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INTRODUCTION

CHIEF JUSTICE ROBERTS' INFLUENCE ON THE SUPREME COURT

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The position of Chief Justice of the United States is an enigmatic one. The Chief Justice is the titular head of the highest court in the land, the leader of the institution empowered “to say what the law is,” even when doing so invalidates the actions of its coordinate branches.¹ Unlike the heads of the other branches or departments, however, the Chief Justice retains relatively little power or responsibility that is not shared by the other members of the Court. Beyond presiding over the Court’s conferences, assigning opinions, and performing administrative and ceremonial duties, the Chief Justice’s core judicial functions are largely indistinguishable from those of the Associate Justices.² Nevertheless, close observers of the Court use the identity of the presiding Chief Justice to delineate specific eras and trends in the Court’s history. The Roberts Court is no exception.³

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1. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

2. Joel K. Goldstein, *Leading the Court: Studies in Influence as Chief Justice*, 40 Stetson L. Rev. 716, 719 (2011) (noting that some suggest the office of Chief Justice “carries ‘no more authority than other members of the [C]ourt’” (quoting Bernard Schwartz, *A History of the Supreme Court* 246 (Oxford U. Press 1993)).

3. E.g. Adam Liptak, *Court under Roberts Is Most Conservative in Decades*, N.Y. Times A1 (July 24, 2010) (available at <http://www.nytimes.com/2010/07/25/us/25roberts.html>).

September 29, 2010 marked the fifth anniversary of John Roberts' swearing in as the Supreme Court's seventeenth Chief Justice.⁴ The fifth anniversary of the Roberts Court affords a valuable opportunity to evaluate the tenure of the new Chief and the Court's jurisprudence—especially its constitutional jurisprudence—under his leadership. These were precisely the topics considered at the symposium that is the subject of this issue of the *Stetson Law Review*. Thanks to the formidable organizational efforts of Professor Russell Weaver, a Constitutional Law Discussion Forum addressing the first five years of the Roberts Court was held at the University of Louisville's Louis D. Brandeis School of Law in December 2010.⁵ That meeting included an exceptional group of constitutional law scholars from across the country. Not surprisingly in light of the quality and diverse interests of the participants, the resulting eight articles presented here offer significant scholarly contributions on a wide variety of interesting and highly relevant topics relating to the Roberts Court as an institution, Chief Justice Roberts' leadership and effectiveness as Chief Justice, and the Roberts Court's constitutional jurisprudence in a variety of doctrinal contexts.

The first two articles address higher-order questions of the Roberts Court's jurisprudential philosophy in its first five years. Professor Michael P. Allen examines what he describes as the Court's conscious articulation of the rules of constitutional interpretation under Chief Justice Roberts.⁶ After first situating the concept of rule articulation in the context of constitutional decisionmaking, Professor Allen offers three reasons why the articulation of interpretive rules is beneficial to the Court's function in our democratic system: "judicial legitimacy, the courts' role

4. *Roberts Sworn in As Chief Justice*, CNNPolitics, http://articles.cnn.com/2005-09-29/politics/roberts.nomination_1_judge-roberts-confirmation-votes-john-g-roberts?_s=PM:POLITICS (Sept. 29, 2005). For a complete listing of Supreme Court Justices, see Supreme Court of the United States, *About the Supreme Court, Members of the Supreme Court of the US (Text)*, *Members of the Supreme Court of the United States*, http://www.supremecourt.gov/about/members_text.aspx (accessed May 6, 2011).

5. Professor Weaver did not, however, act alone. Many thanks are also due to the other academic sponsors of the conference, specifically, Dean Bruce Elman of the University of Windsor School of Law; Professor Mark R. Killenbeck of the University of Arkansas School of Law; Professor Ronald Krotoszynski of the University of Alabama School of Law; and Professor David F. Partlett of the Emory University School of Law.

