

# Introduction

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The sixth volume of the *Cato Supreme Court Review* considers the first full term with a new conservative majority—led by Chief Justice John Roberts and joined by Justice Samuel Alito. Last term, I noted the “cacophony of conflicting predictions about where the Court, under its new chief justice, is headed.” The take on the Court’s term that has proved most influential is Supreme Court reporter Jan Crawford Greenburg’s: She argues that the term has revealed “a Supreme Court engaged in a fierce battle of ideas, a big-picture struggle over the role of the Court and the direction it’s going to take. . . . It’s the Roberts Court v. the Stevens Court.”<sup>1</sup> The “Roberts Court,” according to Greenburg, embraces judicial modesty. The Stevens Court, in this view, is fighting to preserve a less “modest” judicial role.

Greenburg’s description, however much it has caught on in the blogosphere, doesn’t really tell us much: It’s true there are two camps, a conservative one led by the chief justice and a liberal one led by the dean of the Court’s liberals, Justice Stevens. But it is far from clear what they are fighting over and it’s not clear that “modesty” precisely captures what that is. Is the Roberts wing simply trying to restrain the extension of old precedent to new areas of the law—stopping, for example, the expansion of affirmative action precedent in higher education, like *Grutter v. Bollinger*, to public high schools? Is the Roberts Court trying to “roll back” precedents dating from the Warren and Brennan Courts—chipping away at certain judicially recognized rights that were once thought to be fixed points in the law, like the *Bivens* doctrine or the taxpayer

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<sup>1</sup>Greenburg, Jan Crawford, “The Roberts Court,” *Legalities* at [[http://blogs.abcnews.com/legalities/2007/05/the\\_roberts\\_cou.html](http://blogs.abcnews.com/legalities/2007/05/the_roberts_cou.html)] (August 27, 2007).

standing doctrine in Establishment Clause cases—while the Stevens Court is trying to preserve them? Or is the Roberts Court staking out new, more aggressive judicial roles for the Court in certain areas: by beefing up, albeit incrementally, First Amendment scrutiny of campaign finance law, for example.

It turns out, it's a bit of all three. Whether you view each of these moves as "modest" depends, ultimately, on your view of what the law commands of the Court in each area. "Modesty," it turns out, is just a slogan for results that observers think aligns the rule of constitutional law and a proper theory of constitutional legitimacy. It's judicial "spin." And, from the standpoint of a liberty-oriented defense of constitutional legitimacy, the record of the Roberts and Stevens wings of the Court are, so far, decidedly mixed.

Judge Danny J. Boggs leads off this edition of the *Cato Supreme Court Review* by examining the Court's existing record from the vantage point of "rule of law" values. He examines three areas: free speech, racial preferences, and election law. In each area, he asks "whether the courts are applying one rule for the cows and refusing to apply that rule when the godly or the goodly are involved." The results, he argues, are mixed: In the area of speech rights, the Court has done reasonably well in acting in an evenhanded way. In the second area, racial preferences, Judge Boggs argues that courts have done quite poorly. And in the third area, election law, he argues the verdict is out, but reports on "dangers and prospects."

Professor Laurence H. Tribe leads off the *Review's* analysis of this term's cases, focusing on the Court's treatment of constitutional remedies in *Wilkie v. Robbins*. Professor Tribe, who argued for the respondent before the Supreme Court, argues that *Robbins* is an important, and overlooked, bellwether for the viability of constitutional tort suits against federal officials under the *Bivens* line of cases. In *Robbins*, he argues, the Court dealt a "severe and unjustifiable blow both to individual rights—including, but not limited to, rights of private property—and to the role of *Bivens* remedies in implementing those rights, thus making them real." After this term, he says, "the best that can be said of the *Bivens* doctrine is that it is on life support with little prospect of recovery."

Next, Professor Lillian BeVier examines this term's foray into election law: *FEC v. Wisconsin Right to Life, Inc. (WRTL II)*. In *WRTL II*, the Court revisits *McConnell v. FEC*, which, as Professor BeVier

notes, was “an unambiguous rejection of the view that at the First Amendment’s core is the principle of free political speech.” While *McConnell* didn’t overrule *Buckley v. Valeo*, she writes, it was dismissive of *Buckley*’s First Amendment foundations. In *WRTL II*, Professor BeVier argues, a new majority of the Court has “revived *Buckley* and thus breathed renewed life into the First Amendment.”

Erik S. Jaffe examines the Supreme Court’s unanimous decision in *Davenport v. Washington Education Association* and *Washington v. Washington Education Association*, and concludes that for what should have been an easy First Amendment case, the Court came to the right conclusion but for reasons that might do more harm than good. While the Court correctly reversed a Washington State Supreme Court decision that turned the First Amendment on its head and declared that unions had a First Amendment right to spend excess agency fees improperly appropriated from nonmember employees on political speech having nothing to do with collective bargaining, the Court emphasized broad discretion by the State in restricting speech rather than the countervailing First Amendment rights of the nonunion employees. The latter approach, argues Jaffe, would have been the correct rationale for the same result, and would not have required weakening various First Amendment Doctrines in order to reject the false rights claimed by the union

Hans Bader dissects the Court’s First Amendment follies in *Morse v. Frederick*, popularly known as the “Bong Hits for Jesus” case. In *Morse*, the Court considered whether the First Amendment barred a school in Alaska from disciplining a student who displayed a banner with those cryptically offending words in view of students and administration officials. Bader argues that the Court, “in its zeal to give the government a win in the ‘War on Drugs,’ . . . upheld censorship of speech that posed little risk of causing drug use.” Even so, he argues, *Morse* “has two bright spots for free speech advocates”: First, the justices recognized that political speech advocating the legalization of drugs could not be banned under their ruling. Second, the Court implicitly rejected some lower court rulings that students’ speech must be on matter of “public concern” to enjoy any protection.

