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Roberts' Rules: The Assertiveness of Rules-Based Jurisprudence

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ROBERTS' RULES: THE ASSERTIVENESS OF RULES-BASED JURISPRUDENCE

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INTRODUCTION

When he was an attorney in private practice, John Roberts represented Great Lakes Dredge and Dock Company in a case involving federal admiralty jurisdiction over a flood. In an effort to limit its liability under federal law, Great Lakes Dredge argued that federal courts were deprived of jurisdiction by the rule-like test articulated in *Sisson v. Ruby*,[1] and that the alternative, multi-factor standard was inappropriate. At oral argument before his future Supreme Court colleagues, Roberts indicted the very idea of standards and balancing: "Totality-of-the-circumstances balancing tests are by their nature vague, indeterminate, manipulable, and lead to different results, depending on who does the balancing . . . ."[2] As usual, the Justices were convinced by his advocacy. In an opinion by Justice Souter, the Court rejected the balancing approach, writing in *Grubart v. Great Lakes Dredge & Dock Co.* that "the proposed four- or seven-factor test would be hard to apply, jettisoning relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal."[3]

Roberts' victory did not end with the verdict in his client's favor. Armed with an eloquent endorsement of rules over balancing tests, Roberts quoted the *Grubart* passage seven times in Supreme Court briefs over the next few years.[4] His enthusiasm for its rejection of balancing tests was consistent, albeit not immediately infectious. During that

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* Assistant Professor, Duke Law School. The discussion of rules and standards here builds on my earlier article, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009). Special thanks to Neil Siegel for bringing together this Supreme Court Review and for his valuable feedback on this piece, and to Thomas Dominic for truly exceptional research assistance.

1. Sisson v. Ruby, 497 U.S. 358 (1990).

2. Transcript of Oral Argument at 49-50, Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995) (Nos. 93-762, 93-1094), 1994 WL 665269.

3. *Grubart*, 513 U.S. at 547. Justice Stevens and Justice Breyer—a noted supporter of multi-factor tests—took no part in the case.

4. *See* Brief for Petitioners at 42, Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) (No. 01-679), 2002 WL 332055; Brief for Petitioner at 41, TrafFix Devices, Inc. v. Mktg. Displays, Inc., 532 U.S. 23 (2000) (No. 99-1571), 2000 WL 35796342; Brief for Petitioner at 24-25, NCAA v. Smith, 525 U.S. 459 (1998) (No. 98-84), 1998 WL 784591; Reply Brief for Petitioner at 6, *NCAA*, 525 U.S. 459 (No. 98-84), 1998 WL 34080890; Brief for Petitioner at 26, Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1997) (No. 96-1577), 1997 WL 523883; Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 19 n.5, Dist. Intown Props. Ltd. P'ship v. District of Columbia, 198 F.3d 874 (2000) (No. 99-1663), 2000 WL 34013959 (denied); Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 29, *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (No. 96-1577), 1997 WL 33485538.

same period, only two other attorneys quoted the passage at all, and one of those was Roberts' erstwhile colleague Greg Garre.[5]

Roberts' reliance on the *Grubart* passage was not entirely client-driven, for he continued to cite it after he was appointed to the bench in 2003, quoting it in three of the forty-six opinions he authored during his two-and-a-half years on the D.C. Circuit.[6] Up through that time, only two other courts in the entire country — one state[7] and one federal[8] — had cited the same section, both in the specific context of maritime jurisdiction. Not a single law review article cited the *Grubart* passage for anything other than principles of maritime jurisdiction.[9]

Since his elevation to the Supreme Court, Roberts has employed the *Grubart* language repeatedly to argue for the superiority of rules over standards in a wide variety of legal contexts. In *Federal Election Commission v. Wisconsin Right to Life* (hereinafter "*WRTL*"), for example, he wrote that the "proper standard" for an as-applied challenge "must eschew 'the open-ended rough-and-tumble of factors' " that "invit[es] complex argument in a trial court and a virtually inevitable appeal."[10] After *WRTL*, the *Grubart* quotation finally took hold in other courts. In another First Amendment case, the Fourth Circuit quoted the *Grubart/WRTL* passage in full,[11] and the Tenth Circuit did so while resolving a jurisdictional issue.[12] The most prominent endorsement came in Justice Kennedy's opinion for the Court in *Citizens United v. Federal Election Commission*, which cited the *Grubart/WRTL* language in the course of striking down restrictions on corporate political spending:

> *WRTL* said that First Amendment standards "must eschew 'the open-ended rough-and-tumble of factors," which "invit[es] complex argument in a trial court and a virtually inevitable appeal." Yet, the FEC has created a regime that allows it to select what political

5. Garre cited the passage seven times, twice as Deputy Solicitor General. In three briefs, he was Roberts's co-counsel. *See* Brief for Petitioner, *TrafFix Devices, Inc.*, 532 U.S. 23 (No. 99-1571), 2000 WL 35796342; Brief for Petitioner, *NCAA*, 525 U.S. 459 (No. 98-84), 1998 WL 784591; Brief for Petitioner, *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (No. 96-1577), 1997 WL 523883. After Roberts was appointed to the D.C. Circuit, Garre quoted the passage four more times. *See* Brief for the Appellee at 29 n.8, Wis. Right to Life, Inc. v. Fed. Election Comm'n, 546 U.S. 410 (2005) (No. 04-1581), 2005 WL 3499672; Brief for the U.S. as Amicus Curiae Supporting Petitioner at 22, N. Ins. Co. of N.Y. v. Chatham Cnty., Ga., 546 U.S. 933 (2005) (No. 04-1618), 2005 WL 3476620; Brief for Real Estate Roundtable et al. as Amici Curiae in Support of Petitioners at 12, Lincoln Prop. Co. v. Roche, 546 U.S. 81 (2005) (No. 04-712), 2005 WL 190358; Brief Amici Curiae for the Real Estate Roundtable et al. in Support of Petitioners at *13, *Lincoln Prop. Co.*, 546 U.S. 81 (No. 04-712), 2005 WL 1169107 (appellate brief).

6. *See* Am. Fed'n of Labor & Cong. of Indus. Orgs. v. Chao, 409 F.3d 377, 395 (D.C. Cir. 2005) (Roberts, Cir. J., concurring in part and dissenting in part); LeMoyne-Owen Coll. v. NLRB, 357 F.3d 55, 61 (D.C. Cir. 2004); DSMC Inc. v. Convera Corp., 349 F.3d 679, 683 (D.C. Cir. 2003).