6. Michael P. Allen, *The Roberts Court and How to Say What the Law Is*, 40 *Stetson L. Rev.* 671, 675–679 (2011).

in a democracy, and enhancement of the predictability and efficiency of the decisionmaking process.”⁷ He then offers eight examples from the Roberts Court’s constitutional jurisprudence (five dealing with federalism and separation of powers and three with individual rights) in which the Court engaged in rule articulation.⁸ Without attempting a comparison between the Roberts Court and any of its predecessors, Professor Allen relies on these examples to develop some interpretive themes from the Roberts Court, such as a propensity toward historical analysis, formalism, and—perhaps surprisingly—aggrandizement of judicial power, and develops some potential critiques of both the Court’s interest in articulating its interpretive approach and its choices of interpretive rules.⁹ Finally, Professor Allen concludes by stating that none of the potential critiques of the Court’s efforts at rule articulation, either individually or taken as a whole, are compelling enough to overcome the ultimate value of the practice to “American constitutional democracy.”¹⁰

Professor Eric J. Segall also focuses on the Roberts Court’s approach to constitutional jurisprudence, but from a slightly different perspective. Professor Segall argues that the Roberts Court’s constitutional jurisprudence in controversial cases displays such an “indifference” to “rule-of-law values” that “it seriously calls into question whether the Roberts ‘Court’ is, in fact, a court at all.”¹¹ Professor Segall begins by identifying two fundamental principles of judging: reliance on existing positive law, including precedent, and transparency in judicial decisionmaking.¹² He then uses three controversial cases from the Roberts Court as examples of the Court’s failure to adhere to these fundamental principles. Specifically, Professor Segall cites the Roberts Court’s failure to engage in “any discussion of stare decisis”¹³ in *Gonzales v. Carhart*,¹⁴ its “controversial (at best)

7. *Id.* at 677.

8. *Id.* at 680–693.

9. *Id.* at 693–698.

10. *Id.* at 698–699.

11. Eric J. Segall, *Is the Roberts Court Really a Court?* 40 *Stetson L. Rev.* 701, 702, 715 (2011).

12. *Id.* at 701.

13. *Id.* at 715.

14. 550 U.S. 124 (2007).

historical account”¹⁵ in *District of Columbia v. Heller*,¹⁶ and its willingness to address a constitutional question *sua sponte* in *Citizens United v. Federal Election Commission*¹⁷ “without any meaningful discussion of history or stare decisis” as evidence of the Court’s failure to adhere to the standards of “judging according to the Rule of Law”¹⁸

The next two articles focus on Chief Justice Roberts as an individual. Professor Joel K. Goldstein offers the first examination of the new Chief, focusing on his potential for success as Chief Justice.¹⁹ Although he readily admits that only time will provide a truly accurate picture of Chief Justice Roberts’ tenure,²⁰ Professor Goldstein puts the new Chief’s prospects for success in historical perspective. He relies on Professor David J. Danelski’s criteria for evaluating a Chief Justice, “task and social leadership,” and offers the role of context as a refinement on that assessment.²¹ Professor Goldstein illustrates the importance of these features by evaluating six former Chief Justices—three considered historically successful and three who were not—and highlighting the consistent correlation between high levels of task and social leadership, “the context in which a Chief Justice operates,”²² and success.²³ He concludes with the observation that although there is no single model for a Chief Justice’s success, leadership and legal ability, as well as prior judicial experience and prior experience with one’s colleagues on the Court are all useful in formulating an influential tenure as Chief Justice.²⁴

Applying this analytical framework to Chief Justice Roberts, Professor Goldstein finds some reason for optimism. First, Chief

15. Segall, *supra* n. 11, at 715.

16. 554 U.S. 570 (2008).

17. 130 S. Ct. 876 (2010).

18. Segall, *supra* n. 11, at 715.

19. Goldstein, *supra* n. 2, at 753–760.

20. *Id.* at 719 (explaining that “the history of [Chief Justice Roberts’] leadership will not be heard” for some time).

