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## AN OVERVIEW OF THE OCTOBER 2006 SUPREME COURT TERM

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### I. FOUR THEMES FROM THE OCTOBER 2006 SUPREME COURT TERM

The October 2006 Term was truly remarkable. First, it was remarkable for the few number of cases that were decided.<sup>1</sup> There were only sixty-eight decisions after briefing and oral argument. As best I can tell, that is the fewest in over a century.

#### A. Theme One: A Smaller Docket

To put this in some context, through much of the 20th Century, the Supreme Court decided over 200 cases per term.<sup>2</sup> As recently as the 1980s, the Court was averaging almost 147 decisions a term.<sup>3</sup> The decrease began when Chief Justice Rehnquist was presid-

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<sup>1</sup> Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1.

<sup>2</sup> Erwin Chemerinsky, *An Overview of the October 2005 Supreme Court Term*, 22 *TOURO L. REV.* 873, 874 (2007).

<sup>3</sup> Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 *SUP. CT. REV.* 403, 403 (1996) (" 'One hundred fifty cases per year' came to be regarded both as a maximum and a norm for the plenary docket." (citing Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 *COLUM. L. REV.* 1093 (1987))).

ing. In fact, in his last Term, the October 2004 Term, the Supreme Court decided seventy-four cases.<sup>4</sup> A year ago it was down to sixty-nine.<sup>5</sup> This year it was down to sixty-eight.<sup>6</sup>

My guess is that no other court in the country has had this kind of docket reduction. There is no clear explanation for why this has happened. One interesting phenomena related to it has been the increase in the length of the opinions. While the number of cases has decreased, the length of the opinions as measured by words per opinion and pages per opinion has increased. It is difficult to know what is the cause and what is the effect. Is the Supreme Court taking fewer cases so it can write longer opinions, or, are they writing longer opinions because they have fewer cases? I tend to agree with the latter.

On the last day of the term, June 28th, the Supreme Court handed down a major decision with regard to school desegregation.<sup>7</sup> The slip opinion in that case was 176 pages long, not counting the appendices.<sup>8</sup>

I edit a case book and annual supplement that is used as a textbook at law schools throughout the country. There is no way to edit a 184-page opinion down to an assignment manageable for law students in a single day without making a hash of it. Therefore, I have a new campaign that I hope you will join me in. I think there should be word and page limits imposed on Supreme Court opinions.

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<sup>4</sup> See JOHN G. ROBERTS, JR., C.J., 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9 (2007), available at <http://www.supremecourtus.gov/publicinfo/year-end/2006year-endreport.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> See Greenhouse, *supra* note 1.

<sup>7</sup> See *Parents Involved in Comty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

<sup>8</sup> See *id.*

Whatever the cause for the decrease in the docket, it has enormous implications for you, as lawyers, and for judges across the country. The implications include: (1) an increase in the amount of major legal issues; (2) prolonging the resolution of these issues; and (3) more conflicts among the circuits and the states.

### **B.      Theme Two: The Anthony Kennedy Court**

The second theme that makes this Term remarkable is the extent to which this was the Anthony Kennedy Court. We generally refer to it as the Roberts Court, out of tradition and in deference to the Chief Justice, however, practically speaking, it was much more the Kennedy Court.

This year, out of the sixty-eight cases, twenty-four were decided by a five-four margin.<sup>9</sup> That is an exceptionally large percentage of five-four decisions. In all twenty-four five-four cases, Anthony Kennedy was in the majority.<sup>10</sup> No other justice was in the majority in all of the five-four cases. In fact, it is difficult to think of another Term where one justice was in the majority in literally every five-four decision. Remarkably, over the course of the entire Term, Justice Kennedy dissented only twice.<sup>11</sup>

I occasionally argue cases in the Supreme Court and frequently write briefs to the Court. This year I wrote briefs to the

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<sup>9</sup> See Greenhouse, *supra* note 1.

<sup>10</sup> See *id.*

<sup>11</sup> See *id.* See generally *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1803 (2007) (Kennedy, J., dissenting); *Cuningham v. California*, 127 S. Ct. 856, 872 (2007) (Kennedy, J., dissenting).

Court in two school desegregation cases.<sup>12</sup> My brief was a shameless attempt to pander to Justice Kennedy. If I could have put Justice Kennedy's picture on the front of my brief, I would have done so.

### C. Theme Three: Year of the Conservatives

The third theme that makes this Term particularly remarkable was that this was the year the conservatives got their Court. From the time Richard Nixon ran for president in 1968, every Republican nominee for president and every Republican president has had a stated goal of creating a solid, conservative, consistent voting majority on the Supreme Court.

