

AN OVERVIEW OF THE OCTOBER 2007 SUPREME COURT TERM

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I. FOUR THEMES FROM THE OCTOBER 2006 SUPREME COURT TERM

The term which ended on June 26, 2008, was the third year of the John Roberts Court. I want to offer a few overall thoughts about the Court; where it is at and where it is going.

A. Theme One: A Smaller Docket

Consider the numbers concerning the October Term of 2007. The Supreme Court decided sixty-seven cases last year, one less than the sixty-eight cases we talked about last year at this time.¹ What is significant about these numbers is that for much of the twentieth century the Supreme Court was deciding over 200 cases a year.² As recently as the 1980s, the Court was deciding about 160 cases per year.³ Now it is down to sixty-seven. I cannot think of any other

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¹ Erwin Chemerinsky, *Nineteenth Annual Supreme Court Review: An Overview of the October 2006 Supreme Court Term*, 23 TOURO L. REV. 731, 731 (2008).

² Erwin Chemerinsky, *Eighteenth Annual Supreme Court Review: An Overview of the October 2005 Supreme Court Term*, 22 TOURO L. REV. 873, 874 (2007).

³ 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 maxi-

court in the country that has had that kind of docket reduction. This reduction has enormously important legal implications, paramount of which is the fact that many important legal issues will have to wait much longer before being resolved, and more conflicts will have to wait a longer time before being settled.

One implication of the smaller docket—less widely noted—is that as the number of cases goes down, the length of the opinions has gone up. There is a perfect inverse correlation. As the number of cases decided per year decreases, the average length of the opinion, which is measured by the words per opinion, has increased. Legal scholars can argue over what is the cause and what is the effect of this phenomenon. For example, is the Court taking fewer cases because they want to write longer opinions?

My surmise is that the Court is writing longer opinions because there are fewer cases. This year there were a number of decisions that produced split opinions that were over 150 pages long.⁴ I have a constitutional law casebook that is used in law schools around the country, for which I have to do an annual supplement each July. There is no way to edit a 150-page opinion down to an assignment manageable for law students without making a hash of it. I have a new campaign that I will ask you to join me in: Word and page limits should be imposed on Supreme Court opinions.

Other numbers that you should know; there were fourteen

mum 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))).

⁴ See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008); *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

five-to-four or five-to-three decisions this year.⁵ That is down from the twenty-four five-to-four decisions from the term before. I do not think this reduction is because the Court found new unanimity for consensus this year; I think there were fewer cases that were ideologically defined this year compared to the year before.

The two Justices who were most frequently in agreement this year were Chief Justice John Roberts and Associate Justice Samuel Alito; 80.6 percent of the time they voted together.⁶ The next pair that was most frequent in agreement were Justices Souter and Ginsburg, followed thereafter by Chief Justice Roberts and Justice Kennedy.⁷ I think the pairings give a clear sense of the ideology of the Justices.

B. Theme Two: The Anthony Kennedy Court

My second theme is that when it matters most, it is still the Anthony Kennedy Court. I know we call it the Roberts Court out of tradition and deference to the Chief, but in all actuality, for the cases that receive the most media attention—those that by any measure matter the most—the more accurate description is the Anthony Kennedy Court. A year ago when there were twenty-four, five-to-four decisions, Anthony Kennedy was the majority in literally every one of them.⁸ I cannot identify any other term where there existed a significant number of five-to-four decisions where one Justice was in the

⁵ Linda Greenhouse, *On Court That Defied Labeling, Kennedy Made the Boldest Mark*, N.Y. TIMES, June 29, 2008 at A1.

⁶ U.S. Supreme Court, Summary of the Term, <http://hosted.ap.org/specials/interactives/wdc/scotus0708/> (last visited Oct. 29, 2008).

⁷ *Id.*

⁸ Chemerinsky, *supra* note 1, at 733.

majority almost every time. This year, in the split decisions, Justice Kennedy was in the majority more than any other Justice except Chief Justice Roberts. He was in the majority seventy-nine percent of the time.⁹ He was not in the majority in every five-to-four or five-to-three decision, but still more than any other Associate Justice.

I am terrible at making predictions; however, when there is a case before the Roberts Court that is likely defined by ideology, it is easy to make the bold prediction that it is going to be a five-to-four decision and Justice Kennedy is going to be in the majority. If nothing else, this has important implications for the lawyers who appear before the Justices and write briefs to them. I wrote a brief in a Second Amendment case, and I can tell you 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. My brief was not unique among those in this case, and this case was not unique among those on the docket. Of course, the predictions came true.