21. *Id.* at 722 (quoting David J. Danelski, *The Influence of the Chief Justice in the Decisional Process*, in Walter F. Murphy et al., *Courts, Judges & Politics* 675, 676 (6th ed., McGraw-Hill 2006)).

22. *Id.* at 740.

23. *Id.* at 723–740. Professor Goldstein stresses that the two most important contextual factors to consider when assessing the perceived success of a Chief Justice are (1) the Court’s composition; and (2) the historical backdrop against which decisions are made. *Id.* at 740. He provides a thorough analysis of each. *Id.* at 740–748.

24. *Id.* at 760–761.

Justice Roberts possesses the requisite legal and social skills to fashion an efficient, purposeful, and collegial Court.²⁵ Moreover, Chief Justice Roberts' jurisprudence suggests that he gives significant weight to institutional concerns—such as the public perception and reputation of the Court—that should serve him well as the institution's leader.²⁶ He not only votes with the majority of the Court more frequently than most of his colleagues, but he also is among the least frequent dissenters, and has yet to file a lone dissent.²⁷ Similarly, he has authored relatively few concurring opinions and has developed a reputation for fashioning narrow rulings.²⁸ Despite his apparent institutional concerns, Chief Justice Roberts “is not simply content to make the engines run smoothly; there are some directions in which he wishes to lead the Court.”²⁹ Professor Goldstein concludes that while none of these facts guarantee that Chief Justice Roberts ultimately will be judged as a consequential Chief, history suggests they represent useful qualities for making a mark on Supreme Court history.³⁰

Professor Arnold H. Loewy offers a somewhat broader analysis of Chief Justice Roberts by considering his effectiveness not only as Chief, but also as a member of the Court generally.³¹ Professor Loewy begins by discussing his impressions of Chief Justice Roberts as a leader, and sees “little for which to commend” the new Chief in that regard.³² Although careful not to imply that these observations apply uniquely to the current Chief Justice,³³ Professor Loewy cites two examples of the Chief Justice's leadership shortcomings. The first is what he describes as a failure to lead the Court to either particular results or unanimity in its decisions, and the second is that the Chief Justice does not occupy any other influential positions on the Court, such as intellectual

25. *Id.* at 753.

26. *Id.* at 754.

27. *Id.*

28. *Id.* at 755–756.

29. *Id.* at 756.

30. *Id.* at 761.

31. Arnold H. Loewy, *Chief Justice Roberts (A Preliminary Assessment)*, 40 *Stetson L. Rev.* 763 (2011).

32. *Id.* at 765.

33. *Id.* at 766.

leader of its conservative wing (Justice Scalia) or as the swing vote in controversial cases (Justice Kennedy).³⁴

Considering Chief Justice Roberts' role as a jurist, Professor Loewy compliments the new Chief's legal acumen and the incremental and respectful tone of his opinions.³⁵ In terms of the Chief Justice's positions on specific issues, however, Professor Loewy is critical of Chief Justice Roberts' failure to "hold the balance true"³⁶ in favor of a "visceral conservatism" in all but one major doctrinal area.³⁷ For instance, Professor Loewy derides Chief Justice Roberts' Fourth Amendment opinion in *Herring v. United States*³⁸ for both its reasoning and result, and generally disapproves of the Chief's positions in areas such as the First Amendment and criminal procedure.³⁹ The one field in which Professor Loewy sees promising potential for the Roberts Court is in the area of federalism—as evidenced by Chief Justice Roberts' willingness to concur in the Court's broad interpretation of the Necessary and Proper Clause in *United States v. Comstock*.⁴⁰ In sum, Professor Loewy remains hopeful that Chief Justice Roberts' incrementalism, decorum, and intellectual honesty will work to counterbalance his strong conservatism, especially in the area of criminal procedure.⁴¹

The final four submissions deal with the Roberts Court's jurisprudence in more specific contexts. Professor Deana Pollard Sacks' article is the first of these doctrinal analyses.⁴² Professor Pollard Sacks looks at the Roberts Court's use of empirical social science data in its decisions pertaining to the protection of children.⁴³ In particular, she notes the growing body of evidence suggesting "children's and adolescents' vulnerability to influences that create patterns of brain activity harmful to themselves or

34. *Id.* at 765.

