

5-15-2007

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Recommended Citation

Diane S. Sykes *"Of a Judiciary Nature": Observations on Chief Justice's First Opinions*, 34 Pepp. L. Rev. Iss. 4 (2007)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol34/iss4/11>

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“Of a Judiciary Nature”: Observations on Chief Justice’s First Opinions*

Diane S. Sykes**

My thanks to Katherine Kmiec and the Pepperdine Law School Chapter of the Federalist Society for the very kind invitation to leave Wisconsin in the middle of January and come to Malibu to speak. I am honored and delighted to be with you this afternoon. I thought it might be appropriate to offer some observations on our new Chief Justice’s first term in the center chair at the Supreme Court. Not surprisingly, as that term concluded last June, and as the Court’s new term opened in October, the Supreme Court press corps and political commentators on the left and right focused intently on how new Chief Justice John Roberts—and new Associate Justice Samuel Alito—might influence the Court’s jurisprudence.

I collected a sampling of the media commentary. Linda Greenhouse of the *New York Times* offered this analysis in an article anticipating the Court’s new term: “If Year 1 was the transition for the new Roberts court, Year 2 is likely to be the test.”¹ She observed that during the Chief Justice Roberts’s first term, “the justices were able to find common ground with some regularity by agreeing not to decide much.”² So, she said, “the extent to which the members of the newly configured court were prepared to confront either precedent or one another remained unclear” at the end of the term.³ But this term, Greenhouse predicted, “will be different. The cases that the court has agreed to decide . . . offer few off-ramps, requiring instead that the justices proceed to rulings that will define the new court in both substance and style.”⁴

* Pepperdine Law School Chapter of the Federalist Society, January 25, 2007. This speech was also delivered on October 10, 2006, at Indiana University School of Law–Indianapolis as part of the Indiana Supreme Court Lecture series.

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1. Linda Greenhouse, *Roberts Court May Be Defined in Second Term*, N.Y. TIMES, Oct. 2, 2006, at A1.

2. *Id.*

3. *Id.*

4. *Id.*

David Savage, who covers the Court for the *Los Angeles Times*, began his preview of the Court's new term by invoking the new Chief Justice's now-famous "umpire" metaphor from his confirmation hearing, in which then-Judge Roberts likened the role of a judge to that of an umpire merely applying the rules, not making them.⁵ "Roberts suggested that modesty, humility and stability in the law were the goals of his umpire credo," Savage wrote.⁶ "Not to make law . . . but merely to interpret existing laws fairly"⁷ Savage offered his assessment that "during much of [the new chief's] first year, he did just that."⁸

"But in several cases," Savage continued, "[Roberts] behaved differently, joining Justice Antonin Scalia [in opinions] that would have rolled back a major environmental law and undercut states' traditional authority over the practice of medicine."⁹ "Neither," Savage concluded, "would have qualified as a modest act."¹⁰ So, the reporter asked, "[o]n the eve of the court's new term . . . , the question that was hanging in the air during his confirmation hearing remains: Will the new chief justice seek the right result, or the right's result?"¹¹

And then there was this from Charles Lane of the *Washington Post*: In light of the Court's changed membership, he wrote, the new term "will be closely watched not only for the results the court reaches, but for how it reaches them."¹²

As a lower court judge trying to understand the jurisprudential direction of the Supreme Court, it is this last question that holds the most interest for me—*how* does the Roberts Court decide its cases? The public and the press tend to view the Court's decisions through the prism of politics, looking to outcomes rather than process and evaluating the Court's work by reference to approval or disapproval of the bottom line. This is understandable given that so many of our most hotly debated political and policy issues are brought to the judicial branch nowadays. But I would prefer to focus today not so much on the *results* of the new Chief Justice's first-term of opinions as their *reasoning*—the decisional principles that controlled and informed the outcomes. This is not meant to be a comprehensive analysis. Instead, I am looking for insight into the Chief Justice's method of decisionmaking.

5. David G. Savage, *Is the Chief Justice Really a Judicial Activist?*, L.A. TIMES, Sept. 24, 2006, at M3, available at <http://www.latimes.com/news/opinion/la-op-savage24sep24,0,4059844.story?coll=la-opinion-righttrail>.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Charles Lane, *Justices to Hear Abortion, Integration Cases*, WASH. POST, Oct. 1, 2006, at A6.