For one reason or another, it has never happened until this year, but it very much occurred this year. In almost every case where the Court was ideologically divided, the conservative position prevailed.

There are a few exceptions, such as *Massachusetts v. Environmental Protection Agency*.<sup>13</sup> There were also a few Texas death penalty cases where Justice Kennedy joined the more moderate justices.<sup>14</sup> However, in all of the other cases, the conservative position triumphed.

There is an easy explanation for this. In every case that was

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<sup>12</sup> See Brief of Anti-Defamation League as Amicus Curiae in Support of Respondents at 7, *Parents Involved in Comty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (No. 05-908), 2006 WL 2882696 (arguing that the school "[d]istricts' race-conscious plans . . . survive strict scrutiny and should be sustained").

<sup>13</sup> 127 S. Ct. 1438 (2007). The Supreme Court reasoned that because "greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant' . . . [the] EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change." *Id.* at 1462.

<sup>14</sup> See *Brewer v. Quarterman*, 127 S. Ct. 1706 (2007); *Smith v. Texas*, 127 S. Ct. 1686 (2007); *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007).

ideologically divided, John Roberts and Samuel Alito voted in the conservative direction. I cannot identify a single case this year where the Court was ideologically divided and where John Roberts and Samuel Alito did not vote with the conservative direction.

So, when the Court was divided five-four along ideological lines, they were always with Justices Antonin Scalia and Clarence Thomas. When the Court was ideologically divided, you then had the block on the other side: Justices Stevens, Ginsburg, Souter, and Breyer. That left Anthony Kennedy as the swing justice. But Anthony Kennedy did not swing from side to side very much this year. He was the anchored justice, very much anchored with the conservative block.

What does it mean to say that the Court was consistently so conservative this year? A review of the Term's docket reveals three things. One is that the Court moved significantly to the right with regard to the controversial issues that most divide who is liberal and who is conservative. For instance, the abortion decision, *Gonzales v. Carhart*.<sup>15</sup> Also, the school desegregation case, *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>16</sup> is another example. These are major steps to the right. They are major conservative triumphs.

The second indication that this is a more conservative Court is that this Court has consistently favored government power over indi-

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<sup>15</sup> 127 S. Ct. 1610, 1639 (2007) (5-4 decision) (upholding the Partial-Birth Abortion Ban Act of 2003 because "[r]espondents have not demonstrated that the Act, as a facial matter, is void for vagueness, or that it imposes an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception").

<sup>16</sup> 127 S. Ct. 2738, 2767 (2007) (5-4 decision) (finding that racially based student assignment plans, which purported to promote educational diversity, constituted "extreme means").

vidual liberties. When we think of what is meant to have a conservative Court since the end of the Warren era, it has always been that the Court is more likely to side with the government than the individual. This is reflected, in the context of free speech, in *Morse v. Frederick*,<sup>17</sup> where a student was suspended from school for holding up a banner that said “Bong Hits 4 Jesus.”<sup>18</sup> In that case, the Court upheld school power.<sup>19</sup>

Another example is a case that received less media attention: *Bowles v. Russell*.<sup>20</sup> In *Bowles*, a man was convicted in Ohio State Court and sentenced to fifteen years to life in prison.<sup>21</sup> He filed a habeas corpus petition in United States District Court for the Northern District of Ohio, and the court ruled against him.<sup>22</sup> He asked for an extension for time to file his notice of appeal and the court granted him seventeen days.<sup>23</sup> He filed his notice of appeal on the sixteenth day so it was timely under the court’s order.<sup>24</sup>

On appeal to the Sixth Circuit, the State of Ohio argued that the petition should be deemed time barred because the judge only had the authority to give a fourteen-day extension under the statutes gov-

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<sup>17</sup> 127 S. Ct. 2618, 2629 (2007) (plurality opinion) (“The First Amendment does not require schools to tolerate at school events student expression that contributes to [the dangers of illegal drug use.]”).

<sup>18</sup> *Id.* at 2622.

<sup>19</sup> *Id.* at 2629.

<sup>20</sup> 127 S. Ct. 2360, 2366 (2007) (5-4 decision) (“[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement. Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the ‘unique circumstances’ doctrine is illegitimate.”).

<sup>21</sup> *Id.* at 2362.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

erning notices of appeal.<sup>25</sup> The Supreme Court, in a five-four decision, ruled in favor of the State of Ohio. Justice Thomas wrote the opinion for the Court and held that even though the judge “inexplicably gave Bowles 17 days,” the statute said fourteen days, so Bowles was out of luck.<sup>26</sup>

There were prior Supreme Court decisions that have held even untimely notice of appeal are allowed under “unique circumstances.”<sup>27</sup> The Supreme Court overruled those decisions and said Bowles could not proceed with his appeal.<sup>28</sup> This reflects a Court that is much more deferential to government authority than individual liberties.

