

CHIEF JUSTICE ROBERTS (A PRELIMINARY ASSESSMENT)

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When Chief Justice John G. Roberts¹ appeared before the Senate Judiciary Committee for his confirmation hearings, he famously remarked: “Judges are like umpires. Umpires don’t make the rules, they apply them.”² The comment implies that for a judge there is really no judgment to be exercised, and hence a judge’s personal view is irrelevant.

Nearly seventy years earlier, another Justice, ironically also named Roberts,³ wrote in a remarkably similar vein:

It is sometimes said that the [C]ourt assumes a power to overrule or control the action of the people’s representatives. This is a misconception. . . . When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution [that] is invoked beside the statute [that] is challenged and to decide whether the latter squares with the former. All the [C]ourt does, or can do, is to announce its considered judgment upon the question. The only power it

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1. Chief Justice Roberts has served as Chief Justice since he took the judicial oath on September 29, 2005. S. Ct. of the U.S., *Members of the Supreme Court of the United States*, <http://www.supremecourt.gov/about/members.aspx>; *select* Roberts, John G., Jr. (accessed Apr. 12, 2011).

2. John G. Roberts, Jr., Statement, *Statement of John G. Roberts, Jr., Nominee to Be Chief Justice of the United States* (Washington, D.C., Sept. 12, 2005) in Sen. Jud. Comm., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States*, 109th Cong. 158, 55 (Sept. 12, 2005) (available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/browse.html>); *select* Download the entire S. Hrg. 109-158).

3. Justice Owen Josephus Roberts served as an Associate Justice from 1930 to 1945. S. Ct. of the U.S., *supra* n. 1, at *select* Roberts, Owen Josephus. Justice Owen Roberts is not a known relative of Chief Justice John Roberts.

has, if such it may be called, is the power of judgment. This [C]ourt neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.⁴

Justices John and Owen Roberts were each suggesting that there is no need to worry about who is judging because judicial ruling is all preordained. Indeed, the umpire analogy suggests that judges could one day be replaced by computers similar to computerized umpires at baseball games. Computerized umpires have proven to be more accurate and efficient than human umpires are because, assuming that the computers are properly programmed and positioned, the human umpires sometimes miss calls that the computers would otherwise get right. Carrying the umpire analogy a step further, it is worth noting that some human umpires have a propensity to call high strikes while others have a propensity to call low strikes. Some have a narrow strike zone. Some have a wide strike zone. And these are the good umpires. The bad umpires may call an identical pitch a strike sometimes and a ball other times. Let us analogize that to the work of a Supreme Court Justice.

Suppose in 2014 the Supreme Court accepts a case dealing with the question of whether a state law restricting marriage between homosexuals is constitutional. The argument for those challenging the statute would go something like this: “The Equal Protection Clause requires that similarly situated people be treated similarly. The plaintiffs are similar to a heterosexual couple who would like to get married. Therefore, they are denied equal protection.”⁵ The state would contend that things not equal in fact or opinion need not be treated as if they were equal.⁶ Consequently, assuming much of the citizenry does not believe that homosexual marriage equates to heterosexual marriage, equal

4. *United States v. Butler*, 297 U.S. 1, 62–63 (1936).

5. Of course, this argument is grossly oversimplified.

6. *See Tigner v. Tex.*, 310 U.S. 141, 147 (1940) (stating that “[t]he Constitution does not require things [that] are different in fact or opinion to be treated in law as though they were the same”).

protection is not violated. Furthermore, the state would contend: “History is on our side.”⁷

So what is a Justice to do? Relying on the umpire analogy, it all depends on whether the judge has a broad or narrow strike zone. If the judge has a broad strike zone, then the judge might decide that the state prevails. The judge might base this ruling on the belief that, historically, marriages have been limited to heterosexuals, and despite the arguable inequity in the law, it is “close enough to the plate” to pass constitutional muster. A judge with a narrower strike zone might see it differently and say, “For the statute to pass equal protection muster, it cannot draw arbitrary classifications, which I think this is. Therefore, even though this statute is close to being constitutional, it misses.” Any judicial methodology that purports to reduce Justices to automatons, or umpires, cannot effectively explain what judges do. Judges must exercise judgment. Ultimately, judges will be criticized based on the quality and wisdom of their judgment, not on whether they exercised it.