7. Matthews v. Howell, 753 A.2d 69, 80 n.6 (Md. 2000).

8. Lambert v. Babcock & Wilcox, Co., 70 F. Supp. 2d 877 (S.D. Ind. 1999).

9. A Westlaw "JLR" search for the time period turns up no relevant hits.

10. Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 469 (2007) (quoting Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 547 (1995)).

11. N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 282 (4th Cir. 2008) ("Thus, for any test to meet the 'functional equivalent' standard, it must eschew 'the open-ended rough-and-tumble of factors,' which invite burdensome discovery and lengthy litigation.").

12. Hydro Res., Inc. v. U.S. EPA, 608 F.3d 1131, 1163 (10th Cir. 2010) ("[T]he community of reference test invites not just a checkerboard, but a virtually three-dimensional checkerboard, a sort of ever-shifting jurisdictional Rubik's cube, 'jettisoning relative predictability for the open-ended rough-and-tumble of factors' that assures 'complex argument[s] in [the] trial court and . . . virtually inevitable appeal[s].' ").

speech is safe for public consumption by applying ambiguous tests.[13]

The *Grubart* language had completed its trip from a throwaway line in a maritime case to a cornerstone of the most controversial constitutional decisions of the Roberts Court's first five years.

Recounting the unusual career of this passage from a seemingly minor Supreme Court decision does more than relate the biography of a well-traveled legal quotation.[14] It also illustrates an important and perhaps under-appreciated characteristic of Chief Justice Roberts' legal philosophy: his apparent commitment to rules rather than standards. Because rules are, above all, a mechanism for allocating decisionmaking authority,[15] the Court's use of rules can be an important measure of its assertiveness vis-à-vis lower courts and the political branches. And since the theme of this symposium is "Assertiveness and the Roberts Court," this short article evaluates the Chief Justice's use of and statements about rules in order to evaluate what, if anything, they suggest about his jurisprudence.

Part I fleshes out the argument that rules can be assertive, contending that rules effectively transfer power from lower courts (and sometimes the political branches) to the Court itself.[16] This may be counterintuitive. After all, *Grubart*'s language seems to go hand in hand with the judicial minimalism to which Roberts pledged allegiance during his confirmation hearings.[17] But, as this article demonstrates, rules are not necessarily minimalist; they constrain discretion, not power. As a result, they tend to increase the power of the rule makers at the expense of rule appliers. And since within our constitutional system it is the Supreme Court that has the most rule-setting power — a power that extends over time, at least if precedent and stare decisis are taken seriously — Justices who embrace a rule-based jurisprudence effectively assert their power over lower and future courts. Moreover, rules are not self-generating, nor are they impervious

13. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 896 (2010) (internal citation omitted).

14. This is not the first attention paid to the Chief Justice's affection for the *Grubart* passage. *See also* Jan Crawford Greenburg, *The Gift That Keeps on Giving*, LIFE, POLITICS AND THE LAW (March 31, 2008, 3:51 PM), http://blogs.abcnews.com/legalities/2008/03/the-gift-that-k.html ("Roberts has said the case is one of his favorite opinions because of what the Court said.").

15. *See* Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 647 (1991) [hereinafter Schauer, *Rules and the Rule of Law*] (discounting the "frequently overstated arguments for certainty and predictability, and instead concentrat[ing] largely on rules as devices for the allocation of power"). *See also* Frederick Schauer, *Rules, the Rule of Law, and the Constitution*, 6 CONST. COMMENT. 69, 83 (1989) [hereinafter Schauer, *Rules, the Rule of Law, and the Constitution*] ("[W]e must understand the ways in which rules operate as instruments for the allocation of power."); *id.* at 84 ("I do want to suggest . . . that evaluating the appeal of ruleness cannot take place without confronting the question of *who* is making the constitutional decision.").

16. That rules can be assertive is not necessarily a bad thing; one's enthusiasm for absolute rules tends to vary in direct proportion to one's sympathy for the right or principle they protect. In this article, I do not mean to stake out a position in the larger jurisprudential debate about rules and standards but rather to focus on one underappreciated characteristic of rules — their assertiveness.

17. Roberts famously said at his confirmation hearing: "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 ballgame to see the umpire." *'I Come Before the Committee With No Agenda. I Have No Platform.'*, N.Y. TIMES, Sept. 12, 2005, at A28, *available at* 2005 WLNR 14381957. *See also* Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701 (2007); Jeffrey Rosen, *Roberts's Rules*, ATLANTIC MONTHLY, Jan./Feb. 2007, at 104, 110, *available at* http://www.theatlantic.com/magazine/archive/2007/01/roberts-apos-s-rules/5559/2/ ("In most cases, I think the narrower the better, because people will be less concerned about it . . . .").

to manipulation — they are consciously created and shaped by lawyers and judges. The *Grubart* passage, for example, was first articulated in a Supreme Court opinion rejecting a proposed change to a long-standing rule of maritime jurisdiction. In *Citizens United*, it had become the lodestar for "First Amendment standards."[18] Thus, in considering the relationship of rules to judicial discretion and judicial power, it must be remembered that judges themselves often make the rules.

Part II connects Part I's theoretical discussion of rules to Chief Justice Roberts' own analysis of rules, standards, and judicial power. In doing so, the discussion draws on his opinions that engage with the rules-standards debate. The survey is not comprehensive, but it does suggest that the Chief Justice has often invoked rules as a mechanism for reducing the role of judges and judging. However, as the discussion in Part I illustrates, rules are themselves an incident of judicial power. When the Court sets the rules, it is asserting its own power.

I. RULES AND ASSERTIVENESS

Before exploring the Chief Justice's jurisprudence, it may be useful to say something about rules, standards, and their relationship to judicial power and discretion.

Rules and Standards

Barrels of ink have been spilled in the debates and even battles over rules and standards. This article will make every effort to step gingerly and quickly across the battlefield in order to address the discrete question of how rules making is an assertion of judicial power, and how that issue has played out in Chief Justice Roberts' opinions thus far. Nevertheless, some respects must be paid, and some definition of terms is in order.