From this, perhaps we can draw some inferences about what the Court's future might hold.

Let's start with what then-Judge Roberts told us about his approach to deciding cases during his confirmation hearing before the Senate Judiciary Committee in the fall of 2005. First, there was that very apt and attractive "umpire" analogy. He said:

[A] certain humility should characterize the judicial role. Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire.¹³

In a later exchange with Senator Hatch about the nature of the judicial role, Judge Roberts invoked *Marbury v. Madison*¹⁴ and reminded us that "the obligation to decide cases is the only basis for the [judiciary's] authority to interpret the Constitution and laws."¹⁵ He explained that federal judges are "careful in making sure that they have a real case" to decide, a "live dispute between parties who have actual injury . . . , actual interests at stake, because that is the basis for [the decision's] legitimacy" as an exercise of the Article III power.¹⁶ He went on: "And then [the judges are] to decide that case as a judge would, not as a legislator would based on a [] view of what's the best policy but as a judge would based on the law."¹⁷ He said: "That's why the Framers were willing to have the judges decide cases that required them to interpret the Constitution, because they were going to decide . . . according to the rule of law."¹⁸

Judge Roberts emphasized that the Framers would not have said to themselves "'Let's take all the hard issues and give them over to the judges.' That would have been the furthest thing from their mind."¹⁹ The courts, he said, should not have a "dominant role in society" or try to solve "society's problems."²⁰ Rather, he said, "[i]t is their job to say what the law is," and only in the context of deciding actual, concrete cases within the meaning of

13. *Confirmation Hearing on the Nomination of John G. Roberts Jr. to be Chief Justice of the United States Before the S. Comm. On the Judiciary*, 109th Cong. 55 (2005).

14. 5 U.S. 137 (1803).

15. *Confirmation Hearing, supra*, note 13, at 161.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 158.

Article III.²¹ When the hard issues come, as they inevitably do, he suggested he would follow the advice of Justice Harlan and “focus again on the question of legitimacy” and whether the case presents a “question that . . . judge[s] are supposed to be deciding rather than someone else.”²²

In response to a question from Senator Spector about *stare decisis*, Judge Roberts paraphrased Alexander Hamilton in *The Federalist No. 78*: “To avoid an arbitrary discretion in the judges,” he said, “they need to be bound down by rules and precedents.”²³ “So, even that far back,” Judge Roberts continued, “the founders appreciated the role of precedent in promoting evenhandedness, predictability, stability, [and the appearance] of integrity in the judicial process.”²⁴ When questioned by Senator Brownback about the checks on judicial power, he offered his belief that “the primary check on the courts has always been judicial self-restraint, and a recognition on the part of judges that they have a limited task.”²⁵

Beyond his confirmation hearing testimony, the new Chief Justice also used the occasion of his first commencement address, near the end of his first term as chief, to offer some additional public comment on his view of the Court’s work. In a speech to the 2006 graduates of the Georgetown University Law Center, Chief Justice Roberts described what he called the “clear [jurisprudential] benefits” of a greater degree of consensus on the Supreme Court: “Unanimity or near unanimity promote clarity and guidance for the lawyers and for the lower courts trying to figure out what the Supreme Court meant.”²⁶ While differences among the justices should not be “artificially suppressed,” he continued, “[t]he rule of law is strengthened when there is greater coherence and agreement about what the law is.”²⁷ He asserted this guiding principle: “If it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more. The broader the agreement among the justices, the more likely it is that the decision is on the narrowest possible ground.”²⁸ He invoked Justice Frankfurter’s insight that “narrow decision[s] help ensure that ‘[we] do not embarrass the future too much.’”²⁹

What emerges from our new Chief Justice’s confirmation hearing testimony and his first major public address is that he is: (1) deeply respectful of the limits on federal judicial power and the prerogatives of the

21. *Id.* at 159.

22. *Id.* at 162.

23. *Id.* at 142.

24. *Id.*

25. *Id.* at 288.

26. Chief Justice Roberts, Address at the 2006 Georgetown Law Center Commencement Ceremony (May 21, 2006), <http://www.law.georgetown.edu/webast/eventDetail.cfm?eventID=144>.