The Second Amendment case was a five-to-four decision with Justice Kennedy in the majority, finding the Second Amendment protects the rights of individuals to have guns other than just for militia service.¹⁰ Justice Scalia wrote for the Court, and was joined by Chief Justice Roberts, as well as Justices Thomas, Alito, and Kennedy.¹¹

The Court decided another case, which I regard as the most important for this term. *Boumediene v. Bush* invalidated a provision

⁹ Greenhouse, *supra* note 5, at 1. See also Summary of the Term, *supra* note 6.

¹⁰ *Heller*, 128 S. Ct. at 2804.

¹¹ *Id.* at 2787.

of the Military Commission Act of 2006, which allowed for the restriction of the right of habeas corpus with respect to non-citizen combatants held within Guantanamo.¹² There was a five-to-four decision to declare this part of the law unconstitutional.¹³ Justice Kennedy wrote for the majority, which included Justices Souter, Stevens, Ginsburg, and Breyer.¹⁴

When the Court considered whether the death penalty for child rape is cruel and unusual punishment, in another five-to-four decision, Justice Kennedy again wrote for the majority, joined by Justices Souter, Ginsburg, and Breyer, saying the death penalty for child rape is cruel and unusual punishment;¹⁵ the death penalty can be used only for the intentional taking of life from another.¹⁶ My point is that when it matters the most, it is the Anthony Kennedy Court.

C. Theme Three: A Year for Business

My third observation about the Court is that it is the most pro-business Supreme Court there has been since the mid-1930s.¹⁷ John Roberts is much more interested in business litigation than were his recent predecessors on the Court: William Rehnquist, Earl Warren, and Warren Burger. Roberts was, for much of his career, except when in government service, a business litigator before the United States Supreme Court, as such, his attitude and the attitudes of the

¹² *Boumediene*, 128 S. Ct. at 2240.

¹³ *Id.* at 2277.

¹⁴ *Id.* at 2240.

¹⁵ *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650-51 (2008).

¹⁶ *Id.* at 2660.

¹⁷ Erwin Chemerinsky, *When it Matters Most, it is Still the Kennedy Court*, 11 GREEN BAG 2D 427, 438 (2008).

majority of the Court are pro-business.¹⁸

There were four preemption cases this year involving business challenges to state and local regulations. All four came down on the side of finding preemption.¹⁹ The majority of the cases decided in the three years of the Roberts Court have come down on the side of finding preemption when involving a business challenge to state and local regulation.²⁰

Two quick examples; one particularly important case is *Riegel v. Medtronic*.²¹ The issue is if the Food and Drug Administration approves a medical device, does that preempt the state for the liability?²²

The federal Medical Device Amendments say if the FDA approves a medical device, states cannot impose “requirements” inconsistent with federal law.²³ Is tort liability preempted by the preclusion of additional requirements? The Supreme Court eight-to-one said yes. Justice Scalia wrote for the Court; only Justice Ginsburg dissented.²⁴ Justice Scalia said liability, like regulation, can impose additional requirements; therefore, federal law preempts state tort liability just as it preempts direct state regulation.²⁵ Justice Ginsburg, in her sole dissent, said there is supposed to be a presumption against

¹⁸ *Id.*

¹⁹ See *Chamber of Commerce of the U.S. v. Brown*, 128 S. Ct. 2408, 2412 (2008); *Preston v. Ferrer*, 128 S. Ct. 978, 981 (2008); *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1011 (2008); *Rowe v. N. H. Motor Transp. Ass’n*, 128 S. Ct. 989, 995 (2008).

²⁰ See, e.g., Ernest A. Young, Symposium, *Ordering State-Federal Relations Through Federal Preemption Doctrine: Executive Preemption*, 102 NW. U. L. REV. 869, 875 (2008).

²¹ 128 S. Ct. 999 (2008).

²² *Id.* at 1002.

²³ See generally 21 U.S.C. § 360(c) (2002).

²⁴ See *Riegel*, 128 S. Ct. at 1013 (Ginsburg, J., dissenting).

