TURNING SHARPLY TO THE RIGHT

Erwin Chemerinsky

Conservatives finally got their Court. That is the central message of the Supreme Court's 2006 Term. Since Richard Nixon ran for President in 1968, every Republican President has sought to create a solid conservative voting majority on the Supreme Court. Now, apparently, it exists thanks to the two newest members, Chief Justice John Roberts and Associate Justice Samuel Alito.

Roberts and Alito voted in a conservative direction in every single ideologically divided case this year. They have been everything that conservatives could have dreamed of and liberals could have feared. Roberts and Alito joined with Justices Scalia, Kennedy, and Thomas to create the majority in almost every major case where the Court split along ideological lines.[1]

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[1] The only 5-4 cases that were ideologically divided that the conservatives did not win were *Massachusetts v. Environmental Protection Agency*, 127 S.Ct. 1438 (2007) (state had standing to sue EPA for failure to promulgate regulations concerning global warming, the EPA had the authority to do so, and had to do so or justify its refusal); and several cases overturning death sentences from the state of Texas, *see Panetti v. Quarterman*, 127 S.Ct. 2842 (2007) (overturning death sentence based on the defendant's incompetence to be executed); *Abdul-Kabir v. Quarterman*, 127

Justice Kennedy is rightly perceived as the swing Justice on the Court. There were 24 decisions resolved by a 5-4 margin, out of 68 cases decided after briefing and oral argument, and, astoundingly, Justice Kennedy was in the majority in all 24. But Justice Kennedy did not swing much from side to side this year. With a few notable exceptions, he was always with the conservative block.

What does it mean that the Court was more conservative? I think that is the key question in understanding the 2006 Term, and likely the Court in the years ahead. Three themes are evident: The Court moved significantly to the right on key issues that divide liberals and conservatives – in particular, abortion and race. The Court tended to favor the government over individuals across a wide range of issues. And the Court tended to favor businesses over employees and consumers.

Parts I-III address each of these three themes in turn. Part IV then suggests some other important themes from the Term: the Court's treatment of precedent; the Court's restricting access to the courts; and the Court's failure to give guidance to lower courts on key issues that constantly recur.

I. HOT-BUTTON ISSUES

The two cases this Term that received the most media attention were a challenge to a federal law that prohibited so-called "partial birth abortion" and challenges to the use of race by school districts as a factor in assigning students to schools to achieve desegregation. In each case, the Court decided 5-4 in favor of the conservative position and in each the Court signaled a major shift in the law that is likely to have significant long-term consequences.

S.Ct. 1654 (2007) (overturning death sentence because of inadequate jury instructions concerning the defendant's mental competence); *Smith v. Texas*, 127 S.Ct. 1686 (2007) (same). In each, Justice Kennedy joined with Justices Stevens, Souter, Ginsburg, and Breyer to compose the majority.

A. Abortion

In *Gonzales v. Carhart*,[2] the Supreme Court upheld the constitutionality of the federal Partial Birth Abortion Ban Act of 2003.[3] In 2000, in *Stenberg v. Carhart*,[4] the Court struck down a Nebraska law prohibiting partial birth abortion. The Nebraska statute prohibited the removal of a living fetus or a substantial part of a living fetus with the intent of ending the fetus' life. Justice Breyer wrote the opinion for the Court in *Stenberg* and was joined by Justices Stevens, Souter, Ginsburg, and O'Connor. The Court stressed that the Nebraska law was unconstitutional because it did not have an exception allowing the procedure when the health of the woman warranted it and because it was broadly written and likely prohibited many types of abortion procedures.

The federal Partial Birth Abortion Act has no health exception, and though narrower than the Nebraska law, it is more broadly written than the Court said it would allow in *Stenberg*. Nonetheless, the Court upheld the federal act. Justice Kennedy wrote the opinion for the Court and was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. The key to the case was not in the difference in wording between the federal law and the Nebraska act; it was Justice Alito having replaced Justice O'Connor. During the confirmation hearings for Chief Justice Roberts and Justice Alito, there was so much talk about "precedent" and "super precedent," but the new Justices had no difficulty in abandoning a precedent that was just seven years old.