27. *Id.*

28. *Id.*

29. *Id.*

political branches; (2) attentive to the discretion-limiting force of decisional rules and precedent; and (3) alert to the need for the Court to speak with greater clarity about what the law is. To a very significant degree, his first opinions as chief justice reflect a consistent judicial method firmly grounded in these attributes.

*DaimlerChrysler Corp. v. Cuno*³⁰—by no means the most noticed of the Chief Justice's first opinions—was his most prominent concerning the limits on federal judicial power. *DaimlerChrysler* presented a Commerce Clause challenge to certain Ohio state and municipal tax credits favoring in-state investment.³¹ The plaintiffs were Ohio taxpayers who asserted that their state and local tax burdens were increased by tax breaks provided to DaimlerChrysler for a newly expanded Jeep factory in Toledo.³² The district court rejected the challenge, finding no Commerce Clause violation.³³ The Sixth Circuit affirmed as to the municipal tax credit, but held that the state tax credit violated the Commerce Clause.³⁴

Chief Justice Roberts, writing for a unanimous Court, did not reach the merits of the Commerce Clause claim because the plaintiff-taxpayers lacked Article III standing to challenge the tax credits.³⁵ He began his opinion with the following principles:

Chief Justice Marshall, in *Marbury v. Madison* . . . , grounded the Federal Judiciary's authority to exercise judicial review and interpret the Constitution on the necessity to do so in the course of carrying out the judicial function of deciding cases. As Marshall explained, "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule."³⁶

The Chief Justice said the determination of whether a matter before the federal courts is a proper case or controversy "assumes particular importance in ensuring that the Federal Judiciary respects 'the proper—and properly limited—role of the courts in a democratic society.'"³⁷

The case-or-controversy limitation—including the requirement that a litigant have standing to invoke the authority of the federal court—is

30. 126 S. Ct. 1854 (2006).

31. *Id.* at 1859.

32. *Id.*

33. *Id.* at 1860.

34. *Id.*

35. *Id.* at 1864.

36. *Id.* at 1860 (citation omitted).

37. *Id.* (citing *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975))).

necessary to maintain the “‘tripartite allocation of power’ set forth in the Constitution”³⁸ and prevent the powers of the legislative and executive branches from being “‘swallowed up by the judiciary.’”³⁹ As Chief Justice Roberts put it: “If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so.”⁴⁰

Moving on from these foundational principles, the Chief Justice framed the issue this way: “We have been asked to decide an important question of constitutional law concerning the Commerce Clause. But before we do so, we must find that the question is presented in a ‘case’ or ‘controversy’ that is, in James Madison’s words, ‘of a Judiciary Nature.’”⁴¹ The phrase “cases of a Judiciary Nature” appears in the records of the Constitutional Convention on August 27, 1787, during a discussion about the scope of the judicial power.⁴² Madison’s notes reflect that it was “generally supposed” by the delegates “that the jurisdiction given [in Article III] was constructively limited to cases of a Judiciary nature.”⁴³ Chief Justice Roberts elaborated on this original understanding by quoting Chief Justice Marshall again, this time from a speech he gave while a member of Congress: “‘A case in law or equity,’ Marshall remarked, ‘was a term . . . of limited signification. It was a controversy between parties which had taken a shape for judicial decision.’”⁴⁴

The plaintiffs in *DaimlerChrysler* claimed standing as Ohio taxpayers, so the Chief Justice concluded his opinion by tracing the Court’s precedents rejecting taxpayer standing in all but a narrow category of Establishment Clause cases and declining to deviate from that long line of precedent.⁴⁵ Standing to sue in federal court requires an actual or imminent particularized injury, fairly traceable to the defendant’s conduct and likely to be redressed by the requested relief.⁴⁶ The injury asserted by the plaintiff-taxpayers in *DaimlerChrysler* was no more than a grievance shared in common with all people generally. The Chief Justice noted that the plaintiffs’ alleged injury was wholly conjectural “in that it depends on how legislators respond to a reduction in revenue, if that is the consequence of the [tax] credit.”⁴⁷

38. *Id.* at 1861 (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982)).

39. *Id.* (quoting 4 PAPERS OF JOHN MARSHALL 95 (C. Cullen ed., 1984)).

40. *Id.* at 1860-61.

41. *Id.* at 1861 (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (M. Farrand ed., 1966) [hereinafter FEDERAL CONVENTION]).