²⁵ *Id.* at 1007-11 (majority opinion).

federal preemption.²⁶ She said where Congress wants to preempt liability, it knows how to do so. There are many federal laws that preempt state liability. She said, here, Congress did not do that, so there should be no preemption.²⁷

Another example from last term is a case called *Chamber of Commerce v. Brown*.²⁸ California has a law that says if an entity receives more than \$10,000 in state money, it cannot use those state funds to engage in antiunion organizing activity.²⁹ The business can still use its own money to engage in speech discouraging union organizing, it just cannot use the state money for this.³⁰

Unlike *Riegel v. Medtronic*, there is no express preemption provision in federal law.³¹ Nonetheless, the Supreme Court seven-to-two found preemption.³² Justice Stevens wrote for the Court; Justice Breyer dissented and Justice Ginsburg joined.³³ Justice Stevens' majority opinion said that the whole scheme of federal labor law showed

²⁶ *Id.* at 1013 (Ginsburg, J., dissenting). "Preemption analysis starts with the assumption that 'historic police powers of the States [a]re not to be superseded . . . unless that was the clear and manifest purpose of Congress.'" *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

²⁷ See generally *id.* at 1013-20.

²⁸ 128 S. Ct. 2408 (2008).

²⁹ See CAL. GOV'T CODE §§ 16645-16649 (West Supp. 2008).

³⁰ *Brown*, 128 S. Ct. at 2411.

"To ensure compliance with the grant and program restrictions at issue in this case, [the statute] establishes a formidable enforcement scheme. Covered employers must certify that no state funds will be used for prohibited expenditures; the employer must also maintain and provide upon request "records sufficient to show that no state funds were used for those expenditures."

Id. (quoting CAL. GOV'T CODE §§ 16645.2(c), 16645.7(b)-(c)).

³¹ *Id.* at 2412 ("the [National Labor Relations Act] itself contains no express pre-emption provision").

³² *Id.* (holding "the [California statutes] are pre-empted under *Machinists [v. Wisconsin Employment Relations Comm'n]*, 427 U.S. 132 (1976)], because they regulate within 'a zone protected and reserved for market freedom'").

³³ *Id.* at 2410.

that the Congress meant to occupy the field with regard to regulating employer and employee speech.³⁴ Justice Stevens said Congress indicated a desire that employers be free to speak against union organizers just like unions can speak for it.³⁵

Justice Breyer in his dissent said this case is just the state saying that it does not want state money to be used in a certain way.³⁶ He said under federalism and state rights, a state can do that. Businesses are still free to use their own money to engage in anti-unionizing speech and activities.³⁷

Why is this? Why is the Roberts Court finding preemption in every case where this issue has been raised? One might think that a conservative Court would want to narrow the reach of the federal preemption. After all, one way to empower state and local governments is to limit the situations warranting federal preemption. I think that the conservatives on the Roberts Court are, above all, probusiness.³⁸ I think the more liberal Justices on the Roberts Court tend to favor expansive federal power.³⁹

There were also punitive damages cases decided this term,

³⁴ *Brown*, 128 S. Ct. at 2412 (reasoning that a second type of pre-emption exists “to regulate conduct that Congress intended be unregulated because left [sic] to be controlled by the free play of economic forces” (internal quotations omitted)).

³⁵ *Id.* at 2413-14 (“[T]he amendment to § 7 calls attention to the right of employees to refuse to join unions, which implies an underlying right to receive information opposing unionization.”).

³⁶ *Id.* at 2419-20 (Breyer, J., dissenting) (“California’s statute . . . does not seek to compel labor-related activity. Nor does it seek to forbid labor-related activity.”).

³⁷ *Id.* at 2420 (“It permits all employers who receive state funds to ‘assist, promote, or deter union organizing.’ It simply says to those employers, do not do so on our dime.”).

³⁸ Justices Alito, Scalia, Thomas, and Chief Justice Roberts are traditionally known as the conservative justices.