Justice Kennedy said that the law is facially constitutional because it is not an undue burden for a "large fraction of women."[5] This is a change in the standard with regard to evaluating the constitutionality of laws regulating abortion. In *Stenberg* and in *Planned*

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[2] 127 S.Ct. 1610 (2007).

[3] 18 U.S.C. § 1531 (2000 ed., Supp. IV).

[4] 550 U.S. 914 (2000).

[5] 127 S.Ct. at 1639.

Parenthood v. Casey,[6] the Court said that laws regulating abortion are unconstitutional if they pose an undue burden on some women. For example, in *Casey*, the Court invalidated a provision in a Pennsylvania law that required married women to notify their husbands before obtaining an abortion. The Justices noted that some women are in abusive relationships and a requirement for spousal notification would be an undue burden on them.

But after *Gonzales v. Carhart*, laws regulating abortion will be struck down only if they pose an undue burden on a significant fraction of women. This test is obviously much more deferential to legislatures and will allow more government regulation of abortion.

Moreover, the Court clearly changed the rhetoric of abortion rights. Justice Kennedy's majority opinion repeatedly referred to the fetus as the "unborn child."[7] He wrote: "[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child. … While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow."[8]

This statement is at odds with prior Supreme Court decisions protecting the right to reproductive freedom, and is demeaning to women. *Roe v. Wade* is based on the fundamental premise that it is for a woman to decide how to regard the fetus before viability and whether to have an abortion. Women – not the legislature or five men on the Supreme Court – are in the best position to decide whether continuing an unwanted pregnancy is best for their psychological and physical well-being.

As Justice Kennedy candidly admitted, there is no reliable data to support the notion that the ban on so-called partial birth abortions will improve the psychological health of women. There is nothing but the view of the five male Justices in the majority that abortions done through a particular procedure are "barbaric." The

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[6] 505 U.S. 833 (1992).

[7] 127 S.Ct. at 1620, 1629, 1630, 1634.

[8] Id. at 1634.

majority ignored the fact that the banned procedure is in many cases the safest for the woman. Alternative procedures last longer and involve increased risks of perforation of the uterus, blood loss, and infection. Moreover, the most used alternative is to dismember the fetus in the uterus and remove it piece by piece. This is no less "barbaric" and is more dangerous because it requires repeated surgical intrusions into the uterus.

As for the future, the Court left open the possibility of an "as applied" challenge to the law, where a woman and her doctor could argue that in her case the law was an undue burden by prohibiting the safest form of abortion. More generally, many state legislatures will see this decision as a signal that they can adopt much greater restrictions of abortion, so long as they do not ban all abortions.

B. School Desegregation

In *Parents Involved in Community Schools v. Seattle School District No. 1*,[9] the Supreme Court struck down efforts by the Seattle and Louisville school districts to further desegregation efforts by using race as a factor in assigning students to schools. Chief Justice Roberts' opinion was joined in its entirety only by Justices Scalia, Thomas, and Alito. Justice Kennedy concurred in part, but also concurred only in the judgment in part, and his separate opinion is thus crucial to determining the scope and impact of the decision.

All five Justices in the majority agreed that the government must meet strict scrutiny – its actions must be necessary to achieve a compelling purpose – even if it is using race to achieve school desegregation. Chief Justice Roberts, writing for a plurality of four, found that Seattle and Louisville lacked a compelling interest for their desegregation efforts. Chief Justice Roberts stressed that the school systems were not seeking to remedy constitutional violations and he rejected the argument that diversity in classrooms was an interest sufficient to meet strict scrutiny. By contrast, Justice Ken-

[9] 127 S.Ct. 2738 (2007).

nedy and the four dissenters said that desegregating schools is a compelling government interest.

But all five Justices in the majority agreed that the school districts failed to show that race-neutral means cannot achieve desegregation. Justice Kennedy, like the four Justices in the plurality, said that race can be used in assigning students only if there is no other way of achieving desegregation.

As Justice Breyer pointed out in his dissenting opinion, American public schools are increasingly racially segregated and the Court's decision will have the effect of placing many effective desegregation plans in jeopardy. Justice Kennedy said that school systems can use race in practices such as drawing attendance zones and choosing where to build new schools. But it is very questionable how successful these efforts can be in achieving meaningful desegregation.