42. FEDERAL CONVENTION, *supra* note 41, at 430.

43. *Id.*

44. *DaimlerChrysler*, 126 S. Ct. at 1861 (citation omitted).

45. *Id.* at 1862-66.

46. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

47. *DaimlerChrysler*, 126 S. Ct. at 1862.

"Establishing injury," the Chief Justice said, "requires speculating that elected officials will increase a taxpayer-plaintiff's tax bill to make up a deficit; establishing redressability requires speculating that abolishing the challenged credit will redound to the benefit of the taxpayer because legislators will pass along the supposed increased revenue in the form of tax reductions."⁴⁸ Such speculation cannot support standing, the Chief Justice wrote, adding that "[a] taxpayer-plaintiff has no right to insist that the government dispose of any increased revenue it might experience as a result of his suit by decreasing his tax liability or bolstering programs that benefit him."⁴⁹ "To the contrary," the Chief Justice said, "the decision of how to allocate any such savings is the very epitome of a policy judgment committed to the 'broad and legitimate discretion' of lawmakers, which 'the courts cannot presume either to control or to predict.'"⁵⁰

*Sanchez-Llamas v. Oregon*⁵¹ offers another example of the new Chief Justice's attention to the boundaries of the separation of powers and federalism and respect for the limits on the authority of the federal judiciary. The case concerned the availability of judicial relief for violations of Article 36 of the Vienna Convention on Consular Relations, ratified by the United States in 1969.⁵² Article 36 of the Vienna Convention requires that if a national of one country is detained by authorities in another country, the authorities must provide notice of the detention to the consular post of the detainee's home country upon the detainee's request.⁵³ The Convention further provides that the authorities "shall inform" the detainee of the consular notification right under Article 36.⁵⁴

Sanchez-Llamas, a Mexican national, was arrested for involvement in a police shooting in Oregon. He received *Miranda* warnings in English and Spanish, but was not told he could request that the Mexican Consulate be notified of his arrest pursuant to Article 36 of the Convention. He moved to suppress his incriminating custodial statements because Oregon authorities had failed to comply with Article 36. The state trial court denied suppression, *Sanchez-Llamas* was convicted, and the Oregon Court of Appeals and Supreme Court both affirmed.⁵⁵

48. *Id.* at 1862-63.

49. *Id.* at 1863.

50. *Id.* (quoting *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (Kennedy, J.)).

51. 126 S. Ct. 2669 (2006).

52. *Id.* at 2674-75.

53. *Id.*

54. *Id.*

55. *Id.* at 2676.

On certiorari, the Supreme Court, in a decision by Chief Justice Roberts, held that suppression was not required. The Chief Justice noted—and deferred—the threshold question in the case: whether Article 36 of the Vienna Convention grants rights that may be invoked by individuals in a judicial proceeding.⁵⁶ This is a sensitive and difficult question of treaty interpretation, and because the Court concluded that Sanchez-Llamas was not entitled to relief on his claim, the Chief Justice said it was “unnecessary to resolve the question.”⁵⁷

On the question of suppression, Sanchez-Llamas argued that the Court should apply the exclusionary rule as a remedy for Article 36 violations pursuant to the Court’s “authority to develop remedies for the enforcement of federal law in state-court criminal proceedings.”⁵⁸ The Chief Justice’s opinion for the Court squarely rejected the premise of this argument: “To the extent Sanchez-Llamas argues that we should invoke our supervisory authority,” he wrote, “the law is clear: ‘It is beyond dispute that we do not hold a supervisory power over the courts of the several States.’”⁵⁹ Instead, the Chief Justice said, “our authority to create a judicial remedy applicable in state court must lie, if anywhere, in the treaty itself.”⁶⁰ This is because “[u]nder the Constitution, the President has the power, ‘by and with the Advice and Consent of the Senate, to make Treaties.’”⁶¹ The Chief Justice went on:

The United States ratified the [Vienna] Convention with the expectation that it would be interpreted according to its terms. . . . If we were to require suppression for Article 36 violations without some authority in the Convention, we would in effect be supplementing those terms by enlarging the obligations of the United States under the Convention. This is entirely inconsistent with the judicial function.⁶²

Amplifying the point, the Chief Justice continued:

Of course, it is well established that a self-executing treaty binds the States pursuant to the Supremacy Clause, and that the States therefore must recognize the force of the treaty in the course of adjudicating the rights of litigants. . . . And where a treaty provides for a particular judicial remedy, there is no issue of intruding on the

56. *Id.* at 2677-78.