As generally conceived, rules take something of an absolutist form, dictating outcomes based on inputs. The exclusionary rule, for example, forbids the admission at trial of unconstitutionally obtained evidence. It does not require (in fact, forbids) a judge in any particular case to evaluate whether exclusion will deter police misconduct or will impose too great a social cost.[19] Rules thereby deny discretion to decisionmakers in individual cases. A system of strict and mandatory sentencing guidelines would be a rule-based system because it would require a judge to impose whatever sentence is enumerated in the guidelines, regardless of whether the judge thought it appropriate in the case before her.

The benefits of such systems are clear, at least in theory.[20] Above all, they help ensure predictability and a certain kind of evenhandedness. This is generally what Justice

18. *Citizens United*, 130 S. Ct. at 896.

19. Of course, the exclusionary rule itself is shot through with exceptions, which are discussed in more detail below. *See infra* notes 27-30 and accompanying text. But they, too, are rule-like — they do not rest, in any individual case, on exercises of judicial discretion.

20. For present purposes I will take for granted that rules *do* bind judges—an assumption that becomes complicated the more one considers it. *See* Neil S. Siegel, *A Prescription for Perilous Times*, 93 GEO. L.J. 1645, 1664-65 (2005) (book review) ("Nor is it self-evident as a general matter (the conventional wisdom notwithstanding) that rules constrain behavior more than standards . . . . [T]he choice between rules and standards is of little consequence by itself, because nothing within a rule or standard identifies the interpretive filter through which either is applied.").

Scalia means by the "rule of law as a law of rules."[21] But if the benefits are apparent, so, too, are the costs. Rules are inevitably over and under inclusive, and thus cases will arise where the facts demand an outcome that would otherwise be undesirable or even absurd.[22] In the specific context of sentencing guidelines, such costs arose (at least in the pre-*Booker*[23] mandatory guideline days) in cases where judges were required to hand down identical sentences for what appeared to be, in all but their legal categorizations, entirely different crimes.

Standards, by contrast, permit judicial discretion in individual cases. Standards can take many forms, but in the main they are akin to reliance on guiding principles or interest balancing. A decisionmaker in a standards-based regime therefore must generally justify her decision according to some background principle that does not itself clearly compel one answer or another, whereas the rule-bound decisionmaker would need only to point to the applicable rule and be done with it. Balancing tests are closely associated with standards because they do not predetermine any particular outcome, but instead require judges to evaluate context-specific reasons. In theory, then, a standards-based regime can better deal with cases that would otherwise be improperly included or excluded in a rules-based regime. The current system of advisory sentencing guidelines is closely related to this model, as it gives judges the discretion to depart from guidelines sentences when circumstances dictate. Of course, the costs of the system are well-known. They are the same costs that led to the establishment of the federal sentencing guidelines in the first place: the vesting of too much discretion in judges and the creation of a system in which individual judges can rule according to their own political preferences or prejudices.[24]

On some level it is undoubtedly true that the division between rules and standards, or their sister concepts categorization and balancing, is a "misleading oversimplification."[25] Even so, as Kathleen Sullivan argues, "categorization and balancing are practically if not logically distinct. Rhetorically they call forth very different efforts. And such differences give shifts between the modes their dynamic power — that's why the Court treats them as worth fighting over."[26] At the very least, then, there is a distinction between rules and standards, even if it is often one of degree rather than one of kind.

The blurry line between rules and standards is readily observable in practice. Rules often beget exceptions, leading to situations where theoretically absolute rules become so dotted with holes and sub-rules that they come to resemble something else entirely. The

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21. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

22. *See* Schauer, *Rules, the Rule of Law, and the Constitution*, *supra* note 15, at 75 ("Rules get interesting . . . when some member of the category is within the category as stated but not within the background justification.").

23. *See* U.S. v. Booker, 543 U.S. 220, 233-35 (2005).

24. *See generally* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING (1998) (describing the mandatory Sentencing Guidelines regime and advocating a more active role for judges).

25. Schauer, *Rules and the Rule of Law*, *supra* note 15, at 653 n.11.

26. Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 309 (1992). *See also* Robert F. Nagel, *Liberals and Balancing*, 63 U. COLO. L. REV. 319, 319 (1992) ("I agree that it can make some difference whether judges employ balancing tests instead of categorical tests.").

exclusionary rule is an excellent example of this phenomenon. First announced as a flat ban on the admission of unconstitutionally obtained evidence,[27] it has been altered greatly over the course of its career by exceptions for evidence obtained where an officer has relied in good faith on a faulty warrant,[28] or where a warrant is faulty because of a court clerk's error,[29] or where evidence is seized as the result of a knock-and-announce violation.[30] Further complicating the rules/standards division, these carve-outs are themselves premised on a standard-like weighing of costs and benefits: evidence will not be excluded where the social cost of suppression outweighs the deterrence value of exclusion.[31] Because it is justified in terms of social costs and benefits and recognizes the weighty concerns on both sides, the rule itself is shot through with the language of balancing and standards.

Nor is the exclusionary rule a unique example; rules are often the calcified outcome of repeated balancing, just as common law rules "emerge" over time. Melville Nimmer charted such a development in the context of the First Amendment, where seemingly absolute rules had evolved out of repeated interest balancing. He called this process "definitional balance[ing]."[32] Similarly, Kermit Roosevelt has identified a process of "constitutional calcification,"[33] by which the Court, having created a rule, applies it without regard to the reasons for its existence:

> In a striking number of cases the Court has forgotten the reasons behind particular rules and has come to treat them as nothing more than statements of constitutional requirements. This mistaken equation of judicial doctrine and constitutional command tends to warp doctrine, frequently at significant cost to constitutional values; it also distorts the relationship the Court has to other governmental actors and to the American people.[34]

But not all rules emerge slowly, over time, through a process of repeated balancing. Some spring, apparently fully formed, from the foreheads of the Justices and are justified according to some other basis. In recent years, the most common alternative basis has been originalism, or the related but distinct desire simply to limit judicial discretion. Indeed, the debate about rules and standards is deeply tied to views about the proper role of the judiciary and the proper methods of judging. As Kathleen Sullivan put it in her *Harvard Law Review* Foreword, *The Justices of Rules and Standards*,

> The Justices of rules are skeptical about reasoned elaboration and suspect that standards

27. Mapp v. Ohio, 367 U.S. 643, 648 (1961). *See also* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (Holmes, J.) (applying exclusionary rule); Weeks v. United States, 232 U.S. 383 (1914) (same).