35. *Id.* at 766–767.

36. *Id.* at 775 n. 76 (quoting *Ill. v. Gates*, 462 U.S. 213, 241 (1983)).

37. *Id.* at 775.

38. 129 S. Ct. 695 (2009).

39. Loewy, *supra* n. 31, at 767–772.

40. 130 S. Ct. 1949 (2010); Loewy, *supra* n. 31, at 772.

41. Loewy, *supra* n. 31, at 775.

42. Deana Pollard Sacks, *Children's Developmental Vulnerability and the Roberts Court's Child-Protective Jurisprudence: An Emerging Trend?* 40 *Stetson L. Rev.* 777 (2011).

43. *Id.* at 777.

others”⁴⁴ and “fundamental differences between juvenile and adult minds’ that render juveniles less morally blameworthy and more capable of rehabilitation than adults.”⁴⁵ She then focuses on three recent cases—two First Amendment free-speech cases and one decision under the Eighth Amendment’s prohibition on cruel and unusual punishment—and notes how in each decision the Roberts Court relied on empirical evidence of the inherent differences between juveniles and adults to justify state action that protects children.⁴⁶ These developments are significant, Professor Pollard Sacks explains, because a trend toward reliance on such data could signal a “new era of children’s constitutional jurisprudence grounded in legislative fact-finding . . . [and] could foretell an emerging trend toward child protectionism” in the Court’s constitutional jurisprudence.⁴⁷

Professor Christina E. Wells and her co-authors William E. Marcantel and Dave Winters view the Roberts Court’s tenure through the lens of federal preemption of state tort suits, an area in which the Roberts Court has been quite active in its first five terms.⁴⁸ The article begins by outlining two distinct paradigms of preemption analysis: regulatory and compensatory.⁴⁹ The regulatory paradigm favors treating tort suits as forms of regulation, which are contrasted more easily with federal laws and are thus more vulnerable to preemption, while the compensatory regime views tort law as a means of compensating victims for harm.⁵⁰ The article documents the Court’s use of these competing paradigms over time, arguing that the Court not only began embracing the regulatory paradigm in the years preceding the Roberts Court, but also that under Chief Justice Roberts it has “continued to elevate the regulatory function of tort law over its compensatory function.”⁵¹

44. *Id.* at 784.

45. *Id.* at 790 (quoting *Graham v. Fla.*, 130 S. Ct. 2011, 2026–2027 (2010)).

46. *Id.* at 778.

47. *Id.* at 779.

48. Christina E. Wells, William E. Marcantel & Dave Winters, *Preemption of Tort Lawsuits: The Regulatory Paradigm in the Roberts Court*, 40 *Stetson L. Rev.* 793, 793 (2011) (explaining that “[t]he Roberts Court alone has handed down six [preemption] cases[,] with the two most recent having just been decided in the 2010 term”).

49. *Id.* at 794–795.

50. *Id.* at 794.

51. *Id.* at 810.

The authors argue that this trend creates difficulties for an already-complex preemption doctrine for three reasons. First, the regulatory paradigm is problematic because it makes preemption law more vulnerable to judicial manipulation.⁵² Second, in the administrative context, agency preemption decisions may receive unwarranted judicial deference.⁵³ Finally, the regulatory paradigm may be undesirable because it “ignores the individuals originally at the heart of the lawsuits—i.e., the plaintiffs.”⁵⁴ In light of these inherent problems, the authors suggest that the Court should work harder to acknowledge the difference between tort law and “statutory or regulatory enactments” in order to dilute the regulatory paradigm’s potentially negative effects.⁵⁵