57. *Id.* at 2677.

58. *Id.* at 2679 (quoting Pet.’s Reply Br. in No. 04-10566 at 11).

59. *Id.* (quoting *Dickerson v. United States*, 530 U.S. 428, 438 (2000)).

60. *Id.*

61. *Id.* (quoting U.S. CONST. art II, § 2, cl. 2).

62. *Id.*

constitutional prerogatives of the States or other federal branches. . . . But where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own.⁶³

The Chief Justice, for a six-justice majority, concluded that the Convention did not provide a suppression remedy for violations of Article 36, either explicitly or implicitly.

Two other opinions from Chief Justice Roberts's first term are notable for their deference to the legislative and executive branches: *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* ("FAIR"),⁶⁴ likely the most reported of the Chief's first opinions for the Court, and his concurrence in *Rapanos v. United States*.⁶⁵ *Rumsfeld v. FAIR* involved a First Amendment challenge to the Solomon Amendment, enacted by Congress in response to restrictions on military recruitment imposed by law schools in opposition to the government's policy on homosexuals in the military. The Solomon Amendment denies federal funding to any institution of higher education that has a policy or practice that prevents military recruiters from gaining access to students on campus at least equal to that provided to any other recruiter. A coalition of law schools and law professors challenged the law, claiming that it violated their First Amendment freedoms of speech and association.

The Supreme Court unanimously upheld the Solomon Amendment. In his opinion for the Court, Chief Justice Roberts placed substantial emphasis on the breadth of the congressional power to raise and support the military: "The Constitution grants Congress the power to 'provide for the common Defence,' '[t]o raise and support Armies,' and '[t]o provide and maintain a Navy,'"⁶⁶ he said. "Congress' power in this area 'is broad and sweeping,'" he continued, "and . . . includes the authority to require campus access for military recruiters. . . . [T]he fact that legislation that raises armies is subject to First Amendment constraints does not mean that we ignore the purpose of this legislation when determining its constitutionality; as we [have] recognized . . . 'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies."⁶⁷

The Chief Justice then noted that Congress "chose to secure campus access for military recruiters indirectly," through a funding condition, but he

63. *Id.* at 2680.

64. 126 S. Ct. 1297 (2006).

65. 126 S. Ct. 2208 (2006).

66. *FAIR*, 126 S. Ct. at 1306 (quoting U.S. CONST. art I, § 8, cls. 1, 12-13).

67. *Id.* (citations omitted).

held that the “decision to proceed indirectly does not reduce the deference given to Congress in the area of military affairs. Congress’ choice to promote its goal by creating a funding condition deserves at least as deferential treatment as if Congress had imposed a mandate on universities.”⁶⁸ He went on to conclude that because “[t]he Solomon Amendment neither limits what law schools may say nor requires them to say anything,” the free speech rights of FAIR’s members were not implicated.⁶⁹ Neither were their expressive association rights; the Chief Justice noted that the Solomon Amendment requires the law schools to associate with military recruiters only “in the sense that they interact with them. But recruiters are not part of the law school . . . [and do not] . . . become members of the school’s expressive association.”⁷⁰

Finally, the Chief Justice explained how the Third Circuit had misapplied the Court’s expressive conduct precedents by focusing on what it said were “ample . . . alternative means” for military recruiting other than direct campus access: “The Court of Appeals’ proposed alternative methods of recruiting are beside the point,” he said. “The issue is not whether other means of raising an army and providing for a navy might be adequate. . . . That is a judgment for Congress, not the courts. . . . It suffices that the means chosen by Congress add to the effectiveness of military recruitment.”⁷¹

In *Rapanos*, the issue was the meaning of the term “navigable waters” in the Clean Water Act.⁷² Chief Justice Roberts joined a plurality opinion by Justice Scalia, but wrote separately to declare his dismay that the Court had not produced a majority holding and that the Army Corp of Engineers and the Environmental Protection Agency had failed to complete rulemaking about the scope of the statutory term.⁷³ The latter, the Chief Justice said, might well have merited the Court’s deference; the former meant continued legal uncertainty.⁷⁴

In an earlier case, the Court had rejected the Army Corps’ expansive position on the scope of its authority over navigable waters.⁷⁵ As described by the Chief Justice: “The Corps had taken the view that its authority was essentially limitless; this Court explained that such a boundless view was inconsistent with the limiting terms Congress had used in the [Clean Water]

68. *Id.*

69. *Id.* at 1307.