Previously, the Supreme Court had imposed significant obstacles to court-ordered remedies for school segregation. In *Milliken v. Bradley*, in 1974, the Court ruled that courts are greatly limited in ordering interdistrict remedies for segregation.[10] In the 1990s, in *Oklahoma City v. Dowell*[11] and *Missouri v. Jenkins*,[12] the Court ordered an end to successful court-ordered desegregation plans once unitary school systems were achieved. *Parents Involved* is important because it greatly limits the ability of school districts to create effective voluntary desegregation plans.

More generally, the Court's decision signals that it may only be a matter of a short time before the Court reconsiders and overrules *Grutter v. Bollinger*.[13] In that decision, four years ago, the Supreme Court held that colleges and universities have a compelling interest in having a diverse student body and may use race as one factor in admissions decisions to achieve diversity. *Grutter* was a 5-4 decision, with Justice O'Connor writing a majority opinion joined by Justices

[10] 418 U.S. 717 (1974).

[11] 498 U.S. 237 (1991).

[12] 515 U.S. 70 (1995).

[13] 539 U.S 982 (2003).

Stevens, Souter, Ginsburg, and Breyer. Chief Justice Roberts' plurality opinion in *Parents Involved* emphatically espouses the view that the government must be colorblind in its decisions. The opinion leaves no doubt where he and Justice Alito will be when *Grutter* is reconsidered. Moreover, from a doctrinal perspective, Justice O'Connor's majority opinion in *Grutter* said that the government did not have to prove that no race neutral alternative could achieve diversity, whereas all five Justices in the majority in *Parents Involved* said that this is the government's burden.

There is an irony in seeing the conservative majority interpret the equal protection clause as requiring colorblind government decision-making. These are the Justices who profess the need to follow the original intent behind constitutional provisions. But if anything is clear about the Congress that ratified the Fourteenth Amendment it is that it did not believe in colorblindness as a constitutional principle. It created numerous programs, such as the Freedmen's Bureau, to provide benefits based on race[14] and it voted to segregate the District of Columbia public schools.

Unfortunately, the Court's conservative majority ignored this history and failed to see that there is a crucial difference between using race to subordinate minorities through government-mandated segregation and using race to achieve compelling goals, such as school desegregation.

II. FAVORING THE GOVERNMENT OVER INDIVIDUALS

Ever since the end of the Warren Court, conservative constitutional jurisprudence has tended to defer to the government in the face of most claims of individual rights. That was certainly true in many of the 5-4 decisions this year.

[14] *See* Stephen A. Siegel, *The Federal Government's Power to Adopt Color Conscious Laws*, 92 NORTHWESTERN L. REV. 477 (1998) (describing the actions of the Congress that ratified the Fourteenth Amendment).

A. Speech

For example, in *Morse v. Frederick*,[15] the Court held that the First Amendment was not violated when a student was punished for displaying a banner with the inscription, "Bong Hits 4 Jesus." When the Olympic torch came through Juneau, Alaska, a high school released its students from class to watch and a student unfurled his banner. The principal, believing that the banner encouraged drug use, confiscated it and suspended the student who displayed it.

In an opinion by Chief Justice Roberts, the Court said that the principal could reasonably interpret the banner as encouraging illegal drug use and that schools have an important interest in stopping such speech. Justice Alito wrote a concurring opinion, joined by Justice Kennedy, which stressed the narrowness of the Court's holding. Justice Alito explained that the Court was holding only that schools may punish speech that encourages illegal drug use.

Although the Court's holding was narrow, the decision's implications are broad, and indicate greater judicial deference to schools when they want to suppress student speech. In *Tinker v. Des Moines Board of Education*, the Court held that schools may punish student speech only if it is actually disruptive of school activities.[16] The Court in *Morse* rejected that actual disruption is necessary to punish student speech. Nor did the Court require any showing that the speech would actually increase the likelihood of illegal drug use. As Justice Stevens pointed out in a dissent, it is highly unlikely that any student would be more likely to use drugs because of Frederick's banner. By allowing schools to punish speech when there is no evidence of disruption or other harm, *Morse* likely will be read by school administrators and lower courts as permitting much more government regulation of student speech.

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[15] 127 S.Ct. 2618 (2007).

[16] 393 U.S. 503 (1969).