The third thing that demonstrates that this is a conservative Court, in my opinion, is that the Court favors business over individuals. You will consistently see a Court favoring business over, say, the rights of employees or consumers.

In the context of employment discrimination, *Ledbetter v. Goodyear Tire & Rubber Co.*<sup>29</sup> is a very pro-business decision. This is also true in the context of antitrust cases for the Term. All these things are manifest in the decisions we have seen which is why we

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<sup>25</sup> *Bowles v. Russell*, 432 F.3d 668, 671 (6th Cir. 2005).

<sup>26</sup> *Bowles*, 127 S. Ct. at 2361-67.

<sup>27</sup> See *Thomson v. INS*, 375 U.S. 384, 387 (1964) (holding that “unique circumstances” existed where the “petitioner relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline”); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 217 (1962) (per curiam) (finding sufficient “unique circumstances” to uphold an untimely notice of appeal).

<sup>28</sup> *Bowles*, 127 S. Ct. at 2366 (finding “no compelling reason to resurrect the [unique circumstances] doctrine from its 40-year slumber” and overruling “*Harris Truck Lines* and *Thompson* to the extent they purport to authorize an exception to a jurisdictional rule”).

<sup>29</sup> 127 S. Ct. 2162, 2165 (2007) (5-4 decision) (holding that a pay-setting decision constitutes a “discrete act” for the purposes of filing a timely Title VII claim).

say the Court is conservative.

#### D. Theme Four: Lack of Precedent

The fourth and final theme of this Term is that the Court is neither deferential, respectful, nor even very concerned about precedent.

This year, the Court was quite willing to at least ignore and sometimes overrule precedent. Some cases expressly overruled precedent—*Bowles*, for instance.<sup>30</sup> Another was an important anti-trust case rendered on the last day of the Term, *Leegin Creative Leather Products, Inc., v. PSKS, Inc.*,<sup>31</sup> which overruled a decision from 1911.<sup>32</sup>

In some cases, the Court did not overrule precedent but simply seemed to ignore it. For example, *Gonzales v. Carhart*,<sup>33</sup> the so-called partial-birth abortion case, cannot possibly be reconciled with *Stenberg v. Carhart*.<sup>34</sup> There are other cases from this Term where the Court drew very arbitrary distinctions rather than overrule precedent, for example, *Hein v. Freedom from Religion Foundation*,<sup>35</sup> an important case about taxpayer standing.

During the confirmation hearings of John Roberts and Samuel Alito, there was much talk about precedent, and super-precedent, and

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<sup>30</sup> See e.g., *supra* notes 20-29 and accompanying text.

<sup>31</sup> 127 S. Ct. 2705 (2007).

<sup>32</sup> *Id.* at 2710 (overruling *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)).

<sup>33</sup> 127 S. Ct. at 1619 (upholding the Partial-Birth Abortion Ban Act of 2003 despite “the objections lodged by the broad, facial attack brought against it”).

<sup>34</sup> 530 U.S. 914, 945-46 (2000) (invalidating a Nebraska statute that banned “partial-birth abortion”).

<sup>35</sup> 127 S. Ct. 2553 (2007).



even super-duper precedent.<sup>36</sup> This Term shows that it was really just a lot of confirmation rhetoric. The bottom line is that if you are politically conservative, this was a term to rejoice. If you are politically liberal, the best thing is that the Court decided only sixty-eight cases.

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<sup>36</sup> See Joan Biskupic, *Nominee Speaks Softly and Sticks to the Big Picture in His Responses*, USA TODAY, Jan. 11, 2006, at 6A. See also Gail Russell Chaddock, *Halfway Through His Hearings, Opponents Have Struggled to Depict High-Court Nominee as an Extremist*, CHRISTIAN SCIENCE MONITOR, Jan. 16, 2006, <http://www.csmonitor.com/2006/0112/p01s01-uspo.htm>; Robert F. Nagel, *Bowing to Precedent: A Decent Respect for the Constitution Should Cause the Supreme Court to Reconsider Some Past Decisions*, WEEKLY STANDARD, Apr. 17, 2006, available at [http://www.weeklystandard.com/Utilities/printer\\_preview.asp?idArticle=12083&R=EC01](http://www.weeklystandard.com/Utilities/printer_preview.asp?idArticle=12083&R=EC01).