70. *Id.* at 1312.

71. *Id.* at 1311 (citations omitted).

72. *See Rapanos v. United States*, 126 S. Ct. 2208 (2006).

73. *Id.* at 2236 (Roberts, C.J., concurring)

74. *Id.*

75. *Id.* at 2235 (Roberts, C.J., concurring) (referring to the Court’s decision in *Solid Waste Agency of N. Cook Cty. v. Army Corps. of Eng’rs*, 531 U.S. 159 (2001)).

Act."⁷⁶ Following that decision, the Corps and the EPA had initiated rulemaking on the subject. The Chief Justice noted that while "[a]gencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer," the agency rulemaking in this instance "went nowhere."⁷⁷

"Rather than refining its view of its authority," the Chief Justice observed, "providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency."⁷⁸ The Chief Justice offered this comment on the Court's failure to achieve a majority holding: "It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis."⁷⁹

The Chief Justice also made his preference for clear holdings known in his dissent in *Georgia v. Randolph*.⁸⁰ The case presented the question of the reasonableness of a warrantless search of a home based on the consent of one occupant when another occupant is present and objects. The context was a domestic dispute dispatch; the defendant's wife told responding officers that her husband had a cocaine habit, and she consented to the police entry and search. The husband, however, was present and expressly refused his consent. A five-justice majority invalidated the ensuing search; the Court held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident."⁸¹

The Court based its holding in *Randolph* on an analysis of "widely shared social expectations" that it said revealed "no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders."⁸² The Court concluded, however, that it was "fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to

76. *Id.* (citations omitted).

77. *Id.* at 2235-36 (Roberts, C.J., concurring).

78. *Id.* at 2236 (Roberts, C.J., concurring).

79. *Id.*

80. 126 S. Ct. 1515, 1531 (2006) (Roberts, C.J., dissenting).

81. *Id.* at 1526.

82. *Id.* at 1523.

enter when a fellow tenant stood there saying, ‘stay out.’”⁸³ Accordingly, the Court held, a “disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all.”⁸⁴ The Court suggested, however, that the new rule it was establishing might not apply if the police had “good reason” to believe a threat of domestic violence existed.⁸⁵

The Chief Justice dissented, canvassing the Court’s case law on consent searches, including the long-accepted rule that a “warrantless search is reasonable if police obtain the voluntary consent of a person authorized to give it. Co-occupants have ‘assumed the risk that one of their number might permit [a] common area to be searched.’”⁸⁶ The Chief Justice asserted that the majority had “create[d] an exception to [an] otherwise clear rule.”⁸⁷ He thought the exception was arbitrary and insufficiently rooted in the privacy interests protected by the Fourth Amendment: “The rule the majority fashions,” he said,

does not implement the high office of the Fourth Amendment to protect privacy, but instead provides protection on a random and happenstance basis, protecting, for example, a co-occupant who happens to be at the front door when the other occupant consents to a search, but not one napping or watching television in the next room.⁸⁸

The Chief Justice objected to the creation of a constitutional rule based on an analysis of “social expectations” that he viewed as nothing more than “a hunch about how people would typically act in an atypical situation.”⁸⁹ “Such shifting expectations,” he said, “are not a promising foundation on which to ground a constitutional rule.”⁹⁰ The Chief Justice was especially concerned about the uncertainties of applying the new rule in cases involving domestic abuse: “The majority’s rule,” he said, “apparently forbids police from entering to assist with a domestic dispute if the abuser whose behavior prompted the request for police assistance objects.”⁹¹

Justice Breyer provided the fifth vote for the majority, but wrote separately to explain his view of the limits of its holding. He first stated his position that

83. *Id.* at 1522-23.

84. *Id.* at 1523.

85. *Id.* at 1525.

86. *Id.* at 1531 (Roberts, C.J., dissenting) (quoting *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974)).

87. *Id.*

88. *Id.*

89. *Id.* at 1532 (Roberts, C.J., dissenting).

90. *Id.*

91. *Id.* at 1538 (Roberts, C.J., dissenting).

