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## Symposium Foreword

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# SYMPOSIUM: SUPREME COURT REVIEW

## SYMPOSIUM FOREWORD

Erwin Chemerinsky\*

By any measure, October Term 2006 was an especially important year at the Supreme Court. Many of the Court's decisions will have a profound effect on people's lives. *Gonzales v. Carhart*, which upheld the federal Partial Birth Abortion Ban Act, will make it harder for women at certain stages of pregnancy to get safe abortions and likely will lead to more laws across the country restricting access to abortion.<sup>1</sup> *Parents Involved in Community Schools v. Seattle School District No. 1*, will make it much harder for school boards to take actions to desegregate public schools.<sup>2</sup> *Philip Morris USA v. Williams* will limit the amount of punitive damages that injured people can recover.<sup>3</sup> *Ledbetter v. Goodyear Tire and Rubber Co., Inc.*, will make it far more difficult for victims of pay discrimination based on race or gender to recover under Title VII of the 1964 Civil Rights Act.<sup>4</sup>

The Term is also important in that it was the first full year of the John Roberts Court. Although Roberts was sworn in just before the beginning of October Term 2005, Samuel Alito did not take his seat until January 31, 2006. Thus, the docket for that Term was already set and over half the cases argued before Alito arrived. October Term 2006 was the start of an era and thus likely important in revealing the Supreme Court's direction, at least as long as these nine Justices remain.

The wonderful collection of essays in this issue of *Tulsa Law Review* reflect the significance of these decisions and the likely consequences of the Roberts Court. First, they show a Court that has moved significantly to the right over its predecessor, the Rehnquist Court.<sup>5</sup> Elizabeth Dale's article, *Death or Transformation? Educational Autonomy in the Roberts Court*,<sup>6</sup> focuses on two important conservative victories: *Parents Involved in Community Schools*, which made voluntary school desegregation

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1. 127 S. Ct. 1610 (2007).

2. 127 S. Ct. 2738 (2007).

3. 127 S. Ct. 1057 (2007).

4. 127 S. Ct. 2162 (2007).

5. I develop this theme in Erwin Chemerinsky, *Turning Sharply to the Right*, 10 Green Bag 2d 423 (2007).

6. Elizabeth Dale, *Death or Transformation? Educational Autonomy in the Roberts Court*, 43 *Tulsa L. Rev.* 725 (2008).

efforts more difficult, and *Morse v. Frederick*,<sup>7</sup> which upheld the power of schools to punish student speech that is perceived by school officials as encouraging illegal drug use. Michael Anthony Lawrence's article, *Reading Tea Leaves in Federal Election Commission v. Wisconsin Right to Life: Hope for a Buckley Evolution*,<sup>8</sup> describes how the Court's decision in *Federal Election Commission v. Wisconsin Right to Life, Inc.*,<sup>9</sup> signals a Court that is moving towards a major change in campaign finance law and invalidating restrictions on contributions and election spending.<sup>10</sup>

But another article in this issue questions whether the Term really shows a Court that has moved significantly to the right. Lee Epstein, Andrew D. Martin, Kevin M. Quinn, and Jeffrey A. Segal, in their article suggest that the Term is more of a continuation of the Rehnquist Court's conservatism than a sharp break from the past.<sup>11</sup> Their analysis indicates that the Court overall may not be that much more conservative than its predecessor, though there are areas—such as abortion, racial justice, campaign finance, and separation of church and state—where the Court is likely further to the right because of Samuel Alito replacing Sandra Day O'Connor. Put another way, these are the areas where Anthony Kennedy is significantly more conservative than his predecessor as the swing Justice, O'Connor.

Second, the articles in this issue illuminate another important theme for the Roberts Court: closing the door on litigants, especially civil rights litigants. Yale Law Professor Judith Resnik described October Term 2006 as "the year they closed the Courts."<sup>12</sup> Many of the articles discuss the cases in which this occurred. Scott Dodson's article, *The Failure of Bowles v. Russell*,<sup>13</sup> discusses an important case in which the Court prevented a person sentenced to a long prison term from appealing even though he complied with the federal district court's order for when to file his notice of appeal.<sup>14</sup> Eric J. Segall's article, *The Taxing Law of Taxpayer Standing*,<sup>15</sup> written as a dialogue, focuses on the Supreme Court's decision in *Hein v. Freedom from Religion Foundation, Inc.*,<sup>16</sup> which limited the ability of taxpayers to sue to challenge government violations of the Establishment Clause of the First Amendment. Rachel A. Van Cleave's article, *Mapping Proportionality Review: Still a "Road to Nowhere"*,<sup>17</sup> discusses how the

7. 127 S. Ct. 2618 (2007).