³⁹ Justices Breyer, Ginsburg, Souter, and Stevens are traditionally known as the liberal justices.

such as *Exxon Shipping Co. v. Baker*.⁴⁰ For the second time in the last two years, the Court found significant limits on punitive damages. The Court held that under the common law of maritime compensatory and punitive damages had to be in a one-to-one relationship. This year's case was the common law case, not a constitutional ruling. But Justice Souter's reasoning for the majority was about juries having too much discretion in awarding punitive damages, and that punitive damage awards are too unpredictable.⁴¹ His solution, that there should be a one-to-one ratio in common law and in common law maritime law between punitive damages and compensatory damages, has far-reaching implications if it is followed in other cases.⁴²

The most important corporate case to be decided in the Supreme Court in many years was *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*,⁴³ wherein the Supreme Court limited the ability of investors to sue, in this case, vendors who were part of a fraudulent scheme.⁴⁴

The only exceptions this year to the Court being pro-business, were two important employment discrimination cases where the employees prevailed. In the major employment discrimination case from last term, *Ledbetter v. Goodyear Tire and Rubber Co.*, the Court came down on the side of the employer.⁴⁵ The Supreme Court im-

⁴⁰ 128 S. Ct. 2605 (2008).

⁴¹ *Id.* at 2625-30.

⁴² *Id.* at 2633.

⁴³ 128 S. Ct. 761 (2008).

⁴⁴ *Id.* at 766.

⁴⁵ 127 S. Ct. 2162, 2165 (2008).

posed a strict statute of limitations to pay discrimination claims under Title VII.⁴⁶

This year, *CBOCS West, Inc. v. Humphries*⁴⁷ and *Gomez-Perez v. Potter*⁴⁸ were the two most important employment civil rights cases. Each concluded that, unless Congress specifically finds otherwise, statutes prohibiting discrimination include a cause of action for those who complain of retaliation for bringing discrimination claims.⁴⁹ These cases represent the most important loss for business of the term.

D. Theme Four: Looking Ahead Towards the Future of the Court

Fourth and finally, it is worth looking ahead. What is the November 2008 election likely to mean for the future of the Supreme Court?⁵⁰ The bottom line, I think, is that the next election is going to determine whether the Supreme Court becomes politically more conservative or stays ideologically where it is now.⁵¹ It is very unlikely that the coming election will cause the Supreme Court to become more liberal in the short term.

There is an easy basis for this prediction. Think about where the vacancies are likely to come on the Court between January 20,

⁴⁶ *Id.* at 2177; see also Derrick A. Bell, Jr., *Ledbetter v. Goodyear Tire & Rubber Co.*, 23 TOURO L. REV. 843, 846 (2008).

⁴⁷ 128 S. Ct. 1951 (2008).

⁴⁸ 128 S. Ct. 1931 (2008).

⁴⁹ *CBOCS*, 128 S. Ct. at 1954-60; *Gomez-Perez*, 128 S. Ct. at 1935.

⁵⁰ This talk was given in October 2008 before the presidential election.

⁵¹ See generally Bill Mears, *Election Could Decide the Future of the Federal Courts*, CNN, Oct. 6, 2008, http://www.cnn.com/2008/POLITICS/10/03/supreme.court.politics/index.html?eref=rss_crime.

2009, and January 20, 2013. John Paul Stevens turned eighty-eight years old on April 21st of this year. He is in good health, but it seems unlikely he will still be on the Court at age ninety-three in 2013. Ruth Bader Ginsburg will soon turn seventy-five. She, too, is in good health, but perhaps because she is frail in appearance, there are rumors that she might step down. There is a widely-circulated rumor that David Souter wants to retire and go home to New Hampshire. Now think about the other side of the ideological aisle. John Roberts turned fifty-four in January of this year. If he remains on the Court until he is eighty-eight, the current age of John Paul Stevens, he will be Chief Justice until the year 2042. Clarence Thomas is sixty, and Samuel Alito, fifty-eight, are also unlikely to step down anytime soon. Antonin Scalia and Anthony Kennedy both turned seventy-two this year; I think the best predictor of a long life span is being confirmed for a seat on the Supreme Court.

It is not likely that any of these five Justices are going to be leaving the Court in the next five years, or maybe the next ten years. So, if it is Senator McCain replacing Justice Stevens, Justice Ginsburg, and Justice Souter, then the Court is going to become significantly more conservative, and no longer will Anthony Kennedy be the swing justice. If it is Senator Obama replacing Justices Stevens, Ginsburg, or Souter, he is likely to do so with individuals with the same ideology, so the Court is not going to become more liberal over the next five, or maybe the next ten years. I guess the bottom line of the Supreme Court now, and in the foreseeable future is, if you are politically conservative, it is a Court to rejoice over. If you are po-

litically liberal, you should be glad the Court is deciding only about sixty-seven cases a year.