[i]f Fourth Amendment law forced us to choose between two bright-line rules, (1) a rule that always found one tenant's consent sufficient to justify a search without a warrant and (2) a rule that never did, I believe we should choose the first. That is because, as the Chief Justice's dissent points out, a rule permitting such searches can serve important law enforcement needs (for example, in domestic abuse cases) and the consenting party's joint tenancy diminishes the objecting party's reasonable expectation of privacy.⁹²

However, Justice Breyer did not believe the majority opinion established a bright-line rule, but, rather, a case-specific holding based on the particular circumstances of the case; "were the circumstances to change significantly," Justice Breyer said, "so should the result."⁹³ "[W]ith these understandings," Justice Breyer joined the majority.⁹⁴

Chief Justice Roberts saw some danger in this mode of decision: "The concurrence joins with the apparent 'understandin[g]' that the majority's 'rule' is not a rule at all, but simply a 'case-specific' holding," he said.⁹⁵ "The end result is a complete lack of practical guidance for the police in the field, let alone for the lower courts."⁹⁶

The Chief Justice also filed a partial dissent in the Court's major voting rights case from the last term, *League of United Latin American Citizens ("LULAC") v. Perry*,⁹⁷ which involved a challenge to the Texas congressional redistricting map. The plaintiffs in *LULAC* asserted that the state's 2003 congressional redistricting map was an unconstitutional political gerrymander and violated section 2 of the Voting Rights Act. A three-judge panel of the district court upheld the redistricting map against these challenges. The Supreme Court, for the most part, affirmed. But the case produced six separate opinions. The Court was splintered on the threshold question of whether claims of unconstitutional political gerrymandering are justiciable, but a majority of the Court upheld the redistricting map against this challenge on the ground that the plaintiffs had not in any event articulated a reliable standard for identifying unconstitutional political gerrymanders.⁹⁸

92. *Id.* at 1529 (Breyer, J., concurring).

93. *Id.* at 1530 (Breyer, J., concurring).

94. *Id.* at 1531 (Roberts, C.J., dissenting).

95. *Id.* at 1539 (Roberts, C.J., dissenting).

96. *Id.*

97. 126 S. Ct. 2594 (2006).

98. *Id.* at 2612.

A different majority of the Court, however, went on to hold that one of the Latino majority-minority districts in the state's map violated section 2 of the Voting Rights Act because it combined Latino communities that were too geographically distant and politically distinct to be considered "compact" under section 2.⁹⁹ Chief Justice Roberts dissented from this aspect of the lead opinion largely because he viewed its conclusions to be insufficiently deferential to the factfinding of the district court under the "clear error" standard of review, and insufficiently deferential to the discretion retained by state legislatures to draw district lines in compliance with section 2.¹⁰⁰ The Chief Justice also believed the majority had distorted the "compactness" inquiry in section 2 litigation: "Far from imposing a freestanding compactness obligation on the States," he said,

we have repeatedly emphasized that "States retain broad discretion in drawing districts to comply with the mandate of § 2" . . . and that § 2 itself imposes "no *per se* prohibitions against particular types of districts" We have said that the States retain "flexibility" in complying with voting rights obligations that "federal courts enforcing § 2 lack."¹⁰¹

Chief Justice Roberts summarized his disagreement with the majority in this way:

The State has drawn a redistricting plan that provides six of seven congressional districts with an effective majority of Latino voting-age citizens in south and west Texas, and it is not possible to provide more. The majority nonetheless faults the state plan because of the *particular mix* of Latino voters forming the majority in one of the six districts This despite the express factual findings, from judges far more familiar with Texas than we are, that the State's new district would be a more effective Latino majority district than [the] old [one] ever was, and despite the fact that *any* plan would necessarily leave *some* Latino voters outside a Latino-majority district.¹⁰²

The Chief Justice concluded with this:

Whatever the majority believes it is fighting with its holding, it is not vote dilution on the basis of race or ethnicity. I do not believe it is our role to make judgments about which *mixes* of minority voters

99. *See id.* at 2652-62 (Roberts, C.J., dissenting).

100. *Id.* at 2660 (Roberts, C.J., dissenting).

101. *Id.* (citations omitted).