I. JUDGING CHIEF JUSTICE ROBERTS

A. As a Leader

Candidly, as a Justice who leads the Court to particular votes or to unanimity, I see little for which to commend Chief Justice Roberts. He does not appear to be the intellectual leader of the conservatives because that title probably belongs to Justice Scalia.⁸ He is not usually the swing vote because that accolade normally belongs to Justice Kennedy.⁹ While much has been written about the Roberts Court, to my knowledge nobody has suggested that the Court is unified. For good or ill, the Court has

7. Again, this argument is grossly oversimplified.

8. Concededly, because “leadership of the conservatives” is not an official title, the textual assertion is impossible to document. Justice Scalia has served as an Associate Justice since taking his judicial oath on September 26, 1986. S. Ct. of the U.S., *supra* n. 1, at *select* Scalia, Antonin.

9. But see *United States v. Comstock*, 130 S. Ct. 1949 (2010), in which Justice Roberts joined the opinion of the Court, 130 S. Ct. at 1953, and Justice Kennedy concurred, 130 S. Ct. at 1965 (Kennedy, J., concurring). Justice Kennedy has served as an Associate Justice since taking his judicial oath on February 18, 1988. S. Ct. of the U.S., *supra* n. 1, at *select* Kennedy, Anthony M.

many five-to-four decisions, with only Justice Kennedy regularly in the majority.¹⁰

The lack of unanimous decisions should not be taken as criticism of the Chief Justice. I can think of only two Chief Justices, Justices John Marshall¹¹ and Earl Warren,¹² who in any serious way actually molded the Court. Chief Justice Marshall's record in cases such as *Marbury v. Madison*,¹³ *McCulloch v. Maryland*,¹⁴ and *Gibbons v. Ogden*¹⁵ are legendary and need no elaboration here. Chief Justice Warren's masterful ability to forge a unanimous vote in *Brown v. Board of Education*¹⁶ has also been recounted by others¹⁷ and also requires no embellishment here.

B. As a Jurist

1. In General

Three things stand out about Chief Justice Roberts' interpretative methodology. First, like Justice Breyer,¹⁸ and unlike Justice Scalia, he appears to be an incrementalist because he tries to decide no more than is absolutely necessary to rule on the case before him. In so doing, he eschews sweeping rules in favor of nuanced judgment.¹⁹

The second feature of the Chief's opinions is his gentle tone. Rarely does one see rancor or derision directed toward his colleagues; instead, whatever one might think of his opinions, one

10. Erwin Chemerinsky, *October Term 2009* at 141 (PLI Litig. & Admin. Practice Ser. Litig. Order No. 23559, Oct. 28, 2010) (available in WL, PLI-LIT database). For example, Justice Kennedy joined the majority in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 2977 (2010), and he delivered the opinion for the Court in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 886 (2010).

11. Justice Marshall served as Chief Justice from February 4, 1801, when he took his judicial oath, until July 6, 1835. S. Ct. of the U.S., *supra* n. 1, at *select* Marshall, John.

12. Justice Warren served as Chief Justice from October 5, 1953, when he took his judicial oath, until June 23, 1969. *Id.* at *select* Warren, Earl.

13. 5 U.S. 137 (1803).

14. 17 U.S. 316 (1819).

15. 22 U.S. 1 (1824).

16. 347 U.S. 483 (1954).

17. *E.g.* Richard Kluger, *Simple Justice* 681–702 (Alfred A. Knopf 2004) (highlighting Chief Justice Warren's behind-the-scene efforts to secure a unanimous opinion in *Brown*).

