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Glenn Harlan Reynolds
Beauchamp Brogan Distinguished Professor of Law

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Looking Ahead: October Term 2007

*Glenn Harlan Reynolds**

Last year's Supreme Court term was notable in at least one way: It lived up to the prediction, made in this space last year by Professor Peter Rutledge,¹ that Justice Anthony Kennedy would solidify his position as the "swing voter" on the court. Justice Kennedy found himself on the majority side in every single 5-4 decision last term.² Likewise, predictions that Chief Justice Roberts would move the Court were borne out to a substantial degree.³

Nonetheless, changes in the Court tend to occur gradually—Harry Blackmun, after all, initially voted with Warren Burger so often that they were called "the Minnesota Twins," but that was only at first. Cases selected for the coming term may shed more light on where the Court is likely to head in coming years, and provide some sense of the kind of issues that the Court, or at least some of its members, regard as particularly important. This all-too-brief Essay will look at some of the highlights from next year's docket. (Will predictions made here turn out as well as those made by Professor Rutledge? One can hope.) It will also discuss the Supreme Court's diminished caseload, the Court's relationship with the courts of appeal, and the implications of, and possible remedies for, this mismatch in output.

*Beauchamp Brogan Distinguished Professor of Law, The University of Tennessee College of Law. Thanks to Sybil Richards of the University of Tennessee Law Library for the caseload numbers for the Court of Appeals and Supreme Court.

¹Peter B. Rutledge, *Looking Ahead: October Term 2006, 2005–2006 Cato Sup. Ct. Rev.* 361 (2006).

²Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, *New York Times*, July 1, 2007, at A1, available at <http://www.nytimes.com/2007/07/01/washington/01scotus.html>.

³David G. Savage, *High Court Has Entered a New Era*, *Los Angeles Times*, July 1, 2007, at A1, available at <http://www.latimes.com/news/nationworld/washington/la-na-scotus1jul01,1,4832858.story>? ("Working with a 5-4 majority, Roberts prevailed in nearly all the major cases.").

I. Free Speech and the Internet

*Williams v. United States*⁴ deals with the constitutionality of 18 U.S.C. §2252A(a)(3)(B), which prohibits knowingly advertising, promoting, presenting, distributing, or soliciting any material that reflects the belief, or that is intended to cause another to believe, that the material is illegal child pornography. The question before the Supreme Court is whether this prohibition is unconstitutional on grounds of vagueness and overbreadth. A statute is “vague” if its language is so unclear that a person of reasonable intelligence cannot tell what it prohibits, opening the way to arbitrary and discriminatory enforcement. A statute is overbroad if it significantly prohibits conduct that is protected by the First Amendment as well as conduct that is not.

In an online chat room, defendant Williams had shared nonpornographic pictures of children—and adults digitally manipulated to look like children—with an undercover federal agent. Williams promised, but did not deliver, genuinely pornographic pictures of children, and was charged with “pandering” under § 2252A(a)(3)(B). Before the Eleventh Circuit, Williams argued that the statute was overbroad and vague. The Eleventh Circuit found that it was, and struck down the statute:

First, that pandered child pornography need only be “purported” to fall under the prohibition of § 2252A(a)(3)(B) means that promotion or speech is criminalized even when the touted materials are clean or nonexistent . . . In a non-commercial context, any promoter . . . be they a braggart, exaggerator, or outright liar . . . who claims to have illegal child pornography materials is a criminal punishable by up to twenty years in prison, even if what he or she actually has is a video of “Our Gang,” a dirty handkerchief, or an empty pocket.⁵

The government’s justification was that shutting down a market in child pornography requires banning all promotional speech, regardless of whether it actually involves child pornography. The Eleventh Circuit disagreed, holding that “the government may not

⁴444 F.3d 1286 (11th Cir. 2006).

⁵*Id.* at 1298.

suppress lawful speech as the means to suppress unlawful speech.”⁶ It added: “The Government must do its job to determine whether illegal material is behind the pander.”⁷ Since the statute bans “pandering” whether illegal material is present or not, the Eleventh Circuit found it overbroad and, hence, unconstitutional.

