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From The Editors

FROM THE EDITORS . . .

It is with great honor that we publish the first issue of Volume 33 commemorating the 75th Anniversary of the University of Tulsa Colege of Law. We proudly dedicate this issue to the Supreme Court of the United States. The Oklahoma legal community, and especially law students at the University of Tulsa, were honored by visits this past year by distinguished Associate Justices O'Connor, Thomas, and Ginsburg. Each took time from their busy schedules to informally meet with students and have graciously allowed us to publish their remarks.

Justice Sandra Day O'Connor compares and contrasts the Indian, Federal, and State court systems. In *Lessons from the Third Sovereign: Indian Tribal Courts*, Justice O'Connor notes that the tribal court systems are expanding and this expansion has always been encouraged by the federal government. Justice O'Connor explains that tribal courts are informal and can act more quickly than their federal and state counterparts. In addition, the tribal courts make their decisions based on tribal values. Justice O'Connor discusses how the tribal courts use mediation and how ADR is more effective than litigation in resolving a wide array of disputes, especially disputes involving the family. Justice O'Connor concludes that all the court systems can learn from each other.

Justice Clarence Thomas writes that civility is disappearing from all of our lives. In *A Return to Civility*, Justice Thomas explores this loss of civility using examples from baseball, academics, and the courtroom. Justice Thomas explains that civility is essential to the functioning of society and plays an important role in collective self-governance. Justice Thomas uses historical events to describe various milestones in the decline of civility and calls on all of us to raise the level of our conduct toward each other.

Justice Ruth Bader Ginsburg remarks on the progress that women lawyers and judges have made. In *Remarks on Women's Progress in the Legal Profession in the United States*, Justice Ginsburg, drawing on many of her own experiences as a mother and a lawyer, paints a vivid picture of the changes she has witnessed and experienced as a woman in the legal profession. Justice Ginsburg traces several areas where policy and judgments based on gender were changed through the law. Justice Ginsburg also expresses her hopes for the future and concludes that the trend towards shared roles for men and women, at work and at home, will continue.

This issue also contains remarks from two featured speakers at *The Burger Court Conference* held at the University of Tulsa College of Law in October, 1996. Chief Judge Stephanie K. Seymour contributes *Women as Constitutional Equals: The Burger Court's Overdue Evolution*, analyzing the historical development of Constitutional protections afforded to women. Lino Graglia, A. Dalton Cross Professor of Law, University of Texas School of Law, contributes *The Burger Court and Economic Rights*. Professor Graglia concentrates on the constitutional impact (or lack thereof) the Burger Court had on economic rights. "Most important" to Professor Graglia is that the Burger Court "failed almost

totally to bring about the change that was expected of it." He notes, however, that the Burger Court ushered in the partial revival of the Contracts Clause to invalidate state laws, and notes that no claim based upon the Contracts Clause has prevailed since. Professor Graglia devotes the bulk of his analysis to antitrust law, noting that the Burger Court handed down opinions in almost all antitrust areas. Professor Graglia argues that the the Burger Court's decisions returned antitrust law to its original purpose—"to remove restraints on Commerce and Trade."

In addition to the remarks made by members of the Court, we include the first part of our Symposium entitled *Practitioner's Guide to the October 1996 Supreme Court Term.* We will include the second part in our next issue. This Symposium was held at the University of Tulsa College of Law on October 31, 1997; for the past three years, Judge Sven Erik Holmes has honored us by providing the introduction.

This term, the Court articulated specific guiding principles for use by government actors "clearly fulfill[ing] its role as the ultimate decision-maker in our society." Judge Holmes notes the Court tackled a wide range of compelling issues this term, including doctor-assisted suicide, efforts to criminalize indecent material on the Internet, Fourth Amendment jurisprudence, and several politically charged issues such as R.F.R.A., Brady Handgun Violence Prevention Act, Line Item Veto Act, and voter re-districting plans.

One case decided this term was particularly important to Judge Holmes. He sat by designation with Judges Ebel and Logan on the Tenth Circuit Court of Appeals panel in a case styled *Edens v. Hannigan.* Part of *Edens* was criticized by the Seventh Circuit when it decided *Lindh v. Murphy en banc*, a case ultimately decided by the Supreme Court, which upheld both the analysis and conclusion of the Tenth Circuit in *Edens.*

Chapman Distinguished Professor of Law, Bernard Schwartz contributes *A Presidential Strikeout, Federalism, RFRA, Standing, and A Stealth Court.* Professor Schwartz examines the scope of presidential immunity, the Court's appraoch to federalism, congressional power under the Fouteenth Amendment's enforcement clause, and qualifications for standing. Professor Schwartz describes the Court's subtle approach to make a dramatic swing to the right.