18. Justice Breyer has served as an Associate Justice since taking his oath on August 3, 1994. S. Ct. of the U.S., *supra* n. 1, at *select* Breyer, Stephen G.

19. *E.g.* *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010); *Morse v. Frederick*, 551 U.S. 393 (2007).

has no doubt that they were written by a gentleman. For example, when comparing Chief Justice Roberts' opinion in *Herring v. United States*²⁰ to Justice Scalia's opinion in *Hudson v. Michigan*,²¹ one sees far more gentleness and far less arrogance in Roberts' opinion.

Finally, I am impressed with the Chief Justice's honesty in writing. While some Justices will either ignore a precedent against them, or misstate it, I have never seen this from Chief Justice Roberts. Perhaps it is because of his prominent role as a litigator before ascending the bench that he grasps his nettles firmly and does not either ignore cases or claim that they stand for more than they actually do.²²

2. The Fourth Amendment

A large number of Fourth Amendment cases have been decided during Chief Justice Roberts' watch; however, he has been on the conservative side on all of them. Except for two cases, *Georgia v. Randolph*,²³ in which he wrote the dissenting opinion,²⁴ and *Arizona v. Gant*,²⁵ he has been in the majority.

The one majority opinion for the Court that Chief Justice Roberts has written regarding the Fourth Amendment, *Herring*, could be characterized as a jurisprudential disaster.²⁶ Principally, he assumed with then-Judge Cardozo that "[t]he criminal is to go free because the constable has blundered."²⁷ Yet in *Herring*, if the

20. 129 S. Ct. 695 (2009).

21. 547 U.S. 586 (2006).

22. For example, in *Herring*, unlike his predecessor Chief Justice Rehnquist, Chief Justice Roberts did not overread *United States v. Leon* to allow a good-faith exception when Officer A reasonably relied on Officer B's reckless mistake. 129 S. Ct. at 703–704 (citing *United States v. Leon*, 468 U.S. 897, 923 n. 24 (1984)). Chief Justice Rehnquist, on the other hand, erroneously read *Whiteley v. Warden* as having been overruled by *Leon*. *Ariz. v. Evans*, 514 U.S. 1, 13–14 (1995) (citing *Leon*, 468 U.S. 897; *Whiteley v. Warden*, 401 U.S. 560, 568–569 (1971)).

23. 547 U.S. 103 (2006).

24. *Id.* at 127–142 (Roberts, C.J. & Scalia, J., dissenting).

25. 129 S. Ct. 1710, 1726–1732 (2009) (Alito, J., Roberts, C.J. & Kennedy, J., dissenting; Breyer, J., dissenting except as to Part II(E)).

26. See Arnold Loewy, *The Fourth Amendment: History, Purpose, and Remedies*, 43 Tex. Tech L. Rev. 1, 8–9 (2010) (opining that the Court “erred mightily” in *Herring* by overstating the cost of applying the exclusionary rule).

27. *State v. Defore*, 150 N.E. 585, 587 (N.Y. 1926). Judge Cardozo's statement was quoted in part by Chief Justice Roberts in *Herring*. 129 S. Ct. at 704. Judge Cardozo was appointed to the Supreme Court on March 14, 1932, and served as an Associate Justice

constable had not blundered, the criminal never would have been arrested or the evidence discovered and, hence, the criminal would have gone free anyway.²⁸ Thus, the exclusionary rule cost the government nothing that it should have had.

Chief Justice Roberts placed an important limitation on his ruling. He made it clear that, unlike the earlier case of *Arizona v. Evans*,²⁹ if an arrest is made because of a negligent police error (at any stage), then, and only then, can it justify dispensing with the exclusionary rule.³⁰ That is, he held in *Herring* that if a police officer reasonably relied on an error *recklessly* made by a police clerk or another police officer, the evidence obtained thereby would be inadmissible.³¹ Post-*Herring*, the rule seems to be that a negligent mistake made by a police officer will not trigger the exclusionary rule, but a grossly negligent, reckless, or willful mistake will. On the surface that seems fair enough, until one realizes that almost every search invalidated under the Fourth Amendment in recent years involved at most a negligent mistake.