Williams’ vagueness challenge also received a friendly reception from the court of appeals. The void-for-vagueness doctrine, the court observed, exists for three reasons:

(1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on arbitrary or discriminatory interpretations by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms. Thus, to pass constitutional muster statutes challenged as vague must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provide explicit standards for those who apply it to avoid arbitrary and discriminatory enforcement.⁸

These concerns are heightened, it said, where a criminal statute is involved, and where First Amendment rights are implicated, given the greater danger of constitutional deprivations due to arbitrary or discriminatory enforcement.⁹ And the court seemed to regard § 2252A(a)(3)(B) as rather obviously vague:

This language is so vague and standardless as to what may not be said that the public is left with no objective measure to which behavior can be conformed. Moreover, the proscription requires a wholly subjective determination by law enforcement personnel of what promotional or solicitous speech “reflects the belief” or is “intended to cause another to believe” that the material is illegally pornographic. Individual officers are thus endowed with incredibly broad

⁶*Id.* at 1304 (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002)).

⁷*Id.*

⁸*Id.* at 1305–06 (citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972)).

⁹*Id.* at 1306.

discretion to define whether a given utterance or writing contravenes the law's mandates.¹⁰

The appellate court imagined numerous examples of harmless speech that might contravene the statute: "good pics of kids in bed," or "little Janie in the bath—hubba, hubba!" as sent, along with innocuous photos, by a grandmother. Such speech is not child pornography and is protected by the First Amendment. It thus found the pandering provision void for vagueness.

The *Williams* case reaches the Supreme Court at a time when there is increasing concern regarding illegal activities using the Internet, and a general move toward increasing regulation of Internet activities.¹¹ On the other hand, the most troubling cases involve real harm to real children, at the hands of stalkers and pedophiles, rather than the somewhat more rarefied harm addressed by the pandering provisions of § 2252A(a)(3)(B).¹² The Court's disposition of the case is likely to depend on whether a majority of justices regard Congress's effort to suppress the market for child pornography as sufficiently important to justify some infringement of speech, and whether those justices also regard the Eleventh Circuit's view of the statute's vagueness and overbreadth as compelling, or as exaggerated and subject to control via case-by-case analysis. Playing into this analysis may be the heightened power of law enforcement in the highly charged area of child pornography cases, where an accusation may be nearly as destructive as a conviction, as a reason for greater judicial strictness in statutory interpretation.

II. Dormant Commerce Clause

Despite calls from some academics, and even some members of the Court,¹³ to lay the Dormant Commerce Clause to rest, it remains

¹⁰*Id.* An interesting question: Since, to avoid vagueness, a statute must be understandable by people of ordinary intelligence, is a determination by judges that the statute cannot be understood capable of being reversible error? Or is it inherently self-validating? Or, alternatively, might we conclude that there are statutes that judges cannot understand, but that are nonetheless clear to people of ordinary intelligence?

¹¹Neil Munro, *Regulating Fantasy*, National Journal, June 30, 2007, at 34.

¹²Alexander Burns, *Your Space*, National Journal, June 30, 2007, at 32 (describing predators' use of the Internet to target underage victims).

¹³See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 611 (1997) (Thomas, J. dissenting).

alive. Existing doctrine forbids states from discriminating against interstate commerce, or from regulating commerce in a way that places an undue burden on interstate commerce. *Kentucky Department of Revenue v. Davis* may provide the next opportunity for the Court to abolish or to reinforce the doctrine.

Davis involves a claim that Kentucky's income tax system, by exempting income from bonds issued by the state of Kentucky or its political subdivisions from tax while taxing income from bonds from other states, discriminated impermissibly against interstate commerce. The Kentucky Court of Appeals held that it did,¹⁴ and the Kentucky Supreme Court denied review.

Noting that "state laws discriminating against interstate commerce on their face are 'virtually *per se* invalid,'"¹⁵ the Kentucky court held that the Kentucky statute was facially discriminatory and hence invalid.

Though the case is in some sense one of first impression—no case specifically addresses the exact same issue—the discriminatory nature of the law makes the outcome seem rather unexceptional.¹⁶ That the Supreme Court granted certiorari, just one year after its decision in *DaimlerChrysler Corp. v. Cuno*,¹⁷ however, suggests that at least some of the justices wish to address the question of state tax incentives on the merits, after dismissing *Cuno* on standing grounds.¹⁸

One potential issue not raised in the opinion below or in the petition for certiorari, but suggested in some prior Supreme Court dissents, is whether the Dormant Commerce Clause result might be reached via the Privileges and Immunities Clause, which prohibits some forms of discrimination against out-of-state citizens. Previous

¹⁴*Davis v. Dep't of Revenue*, 197 S.W.3d 557 (Ky. Ct. App. 2006).

¹⁵*Id.* at 562 (quoting *Fultron Corp. v. Faulkner*, 516 U.S. 325, 331 (1996)).