Martin H. Belsky, Dean and Professor of Law analyzes the Court's recent holdings in *Agostini v. Felton* and *City of Boerne v. Flores* concerning the religion clauses of the First Amendment. In *Antidisestablishmentarianism: The Religion Clauses at the End of the Millennium*, Dean Belsky argues that the wall of separation between church and state is crumbling under the current Court. In the future, he continues, protection of religious rights will have to be sought through the political arena rather than through the courts.

In *The Cyberwar of 1997: Timidity and Sophistry at the First Amendment Front*, Professor Gary D. Allison discusses *Reno v. ACLU* at both the district and Supreme Court levels. The Supreme Court upheld the lower court's finding that the Communications Decency Act was unconstitutional because it was

vague and overbroad. The Court also held that First Amendment protections must be tailored to the Internet's unique characteristics. Professor Allison argues that the *Reno* outcome could be statutorily reversed. Additionally, he discusses several implications of the *Reno* holding, such as the appropriate level of scrutiny which should be applied in content regulations imposed on communications media.

Our prolific and most patient Faculty Advisor, Professor Larry Catá Backer adds to the Symposium *Fairness as a Constitutional Principle of American Constitutional Law: Applying Extra-Constitutional Principles to Constitutional Cases in Hendricks and M.L.B.*. Using these two recent cases, Professor Backer illustrates how the "extra-constitutional principles" of essential fairness and legitimacy of purpose have invaded the Supreme Court's traditional perception of Due Process and Equal Protection. Professor Backer suggests that because of this "deeply embedded" habit of substituting "equity" for "rule making" of the law, our Supreme Court has created "general principles of Constitutional law." He compares the Court's quiet application of these "extra-constitutional principles" to the European Union's revolutionized constitutionalism of community law. Professor Backer's work is not a plea against "judicial activism" *vis a vis* "liberal" or "conservative" Justices. Rather, his plea is directed to all walks of the judiciary to be more "explicit" about its application of the extra-constitutional principles of legitimacy and essential fairness.

Kimberly Krawiec, Assistant Professor of Law, contributed *Fiduciaries, Misappropriators, and the Murky Outlines of the Den of Thieves: A Conceptual Continuum for Analyzing United States v. O'Hagan.* Professor Krawiec, visiting this year at the University of Oregon, also participated in one of the *amicus* briefs submitted for this infamous case. Professor Krawiec critically analyzes the Court's decision, acknowledging the public appeal of the misappropriation theory, but suggesting that the "theory is, in fact, a misguided judicial attempt to steer the middle ground between a free market in information and parity of information in the absence of legislative guidance." Professor Krawiec argues that the Court should have affirmed the Eighth Circuit's rejection of the misappropriation theory thereby inviting Congress to define the scope of illegal conduct under § 10(b).

In Part II of the Symposium to be included in our next issue, Associate Professor of Law and Director of the Health Law Certificate Program, Marguerite Chapman contributes *Physician-Assisted Suicide & The Relief of Pain & Suffering: An Analysis of Washington v. Glucksberg & Vacco v. Quill.* Professor Chapman notes that the Court waited almost literally until the end of the term to address the "federal constitutional dimensions of the emotionally charged, heavily value laden, and hotly controversial subject of physician-assisted suicide." Only four other Justices joined Chief Justice Rehnquist in the opinions he wrote for both cases, with five separate concurring opinions in each. Professor Chapman suggests that Chief Justice "Rehnquist's opinions were carefully circumscribed and couched in language that neither precludes the

enactment of future state legislation allowing physician-assisted suicide, nor completely forecloses the recognition by the Court in some future case of a very narrowly recognized constitutional right to medical assistance in hastening one's death. . . . " Professor Chapman examines the differences in the reasoning process that produced the unanimous agreement in which the Court reversed the "rather breath taking cutting edge rulings" of the Ninth and Second Circuits. Finally, Professor Chapman attempts to predict the direction that will be taken at the state level as a result of these decisions.

Melissa Koehn, Assistant Professor of Law will contribute *The New American Caste System: The Supreme Court and Discrimination Among Civil Rights Plaintiffs.* In her articles, Professor Koehn explores the Court's section 1983 jurisprudence. She concludes that two disturbing trends emerge from the twelve pertinent opinions issued during the 1996-97 term. First, the Court appears to be creating a hierarchy of constitutional rights, with the emphasis as much on the identity of the plaintiff as on the right the plaintiff is seeking to vindicate. Thus, for example, plaintiffs who are prisoners or are suing police officers face much higher procedural barriers than plaintiffs raising free speech or taking claims. Second, the Court is raising these unequal procedural barriers without explicitly acknowledging them or providing any sort of principled rationale. As a result, the Court has significantly confused section 1983 jurisprudence without providing any guidance to lower courts.