28. United States v. Leon, 468 U.S. 897 (1984).

29. Arizona v. Evans, 514 U.S. 1, 14 (1995).

30. Hudson v. Michigan, 547 U.S. 586 (2006).

31. *See, e.g.*, *Leon*, 468 U.S. at 906-07 (weighing deterrent benefits against costs of exclusion).

32. Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1192-93 (1970). *See also* Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 959-60 (1919) ("The true boundary line of the First Amendment can be fixed only when Congress and the courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth.").

33. Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005).

34. *Id.* at 1652.

> will enable the Court to translate raw subjective value preferences into law. The Justices of standards are skeptical about the capacity of rules to constrain value choice and believe that custom and shared understandings can adequately constrain judicial deliberation in a regime of standards.[35]

Having described the basic jurisprudential terrain, the basic purpose of this article is to explore how these jurisprudential concerns have played out in the Roberts Court.

The Assertiveness of Rules

This article does not seek to add to the generalized cacophony of the rules-standards debate. Rather, it argues that, perhaps contrary to their reputation, rules generally maintain or increase judicial power even as they restrict judicial discretion. Rules are a means of allocating decisionmaking authority, not destroying it.[36] One might think of this as the "Law of Conservation of Judicial Power" — the notion that switching between rules and standards does not lessen the role of courts in resolving disputes, but merely changes who exercises that power, when, and how.

Simple as it sounds, this conclusion runs counter to the common narrative in which rules restrict the judiciary and check its power. After all, one of the primary virtues of rules-based jurisprudence — especially when coupled with interpretive methodologies like originalism and textualism — is supposed to be that it limits the power of judicial decisionmakers. Just as originalism is supposed to reduce judicial discretion in identifying constitutional principles, a rules-based jurisprudence is supposed to reduce judicial discretion in applying them. Opponents of "judicial activism" have waved the banner of originalism for thirty years, but they might just as easily rally around rule-based adjudication as the new means of limiting judicial discretion and power. Indeed, Justices, judges, and scholars who claim fealty to a "limited" judicial power often praise not only interpretive methods such as originalism but also judicial "output" of rules. As Justice Scalia — perhaps the leading proponent both of constitutional rules and of constitutional originalism — has argued, "Only by announcing rules do we hedge ourselves in";[37] standards, by contrast, permit judges to be guided by their "political or policy preferences."[38] Chief Justice Roberts might not share Justice Scalia's commitment to originalism, but he does seem to share Scalia's oft-stated antipathy for judicial discretion.[39] And as Part II of this article will address in more detail, he has often invoked rules in the same way that Justice Scalia has invoked originalism: as a means of limiting judicial discretion and power.

35. Kathleen M. Sullivan, Foreword, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 27 (1992).

36. *See supra* note 15 and sources cited therein.

37. Scalia, *supra* note 21, at 1180.

38. *Id.* at 1179.

39. *See supra* note 17.

The simple story, therefore, is that rules lessen judicial discretion and judicial power by requiring courts to resolve cases mechanically. The reality is more complicated. Rules and standards (like their cousins categorization and balancing)[40] do not alter the amount of judicial power in existence, they simply alter the way in which it is exercised. Standards, like balancing, "tend[] to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation," whereas rules, like categories, "bind[] a decisionmaker to respond in a determinative way to the presence of delimited triggering facts."[41] In other words, rules transfer judicial power away from decisionmakers in individual cases and give that power to those with the authority to set the rules in the first place.

This argument emerges more clearly if one recognizes a distinction between judicial *discretion* and judicial *power*. As used here, judicial discretion refers to the size of a judge's decision space — the breadth of decisions available to her.[42] If there are many ways in which a case could be resolved, and the court can decide for itself which one to take, then the court has broad discretion. Courts have a wide range of possible options when it comes to trial management, for example, as evidenced by the fact that such decisions are reviewed on appeal only for abuse of discretion. As a jurisprudential matter, standards and balancing tests are thought to increase judicial discretion, because they open up different roads to the resolution of a case and leave it to the judge to choose one.

Judicial power, by contrast, means the authority of courts to resolve controversies. If a court renders a binding decision in a specific case, that court has exerted judicial power over the parties. But a court also exercises power when it sets down a rule to govern all future cases of a particular type. In the latter scenario, the court has exercised power not only over the case before it but also over all other future cases governed by the rule (i.e., bound by the precedent). Whether or not the litigants in those cases ever appear before the rule-setting court or even know of its existence, the court has determined their disputes just as surely as if it heard and resolved each one individually. It follows that a court setting a rule governing 100 cases has exercised just as much power as would have been exerted if the 100 cases had been heard and resolved individually by separate courts. This shows that, within the judiciary, rulemaking does not destroy power, but merely shifts it.

There is another way to measure the relationship between rules, standards, and

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40. *See* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 398 (1985) ("The dialectic here [of rules v. standards] traces the so-called balancing v. absolutism debate.").

41. Sullivan, *supra* note 35, at 58.

42. This wiggle room is not easily defined. *See, e.g.*, Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097, 1099-1100 (1984) ("Usually what legal scholars and others mean when they speak of judicial discretion is that judges do a good bit of legislating at a substantive level."). *See also* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98–141 (1921)

> We do not pick our rules of law full-blossomed from the trees. Every judge consulting his own experience must be conscious of times when a free exercise of will, directed of set purpose to the furtherance of the common good, determined the form and tendency of a rule which at that moment took its origin in one creative act.

