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SYMPOSIUM: SUPREME COURT REVIEW

SYMPOSIUM FOREWORD

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There is a sense in which the 2006 Term of the Supreme Court truly marked the start of the Roberts Court. Although the 2005 Supreme Court Term opened with John Roberts newly at the helm, it is not entirely unwarranted to affix that term with an asterisk. Roberts himself was not confirmed as Chief Justice until a bare four days before the start of term. Furthermore, the Court's composition was unsettled for much of the year, as Samuel Alito was not confirmed as Associate Justice until the last day of January. Perhaps for these reasons, the 2006 Term seemed to attract even greater scrutiny than usual, and commentators were quick to draw lessons. Two predominated.

The first lesson focused on the pivotal role of Justice Anthony Kennedy. To start, Kennedy was in the majority more often than any other justice, joining the majority opinion in 88 percent of the non-unanimous cases and agreeing with the disposition in 96 percent of those cases.[1] More strikingly, the 2006 Term saw a whopping 25 5-4 decisions, and Kennedy was in the majority in every single one. More and more commentators, it seemed, took to dubbing this Supreme Court "the Kennedy Court."

A second supposed lesson concerned the Court's unwavering conservatism. Thanks in large part to Kennedy's rightward tilt, conservatives emerged victorious on virtually all[2] of the major cases in the 2006 Term—including on abortion,[3] benign racial classifications,[4] employment discrimination,[5] student free speech,[6] religious liberty,[7] and

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1. At the margins, there is some room for argument regarding how to count a case and how to assess whether an individual justice has agreed or disagreed with the majority's disposition. I'm taking all my numbers from those compiled in the annual Supreme Court issue of the *Harvard Law Review*. *See The Supreme Court, 2006 Term—The Statistics*, 121 Harv. L. Rev. 436 (2007); *The Supreme Court, 2007 Term—The Statistics*, 122 Harv. L. Rev. 516 (2008).

2. The most notable liberal victory came in *Mass. v. EPA*, 549 U.S. 497 (2007) (holding that states had standing to sue the EPA to compel it to consider whether to regulate tailpipe emissions to help curb global warming).

3. *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding a federal statute banning "partial-birth" abortions).

4. *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (invalidating state school assignment plans that gave consideration to student race to produce more diverse student bodies).

campaign finance reform.[8] Pundits responded by declaring this Court the most conservative in generations.

What a difference a year makes.

While nobody would deny Kennedy's continued centrality as swing justice, he did not wield anywhere near the power over the 2007 Term that he appeared to exercise the previous term—at least as measured by conventional metrics. This is most apparent from the 5-4 decisions, which dropped by more than half from the previous year, to 12. Of those twelve 5-4 decisions, Kennedy found himself in the majority only eight times, the same number as did Justice Thomas and only one more than the Chief Justice and Justices Stevens and Scalia. Overall, Chief Justice Roberts regained the position he had held during his first term[9] as the justice most often voting with the majority, agreeing with the majority's disposition in non-unanimous cases nearly 86 percent of the time, while Kennedy dropped to a tie for third at 80 percent.

Additionally, and perhaps superficially in tension with the first observation, the Court's rightward bias was somewhat less pronounced. Of the highest profile of the constitutional decisions, conservatives won the gun control decision, *District of Columbia v. Heller*,[10] and the treaty case, *Medellin v. Texas*.[11] The Indiana voter ID case, *Crawford v. Marion County Election Board*,[12] must also be counted a conservative victory, though in leaving the door ajar for future as-applied challenges to the law, Justice Stevens's majority opinion rendered the victory more qualified than a concurrence by Justices Scalia, Thomas, and Alito would have wanted. However, liberals prevailed in the principal decision on the detention of enemy combatants, *Boumediene v. Bush*,[13] as well as on the highest profile of the death penalty cases, *Kennedy v. Louisiana*.[14] Moreover, the Term saw more decisions with unusual alignments, making the image of a one-dimensional left-right or liberal-conservative continuum problematic.

In making these brief observations, I do not intend to contend that the 2007 Term teaches lessons rather different than did the previous term. To the contrary, I mean only to sow some seeds of skepticism about the enterprise of trying to distil particularly useful insights or generalizations from single terms of the Court. This is assuredly not to say that it can't be done, but only to suggest that the felt compulsion to do so might provoke

5. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (interpreting Title VII to impose extraordinarily demanding statute of limitations on suit claiming pay discrimination).

6. *Morse v. Frederick*, 551 U.S. 393 (2007) (rejecting First Amendment challenge to actions of a school principal punishing students for speech off school property).

7. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007) (denying taxpayer standing to challenge, as violative of the Establishment Clause, expenditures by the Executive Branch).

8. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (striking down federal ban on use of corporate funds for political advocacy close to an election as applied to ads that do not explicitly endorse or oppose a candidate).

9. This is putting aside Justice O'Connor who joined the opinion of the Court in all eight of the non-unanimous cases in which she participated during the 2005 Term.

10. 128 S. Ct. 2783 (2008).

11. 128 S. Ct. 1346 (2008).

12. 128 S. Ct. 1610 (2008).

13. 128 S. Ct. 2229 (2008).

14. 128 S. Ct. 2641 (2008).

as many misses as hits, and to explain why I will resist the temptation. Writing two years ago in these pages, Mark Tushnet observed that the "substantive contributions" made by the individual articles in that issue "will matter more than my speculations in this Foreword."[15] Given the far more limited expertise of this year's Guest Editor and the unusual excellence of the five substantive articles, Professor Tushnet's observation is triply apt this year. So let us turn to them.

Richard Briffault's essay, Davis v. FEC*: The Roberts Court's Continuing Attack on Campaign Finance Reform*,[16] analyzes one of the term's most important election law decisions. *Davis v. FEC*[17] concerned a challenged to the so-called Millionaires' Amendment, a provision of the federal Bipartisan Campaign Reform Act of 2002 that sought to equalize electoral opportunity for congressional candidates, regardless of wealth, by relieving candidates of certain otherwise applicable campaign financing restrictions when running against opponents who planned to spend large amounts of personal funds. A 5-4 conservative majority invalidated the provision on First Amendment grounds.

As Professor Briffault explains, the direct consequences of the decision were relatively insignificant: The provision was implicated in only a small handful of races during the two cycles it had been in force, and appeared to have little impact in the few cases when candidates invoked its benefits. But, he argues, features of Justice Alito's majority opinion might augur ill for a variety of far more consequential campaign finance reform measures. First, the decision extended a trend of Roberts Court decisions hostile to campaign finance reform. Most significantly, though, the decision was the first in which the Court had declared that a purpose to level the electoral playing field is not even a legitimate governmental interest, let alone a substantial one. Overall, Briffault paints the decision as markedly activist, exhibiting "no trace of judicial modesty."[18] And it threatens a host of state public funding laws that ease spending limits on candidates running against high-spending wealthy opponents.

If *Davis* was among the more highly publicized decisions of the term, Rick Hills's contribution, *The Problem of Canonical Ambiguity in* Ali v. Federal Bureau of Prisons,[19] focuses on one of the lower profile cases. *Ali v. Federal Bureau of Prisons*[20] involved the application of an exception to the waiver of immunity under the Federal Tort Claims Act for claims arising from the detention of property by "any officer of customs or excise or any other law enforcement officer." The fairly narrow question raised was whether the exception covered prison guards who had lost Ali's prayer rug and Quran. Justice Thomas, writing for a five-member majority, concluded that it did, emphasizing the ordinary meaning of "any . . . law enforcement officer" and refusing to apply the *ejusdem generis* canon. Invoking that canon in dissent, Justice Kennedy concluded that

15. Mark Tushnet, *The First (and Last?) Term of the Roberts Court*, 42 Tulsa L. Rev. 495, 502 (2007).

16. Richard Briffault, Davis v. FEC: *The Roberts Court's Continuing Attack on Campaign Finance Reform*, 44 Tulsa L. Rev. 475 (2009).

17. 128 S. Ct. 2759 (2008).

18. Briffault, *supra* n. 16, at 497.

19. Roderick M. Hills, Jr., *The Problem of Canonical Ambiguity in* Ali v. Federal Bureau of Prisons, 44 Tulsa L. Rev. 501 (2009).

20. 128 S. Ct. 831 (2008).

it did not. According to Kennedy, "any other law enforcement officer" referred only to law enforcement officers who were not officers of customs or excise, but who were engaged in similar functions, like DEA and Coast Guard officers. Justice Breyer also dissented. Unlike Kennedy, however, he eschewed reliance on *ejusdem generis*, inquiring directly into extrinsic evidence of the statute's purpose.