For example, in *Bond v. United States*,³² an INS agent believed that squeezing a soft-sided bag did not constitute a search.³³ Was the agent more than negligent in his misreading of the Fourth Amendment? Not likely. Justices Scalia and Breyer agreed with the agent and disagreed with the Court.³⁴ Similarly, in *Kyllo v. United States*,³⁵ police agents used a thermal imager on Kyllo's home without first obtaining a warrant.³⁶ The Court ruled

until July 9, 1938. S. Ct. of the U.S., *supra* n. 1, at *select* Cardozo, Benjamin Nathan.

28. Loewy, *supra* n. 26, at 9. In this case, the arresting officer negligently relied on a warrant that had not been quashed by a police clerk, or if it had been quashed, there never would have been an arrest and, consequently, the evidence never would have been discovered in the first place. *Herring*, 129 S. Ct. at 698.

29. 514 U.S. 1.

30. *See Herring*, 129 S. Ct. at 698, 704 (limiting the Court's holding to cases of negligent police mistakes).

31. *See id.* at 709–710 (Ginsburg, Stevens, Souter & Breyer, JJ., dissenting) (discussing the issues created by the majority's distinction between reckless and negligent conduct).

32. 529 U.S. 334 (2000).

33. *Id.* at 335–336 (describing how the agent proceeded to manipulate the defendant's luggage in a manner that enabled him to discover that it contained a "brick-like" object despite the fact that the object was "wrapped in duct tape until it was oval-shaped and then rolled in a pair of pants").

34. *Id.* at 339 (Breyer & Scalia, JJ., dissenting).

35. 533 U.S. 27 (2001).

36. *Id.* at 29–30.

five to four that this was impermissible.³⁷ Yet the four Justices who agreed that the police acted properly were Justices Stevens, Rehnquist, O'Connor, and Kennedy,³⁸ which is unusual because these four Justices are usually on opposite sides of the judicial fence. If this group of Justices agreed with the agents, then how could the Court call the agents' violation more than (or even) negligent?

So if Chief Justice Roberts' opinion in *Herring* is taken to its logical conclusion, the exclusionary rule, in all but the clearest violations, could cease to exist.

3. Confessions

Chief Justice Roberts has not written any opinions on confessions since joining the Court. He has, however, joined in several opinions that have upheld the admissibility of a confession and has never voted to disallow a confession in any case in which a full opinion has been written.³⁹ Thus, one might conclude that while he does not appear to have any great personal interest in confession cases, he is a fairly reliable vote for the state. In *Montejo v. Louisiana*,⁴⁰ the Court specifically overruled a prior decision,⁴¹ and in another case, *Berghuis v. Thompkins*,⁴² the Court eschewed a narrow decision (habeas corpus is not an appropriate remedy for this defendant) in favor a broader decision (the defendant waived his right to silence under *Miranda*).⁴³ Apparently, the Chief Justice's penchant for narrow decisions only applies to the opinions he writes and not to those in which he

37. *Id.* at 40.

38. *Id.* at 41 (Stevens, J., Rehnquist, C.J., O'Connor & Kennedy, JJ., dissenting).

39. See *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2264 (2010) (joining the majority in finding the defendant's confession admissible); *Md. v. Shatzer*, 130 S. Ct. 1213, 1227 (2010) (joining the majority in determining that suppression of the defendant's statements was not mandated when the statements were made two weeks after invoking *Miranda* rights); *Montejo v. La.*, 129 S. Ct. 2079, 2091–2092 (2009) (joining the majority in vacating the judgment of the Louisiana Supreme Court and remanding with directions to determine whether the defendant's confession should be suppressed); *Kan. v. Ventris*, 129 S. Ct. 1841, 1847 (2009) (joining the majority in allowing "testimony, concededly elicited in violation of the Sixth Amendment," for impeachment purposes).