Id. at 103–04.

judicial power, however — observing how courts behave vis-à-vis the political branches. It is often thought that standards and balancing tests increase judicial power by transferring authority from the legislature to the judiciary. Justice Black's famously rule-bound approach to the Bill of Rights was largely premised on that conclusion.[43] But it is not necessarily sound. A standards-following judge may in fact be extremely deferential to the legislature, and may therefore uphold a statute that his rule-following colleague would be compelled to strike down. In free speech doctrine, for example, "[a]d hoc balancing gained its dismal first amendment reputation in large part because its chief proponent, Justice Frankfurter, held as well a theory of great deference to legislative determinations."[44] Rules, by contrast, do not permit this kind of deference. Indeed, in many ways their very *purpose* is to hold the line against political pressures.[45]

Thus it is too simple to say that rules limit judicial power. Within the judiciary, they do no more than transfer power from one court to another. And even when one considers the power of the judiciary as against the political branches, rules are not necessarily power-denying. The real issue is who has the power to set the rules and how they go about doing so. When Congress writes a clear statutory rule, it limits both judicial discretion and judicial power. In applying the statutory rule, courts will not have much wiggle room (i.e., very little discretion), nor will they have any real power over how disputes involving that rule are resolved, (i.e., no real power), since Congress has effectively done so itself. But when rules emanate from within the judiciary, the picture is a little bit different. If the Supreme Court creates a rule, it limits judicial discretion (the discretion of lower courts, at least) just as surely as a statutory rule. But a Supreme Court-created rule does not necessarily limit judicial power. This flows, of course, from the fact that the establishment of the rule by the Court is itself an exercise of judicial power. Effectively, then, disputes are resolved by the court that establishes the rule, whether or not that is the court that hears the dispute.

Consider the example of obscenity. Under current First Amendment doctrine, obscenity has no constitutional protection, and thus states are free to prohibit it.[46] As the Supreme Court said in *Miller v. California*: "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment."[47] This is a

43. *See* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 878 (1960) ("[A] balancing approach to basic individual liberties assumes to legislators and judges more power than either the Framers or I myself believe should be entrusted, without limitation, to any man or any group of men."). *See also* Sullivan, *supra* note 35, at 118 ("The vaguer and more unpredictable its extension to the next situation with slightly different facts, the more it transfers power from the political branches to the courts.").

44. Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 303 (1981) (citing Dennis v. United States, 341 U.S. 494, 524-25, 542 (1951) (Frankfurter, J., concurring); WALLACE MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT 119-20 (1961)).

45. *See* Denver Area Educ. Telecomms. Consortium, Inc. v. Fed. Commc'ns Comm'n, 518 U.S. 727, 774 (1996) (Souter, J., concurring) ("Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said."). *See also* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 474 (1985) ("[C]ourts . . . should place a premium on confining the range of discretion left to future decisionmakers who will be called upon to make judgments when pathological pressures are most intense.").

46. This is something of an oversimplification, since it may well be that states cannot selectively ban obscenity — prohibiting only obscenity involving African Americans or Democrats, for example. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 384 (1992) (concluding that a city may ban all obscene works, but not "only those legally obscene works that contain criticism of the city government").

47. Miller v. California, 413 U.S. 15, 23 (1973). *See also* Roth v. United States, 354 U.S. 476, 483, 485

clear-cut rule. If 100 pornographers seek to bring constitutional challenges when their obscene works are banned,[48] they will lose as a simple function of the rule that obscenity is constitutionally unprotected. *Miller*, in other words, governs all of their cases. One hundred cases — or potential cases — have been resolved by a single decision of a single court. If, on the other hand, the Supreme Court had not decided that obscenity (however defined) is entirely outside the reach of the First Amendment, but instead had held that "states may ban obscene depictions of sexual acts when, in a particular case, the social and moral harms of the depiction outweigh its artistic or other benefits," then it is quite possible that all 100 pornographers would have brought their cases to court, arguing vociferously about the artistic merits of their particular pieces.[49] All 100 of those cases would be resolved by courts, perhaps by different courts. But just as with the overarching *Miller* rule, a court's power would resolve the issue in all 100 cases.

The point is simply that, in rules and standards regimes alike, disputes are determined by judicial power, whether on a case-by-case basis or through the application of a rule. There is, however, at least one important caveat (and perhaps many more) to the Law of Conservation of Judicial Power. Where rules are well-established and well-known, parties may avoid litigation altogether. Chief Justice Roberts and other supporters of rules-based regimes have noted this feature of rules regimes — something they clearly see as a strength. The passage from *Grubart*, for example, rejects "the proposed four- or seven-factor test" in part because it would "invit[e] complex argument in a trial court and a virtually inevitable appeal."[50] Similarly, at an oral argument during his first term on the Court, the Chief Justice noted that "[a]s soon as you get into a multifactor analysis, then you get briefs on both sides arguing their factors and the other side's factors, and the judge has to decide. If there's a presumption that applies in most cases, you don't waste time over jurisdictional squabbles like this."[51] In that respect, the Chief Justice was undoubtedly correct. If one's goal is to keep cases out of court, rules' predictability may give them an advantage over standards, at least so long as their reach is clear.

Whether these cases — which are essentially resolved before they ever reach the courthouse — should be counted as having been "resolved" by "judicial power" is a complicated question. On the one hand, it seems a bit much to attribute to a court the resolution of a case that was never filed. On the other hand, if the case is never filed *because* the parties know that the outcome is dictated by an earlier court case (the one establishing the rule governing their dispute), then it seems perfectly reasonable to say that judicial authority "resolved" the dispute. Our 100 pornographers, after all, declined to bring their challenge only because they knew that *Roth* decreed that they would lose.[52]

(1957) (holding that, despite the "unconditional phrasing of the First Amendment," "obscenity is not within the area of constitutionally protected speech or press").

48. Of course, not all pornography is "obscene" under the *Miller* test. *See Miller*, 413 U.S. at 23-25

49. The same kind of arguments are already relevant to the question of whether particular pornography is obscenity under *Miller*. That is, the definitional question of whether something *is* obscene involves exactly these kinds of concerns.

50. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 547 (1995).

51. Transcript of Oral Argument at 30, Martin v. Franklin Capital Corp., 546 U.S. 132 (2005) (No. 04-1140), 2005 WL 3112005.

52. *See Roth*, 354 U.S. 476.

In any event, even if the Law of Conservation of Judicial Power does not hold true in every instance, it does indicate that rules do not necessarily limit judicial power. Instead, they transfer power to the court with the power to set the rule in the first place. In the current judicial system, that means that a system of judicially created rules tends to aggregate power in the Supreme Court — the Roberts Court.

II. ROBERTS' RULES

The purpose of this Part is not to give a comprehensive accounting of the use of rules in the Roberts Court but rather to give a relatively broad overview of those cases in which the Chief Justice himself has discussed the relationship between rules and judicial power. It emerges that Roberts has generally supported the use of rules on the basis that they constrain judicial discretion and power — a line of reasoning that may be problematic, as Part I has attempted to show.