B. Standing

Another 5-4 decision that favored the government over individuals is *Hein v. Freedom from Religion Foundation*.[17] The issue was whether taxpayers had standing to challenge the Bush administration's use of government funds to facilitate its Faith-Based and Community Initiatives Program, which sought to channel government monies directly to faith-based institutions such as churches, synagogues and mosques.

The law is clear that taxpayers generally do not have standing to sue to challenge government actions as violating the Constitution. But under *Flast v. Cohen*, taxpayers have standing to challenge government expenditures as violating the Establishment Clause.[18]

The Supreme Court in *Hein* distinguished *Flast* and by a 5-4 margin held that taxpayers did not have standing to challenge the Bush administration's actions. Justice Alito announced the judgment of the Court and explained that *Flast* was a challenge to spending under a federal statute, whereas *Hein* involved spending of general executive funds. He said that taxpayer standing exists to challenge the former, but not the latter, as violating the Establishment Clause.

This fatuous distinction persuaded only three of the nine Justices. Justices Scalia and Thomas concurred in the judgment and argued that *Flast* should be overruled. Justice Souter wrote a dissent joined by Justices Stevens, Ginsburg, and Breyer, and said that there was no meaningful distinction from *Flast* and taxpayer standing should be allowed. These six Justices seem clearly right that *Hein* and *Flast* are indistinguishable. It should make no difference whether it is Congress or the President; both are equally constrained by the Establishment Clause of the First Amendment. The dollars come from exactly the same place, the federal treasury.

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[17] 127 S.Ct. 2553 (2007).

[18] 392 U.S. 83 (1968).

C. Criminal Appeals

A case that received far fewer headlines, but that also reflects the conservative approach of the Roberts Court in favoring the government over individuals, was *Bowles v. Russell*.[19] A habeas petitioner asked a federal district court judge for an extension of time to file a notice of appeal from the denial of his petition. The judge gave him a 17-day extension, and he filed his notice of appeal on the 17th day.

But the Supreme Court, in an opinion by Justice Thomas, held that the statute allowed for extensions of only up to 14 days, and thus that the notice of appeal was time barred.[20] Moreover, the Court expressly overruled earlier decisions holding that exceptional circumstances may excuse the untimely filing of a notice of appeal.[21] Therefore, even though the petitioner followed the judge's order and even though his appeal would have been allowed under prior Supreme Court decisions, he was barred from being able to appeal the denial of his habeas petition.

Justice Souter wrote a powerful dissent and declared: "It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch."[22] Surely this is right. A person should not be denied his or her day in court because the judge made a mistake.

III. Favoring Businesses over Consumers and Employees

Many have predicted that the Roberts Court's conservatism will be manifest in its being more protective of business interests than its recent predecessors. That certainly was evident this year.

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[19] 127 S.Ct. 2360 (2007).

[20] 28 U.S.C. § 2107(c).

[21] *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam); *Thompson v. INS*, 375 U.S. 384 (1964) (per curiam).

[22] 127 S.Ct. at 2367.

A. Punitive Damages

In *Phillip Morris USA v. Williams*,[23] the Court imposed a new limit on punitive damage awards. The Oregon Supreme Court approved a jury's award of $821,000 in compensatory damages and $79.5 million in punitive damages against Philip Morris for its fraud in marketing cigarettes.

The Supreme Court, in a 5-4 decision, reversed the Oregon Supreme Court's decision. Justice Breyer's majority opinion stated: "In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are essentially strangers to the litigation."[24] In other words, the Court held that punitive damages must be based on the defendant's conduct toward the plaintiff and not toward third parties.

But then just three paragraphs later, the Court holds that juries may consider harms to third parties in assessing the reprehensibility of a defendant's conduct: "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk to the general public, and was particularly reprehensible."[25]

How then is a jury to be instructed after *State Farm*?[26] It can be told that it can consider harm to third parties in assessing the reprehensibility of a defendant's conduct and that reprehensibility is the most important factor in determining the size of the punitive damages award. But the jury also must be told that it cannot base the punitive damages award on the harm to third parties. Perhaps Justice Breyer and the Court's majority understand the theoretical difference here, but it is hard to imagine juries comprehending it.

Perhaps the greatest significance of the case is in the composition of the Court's majority. Justice Breyer wrote the opinion for

[23] 127 S.Ct. 1057 (2007).

