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LAW REVIEW SYMPOSIUM 2009

INTRODUCTION: ACCESS TO THE COURTS IN THE ROBERTS ERA

Jonathan L. Entin†

For better or worse, lawyers and scholars refer to the Supreme Court in terms of the chief justice who presides at any particular time.[1] The current chief justice, John G. Roberts, Jr., assumed the center chair at the start of the October term 2005, succeeding the late William H. Rehnquist, for whom he had clerked during the October term 1980.[2] The arrival of a new chief justice naturally prompts speculation about how the Court might change with new leadership.

During its first three years under Chief Justice Roberts, the Supreme Court has made a number of notable decisions. Probably its

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[1] *See, e.g.*, THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000). Indeed, the Oliver Wendell Holmes Devise history of the Supreme Court is organized around the tenure of chief justices. *See, e.g.*, ALEXANDER M. BICKEL & BENNO C. SCHMIDT, THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910–21 (1984) (covering the years during which Chief Justice Edward Douglass White presided over the Court); OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910 (1993) (covering the years that Chief Justice Melville Weston Fuller presided); CARL B. SWISHER, THE TANEY PERIOD, 1836–64 (1974); G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35 (1988) (one of two Holmes Devise volumes on the Marshall era).

[2] *See* Federal Judicial Center, http://www.fjc.gov/public/home.nsf/hisj (last visited June 7, 2009). This makes Roberts the only member of the Court ever to have succeeded the justice for whom he clerked. Several other justices, including Rehnquist, had been Supreme Court clerks. *See id.* (Rehnquist clerked for Justice Robert H. Jackson, Byron R. White clerked for Chief Justice Fred M. Vinson, John Paul Stevens clerked for Justice Wiley B. Rutledge, and Stephen G. Breyer clerked for Justice Arthur J. Goldberg).

highest-profile ruling was *District of Columbia v. Heller*,[3] which found that the Second Amendment protects an individual right to bear arms. That was only one of four well-publicized cases decided during the October term 2007. The others were *Kennedy v. Louisiana*,[4] which held that the Eighth Amendment forbids the imposition of the death penalty on a convicted child rapist; *Boumediene v. Bush*,[5] which concluded that the Military Commissions Act unconstitutionally suspended the right of habeas corpus for detainees at the Guantanamo naval base in Cuba; and *Crawford v. Marion County Election Board*,[6] which rejected a facial challenge to Indiana's law requiring voters to present a government-issued photo identification at the polls.

It is not as though these cases reflect a sudden change in the Court's work. The previous term also saw several prominent rulings, some of which were (if anything) even more controversial than those. At the top of the list was *Ledbetter v. Goodyear Tire & Rubber Co.*,[7] which strictly construed the statute of limitations for filing employment discrimination claims and held that a woman's complaint of pay discrimination was untimely because she could not identify an unlawful employment practice that had occurred within 180 days of her filing a charge with the Equal Employment Opportunity Commission.[8]

Beyond that, *Gonzales v. Carhart*[9] upheld a federal law prohibiting partial-birth abortions and effectively overruled *Stenberg v. Carhart*,[10] which had invalidated a substantially similar state law seven years earlier. Then there were two other constitutional cases dealing with public schools. *Morse v. Frederick*[11] rejected the free-speech claim of a student who unfurled a banner reading "Bong Hits 4 Jesus" as the Olympic torch was carried in front of his high school. And *Parents Involved in Community Schools v. Seattle School District No. 1*[12] struck down voluntary efforts by local school boards

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3 128 S. Ct. 2783 (2008).

4 128 S. Ct. 2641, *modified on denial of rehr'g*, 129 S. Ct. 1 (2008).

5 128 S. Ct. 2229 (2008).

6 128 S. Ct. 1610 (2008).

7 550 U.S. 618 (2007).