One of the Chief Justice's most extensive discussions of the role of rules and judging came in a case that was itself about judging. In *Caperton v. A.T. Massey Coal Co.*, the Court was forced to confront the messy problem of campaign contributions in West Virginia, where a jury had found a coal company liable for fifty-million dollars in damages.[53] Knowing its case would be heard on appeal in the Supreme Court of Appeals of West Virginia, the company contributed "extraordinary" amounts to ensure the election of its preferred candidate to that court.[54] Once elected, the judge refused to recuse himself from the company's case and eventually cast the deciding vote in the company's favor.[55] The failure to recuse was challenged on Due Process grounds.[56]

Justice Kennedy wrote the majority opinion, which concluded that "objective standards . . . require recusal when 'the *probability* of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'. . . [W]e find that, in *all the circumstances of this case*, due process requires recusal."[57] This kind of multi-factor holistic approach, of course, would give discretion to judges. Thus it was no surprise to that Justice Scalia objected to the standard-like approach described in the majority opinion. "The relevant question," he wrote in dissent, "is whether we do more good than harm by seeking to correct this imperfection through expansion of our constitutional mandate in a manner ungoverned by any discernable rule. The answer is obvious."[58]

The Chief Justice's objections to the lack of a clear rule were even more strenuous. In his dissent, Roberts criticized the majority's "probability of bias" test — a standard if ever there was one — saying that it "fails to provide clear, workable guidance for future cases."[59] The Chief Justice then listed forty questions that "quickly come to mind"[60] as

53. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2256-57 (2009).

54. *Id.* at 2256.

55. *Id.* at 2258–59.

56. *See id.* at 2256.

57. *Id.* at 2257 (emphasis added) (internal citation omitted) (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

58. *Caperton*, 129 S. Ct. at 2275 (Scalia, J., dissenting).

59. *Id.* at 2269 (Roberts, C.J., dissenting).

60. *Id.* at 2272.

being relevant to the probability of bias inquiry.[61] The implication was clear: without a clear rule, judges would become embroiled in wide-ranging inquiries and would provide arbitrary answers. Focusing on the difficulty of applying the majority's multi-factor standard, the Chief Justice claimed that the opinion "requires state and federal judges simultaneously to act as political scientists (why did candidate X win the election?), economists (was the financial support disproportionate?), and psychologists (is there likely to be a debt of gratitude?)."[62] He concluded on an ominous note:

> I believe that opening the door to recusal claims under the Due Process Clause, for an amorphous "probability of bias," will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts. I hope I am wrong.[63]

For purposes of this article, what is striking about these objections is that they are *not* arguments against the merits of the majority's opinion, nor necessarily to its implicit conclusion that there may be something amiss in a system where money has such an important role in the selection of state judges and correlates with their decisions in pending cases. Rather, the Chief Justice concluded that the threat to "the confidence of the American people in the fairness and integrity of their courts" was the possibility that federal courts would intervene if a "probability of bias" was proven. Whatever the accuracy of this prediction, there can be no mistaking the Chief Justice's opposition to multi-factor standards, nor the implication that they threaten judicial integrity even more than enormous campaign contributions by a corporate tortfeasor apparently attempting to influence the election of judges with jurisdiction over its appeal.

That opposition — and the well-traveled *Grubart* passage —also emerged in a variety of First Amendment cases. In *Federal Election Commission v. Wisconsin Right to Life*, a lobbying organization (WRTL) sought injunctive relief from a provision in the Bipartisan Campaign Reform Act ("BCRA") that would have made its "electioneering communication[s]" illegal.[64] WRTL contended that, as applied, BCRA violated its First Amendment speech rights.[65] Invoking the *Grubart* passage for the first time as Chief Justice, Roberts said that the "proper standard" for as-applied challenges must be objective, must entail minimal discovery, and "must eschew 'the open-ended rough-and-tumble of factors' which 'invit[es] complex argument in a trial court and a virtually inevitable appeal.' "[66] In 2009's *Ysursa v. Pocatello Education Association*, Roberts again cited *Grubart* in assessing a First Amendment challenge to a ban on political payroll contributions from public employees.[67] True to form, Justice Breyer argued that the law should be evaluated under a standard-like "intermediate scrutiny" approach.[68] Roberts responded that such an approach lacked the comparative rigidity of rational basis

61. *See id.* at 2269–72.

62. *Id.* at 2272.

63. *Caperton*, 129 S. Ct. at 2274 (Roberts, C.J., dissenting).

64. Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 460 (2007) (quoting Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 91 (codified as 2 U.S.C. § 441b(b)(2))).

65. *See id.*

66. *Id.* at 469.

67. Ysursa v. Pocatello Educ. Ass'n, 129 S. Ct. 1093, 1099 n.2 (2009).

68. *Id.* at 1103 (Breyer, J., concurring in part and dissenting in part).

review and concluded, "We therefore would not subject Idaho's statute to the 'open-ended rough-and-tumble of factors' proposed by the dissent as an alternative to rational basis review."[69]

But the ultimate triumph of the *Grubart* passage came one year later in *Citizens United*, when Justice Kennedy's majority opinion (which the Chief Justice joined) turned to *WRTL* in the course of concluding that the FEC could not bar corporations from spending money on candidate advertisements in the run-up to an election:

> *WRTL* said that First Amendment standards "must eschew 'the open-ended rough-and-tumble of factors,' which 'invit[es] complex argument in a trial court and a virtually inevitable appeal.' Yet, the FEC has created a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests.[70]

Thus, almost by the force of repetition alone, the *Grubart* passage became a cornerstone of one of the most important and controversial First Amendment decisions in recent decades. It did not necessarily shape the result, of course — that had much more to do with the majority's understanding of corporate speech rights and stare decisis — but it did alter the path that the majority chose to get there and the rule-like nature of its output.

Of course, since the Chief Justice did not pen the majority opinion in *Citizens United*, its approach cannot be fully attributed to him, *Grubart* citation or no. But in *Morse v. Frederick*, another high-profile First Amendment case, Roberts crafted a majority opinion denying the First Amendment claim of a student who had been punished for holding up a banner saying "BONG HiTS 4 JESUS" at a parade that was held off of school grounds but still (at least arguably) affiliated with the school.[71] "The question," wrote Roberts, was "whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may."[72] In dissent, Justice Stevens lamented that "the Court's ham-handed, categorical approach is deaf to the constitutional imperative to permit unfettered debate."[73] He concluded that:

> Although this case began with a silly, nonsensical banner, it ends with the Court inventing out of whole cloth a special First Amendment rule permitting the censorship of any student speech that mentions drugs, at least so long as someone could perceive that speech to contain a latent pro-drug message.[74]

Implicit in Justice Stevens' objection was the point that a rule does not necessarily deny judicial power.