[24] Id. at 1063.

[25] Id.

[26] *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

the Court and was joined by Chief Justice Roberts and Justices Kennedy, Souter, and Alito. Justices Stevens, Scalia, Thomas, and Ginsburg dissented. Until this decision, it was not known how the two newest Justices, Roberts and Alito, would view constitutional challenges to punitive damages. Some speculated that they might agree with Justices Scalia and Thomas that the Constitution imposes no restrictions on the size of punitive damages. But *Williams* shows that they will be part of a five-person majority to enforce due process limits on punitive damages. That, and the lack of clarity in the Court's opinion in *Williams*, virtually ensure that there will be other punitive damages decisions from the Supreme Court in the near future.

B. Employment Discrimination

Another important victory for businesses over individuals was in *Ledbetter v. Goodyear Tire and Rubber Co.,* where the Court made it much more difficult for employees to sue for pay discrimination under Title VII of the Civil Rights Act of 1964.[27] In a 5-4 decision, the Court held that the statute of limitations for pay discrimination claims under Title VII begins running at the time when the pay is set. The Court rejected the plaintiff's claim that each additional paycheck is a separate violation.

Generally, discrimination claims must be filed with the Equal Employment Opportunity Commission within 180 days of the discriminatory act. Often, however, individuals do not know the salaries of other employees in the workplace. In fact, Justice Ginsburg, in her dissenting opinion, pointed out that "one-third of private sector employers have adopted specific rules prohibiting employees from discussing their wages with co-workers; only one in ten employers has adopted a pay openness policy."[28]

Lilly Ledbetter worked as a supervisor for Goodyear Tire and Rubber Company at its Gadsden, Alabama, plant from 1979 until 1998. In March 1998, Ledbetter submitted a questionnaire to the

[27] 127 S.Ct. 2162 (2007).

[28] Id. at 2182 n.3 (Ginsburg, J., dissenting).

EEOC alleging sex discrimination, and in July of that year she filed a formal EEOC charge.

For most of her years with Goodyear, Ledbetter worked as an area manager, a position largely occupied by men. The evidence at trial indicated that Ledbetter's salary initially was similar to that of male employees, but over time a significant discrepancy developed. By "the end of 1997, Ledbetter was the only woman working as an area manager and the pay discrepancy between Ledbetter and her 15 male counterparts was stark: Ledbetter was paid $3,727 per month; the lowest paid male area manager received $4,286 per month, the highest paid, $5,236."[29] A jury found for Ledbetter and a judgment was entered in her favor.

The Supreme Court, however, found that her claims under Title VII were time barred. Justice Alito – writing for the Court and joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas – explained that Ledbetter's claim was for disparate treatment, which requires proof of discriminatory intent.[30] Justice Alito held that the statute of limitations begins to run with a "discrete discriminatory act" and that this is the time when the pay is set.[31] The Court expressly rejected Ledbetter's claim that each additional paycheck is a new discriminatory act that separately triggers the statute of limitations. The Court's holding in *Ledbetter* thus is likely to be a significant obstacle for many pay discrimination claims under Title VII. The crucial question for litigation will be whether the statute of limitations may be tolled until the employee reasonably could have known of the pay discrimination and, if so, how this is to be determined. The Court expressly did not decide this question. In a footnote, Justice Alito wrote: "We have previously declined to address whether Title VII suits are amenable to a discovery rule. Because Ledbetter does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue."[32]

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[29] Id. at 2178 (Ginsburg, J., dissenting).

[30] Id. at 2167.

[31] Id. at 2169.

[32] Id. at 2177 n.10.

Precisely because most employees don't know of pay discrimination claims at the time salaries are set, it often will be crucial for plaintiffs' lawyers to argue that their clients could not have discovered the discrimination at that time and that the statute of limitations was thus tolled. Courts should be receptive to this argument because generally there is equitable tolling of statutes of limitations until the plaintiff reasonably could have discovered the injury. Courts will then need to decide how to determine when an employee should reasonably have known of the salary discrimination, especially if it is a workplace where rules or customs prevent discussion of salaries.