8. Michael Anthony Lawrence, *Reading Tea Leaves in Federal Election Commission v. Wisconsin Right to Life: Hope for a Buckley Evolution?* 43 *Tulsa L. Rev.* 697 (2008).

9. 127 S. Ct. 2652 (2007).

10. I recognize that it is harder to identify what is the "conservative" as opposed to "liberal" position on campaign finance. Yet, this is not so on the Supreme Court, as the Court divided 5–4 along ideological lines with the majority in *Wisconsin Right to Life* comprised of Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito. The dissent was comprised of Justices Stevens, Souter, Ginsburg, and Breyer.

11. Lee Epstein et al., *The Bush Imprint on the Supreme Court: Why Conservatives Should Continue to Yearn and Liberals Should Not Fear*, 43 *Tulsa L. Rev.* 651 (2008).

12. Quoted in Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, *New York Times*, July 1, 2007, at A1.

13. Scott Dodson, *The Failure of Bowles v. Russell*, 43 *Tulsa L. Rev.* 631 (2008).

14. *Bowles v. Russell*, 127 S. Ct. 2360 (2007).

15. Eric J. Segall, *The Taxing Law of Taxpayer Standing*, 43 *Tulsa L. Rev.* 673 (2008).

16. 127 S. Ct. 2553 (2007).

17. Rachel A. Van Cleave, *Mapping Proportionality Review: Still a "Road to Nowhere"*, 43 *Tulsa L. Rev.* 709 (2008).

Court's decision in *Philip Morris USA v. Williams* will make it much harder for injured individuals to recover punitive damages.<sup>18</sup> Here, too, though, Professors Epstein et al., question whether this is a change in direction or a continuation of a preexisting pattern.

One thing that is striking in reading the articles in this issue is that all are discussing 5–4 decisions. Almost all of the cases mentioned above were decided by the same split on the Court: the majority was comprised of Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito. The dissents usually were Justices Stevens, Souter, Ginsburg, and Breyer.<sup>19</sup> That the authors each focused on a 5–4 decision is not coincidence. It reflects a Term in which the Court decided all of its most important cases by that margin.

A third theme that emerges from these articles was the Court's approach to precedent in October Term 2006. Many of the articles focus on decisions that were significant departures from precedent. Professor Dale shows the inconsistency between *Parents Involved in Community Schools* and the Court's prior ruling in *Grutter v. Bollinger*,<sup>20</sup> which had found that diversity in the classroom is a compelling government interest and professed the need for deference to educational institutions. Professor Lawrence discusses the inconsistency between *Wisconsin Right to Life* and the Court's decision just a few years earlier in *McConnell v. Federal Election Commission*.<sup>21</sup> Professor Segall shows the impossibility of reconciling the Court's decision in *Hein*, which limited taxpayer standing, with *Flast v. Cohen*.<sup>22</sup> Much of Professor Dodson's article is devoted to showing how *Bowles v. Russell* cannot be reconciled with precedent.

These articles thus reveal a Court willing to depart from prior rulings, even recent precedents. Yet, the Court rarely expressly overruled precedent during October Term 2006,<sup>23</sup> instead reinterpreting it or distinguishing it. This may be a long-term characteristic of the Roberts Court, changing the law, even dramatically, but without expressly overruling precedent. But this also may be a short-term phenomena and the reflection of the recent confirmation hearings of John Roberts and Samuel Alito. At both, there was considerable discussion of precedent and even "super precedent." Perhaps with these confirmation discussions still fresh in mind, these Justices did not want to expressly overrule recent precedent. But as time passes, this hesitancy may disappear and changes in the law will be made more explicit.

Without a doubt, October Term 2006 provided much to consider and analyze. The articles in this issue provide an excellent vehicle for doing so.

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18. 127 S. Ct. 1057.

19. The one exception to this pattern among the cases discussed was *Philip Morris USA v. Williams*. In that case, the majority was comprised of Chief Justice Roberts and Justices Kennedy, Souter, Breyer, and Alito. The dissenters were Justices Stevens, Scalia, Thomas, and Ginsburg.

20. 539 U.S. 306 (2003).

21. 540 U.S. 93 (2003).

22. 392 U.S. 83 (1968).

23. An exception to this, though not discussed in the articles in this issue, is *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007), which overruled a long-standing precedent in the antitrust area.

