time to gather her belongings and leave, apparently putting to one side the fact that it is her castle, too." In his final paragraph, Roberts returns to what he sees as the majority's flawed assumption that its holding will protect privacy in spite of the practical realities of such situations:

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.

The recurrent image, with its overtones of sovereign rights, is steadily eroded by the contrast between those abstract rights and the humbler realities of shared domestic life.

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152. 547 U.S. 103, 129 (Roberts, C.J., dissenting). Roberts later offers a second analogy to support his point: "If two friends share a locker and one keeps contraband inside, he might trust that his friend will not let others look inside. But by sharing private space, privacy has 'already been frustrated' with respect to the lockermate." *Id.* at 131 (Roberts, C.J., dissenting) (quoting United States v. Jacobsen, 466 U.S. 109, 117 (1984)).

153. According to Souter, "[w]e have, after all, lived our whole national history with an understanding of 'the ancient adage that a man's home is his castle [to the point that t]he poorest man may in his cottage bid defiance to all the forces of the Crown.'" *Id.* at 115 (quoting Miller v. United States, 357 U.S. 301, 307 (1958)).

154. *Id.* at 135 n.1.

155. *See id.* at 138.

156. *Id.* at 139 n.2 (citation omitted).

157. *Id.* at 142 (citation omitted).
B. The Judicial Voice

Although Roberts continues to ground his opinions in the daily reality of human experience, he has not to date written with the same degree of informality as in his Court of Appeals opinions. The highly colloquial diction has largely vanished, and he seems much less likely to use conversational syntactical structures or asides to engage the reader. Nonetheless, there are flashes of his earlier style which suggest that he has not entirely abandoned these practices. In his first opinion, one written for a unanimous Court, he observes that the complaint in a removal case was not clear as to the amount in controversy and adds breezily, between dashes, “no reason it should be, since the complaint had been filed in state court.” In other opinions, he begins one sentence with “[w]orse yet,” inserts “of course” in three others, and points out in dissent that the majority has provided “a complete lack of practical guidance for the police in the field, let alone for the lower courts.” In the same dissent, he also notes that the majority “has taken a great deal of pain in altering Fourth Amendment doctrine, for precious little (if any) gain in privacy.” And in Jones he concedes that “Mr. Jones should have been more diligent with respect to his property, no question.” There are also a few instances of informal diction. A previously unresolved due process issue concerning notice is “a new wrinkle,” the majority’s opinion is “quite a leap” from Justice Jackson’s examples, and “proposed rulemaking went nowhere.” Most of the cited examples come from Roberts’s earlier opinions on the Court, including one dissent. On balance, Roberts’s first term opinions have a noticeably less conversational tone than their Court of Appeals counterparts, and Roberts seems, at the moment, to be hesitant to employ his strategies of informal engagement.

One strategy that Roberts is not hesitant about, particularly in his dissents, is the use of repetition and balance to emphasize a point, a practice sometimes enhanced by the addition of italics to highlight the paired concepts or terms. In Georgia v.  


160. Id. at 58; Martin, 546 U.S. at 139; Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2687 (2006).


162. Id. at 141.


164. Id. at 227.

165. Id. at 233.

Randolph, for example, he begins his critique of the majority by pointing out that its assumption about the consequences of sharing a residence may be just as easily viewed from the opposite perspective: "Does the objecting cotenant accede to the consenting cotenant's wishes, or the other way around?" He then counters the majority's criticism of his dissent by reworking its language to his own advantage:

The majority also mischaracterizes this dissent as assuming that "privacy shared with another individual is privacy waived for all purposes including warrantless searches by the police." The point, of course, is not that a person waives his privacy by sharing space with others such that police may enter at will, but that sharing space necessarily entails a limited yielding of privacy to the person with whom the space is shared, such that the other person shares authority to consent to a search of the shared space.

The alliterative phrase "shared space" appears, with variations, four times, redirecting the emphasis from the majority's abstract "privacy shared" to the concrete reality of a physical dwelling shared with someone else.