Justice Stevens would revisit these complaints, including the invocation of "whole cloth," the next term in *District of Columbia v. Heller*.[75] The Chief Justice did not write an opinion in *Heller*, so it is difficult to say how much the majority opinion, which he

69. *Id.* at 1099 n.2.

70. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 896 (2010) (internal citations omitted).

71. Morse v. Frederick, 551 U.S. 393, 396-98 (2007).

72. *Id.* at 403.

73. *Id.* at 445 (Stevens, J., dissenting).

74. *Id.* at 446.

75. *See* District of Columbia v. Heller, 554 U.S. 570, 646 (2008) (Stevens, J., dissenting) (arguing that the majority had created out of "whole cloth" a list of acceptable gun regulations).

signed, was shaped by his preferences. Nevertheless, it is notable that the majority opinion adopted the rule-like "categorical" approach that Roberts has favored elsewhere. It did so by explicitly rejecting the "balancing" approach advocated by Justice Breyer in his dissent,[76] characterizing it as "judge-empowering" and saying that "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."[77] As for the necessity of balancing in creating rules, Justice Scalia concluded that the Second Amendment itself "is the very *product* of an interest balancing by the people—which Justice Breyer would now conduct for them anew."[78]

Instead of balancing interests, the majority struck down the regulation at issue (a ban on handguns in the District of Columbia) while announcing — without any evident reasoning — that other categorical bans, such as prohibitions on possession by felons and the mentally ill, were permissible:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[79]

This was rule-based adjudication at its clearest. But, as the dissenters pointed out, and as Part I argued, it was not necessarily a limitation on judicial power. Justice Stevens predicted that the majority opinion "will surely give rise to a far more active judicial role in making vitally important national policy decisions than was envisioned at any time in the 18th, 19th, or 20th centuries."[80] Justice Breyer echoed this concern, saying that he could "find no sound legal basis for launching the courts on so formidable and potentially dangerous a mission."[81]

In *Heller*, the champions for the respective camps of rules and standards were Justice Scalia and Justice Breyer,[82] with the Chief Justice lined up behind Justice Scalia's banner. In *Medellìn v. Texas*,[83] decided just three months earlier, it was Roberts and Breyer who engaged in the jousting. Medellìn, a Mexican national accused of murder in Texas, was not informed of his Vienna Convention-guaranteed right to

76. *See id.* at 681-82 (Breyer, J., dissenting).

77. *Id.* at 634.

78. *Id.* at 635.

79. *Id.* at 626-27.

80. *Heller*, 554 U.S. at 680 (Stevens, J., dissenting). *See also id.* ("The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulate civilian uses of weapons, and to authorize this Court to use the common-law process of case-by-case judicial lawmaking to define the contours of acceptable gun-control policy."); Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC, Aug. 27, 2008, at 32, 32 ("The Framers of the Bill of Rights could not have been thinking of the crime problem in the large crime-ridden metropolises of twenty-first-century America, and it is unlikely that they intended to freeze American government two centuries hence at their eighteenth-century level of understanding.").

81. *Heller*, 554 U.S. at 722 (Breyer, J., dissenting). *See also id.* at 704.

82. For an effort to explore this debate more thoroughly, see Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009).

83. Medellìn v. Texas, 552 U.S. 491 (2008).

counsel. He gave a confession, which led to his conviction and eventual death sentence. The questions in *Medellìn* were whether an International Court of Justice ("ICJ") judgment was enforceable in Texas, and whether a presidential memorandum required Texas to review defendants' claims regardless of the state's own procedural rules.[84]

The Chief Justice wrote the majority opinion, which concluded that Medellìn had no enforceable right based on either the ICJ's ruling or the President's memorandum.[85] But the majority and dissent — the latter authored by Justice Breyer — were separated by more than their differing conclusions about whether the Vienna Convention applied. They were divided, perhaps even more starkly, about how that question should be asked in the first place. Justice Breyer, characteristically, favored a multi-factor standard for determining whether a treaty is self-executing — he listed at least seven factors that might be relevant.[86] He derided the majority's search for specific self-executing language as, at best, "hunting the snark."[87] He conceded that that the factors he listed "do not create a simple test, let alone a magic formula,"[88] but maintained that "they do help to constitute a practical, context-specific judicial approach, seeking to separate run-of-the-mill judicial matters from other matters, sometimes more politically charged, sometimes more clearly the responsibility of other branches, sometimes lacking those attributes that would permit courts to act on their own without more ado."[89] Applying these factors, Justice Breyer concluded that the treaty was self-executing and the ICJ's judgment enforceable.[90] But because of the majority's decision, "the Nation may well break its word even though the President seeks to live up to [it] . . . ."[91]

The Chief Justice rejected both the dissent's conclusion and — just as emphatically — the path it took to get there. He called the dissent's multi-factor, case-by-case approach "novel,"[92] a "grab bag of no less than seven reasons"[93] (the same unlucky number of factors proposed by the hapless appellants in *Grubart*),[94] and contrary to the "time-honored" rule approach.[95] His derision was based solidly on the allegedly power-expanding nature of a multi-factor standard, saying that if a treaty's bindingness were to be determined by judges under such a test, it "would be the equivalent of writing a blank check to the judiciary."[96] He invoked the virtue of judicial restraint and said that

> [t]he dissent's contrary approach would assign to the courts — not the political branches — the primary role in deciding when and how international agreements will be enforced. To read a treaty so that it sometimes has the effect of domestic law and sometimes does not is

84. *Id.* at 498.
85. *Id.* at 498.
86. *Id.* at 549-50 (Breyer, J., dissenting).
87. *Id.* at 549.
88. *Medellin*, 552 U.S. at 550 (Breyer, J., dissenting).
89. *Id.* at 550-51.
90. *Id.* at 567.
91. *Id.*
92. *Id.* at 515.
93. *Medellìn*, 552 U.S. at 516.
94. *See* Transcript of Oral Argument, *supra* note 2, at 49 ("The test they propose, a totality of the circumstances, seven-factor, policy-based balancing test, is wholly unsuited to the jurisdictional inquiry.").
95. *Medellìn*, 552 U.S. at 514.
96. *Id.* at 515.