In Professor Hills's view, the debate between Thomas and Kennedy reveals a difficulty with textualism that Breyer's quick embrace of extrinsic sources obscures. Closely analyzing *Ali*, along with a decision from the 2008 Term, *United States v. Hayes*,[21] that implicates the "last antecedent rule," Hills argues that "we do not know what it would mean to apply any canon mechanically without regard to a particular statute's purposes."[22] But this need not direct us to abandon the canons and proceed straightaway to a consideration of statutory purposes. Rather, "[b]y bringing ambiguities to the surface, canons create an opening for even textualist judges to consider extra-textual evidence of statutory purpose (including the purpose of enacting a legislative compromise) without licensing a wholesale abandonment of text for free-wheeling judicial policymaking."[23]

The third article, by Susan Klein and Sandra Guerra Thompson, addresses the sentencing revolution that the Supreme Court commenced during the 1999 Term with *Apprendi v. New Jersey*,[24] and had waged through the decade with its explosive decisions in *Blakely v. Washington*[25] and *United States v. Booker*.[26] *Apprendi* had held that a defendant was entitled to have any sentencing factor that increases the statutory maximum punishment tried before a jury and proven beyond a reasonable doubt. *Blakely* went further to hold that the Sixth Amendment right recognized in *Apprendi* extended to those facts that would lead to a greater sentence under sentencing guidelines even if not beyond the statutory range. *Booker* held that sentencing guidelines that referenced facts not found by a jury would comply with the Sixth Amendment only if wholly advisory. One question remaining was what "advisory" would mean for purposes of appellate review. The Court announced during the 2006 Term that sentences below the federal sentencing guidelines could not be presumed unreasonable, but left open the question of precisely what standard of review would apply.

The Court answered that critical question in a pair of 7-2 decisions announced during the 2007 Term—*Gall v. United States*,[27] and *Kimbrough v. United States*.[28] In *Gall*, the Court held that appellate courts must review sentences that vary from the federal sentencing guidelines, whether upward or downward, under the deferential "abuse of discretion" standard. *Kimbrough* involved a sentence well below the guidelines range for possession of crack cocaine. Expanding on *Gall*, the Court held in *Kimbrough* that this deferential appellate review was required even when the trial judge

21. 129 S. Ct. 1079 (2009).
22. Hills, *supra* n. 19, at 501.
23. *Id.* at 516.
24. 530 U.S. 466 (2000).
25. 542 U.S. 296 (2004).
26. 543 U.S. 220 (2005).
27. 128 S. Ct. 586 (2007).
28. 128 S. Ct. 558 (2007).

imposed a more lenient sentence because of a straightforward policy disagreement with the guidelines, rather than because of defendant-specific mitigating considerations. In a summary reversal handed down during the 2008 Term, the Court reiterated that *Kimbrough* meant what it said.[29] Professors Klein and Thompson draw on these decisions in *DOJ's Attack on Federal Judicial "Leniency," the Supreme Court's Response, and the Future of Criminal Sentencing*,[30] an expansive history of the *Blakely/Booker* revolution.

As with most histories, the devil is in the details, making short summary hazardous. The crux of their story, however, explains those momentous rulings as a response to overreaching efforts by the Ashcroft Justice Department to virtually eliminate sentencing discretion by federal district judges and charging discretion by Assistant United States Attorneys in order to eradicate traces of sentencing leniency. Klein and Thompson conclude, though, that while the Supreme Court has effectively restored judicial and prosecutorial discretion, DOJ's fears of a wave of lenient sentencing have not been realized. Without anticipating that *Gall* and *Kimbrough* are close to the last judicial word on the subject, they do envision a renewed equilibrium in the power struggle over federal criminal sentencing among prosecutors, Congress, and the judiciary.

Recent terms of the Supreme Court have been good to business interests, in part because of the Court's tendency to rule in favor of federal preemption, thus freeing business from a range of state tort duties and consumer protection regulations. In this respect, the 2007 Term ran true to form, the Court resolving four cases in favor of preemption—all by large margins—and one against. Representative of the cases was *Riegel v. Medtronic, Inc.*,[31] in which an 8-1 majority held premarket clearance of a medical device by the FDA to preempt state legal requirements, including those created by common law tort duties. In so doing, however, the Court did not clearly resolve the substantial question, of administrative and constitutional law, of whether courts owed deference to agency determinations regarding the preemptive scope of the statutes they administer.

In *Avoiding Deference Questions*,[32] Professor Garrick Pursley explains that *Riegel* can be read, not simply to *defer* resolving this question, but to favor a rule directing courts to *avoid* answering it. More importantly, he canvasses the various rationales for constitutional avoidance rules to argue that the Court should adopt precisely such a rule to best vindicate a constitutional norm allocating to the federal judiciary the responsibility to police the borders between federal and state power and between legislative and executive authority. Pursley also explains how the innovative rule he proposes would work in practice, with respect to both *Chevron* deference and *Skidmore* deference.