Professor William D. Araiza’s article addresses the Roberts Court’s interpretive approach in First Amendment cases.⁵⁶ Professor Araiza engages the “familiar debate over the relative desirability of rigid rules and contextualized, fact-specific analysis in constitutional cases”⁵⁷ by examining the analytical approach in three First Amendment cases from the Roberts Court that each addressed difficult questions regarding government regulation of potentially harmful speech. Two of the three cases—*United States v. Stevens*⁵⁸ and *Citizens United v. Federal Election Commission*⁵⁹—applied what Professor Araiza describes as strict doctrinal rules in invalidating two federal statutes under the First Amendment’s Free Speech Clause.⁶⁰ In the third case, *Holder v. Humanitarian Law Project*,⁶¹ Professor Araiza argues that the doctrinal principles employed by the Court in the other two cases “gave way to the Court’s perception of the practical realities of the situation” as the Court deferred to the judgments of Congress and the Executive Branch in upholding the statute at issue.⁶²

52. *Id.* at 817–818.

53. *Id.* at 818–819.

54. *Id.* at 819.

55. *Id.* at 820.

56. William D. Araiza, *Citizens United, Stevens, and Humanitarian Law Project: First Amendment Rules and Standards in Three Acts*, 40 *Stetson L. Rev.* 821 (2011).

57. *Id.*

58. 130 S. Ct. 1577 (2010).

59. 130 S. Ct. 876.

60. Araiza, *supra* n. 56, at 821, 824–826, 828–830.

61. 130 S. Ct. 2705 (2010).

62. Araiza, *supra* n. 56, at 831, 833.

Professor Araiza offers these three examples to highlight the normative debate surrounding the context-rich approach to the First Amendment championed by Justice Stevens, as compared with the stringent approaches advocated by the majorities in *Stevens* and *Citizens United*.⁶³ He concludes that the variability of the contextual approach is problematic because it “cabin[s] judicial discretion only at a high level of generality.”⁶⁴ On the other hand, a more rigid approach could lead not only to a lack of transparency in judicial reasoning—as a court may feel compelled to claim it is applying strict standards while in fact seeking a more nuanced resolution in especially difficult cases—but also to “limits . . . on government speech regulation that non-dogmatic (but still careful) analysis would uphold.”⁶⁵

Finally, like Professor Araiza, Professor Russell L. Weaver also considers the Roberts Court’s highly controversial decision in *Citizens United*.⁶⁶ More specifically, Professor Weaver challenges the popular critical perception that the Court’s decision was motivated by “pro-business” political concerns.⁶⁷ He first examines the arc of Supreme Court campaign-finance jurisprudence and notes that “many of the Court’s pre-Roberts [campaign-finance] decisions were issued by a badly divided Court.”⁶⁸ In light of these divisions, Professor Weaver suggests that it was longstanding differences over free-speech doctrine and principles—rather than economic policy preferences—that motivated the dissenters in those earlier contentious decisions to reconsider them when the ideological balance of the Court shifted during Chief Justice Roberts’ tenure.⁶⁹ In short, he argues that the Roberts Court’s decision in *Citizens United* “is more easily explained as a fundamental disagreement regarding the government’s right to control political speech and its ability to equalize resources in political campaigns than as a Court pursuing a pro-business agenda.”⁷⁰

63. *Id.* at 833–834.

64. *Id.* at 834.

65. *Id.* at 837.

66. 130 S. Ct. 876; Russell L. Weaver, *The Roberts Court and Campaign Finance: “Umpire” or “Pro-Business Activism?”* 40 *Stetson L. Rev.* 851–856 (2011).

67. Weaver, *supra* n. 66, at 856–859.

68. *Id.* at 843.

69. *Id.* at 843, 858–859.

70. *Id.* at 859.

Each of these insightful submissions takes advantage of the Roberts Court's fifth anniversary to examine an important feature of the Court's activity to date. Whether for its analysis of the Court's jurisprudential philosophy, its assessment of the Chief Justice's performance in his new role, or its discussion of the Court's doctrinal direction under its new leader, the collection of materials contained in this Volume of the *Stetson Law Review* is sure to make a lasting contribution to our understanding of the Roberts Court and of the Supreme Court (and constitutional law) in general.