Professor Brannon Denning examines the dog that didn’t bark this term: federalism. He does so by a considering a decision in which the federalism “bark” was most glaringly silent: *Gonzales v.*

*Carhart*, in which the Court considered the constitutionality of the federal partial birth abortion ban. Neither the parties nor the Court's majority opinion addressed federalism concerns with the Congress's assertions of power to regulate abortion procedures; instead, the parties argued, and the Court decided, *Carhart* under the *Roe*, *Casey*, and *Stenberg* line of cases. However, Justice Clarence Thomas, in a short concurrence, hinted he'd be willing to consider Commerce Clause arguments against the ban if they were properly raised in subsequent cases. Professor Denning writes the "majority opinion that might have been," had those Commerce Clause arguments been raised by the parties in this case.

From abortion and federalism, we move to Article III standing and separation of powers. In *Massachusetts v. EPA*, the Court considered whether states have standing under the Clean Air Act to complain about the EPA's reticence to regulate global warming. The state won, but, argues Andrew P. Morriss, standing doctrine lost. As he says, "the Supreme Court took yet another significant step away from the Framers' vision of the judiciary and toward a politicized Supreme Court sitting as a super-legislature and super-regulator." Morriss argues that *Massachusetts v. EPA* is "but one piece of a broader trend toward regulation through litigation," in which "[a] wide range of interest groups, including state politicians, private interest groups, and federal regulators, are increasingly using the courts as a vehicle to impose regulatory measures the interest groups cannot obtain from legislatures and agencies."

In the Court's other major standing decision, *Hein v. Freedom from Religion Foundation*, the majority cut back on the once-settled principle, derived from *Flast v. Cohen*, that Establishment Clause challenges are an exception to the general rule against taxpayer standing. First Amendment litigator Robert Corn-Revere argues that the Court's decision in *Hein* has left *Flast* intact in form only. In reality, the Court has created a road map "by which the executive may circumnavigate judicial standing in Establishment Clause cases altogether, simply by supporting religious institutions on its own initiative."

Professor Samuel Estreicher considers the Court's latest foray into equal protection and affirmative action, *Parents Involved in Community Schools v. Seattle School District No. 1*. Estreicher argues that "as long as analysis of racial classification cases turns on the familiar two-prong inquiry into whether government has asserted a 'compelling

interest' and, if so, whether the challenged program reflects 'narrow tailoring,' the Supreme Court jurisprudence in this area will prove deeply unsatisfying and difficult to predict." The Court, he says, needs "a clear, compelling principle" in this area, but hasn't yet identified it. Estreicher considers whether the Court's cases might be read to supply such a principle, and argues that they do, although the Court hasn't recognized it. He argues that this principle—which he calls the "non-preferment principle"—helps explain and unify the results in *Bakke*, *Grutter*, and *Parents Involved*.

Turning to regulatory law, Professor G. Marcus Cole dissects *Watters v. Wachovia Bank*, a preemption case involving a conflict between state and federal banking regulatory regimes. The issue raised in the case is whether federalism principles limit the statutory power of federal regulators to forbid a state from imposing certain regulations on a state mortgage lender. Cole argues that the federalism dilemma perceived by many conservatives and libertarians in this case is a false one. Federalism is an instrumental value, designed to promote individual liberty. In this case, he argues, "the interests of freedom . . . [are] advanced by federal control of banking regulation, and its concomitant limitations on state consumer protection laws."

Professor Thomas Lambert argues while the Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, which overruled the "much-maligned" 1911 *Dr. Miles* decision, is probably the most notable antitrust decision of October Term 2006, the Court's decision in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.* may prove to be the most important in the long run. In *Weyerhaeuser*, the Court addressed the legal standard applicable to predatory bidding claims (*i.e.*, claims that bidders have driven prices up higher than necessary in an attempt to drive rival bidders from the market). "On first glance," says Lambert, "the matter addressed by the *Weyerhaeuser* Court looks quite narrow: Must a plaintiff complaining of predatory bidding make the same two-part showing as a predatory pricing plaintiff? In answering that narrow question in the affirmative, however, the Supreme Court may have unwittingly weighed in on one of the most hotly disputed matters in antitrust—how to define 'exclusionary conduct' under Section 2 of the Sherman Act." Lambert argues that the Court's resolution of that question is a salutary development, with important consequences for antitrust law.

In *Philip Morris v. Williams*, the Supreme Court considered anew due process restraints on excessive punitive damages, this time in

the context of a very large punitive damage judgment against Philip Morris. The Court didn't validate the widespread anxiety among corporate defendants that a wholesale pull-back from due process review of punitive damages would follow in the wake of Justice Sandra Day O'Connor's departure from the Court. But the Court's decision was, even so, no model of clarity. Professor Michael Krauss performs a backward-looking, post-*Williams* survey of the Court's punitive damage case law, and suggests *Williams* is the culmination of a Court that has "no coherent view of punitive damages."

Finally, Glenn Harlan Reynolds surveys the Supreme Court term to come. He examines trends in the Court's caseload and ventures some predications about the hotly watched cases that are either on the Court's docket or expected to be added to its docket—including cases dealing with the right to bear arms, presidential powers, the right to *habeas*, and free speech on the Internet.