In the final contribution to this symposium, *The Problem of Jurisdictional Non-*

29. *Spears v. U.S.*,129 S. Ct. 840 (2009) (per curiam).

30. Susan R. Klein & Sandra Guerra Thompson, *DOJ's Attack on Federal Judicial "Leniency," the Supreme Court's Response, and the Future of Criminal Sentencing*, 44 Tulsa L. Rev. 519 (2009).

31. 128 S. Ct. 999 (2008).

32. Garrick B. Pursley, *Avoiding Deference Questions*, 44 Tulsa L. Rev. 557 (2009).

Precedent,[33] Stephen Vladeck, a second-time contributor to this journal's annual Supreme Court issue,[34] examines one of the highest profile decisions of the term—*Boumediene*. *Boumediene* raised the question of whether non-citizens held at Guantanamo Bay as "enemy combatants" had a constitutional right to challenge their detention in habeas corpus. Relying on a World War II-era precedent, *Johnson v. Eisentrager*,[35] which appeared to hold that non-citizens held outside the territorial United States had no constitutional right to the writ, a panel of the D.C. Circuit ruled against the prisoners. The Court reversed in a 5-4 decision authored by Justice Kennedy that also held unconstitutional a jurisdiction-stripping provision of the Military Commissions Act. In an impassioned dissent, Justice Scalia charged the majority with flouting *Eisentrager*'s clear and unequivocal holding—a charge that many academic commentators endorsed.

Not so, argues Professor Vladeck. According to Vladeck, this reading of *Eisentrager* overlooks the extent to which the jurisdictional holding of that case was influenced by the Court's view that the substantive claims advanced by Eisentrager and his fellow detainees lacked merit. Now, a 1998 Supreme Court decision, *Steel Co. v. Citizens for a Better Environment*,[36] had cautioned courts to more carefully distinguish jurisdictional rulings from merits rulings and had declared that any discussion of the merits in a decision that announced a lack of subject matter jurisdiction was without precedential effect. But, says Vladeck, *Steel Co.* itself, its progeny, and the academic commentary, have not yet paid adequate attention to the impact of that decision on pre-*Steel Co.* decisions that had allowed views about the merits to infect putatively jurisdictional holdings. And, he contends further, a close reading of the opinions in *Eisentrager* reveals that it was just such a decision.

Vladeck supports his argument about *Eisentrager* and *Boumediene* by considering a less noted enemy combatant case from the 2007 Term, *Munaf v. Geren*.[37] In *Munaf*, a unanimous Court upheld the constitutional right of two American citizens held by the Multinational Force—Iraq to file habeas petitions, easily distinguishing another World War II decision, *Hirota v. MacArthur*,[38] that had been read by the D.C. Circuit to deny federal jurisdiction over habeas petitions filed by citizens held abroad under similar circumstances. In upholding the detainees' right to habeas (though proceeding to rule against them on the merits), the *Munaf* Court found *Hirota* distinguishable on its facts. Vladeck argues that *Eisentrager* was more like than *Hirota* than either the Court or commentators have appreciated, and that both "are relics of the pre-*Steel Co.* era, when 'jurisdictional' rules were far more likely to be intensely fact-bound than they are today."[39] Such earlier cases, he says, are close to "non-precedent," decisions that should

33. Stephen I. Vladeck, *The Problem of Jurisdictional Non-Precedent*, 44 Tulsa L. Rev. 587 (2009).

34. *See* Stephen I. Vladeck, *The Increasingly "Unflagging Obligation": Federal Jurisdiction after* Saudi Basic *and Anna Nicole*, 42 Tulsa L. Rev. 553 (2007).

35. 339 U.S. 763 (1950).

36. 523 U.S. 83 (1998).

37. 128 S. Ct. 2207 (2008).

38. 338 U.S. 197 (1948) (per curiam).

39. Vladeck, *supra* n. 33, at 590.

be distinguished "on anything short of entirely parallel facts."[40] While the narrow aim of his article is to defend Kennedy's opinion in *Boumediene* from one line of attack—that it was unfaithful to precedent—the broader ambition is to focus attention on the overlooked problem of pre-*Steel Co.* jurisdictional non-precedents.

Every Supreme Court term is interesting. But to a great extent, that is because the decisions themselves are interesting, even taken individually. The following articles well illustrate how richly one handful of cases from the 2007 Term repay careful attention.

40. *Id.* at 591.