In his later dissent in House v. Bell, Roberts elaborates the technique even further. Rejecting the Court's detailed review of the evidence from a murder trial, he insists that "[t]he District Court did not painstakingly conduct an evidentiary hearing to compile a record for us to sort through transcript by transcript and photograph by photograph." He then goes on to underscore his skepticism about the defendant's veracity through the same device, repeating the word "lie" four times in two sentences:

House retold this story to the District Court, saying that he initially lied to police because he was on parole and did not want to draw attention to himself. In other words, having nothing to hide and facing a murder charge, House lied—and when he was caught in the lie, he said he lied not to escape the murder charge, but solely to avoid unexplained difficulties with his parole officer.

Continuing his assault on the defendant's credibility, Roberts combines repetition with syntactical variations to challenge the majority's focus on motive:

The majority aphoristically states that "[w]hen identity is in question, motive is key." Not at all. Sometimes, when identity is in question, alibi is key. Here, House came up with one—and it fell apart, later admitted to be fabricated when his girlfriend would not lie to protect him. Scratches from a cat.

The fragment "Not at all" emphatically contradicts the quotation from the majority before reformulating the majority's quotation to shift the focus to the defendant's
fabricated alibi. The final comment, another sentence fragment, invokes a detail of that abandoned alibi with sarcastic economy before concluding with a single word of scornful rejection. The dismissive tone covers both the mendacious defendant and a majority willing to reject the district court’s conclusions. Common sense, Roberts suggests, tells us that the key issue is the discredited alibi and that the majority is misguided to ignore it.

C. Mentors and Masters

In his first Supreme Court term Roberts made only a handful of allusions to sources other than case law, including, as Linda Greenhouse has pointed out, only one law review article. Numbers, however, tell only part of the story. It is surely noteworthy—and not coincidental—that in his first opinion for the Court, Martin v. Franklin Capital Corporation, Roberts contrived to cite both the judges for whom he clerked. The issue in the case—whether plaintiffs could recover attorney’s fees under a federal statute when their case was first removed by the defendants to federal court and subsequently remanded back to state court—scarcely provides much scope for citation. Roberts solves the problem by citing Chief Justice Rehnquist for a basic proposition in statutory construction: “As Chief Justice Rehnquist explained for the Court in Fogerty v. Fantasy Inc., '[t]he word “may” clearly connotes discretion.” A vast number of sources were available in support of that proposition, but Roberts chooses to cite Rehnquist in a gesture of respect for his late predecessor. Judge Friendly is also cited for a broad legal tenet, though in a less direct manner. Roberts first provides his own epigrammatic statement: “Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike.” He then supports that statement with an indirect citation: “See Friendly, Indiscretion about Discretion, 31 Emory L.J. 747, 758 (1982).” The cited page discusses the need for consistency among not only like but also strongly similar cases, although Roberts is not interested in that refinement. The basis for the citation is less focused on its content than its author, and Roberts makes his second gesture of respect to a judge who is, as Roberts’s Court of Appeals opinions reveal, a revered mentor. In his inaugural opinion, Roberts thus locates himself as the successor to both Rehnquist and Friendly.

In the first of his two concurrences, issued in eBay Inc. v. MercExchange, L.L.C., Roberts again uses citations to locate himself within the community of judges, this time within the more exclusive company of Supreme Court Justices. When a unanimous Court held general principles for permanent injunctive relief applicable under the Patent Act, Roberts, joined by Justices Scalia and Ginsburg, concurred. The brief concurrence adds a single point to the majority opinion, the value of history as a guide to the application of those principles. Roberts cites two

172. See Greenhouse, supra note 158.
173. Id. at 134–36.
174. Id. at 136 (citation omitted) (quoting 510 U.S. 517, 533 (1994)).
175. Id. at 139.
sources in the concurrence, both of which are cases and both highly revealing. The first source is, remarkably, his own first Supreme Court opinion in Martin issued five months earlier. More specifically, he cites the sentence quoted above that begins with the statement "[d]iscretion is not whim." The second source is a 1921 Supreme Court opinion by Justice Holmes that contains one of his most celebrated aphorisms: "When it comes to discerning and applying those standards, in this area as others, 'a page of history is worth a volume of logic.'" The citation for the quoted passage includes the parenthetical information, not usually contained in such references, indicating that it was an opinion of the Court by Justice Holmes. Together, the two citations stake out Roberts's place in the line of Supreme Court Justices. By citing his own first opinion, Roberts suggests that, however brief his service on the Court, he is now as authoritative as his colleagues present and past. And by citing Holmes—as he did twice in his Court of Appeals opinions, including another use of the same passage—he also suggests that he is now linked to the great Justice not only as a disciple but also as a colleague. It is no coincidence that Roberts's own aphorism about the restraint of judicial discretion is followed by what is arguably Holmes's best-known aphorism. Although Roberts was a clerk to Friendly and Rehnquist, he asserts a stylistic and substantive bond with Holmes as well.