> tantamount to vesting with the judiciary the power not only to interpret but also to create the law.[97]

Instead, Roberts concluded that "[n]othing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the President or Senate intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by 'many of our most fundamental constitutional protections.' "[98] *Medellìn* was an interesting case not just because of the substantive legal issues it presented but because of the debate it encapsulated regarding the jurisprudence of rules and standards. Chief Justice Roberts, as he has in other cases, argued strenuously for rules as a way of constraining judicial discretion and power — a mode of reasoning that, in the particular circumstances of *Medellìn*, he found counseled against the criminal defendant's treaty-based rights claim.

Though cases like *WRTL*, *Ysura*, and *Medellìn* generally seem to be representative, the Chief Justice has not always argued for rules over standards. In *Graham v. Florida*, for example, Roberts concurred with the majority opinion inasmuch as it vacated the life sentence of the criminal defendant who had challenged the constitutionality of life sentences without the possibility of parole ("LWOP") for juveniles.[99] The majority's rule — that such sentences were unconstitutional for people under the age of eighteen — was a straightforward example of the kind of discretion-denying rule that the Chief Justice had supported in the cases discussed above. It would, like the *Grubart* rule, avoid a rough-and-tumble of factors, and would prevent judges from writing their policy preferences into law. But in *Graham*, Roberts could "see no need to invent a new constitutional rule of dubious provenance."[100] He wrote that the majority's "categorical conclusion is as unnecessary as it is unwise"[101] and that the majority had erred "in using this case as a vehicle for unsettling our established jurisprudence and fashioning a categorical rule applicable to far different cases."[102]

Notably, the Chief Justice's objection was not to the result, in which he concurred, but to the majority's approach — the fact that it created a rule, rather than a case-by-case approach that would permit LWOP sentences for juvenile criminals who had truly committed heinous crimes that might be deserving of "more severe punishment."[103] The majority's rule-like approach flatly prohibited such sentences and thereby limited judicial discretion in precisely the same way as the rules the Chief Justice had advocated in *Medellìn* and other cases. The Chief Justice was surely right to point out in *Graham* that the majority's categorical approach would prevent judges from handing down what might seem to be appropriately harsh sentences in cases involving particularly heinous crimes. But that, after all, is precisely the function of rules. As Roberts himself put it in another criminal case — one where a trial court failed to set a restitution award within the statutory time limit — "I am mindful of the fact that when a trial court blunders, the

97. *Id.* at 516.
98. *Id.* at 523 (quoting Sanchez-Llamas v. Oregon, 548 U.S. 331, 360 (2006)).
99. Graham v. Florida, 130 S. Ct. 2011, 2042 (2010) (Roberts, C.J., concurring in judgment).
100. *Id.* at 2036.
101. *Id.* at 2041.
102. *Id.* at 2042.
103. *Id.* at 2041.

victims may suffer. Consequences like that are the unavoidable result of having a system of rules."[104]

Graham is not the only case in which the Chief Justice has grappled with the downside of rules' inflexibility. In *Georgia v. Randolph*, the question was whether a present occupant of an area in common could consent to search, overriding the express refusal of another occupant.[105] The majority held that they could not.[106] Chief Justice Roberts dissented, again emphasizing the negative effects of a hard and fast rule: "The rule the majority fashions does not implement the high office of the Fourth Amendment to protect privacy, but instead provides protection on a random and happenstance basis . . . ."[107] He argued that "[r]ather than draw such random and happenstance lines—and pretend that the Constitution decreed them—the more reasonable approach is to adopt a rule acknowledging that shared living space entails a limited yielding of privacy to others."[108] This objection to line drawing and invocation of reasonableness suggests a "rule" that is really more akin to a standard — one which balances the privacy interests of parties in a shared living space.

There is, of course, a particular constitutional reason why standards are attractive in cases like *Georgia v. Randolph*, which is that the Fourth Amendment itself refers to "reasonable" searches and seizures.[109] Even Justice Scalia, a committed textualist and opponent of standards, has written that, "[a]s the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.' "[110] It is therefore unsurprising that the Court's Fourth Amendment jurisprudence, including even the exclusionary rule itself, is deeply rooted in interest balancing and context-specific determinations.

CONCLUSION

Like originalism, rules hold out the promise of a "neutral" judiciary mechanically following determinate processes. This article has attempted to show that the reality is somewhat more complicated. A rules-based regime does not necessarily limit judicial power, but rather reallocates it from lower courts to the court with the authority to set the rules in the first place — in our current system, the Supreme Court. It follows that when the Supreme Court creates a rule, it effectively asserts its own power while purporting to deny that of courts more generally.

Chief Justice Roberts has consistently expressed a concern with what he sees as overbroad judicial power.[111] This article's brief overview of his opinions suggests that

104. Dolan v. United States, 130 S. Ct. 2533, 2549 (2010) (Roberts, C.J., dissenting).

105. Georgia v. Randolph, 547 U.S. 103, 106 (2006).

106. *Id.* at 122–23.

107. *Id.* at 127 (Roberts, C.J., dissenting). *See also id.* at 137 ("The scope of the majority's rule is not only arbitrary but obscure as well."); *id.* at 138 ("[T]he majority's rule protects something random . . . .").

108. *Randolph*, 547 U.S. at 137.

109. *See* U.S. CONST. amend. IV.

110. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995) (Scalia, J., delivering the opinion of the Court). *See also* Hudson v. Palmer, 468 U.S. 517, 527 (1984) ("Determining whether an expectation of privacy is 'legitimate' or 'reasonable' necessarily entails a balancing of interests.").

111. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 826 (2008) (Roberts, C.J., dissenting) ("[T]he American people . . . today lose a bit more control over the conduct of this Nation's foreign policy to unelected,

he has often invoked rules as a means of limiting that power. But while rules may limit judicial discretion in individual cases, they do not reduce the overall power of the judiciary and in fact tend to increase the power of the Supreme Court itself. It follows that a rules-based jurisprudence will not necessarily be any less "assertive" than one that permits judicial discretion. This article has attempted to show that rules are an assertion of judicial power, not a limitation on it.

* * *

politically unaccountable judges.").