¹⁶See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997) (finding preferential tax exemption for in-state charities violative of the Dormant Commerce Clause); *New Energy Co. v. Limbach*, 486 U.S. 269 (1988) (striking down ethanol sales credit limited to ethanol from Ohio or from states extending reciprocal tax treatment to Ohio-produced ethanol).

¹⁷126 S. Ct. 1854 (2006).

¹⁸See Brannon P. Denning, *DaimlerChrysler Corp. v. Cuno, State Investment Incentives, and the Future of the Dormant Commerce Clause Doctrine*, 2005–2006 *Cato Sup. Ct. Rev.* 173 (2006) (discussing *Cuno* and Supreme Court Dormant Commerce Clause doctrine).

Supreme Court caselaw has found that the imposition of higher tax rates on nonresidents than on residents violates the Privileges and Immunities Clause,¹⁹ which might well be extendable to the unequal availability of tax exemptions as well. This is certainly not a case in which the lower court can be said to be off the reservation, suggesting that the Supreme Court's willingness to grant certiorari involves a desire to tinker with doctrine, not merely to correct an erroneous interpretation below.

III. Presidential Powers

Can the president determine the steps necessary for states to take in complying with U.S. treaty obligations? And are states bound to honor treaty obligations of the federal government in implementing their own criminal justice systems?

Those are the questions raised in *Ex parte Medellín*,²⁰ in which a Texas court found in the negative. This case may well prove to be among the most important of the term, as it addresses core aspects of the foreign affairs power and of federalism.

Jose Ernesto Medellín was a Mexican national convicted and sentenced to death for the gang rape and murder of two teenage girls in Houston. After his appeals were completed, Medellín filed a petition for habeas corpus claiming a violation of his rights under Article 36 of the Vienna Convention on Consular Relations.²¹

Article 36 of the Vienna Convention provides that foreign nationals accused of a crime shall have free access to consular officials

¹⁹Austin v. New Hampshire, 420 U.S. 656 (1975); see also Gillian E. Metzger, Congress, Article IV and Interstate Relations, 120 Harv. L. Rev. 1468 (2007) ("Congress's dormant commerce clause authority is especially significant to congressional power under the Privileges and Immunities Clause, given the overlap between the activities to which both clauses apply. Although the Privileges and Immunities Clause prohibits only state discrimination that affects nonresidents' fundamental rights, much of nonresidents' economic activity falls into that category for Article IV purposes. Thus, invoking that clause the Court has struck down state laws that tax nonresidents at rates higher than residents, charge nonresidents higher license fees for engaging in commercial activities, and impose residency requirements as a prerequisite for certain forms of employment.") As Prof. Metzger notes, there is considerable overlap between the Privileges and Immunities Clause of Article IV and the Dormant Commerce Clause, and this case may well fall within that area of overlap.

²⁰223 S.W.3d 315, 332 n.105 (Tex. Crim. App. 2006).

²¹Vienna Convention on Consular Relations and Optional Protocol on Disputes, art. 36, Apr. 24, 1963, 21 U.S.T. 77, 100-01, 596 U.N.T.S. 261, 292-93.

from their home nation, that the accused shall be notified of these rights, and that upon request the imprisoning state shall notify the consular officials of the arrest or imprisonment.

After a somewhat complex procedural history, Medellín's case came before the Texas Court of Criminal Appeals. In the interim, however, the International Court of Justice had ruled in the *Avena* case that the Vienna Convention confers individual rights, and that the United States was in violation of the Convention.²² President Bush responded by issuing a memorandum directing state courts to give effect to the *Avena* decision.

The Texas Court of Criminal Appeals was unmoved. Claims under Article 36, it held, are subject to procedural default to the same degree as other claims.²³ In addition—and more importantly—the presidential memorandum represented an unconstitutional usurpation of power on the part of the president:

We hold that the President has exceeded his constitutional authority by intruding into the independent powers of the judiciary. By stating "that the United States will discharge its international obligations under the decision of the International Court of Justice in . . . [*Avena*], by having States courts give effect to the decision . . . [,] the President's determination is effectively analogous to that decision. In *Sanchez-Llamas*, the Supreme Court made clear that its judicial "power includes the duty to 'say what the law is.'" And that power, according to the Court, includes the authority to determine the meaning of a treaty "as a matter of federal law." The clear import of this is that the President cannot dictate to the judiciary what law to apply or how to interpret the applicable law.²⁴

In a lengthy discussion, the Texas court distinguished other cases in which presidential foreign affairs power intruded into the realm of the judiciary, and concluded that Medellín's claims failed.