102. *Id.* at 2662-63 (Roberts, C.J., dissenting).

should count for purposes of forming a majority in an electoral district, in the face of factual findings that the district is an effective majority-minority district. 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 effective 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 § 2.¹⁰³

And, finally, Chief Justice Roberts's stated affinity for checks on the exercise of judicial discretion was readily apparent in his opinion for a unanimous Court in *Martin v. Franklin Capital Corp.*¹⁰⁴ At issue in *Martin* was the attorney's fees provision in the federal removal statute that authorizes an award of costs and attorney's fees when a case is remanded to state court because removal was jurisdictionally improper. One side urged that the provision be interpreted to make an award of fees automatic upon remand. The Chief Justice rejected that interpretation as inconsistent with the statutory text, which provides that the district court "'may' require payment of attorney's fees—not 'shall' or 'should.'"¹⁰⁵ "The word 'may,'" the Chief Justice said, "clearly connotes discretion."¹⁰⁶

The Solicitor General had appeared in the case and urged that the statute be construed narrowly, to permit an award of fees only where the unsuccessful removal was "frivolous." The Chief Justice rejected this argument as well, seeing nothing in the "statutory language and context" to support an interpretation "that fees under [the removal statute] should either usually be granted or usually be denied."¹⁰⁷ The statute left the award of attorney's fees "to the district court's discretion, with no heavy congressional thumb on either side of the scales."¹⁰⁸ But, the Chief Justice wrote, this "does not mean that no legal standard governs that discretion."¹⁰⁹ Citing again to Chief Justice Marshall, Chief Justice Roberts wrote: "We have it on good authority that 'a motion to [a court's] discretion is a motion,

103. *Id.* at 2663 (Roberts, C.J., dissenting).

104. 126 S. Ct. 704 (2005).

105. *Id.* at 709.

106. *Id.* (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994)).

107. *Id.* at 710.

108. *Id.*

109. *Id.*

not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.”¹¹⁰

He continued: “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.”¹¹¹ The Court held that attorney’s fees under the removal statute may be awarded “only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied.”¹¹²

I have left out some of Chief Justice Roberts’s first-term opinions—he wrote eight opinions for the Court and five concurrences and dissents—but you’ve been listening patiently for a long time, and this is certainly a representative-enough sample. Perhaps you find yourself agreeing with the Chief’s opinions, perhaps not. But as I said when I began, my focus today is on reasoning, not results, and there is enough in this collection of the new Chief Justice’s early work to draw some preliminary inferences about his approach to decisionmaking. And the inferences I would draw are these: He appears to be strongly rooted in the discipline of traditional legal method, evincing a fidelity to text, structure, history, and the constitutional hierarchy. He exhibits the restraint that flows from the careful application of established decisional rules and the practice of reasoning from the case law. He appears to place great stock in the process-oriented tools and doctrinal rules that guard against the aggregation of judicial power and keep judicial discretion in check: jurisdictional limits, structural federalism, textualism, and the procedural rules that govern the scope of judicial review.

Given the Chief Justice’s apparent inclination in favor of rulings that clearly articulate “what the law is,” it seems unlikely that he will be a fan of the weighing-and-balancing middle-ground compromises that characterize some of the late-Rehnquist Court’s work. When the Chief Justice announced his preference for narrow decisions as a means of producing greater consensus on the Court, I don’t think he meant “narrow” in the sense of fact-specific rulings that resolve the case before the Court but do not produce a clear legal rationale. That much seems clear from his concurrence in *Rapanos* and his dissent in *Randolph*. Also, fact-based balancing tests tend to enlarge the role of the courts at the expense of the other branches, and our new Chief Justice seems positively allergic to that.

Time will tell whether Chief Justice Roberts succeeds in his objective of creating greater consensus on the Court. The Chief Justice is first among equals, and the opportunity to attract justices from across the philosophical spectrum to his approach to judging will be stronger in some cases than

110. *Id.* (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (No. 14,692d) (Marshall, C.J.)).

111. *Id.*

112. *Id.* at 711.

others. This term will undoubtedly hold many tests, as some of the commentators predicted.

I began our review of Chief Justice Roberts's first-term opinions with the *DaimlerChrysler* case on the constitutional doctrine of standing; in that case, the Chief Justice quoted James Madison on the Founders' understanding that the jurisdiction of the federal courts was limited to cases "of a Judiciary Nature." Perhaps, in a somewhat different sense, this phrase can be applied to our new Chief Justice as well.