40. 129 S. Ct. 2079.

41. *Id.* at 2091 (overruling *Mich. v. Jackson*, 475 U.S. 625 (1986)).

42. 130 S. Ct. 2250.

43. *Id.* at 2264–2265.

merely joins.⁴⁴ A great deal more could be said about some of these cases, particularly *Kansas v. Ventris*,⁴⁵ which I think misanalyzed one precedent against it⁴⁶ and ignored another.⁴⁷ But because the Chief Justice did not write any of these opinions and this Article is supposed to be brief, I therefore will expound no further on these cases.

4. Religion

The Court has done little in the area of religion since Chief Justice Roberts ascended the bench. Religion cases can be broken down into four major areas: free exercise of religion; government financing of education in a religious environment; religious, or quasi-religious, exercises in public schools; and religious symbols on public property. The first three have not appeared before the Court during Chief Justice Roberts' tenure, and the fourth has appeared only obliquely.⁴⁸

The one brief glimpse of Chief Justice Roberts' views in this area is in his very short concurring opinion in *Salazar v. Buono*.⁴⁹ The case dealt with whether the federal government's sale of land, containing a cross, was consistent with an injunction forbidding the federal government from displaying the cross on its land.⁵⁰ The Court held that the government's right to transfer land was not compromised by the injunction.⁵¹ The Chief Justice concurred by noting that if the government took down the cross, sold the land to a private party, gave back the cross, and the pri-

44. In a sense that is not too surprising, given his penchant for as much unanimity and harmony as possible on the Court.

45. 129 S. Ct. 1841.

46. See *id.* at 1845–1847 (analyzing *Massiah v. United States*, 377 U.S. 201 (1964), as allowing the use of confessions taken in violation of its dictates for impeachment purposes).

47. See *Me. v. Moulton*, 474 U.S. 159, 179–180 (1985) (holding that incriminating statements regarding pending charges obtained by officials during the investigation into another, separate crime cannot be used against the accused in the trial regarding the pending charges, as doing so would violate the accused's right to assistance of counsel).

48. See *Salazar v. Buono*, 130 S. Ct. 1803, 1811–1812 (2010) (involving a Latin cross placed on government land by private citizens); *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1129 (2009) (concluding that “the display of a permanent monument in a public park is not a form of expression to which [First Amendment] analysis applies”).

49. 130 S. Ct. 1803, 1821 (Roberts, C.J., concurring).

50. *Id.* at 1811 (majority).

51. *Id.* at 1817.

vate party then returned the cross to its prior spot, there would be no constitutional violation.⁵² *Salazar* surely shows the Chief Justice's penchant for deciding cases on narrow grounds; however, it is unclear about where his views on religion lie.

5. *Speech*

Unlike some of the other topics discussed in this Article, a judge's view of speech does not seem to correlate with liberalism or conservatism. For example, in *Citizens United v. Federal Election Commission*,⁵³ the Justices classically regarded as conservative invalidated a statute designed to limit corporate expenditures in political campaigns.⁵⁴ On the other hand, in *Christian Legal Society v. Martinez*,⁵⁵ the Justices generally regarded as being more liberal⁵⁶ upheld a Hastings Law School requirement that forbade ideological considerations when assessing membership in registered student organizations against a speech and association challenge.⁵⁷ Only Justice Kennedy was with the majority in both decisions.⁵⁸ Unsurprisingly, Chief Justice Roberts was with the conservative bloc in both cases.⁵⁹

In another pair of cases, the liberals attempted to protect free speech, while the conservatives successfully squelched the attempt. Leading the charge was Chief Justice Roberts, who wrote the opinion in both cases: *Morse v. Frederick*⁶⁰ and *Holder v. Humanitarian Law Project*.⁶¹ In both of these cases, the Chief Justice, along with the other conservative Justices, gave more weight to the governmental interest in suppression and less to free speech than his more liberal colleagues.