8 *Ledbetter* became a *cause célèbre*. Critics of the ruling sought to amend Title VII and other antidiscrimination statutes to counteract the decision. Those efforts came to naught in 2008, but the first substantive piece of legislation adopted after President Barack Obama's inauguration was a bill designed to overturn *Ledbetter* prospectively. Lilly Ledbetter Equal Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (to be codified at 42 U.S.C. § 2000e-5(e)(3)(A)–(B), 29 U.S.C. § 626(d)(3), and other sections of 29 U.S.C. & 42 U.S.C.).

9 550 U.S. 124 (2007).

10 530 U.S. 914 (2000).

11 551 U.S. 393 (2007).

12 551 U.S. 701 (2007); *see* Jonathan L. Entin, Parents Involved *and the Meaning of* Brown*: An Old Debate Renewed*, 31 SEATTLE U. L. REV. 923 (2008).

to promote more diverse student bodies in elementary and secondary schools.

Cases like these understandably attract wide attention, but they are not necessarily typical of the Supreme Court's docket. Many of the Court's most important decisions address procedural and jurisdictional questions that affect whether courts may entertain certain types of claims at all, who may assert claims, and how broadly challengers may attack laws and policies that they find objectionable. The first of these topics involves both federal preemption of claims based on state law and mandatory arbitration of certain claims, the second implicates the doctrine of standing, and the third concerns the availability of facial as opposed to as-applied challenges.

During its first three terms under the leadership of Chief Justice Roberts, the Supreme Court has addressed several significant cases raising these issues. For example, in *Riegel v. Medtronic, Inc.*[13] the Court, over the lone dissent of Justice Ruth Bader Ginsburg, held that the Food and Drug Administration's premarketing approval of a balloon catheter preempted state tort claims asserted on behalf of a heart patient who was injured as a result of the failure of the device. The docket for October term 2008 contained two significant preemption cases.[14] It turned out that the Court rejected the preemption arguments in both cases. In *Wyeth v. Levine*,[15] a six-justice majority allowed a state-law failure-to-warn claim to proceed against a drug manufacturer. And in *Cuomo v. Clearing House Association*,[16] the Court in a 5–4 ruling held that a provision of the National Bank Act[17] and a regulation promulgated by the Comptroller of the Currency purporting to implement that provision[18] did not preempt a state attorney general's effort to enforce state laws against national banks.

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[13] 128 S. Ct. 999 (2008).

[14] One of these cases dealt with state authority to investigate federally regulated banks. Cuomo v. Clearing House Ass'n, 129 S. Ct. 987 (2009), *granting cert. to* 510 F.3d 105 (2d Cir. 2007). The other dealt with the relationship between federal drug regulation and state tort claims. Wyeth v. Levine, 128 S. Ct. 1118 (2008), *granting cert. to* 944 A.2d 179 (Vt. 2006). The potential significance of *Wyeth* for the medical profession was widely noted. *See, e.g.*, Gregory D. Curfman et al., *Why Doctors Should Worry about Preemption*, 359 NEW ENG. J. MED. 1 (2008); Leonard H. Glantz & George J. Annas, *The FDA, Preemption, and the Supreme Court*, 358 NEW ENG. J. MED. 1883 (2008).

[15] 129 S. Ct. 1187 (2009).

[16] 129 S. Ct. 2710 (2009).

[17] 12 U.S.C. § 484(a) (2006) ("No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts or justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.").

[18] 12 C.F.R. § 7.4000 (2009).

Although the Court under Chief Justice Roberts had not heard a major case involving mandatory arbitration, the earlier decision in *Circuit City Stores, Inc. v. Adams*[19] had upheld an arbitration clause in a case involving a state-law claim of employment discrimination based on sexual orientation,[20] the current docket also contained some potentially important cases involving arbitration.