The Articles section of this issue is quite interesting and varied. Marianne Blair, Associate Professor of Law, begins by contributing *The New Oklahoma Adoption Code: A Quest to Accommodate Diverse Interests,* an opus examining the substantial impact the new Adoption Code will have on adoption practice in Oklahoma. The indefatigable Professor Blair focuses on how the interests of adoptees and their birth and adoptive families will be affected by the new provisions. In addition to highlighting the major procedural and substantive changes in the new Code, Professor Marianne Blair's article discusses the background and policy implications of these changes and addresses the interpretive difficulties that may arise. As a member of the Oklahoma Adoption Law Reform Committee from 1995-1998, Professor Blair's article is a very important resource for all involved in this area.

Ray Yasser, Professor of Law collaborates with his former student, Sam Schiller to contribute *Gender Equity in Interscholastic Sports: A Case Study,* annotating the historic Title IX consent decree entered in United States District Court for the Northern District of Oklahoma. Professor Yasser and Mr. Schiller include their comments and observations earned after intensive negotiations in their quest for gender equity. The article includes valuable insights into the strategy and tactics used to achieve resolution of this matter.

The Honorable Jeffrey S. Wolfe, in collaboration with Lisa B. Proszek, contribute *Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer,* an insider's look at the Social Security Administration's Office of Hearing and Appeals.

Judge Wolfe and Ms. Proszek argue that parts of this process are often incompatible with traditional notions of American jurisprudence and procedural due process. Utilizing first-hand experience, the authors explore whether "due process fundamentally change[s] within the confines of a single party non-adversarial system in which the decision maker is actively engaged in the solicitation and production of evidence." Judge Wolfe and Ms. Proszek describe the "three-hat" roles of Administrative Law Judges and address *Richardson v. Perales*, the Supreme Court's only major foray dealing with potential due process questions arising from this hybrid system. The authors propose alternative solutions to this hybrid model, concluding that "too much is at stake for too many to do otherwise."

Chris Blair, Associate Professor of Law contributes *Let's Say Good-Bye to Res Gestae*, a phrase which Professor Blair argues has "long since outlived any usefulness it ever had." Professor Blair explains that although res gestae "may have played some beneficial role in the development of the law of hearsay and uncharged misconduct evidence, it has been widely criticized for being useless and harmful." Professor Blair suggests that res gestae should be abandoned and states that the courts "simply analyze any contemporaneously committed conduct the same as evidence of any other crime, wrong or act."

Finally, Douglas Ackerman submits *Kennewick Man: The Meaning of "Cultural Affiliation" and "Major Scientific Benefit" in the Native American Graves Protection and Repatriaton Act.* Ackerman examines various problems which arise under the current statutory language of NAGPRA, and suggests alternatives to solve the difficult issues presented when remains are not easily identified.

The Honorable Robert H. Henry, United States Court of Appeals for the Tenth Circuit, contributes *Catching the Jurisprudential Wave: Bernard Schwartz's Main Currents in American Legal Thought.* Judge Henry who inaugurated our Judge in Residence Program, notes the irony between Professor Schwartz's magnum opus and the similar Pulitzer Prize winning book, *Main Currents in American Thought*, by the renowned Vernon Parrington. Judge Henry, an admirer of Professor Schwartz, writes in an inimitable style that is both thought-provoking and entertaining. Judge Henry's historical perspectives are also helpful in understanding "the great themes of American law."

We include two Student Notes in this issue. John J. Baroni submits *Brown v. Pro Football, Inc.: Labor's Antitrust Touchdown Called Back . . .* , an analysis of the nonstatutory labor exemption from the antitrust laws. Telisa Webb Schelin contributes *United States—Standards for Reformulated Gasoline . . .* , an analysis of the effect of the World Trade Organization decision on the U.S. and its administrative agencies.

This issue also inaugurates our Practitioner's Guide, designed to provide a useful forum for discourse on issues directly affecting the practice of law. We are honored to include *Representing Clients Effectively in an ADR Environment*, authored by Martin A. Frey, Professor of Law and Director of the Center on

Dispute Resolution. Professor Frey explores and clearly delineates what attorneys must know to work in the ADR environment. Mike Wilds, Adjunct Professor of Legal Research and Writing, submits *A Practitioner's Guide to Free Legal Information on the Internet.* Professor Wilds thoroughly explains internet access, hardware, service providers, and other issues important to lawyers in today's technology-charged marketplace. Finally, Professor Wilds includes an appendix which contains many useful web sites.

Finally, we would like to thank all of the editors and staff who have worked so very hard to bring this issue to our readers. Your dedication and teamwork have made our job easy. In addition, many thanks to Dean Martin Belsky and our faculty advisor, Larry Catá Backer, as well as to all the faculty and staff at the University of Tulsa College of Law who worked so hard to help us complete this issue.

John J. Baroni and Telisa Webb Schelin