52. *Id.* at 1821 (Roberts, C.J., concurring).

53. 130 S. Ct. 876.

54. *Id.* at 886. Justices Thomas, Scalia, and Alito, along with Chief Justice Roberts, joined the majority. *Id.*

55. 130 S. Ct. 2971.

56. Justices Ginsburg, Stevens, Breyer, and Sotomayor joined the majority. *Id.* at 2977.

57. *Id.* at 2978.

58. *Christian Leg. Socy.*, 130 S. Ct. at 2977; *Citizens United*, 130 S. Ct. at 886.

59. See *Christian Leg. Socy.*, 130 S. Ct. at 2977 (joining fellow conservative Justices Alito, Scalia, and Thomas in dissenting from the majority); *Citizens United*, 130 S. Ct. at 886 (joining fellow conservative Justices Scalia, Alito, and Thomas in voting to invalidate the challenged statute).

60. 551 U.S. 393, 395.

61. 130 S. Ct. 2705, 2712.

These cases could lead one to conclude that Chief Justice Roberts, like everybody else on the Court, either favors or disfavors free speech depending on whose ox is gored. Free speech and association are important constitutional principles whether they advocate marijuana use in school, exclude non-Christians from full-member status in associations, allow corporations more power in the political process than some think is healthy for democracy, or aid terrorist organizations perform lawful functions. Although I wish that the Justices were more consistent on their free-speech views and were not colored by ideology, I cannot particularly fault the Chief Justice for being inconsistent because he is neither better nor worse than his colleagues, who all seem willing to protect free speech only when they like the result. Perhaps one exception is *United States v. Stevens*,⁶² in which a majority of the Court, in an opinion by Chief Justice Roberts, granted constitutional protection to something they did not like: animal cruelty.⁶³

6. Federalism

Federalism is the one area in which Chief Justice Roberts seems to differ from his predecessor. The Rehnquist Court had three Justices, Rehnquist, O'Connor, and Thomas, who were very quick to reign in federal encroachment on state sovereignty.⁶⁴ Two other Justices, Scalia and Kennedy, sometimes voted that way⁶⁵ and other times did not.⁶⁶

In the only case involving federalism during Chief Justice Roberts' tenure, he appeared to be a necessary fifth vote for a majority opinion upholding rather expansive federal powers under the Necessary and Proper Clause. The case, *United States v. Comstock*,⁶⁷ involved the question of whether the federal government has an interest in detaining a potentially sexually

62. 130 S. Ct. 1577 (2010).

63. *Id.* at 1592. See also *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), in which Chief Justice Roberts, for the Court, again protected speech he did not like (funeral-picketing). *Id.* at 1221.

64. See *Gonzales v. Raich*, 545 U.S. 1, 42–74 (2005) (O'Connor, J., Rehnquist, C.J. & Thomas, J., dissenting). Chief Justice Rehnquist and Justice Thomas joined all but Part III of Justice O'Connor's dissenting opinion. *Id.* at 42.

65. *United States v. Morrison*, 529 U.S. 598, 600 (2000); *United States v. Lopez*, 514 U.S. 549, 550 (1995).

66. *Gonzales*, 545 U.S. at 33–42 (Scalia, J., concurring).