Meanwhile, the Court has also decided a couple of important standing cases. In *Massachusetts v. EPA*,[21] a closely divided Court held that a state had standing to challenge the federal government's refusal to regulate greenhouse gas emissions from motor vehicles. On the other hand, in *Hein v. Freedom from Religion Foundation, Inc.*,[22] another 5–4 ruling that came out the other way, the Court concluded that taxpayers lacked standing to mount an Establishment Clause challenge to executive-branch expenditures although *Flast v. Cohen*[23] had found taxpayer standing to assert such a challenge to congressional appropriations.[24]

Finally, the Court has waded into the debate over the availability of facial challenges to controverted statutes. As noted earlier, *Crawford*, involving a state election law, rejected such a challenge to Indiana's photo-ID law for voting. Two years earlier, in *Ayotte v. Planned Parenthood of Northern New England*,[25] the Court also rejected facial invalidation of a New Hampshire abortion law that contained a provision that even the state recognized to be unconstitutional. Rather than invalidating the entire statute, a unanimous Court remanded for consideration of a less drastic remedy.

In January 2009, the *Case Western Reserve Law Review* hosted a symposium exploring many of these issues. This issue contains a series of articles that are based on papers presented at the symposium. The issue begins with a piece by Gene Nichol, the keynote speaker at the symposium, who provides a broad overview of issues relating to access to the courts in the Roberts era.[26]

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[19] 532 U.S. 105 (2001).

[20] *But cf.* EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) (holding that an arbitration clause signed by an employee did not prevent the EEOC from seeking judicial relief on behalf of the employee).

[21] 549 U.S. 497 (2007).

[22] 551 U.S. 587 (2007).

[23] 392 U.S. 83 (1968).

[24] Justice Kennedy was in the majority in both cases. The other eight members of the Court thought that the standing issue in both cases should have come out the same way: four justices (Stevens, Souter, Ginsburg, and Breyer) believed that all challengers had standing, while four others (Roberts, Scalia, Thomas, and Alito) thought that none did.

[25] 546 U.S. 320 (2006).

[26] Gene R. Nichol, *The Roberts Court and Access to Justice*, 59 CASE W. RES. L. REV. 821 (2009).

Several other articles address the subject of federal preemption. Richard Levy and Robert Glicksman advance a theory of preemption;[27] Linda Mullenix addresses the politics of federal preemption;[28] David Vladeck analyzes *Wyeth v. Levine*,[29] which was pending at the time of the symposium and about which he spoke;[30] and Laura Little explores the implications of recent decisions involving foreign affairs and bankruptcy for the debate over the relationship between federal and state power.[31]

The remaining contributions to this issue focus on the Roberts Court's approach to standing and to facial challenges to statutes. With regard to standing, Jonathan Adler sees a more mixed picture than does Professor Nichol,[32] while Michael Solimine looks at the congressional role in defining standing.[33] Finally, Jessie Hill addresses the Roberts Court's approach to facial challenges to statutes, with particular emphasis on the abortion context.[34]

The articles presented in the following pages illustrate why the full-day program left participants both exhilarated and exhausted, with conversations continuing well beyond the formal sessions. As the faculty advisor to our law review, I am delighted to conclude this introduction by thanking editor-in-chief Kristin Marstellar and symposium editor Kelly Johnson as well as the entire staff for their extraordinary work on the symposium and this issue.

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27 Richard E. Levy & Robert L. Glicksman, *Access to Courts and Preemption of State Remedies in Collective Action Perspective*, 59 CASE W. RES. L. REV. 919 (2009).

28 Linda S. Mullenix, *Strange Bedfellows: The Politics of Preemption*, 59 CASE W. RES. L. REV. 837 (2009).

29 129 S. Ct. 1187 (2009).

30 David C. Vladeck, *Deconstructing* Wyeth v. Levine*: The New Limits on Implied Conflict Preemption*, 59 CASE W. RES. L. REV. 883 (2009).

31 Laura E. Little, *Empowerment through Restraint: Reverse Preemption or Hybrid Lawmaking?* 59 CASE W. RES. L. REV. 955 (2009).

32 Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061 (2009).

33 Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023 (2009).

34 B. Jessie Hill, *A Radical Immodest Judicial Modesty: The End of Facial Challenges to Abortion Regulations and the Future of the Health Exception in the Roberts Era*, 59 CASE W. RES. L. REV. 997 (2009).