The final set of revealing references appears in DaimlerChrysler Corp. v. Cuno, where the Court found that taxpayers lacked standing to challenge local tax abatements and credits. Writing for the majority, Roberts turns first to principles, citing Chief Justice Marshall's opinion in Marbury v. Madison for the Court's authority to determine whether a true case or controversy is before it. Roberts then cites a passage from a speech by Marshall to the House of Representatives asserting the limits on the judicial power, and also cites James Madison's remark to the Constitutional Convention that a case or controversy must be "of a Judiciary Nature." Finally, Roberts cites Madison a second time for the distinction between the plaintiffs's rights under the Commerce Clause and the Establishment Clause. Marbury is the classic cite for issues of judicial power, but Roberts's interest in going outside the case law to include Marshall's speech and Madison's views reinforces his commitment to history as well as judicial precedent as sources for constitutional interpretation. After twice quoting Holmes on the value of history, Roberts suits his actions to his cites, invoking both Marshall as legislator and Madison as a drafter of the Constitution.

179. eBay, 547 U.S. at 395.
180. Id.
182. Id. at 340.
183. Id. at 340–41.
184. Id. at 341 (citing 4 PAPERS OF JOHN MARSHALL 95 (C. Cullen ed. 1984)).
185. Id. at 342 (citing 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 430 (M. Farrand ed. 1966)).
186. Id. at 347–48 (citing 2 WRITINGS OF JAMES MADISON 186 (G. Hunt ed. 1901)).
D. Tone: The Skeptic Returns

Roberts’s first term opinions for the Supreme Court show some subtle but intriguing differences in tone from his Court of Appeals opinions. The Chief Justice is clearly a deliberate stylist with an appreciation for the expressive nuances of language, and the continuities of his opinions transcend the basic legal prose characteristic of law clerks on both courts. Whatever the drafting procedures of his chambers, it seems a fair assumption that Roberts, at the least, edits with a sharp pen and decides when to give an opinion a particular edge. The fact that his Supreme Court opinions are somewhat less conversational and playful in style than his earlier work suggests that he still is in the process of shaping his judicial voice to the demands of his new position. And it should come as no surprise that Roberts’s most striking rhetorical moments tend to come in his separate opinions, both concurring and dissenting. That said, it is also clear that the distinctive tone of his Court of Appeals opinions—skeptical, detached, good-natured but coolly rational—has moved with him to the Supreme Court.

The Roberts edge appears in his first opinion, where he notes dryly, “[w]e have it on good authority that ‘a motion to [a court’s] discretion is a motion, not to its inclination; but to its judgment; and its judgment is to be guided by sound legal principles.’”

That “good authority” turns out to be Chief Justice Marshall in United States v. Burr, and the passage is typical of Roberts: mildly ironic and at the same time respectful of Marshall without giving overt praise. Also typical of Roberts is his note of candor in discussing the processes of government. In a Religious Freedom Restoration Act (RFRA) case, he observes, “[w]e have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one.”

He extends the same candor to the executive branch, finding that “[t]he Government’s argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exception.” The criticism, though softened by the conversational voice of the bureaucrat, nonetheless supports the Court’s decision to grant an exception on the facts of this case. When he writes for a unanimous Court to uphold the constitutionality of the Solomon Amendment, which requires law schools receiving federal funding to provide the same campus access for military and non-military recruiters, Roberts reminds the law schools challenging the Amendment that law students are not easily misled. Noting that the Court has previously “held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so,” he takes a mild jab at the protective argument of the law schools: “Surely students have not lost that ability by the time they get to law school.”