Also, it is important to note that the decision applies only to pay discrimination claims under Title VII; it does not apply to pay discrimination claims under the Equal Pay Act of 1963.[33] The latter does not require proof of discriminatory intent so the reasoning of *Ledbetter* would not apply under it. However, the Equal Pay Act applies only to gender discrimination in wages and salaries, while Title VII prohibits employment discrimination based on race, gender, and religion.

C. Antitrust

In several cases, the Court made it much more difficult to sue businesses for antitrust violations. In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[34] the Court overruled a 96-year-old decision[35] and held that it is not a per se violation of antitrust laws for a manufacturer to set minimum resale prices. In the earlier case, the Court had ruled that it violated Section One of the Sherman Act for a manufacturer and its distributor to agree on the minimum price the distributor can charge for the manufacturer's goods. In a 5-4 decision, split along the usual ideological lines, the Court expressly overturned its earlier decision and held that vertical price restraints are to be judged by the rule of reason.

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[33] 29 U.S.C. § 206(d).

[34] 127 S.Ct. 2705 (2007).

[35] *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

In *Credit Suisse Securities (USA) LLC v. Billing*,[36] the Court ruled that there cannot be antitrust claims for securities law violations. The Court explained that securities laws were "clearly incompatible" with antitrust laws, such that securities law implicitly precluded antitrust claims. And in *Bell Atlantic Corp. v. Twombly*,[37] the Court held that stating a claim under the Sherman Act's restraint of trade provision requires that the complaint allege sufficient facts to suggest that an agreement was made. The Court seemingly rejected the usual notice pleading for such claims, thus making it harder for plaintiffs to get into court.

IV. OTHER THEMES FROM OCTOBER TERM 2006

These and other cases suggest three other notable themes from the recently completed term.

First, the Court showed a great willingness to depart from precedent, but generally did not expressly overrule earlier decisions. There were a few instances in which the Court expressly overruled earlier decisions, such as *Leegin* and *Bowles*. But much more often the Court simply implicitly overruled precedents or drew arbitrary distinctions. *Gonzales v. Carhart*, for example, implicitly overruled *Stenberg*. *Hein* did not overrule *Flast*, but drew an arbitrary distinction between government expenditures under a federal statute as opposed to an executive program. These cases suggest a Court that is going to give relatively little deference to precedent. It may not be willing to expressly overrule high profile precedents, but it does not feel constrained to follow them either.

Second, the effect of many of the Court's decisions was to close the courthouse doors. *Hein* does this by limiting taxpayer standing. *Bowles* did this by restricting the ability of district courts to give extensions in filing notices of appeal. *Ledbetter* did this by making it much harder for plaintiffs to file Title VII pay discrimination claims.

Finally, many of the cases this year reflect the problems with having a Court where none of the Justices have spent a significant

[36] 127 S.Ct. 2383 (2007).

[37] 127 S.Ct. 1955 (2007).

amount of time as a trial judge and few have significant litigation experience in trial courts. Several of the key decisions from this Term are going to create enormous confusion in the lower courts. As explained above, the punitive damages case, *Williams*, draws an incoherent distinction as to when and how juries may look to harm to third parties in assessing punitive damages. *Twombley* is going to cause enormous confusion as to the pleading standard to be used in federal courts.[38] These are issues – what pleading standard to use in civil cases, how to instruct juries as to punitive damages – that constantly arise, and the Court failed to give district courts clear guidance on them.

CONCLUSION

These, of course, were only some of the more important and high profile cases of the term. But they reflect an overall docket where the conservative position consistently prevailed.

October Term 2007 promises to be just as important. For example, on June 29, 2007, the Court reversed itself and decided to grant review of the cases of Guantanamo detainees challenging the constitutionality of the restriction of habeas corpus in the Military Commission Act of 2006.[39] The one safe prediction is that it probably will produce a 5-4 decision and Justice Kennedy will be in the majority.

[38] *Twombley* overruled a basic case concerning notice pleading, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), which held that a complaint should be dismissed in federal court for failure to state a claim only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." But it was not clear what will replace *Conley* or if *Twombley* is really just about pleading in antitrust cases. Less than two weeks after *Twombley*, the Court decided *Erickson v. Pardus*, 127 S.Ct. 2197 (2007), where it reaffirmed traditional rules of notice pleading.

[39] *Boumediene v. Bush*, 127 S.Ct. 3078 (2007).