This case—and its tangled procedural history, which includes both state and federal *habeas corpus* petitions and a previous Supreme Court grant of certiorari that was dismissed as improvidently

²²Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

²³Medellin, 223 S.W.3d at 332 n.105.

²⁴*Id.* at 335 (quoting *Sanchez-Llamas v. Johnson*, 126 S. Ct. 2669, 2684 (2006)).

granted—illustrates the difficulty of integrating the national foreign affairs power with the domestic operations of the states. It also illustrates, as so many difficult cases in this realm do, the advantage of legislation: A federal statute, spelling out the duties of state courts in cases involving foreign nationals, would avoid the problems that produced this case.

The case combines some interesting crosscurrents in the *zeitgeist*, setting one theme in current international affairs and legal thinking—increased skepticism regarding executive powers—against another: increased solicitude for foreign criminal defendants and international law. With both federalism issues and questions about the judicial and executive roles involved, it seems likely to produce a plethora of opinions from various members of the Court regardless of outcome.

IV. Criminal Law

When is a gun not a gun? When it's the equivalent of money. That is, sort of, the argument made by the defendant in *United States v. Watson*.²⁵

Watson was convicted of violating 18 U.S.C. § 924(c)(1)(A), which criminalizes the "use" of a firearm during and in relation to drug trafficking. The Supreme Court has previously held in *Bailey v. United States* that "use" of a firearm means "active employment."²⁶

Watson purchased a firearm for drugs. The unloaded firearm was provided to him in exchange for OxyContin tablets. Unfortunately for Watson, the purchase was part of a government sting operation, and he was arrested. Watson entered a plea bargain, but reserved the question of whether receiving an unloaded gun as payment for drugs constitutes "use" of a gun in a drug transaction. The question is whether the firearm's role in this transaction is "active employment," or whether it was merely a passive form of payment. This is a subject on which the circuits are currently split.

The case itself is only moderately interesting, but the Court's handling of this question should shed some light on the interpretive style of the Roberts Court and its new members. The statute seems pretty clearly to have envisioned firearms "use" in a gun-slinging,

²⁵ 191 Fed. Appx. 326 (5th Cir. 2006).

²⁶ 516 U.S. 137 (1995).

Miami Vice sense. On the other hand, the firearm was certainly used here, but as payment. The “tough on crime” interpretation leaves Watson in jail; the narrow, “rule of lenity” approach probably lets him go free. The Court’s choices may prove revealing.

V. Habeas Corpus

In the cases of *Al Odah v. United States*²⁷ and *Boumediene v. Bush*,²⁸ the District of Columbia Circuit held that the Military Commissions Act of 2006 barred habeas corpus actions by detainees. The Supreme Court denied certiorari in April despite what many commentators regarded as substantial tension with *Rasul v. Bush*.²⁹ In a highly unusual action, however, the Supreme Court reversed itself and granted certiorari in these cases on June 29.³⁰

Congress had responded to the Supreme Court’s decision in *Hamdan v. Rumsfeld*, which found the military commissions established to try suspected terrorists unconstitutional, by passing the Military Commissions Act of 2006, which was intended to bar habeas corpus claims by detainees.³¹ The questions presented are extensive:

Questions presented by *Boumediene*:

1. Whether the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, validly stripped federal court jurisdiction over habeas corpus petitions filed by foreign citizens imprisoned indefinitely at the United States Naval Station at Guantanamo Bay.
2. Whether Petitioners’ habeas corpus petitions, which establish that the United States government has imprisoned Petitioners for over five years, demonstrate unlawful confinement requiring the grant of habeas relief or, at least, a hearing on the merits.³²

²⁷ 321 F.3d 1134 (D.C. Cir. 2003).

²⁸ 476 F.3d 981 (D.C. Cir. 2007).

²⁹ 542 U.S. 466 (2004).

³⁰ According to Lyle Denniston, this may not have happened since *Hickman v. Taylor* 60 years ago. Lyle Denniston, Court Switches, Will Hear Detainee Cases, *ScotusBlog*, June 29, 2007, at http://www.scotusblog.com/movabletype/archives/2007/06/court_1.html.

³¹ 126 S. Ct. 2749 (2006).

³² Petition for Writ of Certiorari, *Boumediene v. Bush*, 127 S. Ct. 3078 (2007) (No. 06-1195), available at 2007 WL 680794.