That note of skepticism toward easy generalizations is characteristic of Roberts’s voice. His dissent in Georgia v. Randolph, which is also his first separate

188. See United States v. Burr, 25 F. Cas. 30, 35 (C.C. Va. 1807), cited with approval in Martin, 546 U.S. at 139.
190. Id. at 1223.
opinion, makes clear from its opening sentence his resistance to the broad assumption he sees as underlying the majority's position: "The Court creates constitutional law by surmising what is typical when a social guest encounters an entirely atypical situation." The carefully chosen word "surmising," while not quite so harsh as "speculating" or "guessing" would have been, nonetheless accuses the Court of operating at a remove from the realities of the situation, just as the play on "typical" and "atypical" points out the potential limits of the Court's vision. Roberts develops his point by painting a brief picture of the majority's surmise in action: "Nevertheless, the majority is confident in assuming—confident enough to incorporate its assumption into the Constitution—that an invited social guest who arrives at the door of a shared residence, and is greeted by a disagreeable co-occupant shouting 'stay out,' would simply go away." His repetition of "confident" as well as "assuming" and "assumption" prepares the ground for Roberts's counterposition, a reliance instead on particular circumstances: "The fact is that a wide variety of differing social situations can readily be imagined, giving rise to quite different social expectations." He then spins out a series of differing situations—a guest arriving for a birthday party, a traveler coming from a great distance, a dwelling with a single room or one with common areas—to establish that "[t]he possible scenarios are limitless." In an elegant echo of his opening sentence, Roberts now demotes the Court's surmise to no more than "a hunch about how people would typically act in an atypical situation." The entire passage showcases a number of elements of Roberts's stylistic repertoire, including the use of skepticism rather than blunt attack; the careful modulation of diction; the deliberate repetition of key terms; and the circular resolution that, as in some of his lower court opinions, ends where it began, after making its point. The passage also illustrates a repeated theme in Roberts's jurisprudence, the preference for specific facts over broad abstractions to resolve a case. Where the majority relies on its assumption, Roberts insists that he will rely only on the particular circumstances of the case before him. Style and substance merge in a preference for the particular over the general.

The same preference, expressed by a similar rhetorical strategy, appears in another of Roberts's separate opinions, this time a partial dissent from the majority's application of the actual innocence exception to the procedural bar rule in House v. Bell. Rejecting the majority's reading of the evidence submitted at the petitioner's murder trial, Roberts distinguishes between theory and fact:

I suppose it is theoretically possible that the jeans were contaminated by spillage before arriving at the FBI, that Agent Bigbee either failed to note or lied about such spillage, and that the FBI then transferred the jeans into a plastic bag and put them back inside the evidence container with the spilled blood still sloshing around sufficiently to contaminate the outside of the plastic bag as extensively as it did. This sort of unbridled speculation can theoretically defeat any inconvenient fact, but does not suffice to convince me that the
District Court’s factual finding—that the blood spilled after FBI testing—was clearly erroneous.197

The passage opens with what seems to be a concession to the majority: its position is “theoretically possible.” The description of the facts necessary to support that possibility then shifts abruptly from a neutral account of events to the likelihood of “blood still sloshing around sufficiently” to create the evidence presented. The choice of the word “sloshing”—a colloquial term of deliberate imprecision—makes clear immediately Roberts’s belief that such contamination is not even remotely supported by the evidence. The repetition of “theoretically,” this time linked to “unbridled speculation,” produces another of Roberts’s circular effects—the return to the same language that has now been transformed from a possibility to an absurdity. Theory has come up against an “inconvenient fact” and lost.198

E. A Case Study: The “Sordid Business”199 of Texas Redistricting

League of United Latin American Citizens v. Perry, the highest profile case of the 2005 term in which Roberts participated,200 contains his most impassioned rhetoric. This seems, on the face of it, a curious outcome, since Roberts joined three of the four parts of Justice Kennedy’s opinion, all upholding the Texas redistricting plan, and dissented only from Part III, in which the Court found a violation of section 2 of the Voting Rights Act. The dissent, however, argues strenuously that the Court has erred in reaching what Roberts calls “its surprising result” by holding that the creation of a new minority opportunity district dilutes the voting strength of Latinos.201 In challenging the result, Roberts departs from his usual detached stance and makes his strongest attack on some of his new colleagues.