67. 130 S. Ct. 1949.

violent prisoner after his prison term had expired.⁶⁸ The Court's breakdown was not what one might have expected. The majority opinion, written by Justice Breyer, a staunch proponent of expansive federal powers,⁶⁹ upheld the federal civil detention statute on an extremely broad reading of the Necessary and Proper Clause.⁷⁰ He was joined by Justices Stevens, Ginsburg, and Sotomayor (no surprises there), and Chief Justice Roberts.⁷¹ Justices Kennedy⁷² and Alito⁷³ concurred on narrow grounds, while Justice Thomas, partially joined by Justice Scalia, dissented.⁷⁴

The way this Court split is significant because major innovative federal legislation is likely to be decided by the Court in the next few years. Particularly, there is a good chance that President Obama's healthcare bill⁷⁵ will be before the Supreme Court. One engaging in superficial analysis might think that the success of any constitutional challenge lies in the heart and mind of Justice Kennedy. But if Chief Justice Roberts' view of federalism, as manifested by his joining Justice Breyer's opinion for the Court in *Comstock*, is any indication, there may be good reason to believe that Justice Kennedy's vote will be functionally irrelevant. Of course, it may be a mistake to generalize from insufficient data. Perhaps Chief Justice Roberts just felt strongly about the need to detain sexual predators, or perhaps he did not want a fractured decision and simply joined the majority. While neither of these possibilities should be discounted, it certainly appears that Chief Justice Roberts does not share his predecessor's strong view of limited federal power. Given Justice Alito's concurrence in *Comstock*, it is probably fair to say that he too does not share the strong anti-federal-power view of his predecessor, Justice

68. *Id.* at 1954.

69. See *Morrison*, 529 U.S. at 656 (Breyer, J., dissenting) (arguing against the majority's holding, which limited the federal commerce power); see also *Lopez*, 514 U.S. at 615 (Breyer, J., dissenting) (arguing that "a statute that makes it a crime to possess a gun in, or near, a school . . . falls well within the scope of the commerce power").

70. See *Comstock*, 130 S. Ct. at 1963–1964 (stating that the Necessary and Proper clause grants Congress broad enough authority to enact the challenged statute).

71. *Id.* at 1953.

72. *Id.* at 1965–1968 (Kennedy, J., concurring in the judgment).

73. *Id.* at 1968–1970 (Alito, J., concurring in the judgment).

74. *Id.* at 1970–1983 (Thomas & Scalia, JJ., dissenting). Justice Scalia joined in all but Part III(A)(1)(b) of Justice Thomas' dissent. *Id.* at 1970.

75. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (available at www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf).

O'Connor. Consequently, there is good reason to believe that federal legislation, arguably trenching on state sovereignty, will have smoother sailing in the Roberts Court than it did in the Rehnquist Court.

II. CONCLUSION

Because this Article is a tentative assessment of Chief Justice Roberts, anything more than a tentative conclusion would be inappropriate. So, here are some tentative conclusions regarding Chief Justice Roberts:

- (1) As a leader, though apparently quite affable, he appears to be nothing special. Herding Supreme Court Justices might be a little like herding proverbial cats. Perhaps as Chief Justice Roberts gains in seniority, or if the Court becomes filled with more like-minded Justices, his influence will accelerate.
- (2) In criminal procedure, at least pretrial criminal procedure, it seems unlikely that he will deviate from the conservative position, at least in a case in which the Court is divided.
- (3) He seems quite interested in free-speech cases, which could perhaps become his specialty, but because free-speech cases are so eclectic, it is hard to say where he will wind up. It does seem fair to say that he will probably more readily align himself with the conservative wing of the Court than with the liberal wing.
- (4) Perhaps the one area that he may lead the Court down a different path is federalism. But the final answer remains to be seen.

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In conclusion, perhaps his penchant for moving incrementally, gentleness, and honesty will be the positive attributes that will counteract his almost visceral conservatism in a number of areas, especially criminal procedure.⁷⁶ At least one could so hope.

76. This is not to suggest that a visceral penchant for liberalism is any better. Rather, it is a suggestion that a Justice should “hold the balance true.” See *Ill. v. Gates*, 462 U.S. 213, 241 (1983) (stating that “[t]he task of this Court, as of other courts, is to ‘hold the balance true[]’”).