198. Roberts uses another rhetorical strategy to achieve the same end, the deflation of a theoretical possibility. In the final paragraph of his dissent, he inserts parenthetical qualifications to indicate the remote likelihood that the petitioner can prevail at a new hearing:

The majority’s conclusion is that given the sisters’ testimony (if believed), and Dr. Blake’s rebutted testimony about how to interpret Agent Bigbee’s enzyme marker analysis summary (if accepted), combined with the revelation that the semen on Mrs. Muncey’s clothing was deposited by her husband (which the jurors knew was just as likely as the semen having been deposited by House), no reasonable juror would vote to convict.

Id. at 571–72.
200. Roberts did not participate in the Court’s most closely watched case, Hamdan v. Rumsfeld, because he had been a member of the D.C. Circuit panel that heard the case. Hamdan v. Rumsfeld, 415 F.3d 33 (2005).
Roberts's basic argument is that the majority has improperly rejected the District Court's factual finding that the new District 25 satisfies the standards for a Latino opportunity district:

Unable to escape the District Court's factfinding, the majority is left in the awkward position of maintaining that its theory about compactness is more important under § 2 than the actual prospects of electoral success for Latino-preferred candidates under a State's apportionment plan. And that theory is a novel one to boot. Never before has this or any other court struck down a State's redistricting plan under § 2, on the ground that the plan achieves the maximum number of possible majority-minority districts, but loses on style points, in that the minority voters in one of those districts are not as "compact" as the minority voters would be in another district were the lines differently drawn.202

Roberts returns to his favorite dichotomy of theory and fact, this time italicizing "theory" to emphasize the weakness of a position founded exclusively on that basis. The majority position is even weaker, he notes, because the theory is "a novel one to boot," and to further underscore the point he adds a colloquial emphatic to the typographic one. Finally, Roberts recasts the dichotomy as one between style and substance. He insists that the only argument available to the majority is that, although District 25 satisfies the legal standard, it "loses on style points" by failing to produce a compact community of Latinos. The fundamental dispute between the majority and the dissent therefore rests precisely on the nature of the Latino majority in the new district. According to Kennedy, the grouping together of two disparate Latino communities, separated by "enormous geographical distance" and "disparate needs and interests,"203 violates the standard of compactness and thus is "about more than 'style points.'"204 According to Roberts, however, statistical analysis demonstrates that those communities would favor, and have the numbers to elect, the same candidates. He is, however, particularly harsh in responding to the majority view that the District Court relied on "the prohibited assumption" that voters of the same race would necessarily think and vote alike:205

It is important to be perfectly clear about the following, out of fairness to the District Court if for no other reason: No one has made any "assumptions" about how voters in District 25 will vote based on their ethnic background. Not the District Court; not this dissent. There was a trial. At trials assumptions give way to facts.206

The syntactical rhythm of two fragments followed by a four word sentence hammers home the point that the majority is relying on theory while the dissent sticks to facts.

202. *Id.* at 2653.
203. *Id.* at 2619 (majority opinion).
204. *Id.*
205. *Id.* at 2656 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).
206. *Id.* at 2656–57.
The opinion is a compendium of Roberts’s favorite stylistic devices, all devoted to a steady assault on the majority. He employs one of his unusual adverbs to reveal that “[w]hat is blushingly ironic” in the Kennedy opinion is the fact that the previous opportunity district “suffers from the same ‘flaw’ the majority ascribes to District 25, except to a greater degree,” the flaw being significant geographical separation of two distinct minority communities.\(^{207}\) The majority, he implies, should be ashamed to make that argument. After spelling out the precise distances involved, he concludes tartly by turning the majority’s language against it in another calculated syntactical fragment: “So much for the significance of ‘enormous geographical distance.’”\(^{208}\) He finds a metaphor evocative of shame—“[t]he majority’s fig leaf”—\(^{209}\) for its asserted reliance on both distance and lack of common interests to distinguish the new district from the old. He also invokes expert evidence relied on by the District Court to find that the new district “would likely perform impeccably for Latino voters.”\(^{210}\) Finally, he confesses to bewilderment at the majority’s conclusion, since “[i]t baffles me how this could be vote dilution, let alone how the District Court’s contrary conclusion could be clearly erroneous.”\(^{211}\) The passage combines a verb expressive more of sorrow than anger with the emphasis of alliteration to support once again the blameless District Court against the majority’s unreasonable attack.

Roberts opens the second part of his opinion with another use of repetition: “The majority arrives at the wrong resolution because it begins its analysis in the wrong place.”\(^{212}\) The Court, Roberts insists, should focus not on District 25 in isolation, but on the combined effect of all the districts in the relevant area of the state. Since the new map contains the greatest possible number of majority-minority districts, “the majority’s intrusion into line-drawing . . . suggests that all this is just so much hollow rhetoric,”\(^{213}\) a phrase he has used before and uses here to distinguish once again between theory and fact. The earlier tone of bafflement gives way to a sharper sarcasm as Roberts turns his focus from the majority’s lack of deference to the lower court to the majority’s lack of deference to the states. It is, he suggests, improperly requiring Texas to draw a district containing a compact minority population. That requirement is clearly misguided, since “Section 2 is, after all, part of the Voting Rights Act, not the Compactness Rights Act.”\(^{214}\) He dismisses “[t]he majority’s squeamishness about the supposed challenge facing a Latino-preferred candidate in District 25” as misplaced, since such a contest would be a routine “part of a healthy political process.”\(^{216}\) The submerged physical metaphor—the majority is too fastidious to appreciate the robust nature of that “healthy” process—reinforces the idea that the Court is out of touch with the realities of the political system. In a final jab, Roberts accuses the majority’s demand for a compact and

\(^{207}\) Id. at 2657.

\(^{208}\) Id.

\(^{209}\) Id. at 2657 n.*.

\(^{210}\) Id. at 2658.

\(^{211}\) Id.

\(^{212}\) Id.

\(^{213}\) Id. at 2660.


\(^{215}\) League of United Latin American Citizens, 126 S. Ct. at 2660.

\(^{216}\) Id. at 2661.
unified Latino community of "giv[ing] an unfamiliar meaning to the word 'opportunity.'"217

In the final part of his opinion, Roberts argues that, under the new map, Latino opportunity districts (six out of thirty-two districts, or nineteen percent) are appropriately proportional to the Latino population of the state, which comprises twenty-two percent of the total population.218 He accuses the majority of distortion by counting all Latino voters for purposes of tallying the total population while excluding those Latino voters added to the new district for purposes of the proportionality analysis. This, he suggests, is a deliberately misleading strategy: "Heads the plaintiffs win; tails the State loses."219 The familiar formula, the paradigm of a crooked method of resolving a dispute, casts the majority as not only misguided but also deliberately manipulative.

Roberts concludes his opinion by expanding the focus of his criticism from the Texas redistricting map to the larger question of racial identity in the political process. The passage is unusually striking in its language:

It is a sordid business, this divvying us up by race. When a State's plan already provides the maximum possible number of majority-minority opportunity districts, and the minority enjoys effective political power in the area well in excess of its proportion of the population, I would conclude that the courts have no further role to play in rejiggering the district lines under § 2.220 Although he has not argued in his opinion for the overruling of any of the Court's cited precedents, he seems here to be rejecting the use of race in the redistricting process. "Sordid" is a powerful word to attach, even by implication, to a Court decision. The use of two highly colloquial terms, "divvying" and "rejiggering," suggests that the entire redistricting process is a political game rather than a constitutionally necessary or even valid procedure. And the syntax of the first sentence, itself rarely seen in legal prose, sounds an elegiac note. He has done his best, Roberts suggests, to identify and correct the Court's specific errors, but to his sorrow and regret the larger problem, the sordid business of race in politics, remains.

CONCLUSION

After Chief Justice Roberts's first term on the Supreme Court, the familiar elements of his judicial personality are at least provisionally in place. He continues to write with skillfully crafted clarity to reach a lay as well as a legal audience. The typical Roberts opinion contains a minimum of legal jargon and an absence of law review citations, relying instead on an assortment of rhetorical strategies to engage and persuade his readers.221 The voice is conversational, sometimes colloquial, in
its diction and syntax. It uses conventional adages to reassure. Occasionally it uses unconventional metaphors or analogies to startle; it may at times be playful in its language or erudite in its allusions. The voice remains detached but genial, more likely to profess itself baffled than angered by opposing views, although Roberts's final dissent suggests that, when provoked, he is capable of a harsher response. It is, in short, the voice of a usually good-humored, coolly rational judge who views the task of decision making as rooted in human experience and largely explicable in human terms.

Roberts's preference for grounding his legal conclusions in the realities of experience reflects his broader preference for fact over theory, a position that has led him to disavow any "overarching judicial philosophy" of his own.222 The commonsensical tone of his opinions repeatedly insists that legal problems, even problems of constitutional interpretation, can best be approached through an understanding of how people or institutions behave under specific circumstances: how, for example, a visitor to a shared dwelling decides whether to enter when one resident refuses access or how likely a property owner is to receive a tax notice sent by certified mail. Roberts's insistence on the particular rather than the general also underlies his view of narrow decisions as a means of fostering consensus on the Court, a connection he made clear in a recent speech: "Division should not be artificially suppressed, but the rule of law benefits from a broader agreement. The broader the agreement among the justices, the more likely it is a decision on the narrowest possible grounds."223 The new Chief Justice's goal for the Court and his preferred approach to decision making suggest that his future opinions may well continue to be focused on factual context rather than on expansive theories.224

There is one further, though more tentative, aspect of Roberts's judicial personality that may have important implications for the development of his jurisprudence: his location of himself as the heir to a line of distinguished judges—Oliver Wendell Holmes, Learned Hand, Henry Friendly—who, among them, represent traditions of skepticism, judicial restraint, and legal craftsmanship. In his opening statement at his confirmation hearing, Roberts observed that "[m]y constraints." Greenhouse, supra note 158, at 5.

222. In response to a question from Senator Schumer, Roberts made a similar point in defending his judicial record: "I don't think you can read these opinions and say that these are the opinions of an ideologue. . . . But I think if you look at what I've done since I took the judicial oath, that should convince you that I'm not an ideologue. And you and I agree that that's not the sort of person we want on the Supreme Court." Confirmation Hearing, supra note 40, at 27. In an exchange with Senator Hatch, Roberts was even more explicit: "Well, I have said I do not have an overarching judicial philosophy that I bring to every case. And I think that's true. I tend to look at cases from the bottom up rather than the top down and, like I think all good judges, focus a lot on the facts." Id. at 159.

223. The speech was his commencement address at Georgetown University's law school. Chief Justice Says His Goal Is More Consensus on Court, supra note 71, at A16.

224. At his confirmation hearing, Roberts emphasized the value of consensus: "I do think the Chief Justice has a particular obligation to try to achieve consensus consistent with everyone's individual oath to uphold the Constitution, and that would certainly be a priority for me if I were confirmed." Confirmation Hearing, supra note 40, at 303. The concern for consensus based on narrowly-drawn opinions might also contribute to another of Roberts's stated goals for the Court, the expansion of its docket. He testified that the Court currently hears half the cases it heard twenty years ago and added, "I think the capability to address more issues is there in the court." Id. at 309.
personal appreciation that I owe a great deal to others reinforces my view that a certain humility should characterize the judicial role.” And, in a recent interview, he added another judicial figure to his pantheon, John Marshall, the Chief Justice whom he hopes to emulate in leading a unified Court that will relinquish “the personalization of judicial politics” and “the jurisprudence of the individual” in favor of “a jurisprudence of the Court.” These comments, like the rhetoric of his opinions, suggest that there are jurisprudential values he places above ideological purity. They suggest as well that, in performing his dual roles of opinion writer and Chief Justice, Roberts may prove to be that rara avis on the Supreme Court bench, both an artful voice of judicial skepticism and a forger of judicial consensus.

The recent end of Roberts’s second Court term, one that produced a number of controversial cases, suggests a somewhat different picture. In a series of high-profile decisions involving such divisive issues as abortion, and the First Amendment, and the use of race in pupil assignment policies, Roberts joined Justices Scalia, Kennedy, Thomas, and Alito in upholding conservative positions. Those decisions tended to undermine, though not expressly overrule, Court precedents. In Gonzales v. Carhart, for example, the majority upheld the federal Partial-Birth Abortion Ban without reversing Stenberg v. Carhart, which struck

225. Confirmation Hearing, supra note 40, at 55. At his confirmation hearing Roberts also described himself as “a modest judge”:

Like most people, I resist the labels. I have told people, when pressed, that I prefer to be known as a modest judge. And to me that means some of the things you talked about in those other labels. It means an appreciation that the role of a judge is limited; that a judge is to decide cases before them; they’re not to legislate, they’re not to execute the laws.

Id. at 158.


227. Rosen states,

Roberts praised justices who were willing to put the good of the Court above their own ideological agendas. “A justice is not like a law professor, who might say, ‘This is my theory . . . and this is what I’m going to be faithful to and consistent with.’ . . .” Instead of nine justices moving in nine separate directions, Roberts said, “it would be good to have a commitment on the part of the Court to acting as a Court, rather than being more concerned about the consistency and coherency of an individual judicial record.”

Id.


229. See FEC v. Wisconsin Right to Life, 127 S. Ct. 2652 (2007) (holding application of Bipartisan Campaign Reform Act to issue-advocacy ads a violation of First Amendment free speech rights); Morse v. Frederick, 127 S. Ct. 2618 (2007) (finding no violation of student’s First Amendment free speech rights in high school principal’s confiscation of banner that could reasonably be read as advocating drug use).


down a comparable Nebraska statute. And Roberts's own positions were sometimes even more nuanced than the Court's holdings. In Gonzales, he did not join the Thomas concurrence declaring the Court's major abortion precedents unconstitutional, and, in Hein v. Freedom from Religion Foundation, he joined the majority opinion dismissing the case on standing grounds under Flast v. Cohen but declined to join Scalia's concurrence calling for Flast's reversal. Such refinements led Scalia to denounce what he called "faux judicial restraint" and caused Jeffrey Toobin, in his recent study of the Court, to charge that "Roberts had engaged in the pretense of minimalism—that is, of respecting the Court's precedents—without actually doing so." In the term's most prominent case, Roberts chose to write for the Court in striking down pupil assignment policies that used racial classifications, ending his opinion with a characteristically artful repetition: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Yet he also chose to invoke both of the Court's opinions in Brown v. Board of Education as authority for his position, seeming at once to honor and reinterpret those iconic cases.

What should we make of all this? Is Roberts, as Toobin argues, driven exclusively by his ideological convictions in spite of his public embrace of consensus and judicial minimalism as his goals for the Court? Or should his nuanced positions be read as the early efforts of a conservative Justice who recognizes such non-ideological constraints as stare decisis and the institutional claims of the Court on his jurisprudence? Two terms provide insufficient evidence to answer such questions, just as they provide insufficient time for a new Justice to emerge with clarity. As Roberts himself might say, reaching for one of the homely adages he favors to underscore a point, the proof will be in the pudding.

233. Id.
234. Gonzales, 127 S. Ct. at 1639. Only Scalia joined the concurrence. Id.
236. 392 U.S. 83 (1968).
237. Hein, 127 S. Ct. at 2584 (Scalia, J., concurring in judgment). Only Thomas joined the concurrence. Id.
239. Jeffrey Toobin, The Nine: Inside the Secret World of the Supreme Court 332 (2007). Scalia offered a more acerbic critique of the majority's refusal to strike down Flast: "Minimalism is an admirable judicial trait, but not when it comes at the cost of meaningless and disingenuous distinctions that hold the sure promise of engendering further meaningless and disingenuous distinctions in the future." Hein, 127 S. Ct. at 2582 (Scalia, J., concurring in judgment).
242. Parents Involved in Community Schools, 127 S. Ct. at 2767–68.