Questions presented by Al Odah:

1. Did the D.C. Circuit err in relying again on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), to dismiss these petitions and to hold that petitioners have no common law right to habeas protected by the Suspension Clause and no constitutional rights whatsoever, despite this Court's ruling in *Rasul v. Bush*, 542 U.S. 466 (2004), that these petitioners are in a fundamentally different position from those in *Eisentrager*, that their access to the writ is consistent with the historical reach of the writ at common law, and that they are confined within the territorial jurisdiction of the United States?
2. Given that the Court in *Rasul* concluded that the writ at common law would have extended to persons detained at Guantanamo, did the D.C. Circuit err in holding that petitioners' right to the writ was not protected by the Suspension Clause because they supposedly would not have been entitled to the writ at common law?
3. Are petitioners, who have been detained without charge or trial for more than five years in the exclusive custody of the United States at Guantanamo, a territory under the plenary and exclusive jurisdiction of the United States, entitled to the protection of the Fifth Amendment right not to be deprived of liberty without due process of law and of the Geneva Conventions?
4. Should section 7(b) of the Military Commissions Act of 2006, which does not explicitly mention habeas corpus, be construed to eliminate the courts' jurisdiction over petitioners' pending habeas cases, thereby creating serious constitutional issues?³³

The central issue is whether habeas corpus jurisdiction extends to prisoners at Guantanamo, and whether Congress can strip away that jurisdiction. The United States has taken the (somewhat implausible) position that the base at Guantanamo Bay is not within the jurisdiction of the United States, and hence not within the territorial jurisdiction of U.S. courts. This position was upheld by the D.C.

³³Petition for Writ of Certiorari, *Al Odah v. United States of America*, 127 S. Ct. 3067 (2007) (No. 06-1196), available at 2007 WL 671010.

Circuit in *Al Odah v. United States*,³⁴ and reversed by the Supreme Court in *Rasul v. Bush*.³⁵ Congress then passed the Detainee Treatment Act of 2005,³⁶ which barred habeas corpus jurisdiction by “any court, justice, or judge.” The Supreme Court then held in *Hamdan v. Rumsfeld*³⁷ that the Detainee Treatment Act did not strip federal courts of habeas corpus jurisdiction in pending cases. Congress responded by passing the Military Commissions Act of 2006,³⁸ barring habeas corpus jurisdiction regarding aliens detained as enemy combatants. In *Boumediene*, the D.C. Circuit held that this statute barred habeas relief for Boumediene et al., and that it did not work an unconstitutional suspension of the writ.

Some experts seem to think that a Supreme Court reversal is likely in light of the Supreme Court’s sudden shift on certiorari,³⁹ and that seems plausible. There seems no reason to infer a sudden desire to *uphold* the D.C. Circuit based on these actions. But while it seems quite likely that the Court will overturn the D.C. Circuit, what rule it will announce in doing so is unclear. While some commentators have in the past argued that the U.S. government faces substantial limitations under the Constitution even in its dealings with aliens outside of United States territory,⁴⁰ it seems unlikely that the Roberts Court will abandon the principle of *Verdugo-Urquidez*⁴¹ to adopt such an expansive rule. On the other hand, it seems reasonably clear that Congress’s legislative intent was to bar such habeas petitions, and the *pas de deux* engaged in by the Court and Congress thus far will require a certain amount of fancy footwork on the part of the justices if the result is not to look like a pure judicial power play—though

³⁴321 F.3d 1134 (D.C. Cir. 2003).

³⁵542 U.S. 466, 483–84 (2004).

³⁶Pub. L. 109–148, 119 Stat. 2680 (2005).

³⁷126 S. Ct. 2749 (2006).

³⁸Pub. L. 109–366, 120 Stat 2600 (2006).

³⁹This is extremely unusual, and it is probably a pretty good sign that a reversal is likely. See, e.g., Orin Kerr, Supreme Court Agrees to Take Guantanamo Bay Cases, *The Volokh Conspiracy*, at <http://volokh.com/posts/1183133554.shtml> (June 29, 2007).

⁴⁰See, e.g., John A. Ragosta, *Aliens Abroad: Principles for the Application of Constitutional Limitations to Federal Action*, 17 N.Y.U. J. Int’l L. & Pol. 287 (1985).

⁴¹*U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (constitutional protections do not extend to aliens who have not formed a “voluntary attachment” to the United States).

this may be vitiated by the turnover in congressional control since that legislation's passage.

VI. Preemption

States are growing more enthusiastic about regulating tobacco, but this sometimes creates conflict with federal law. That's what *New Hampshire Motor Transport Association v. Rowe*⁴² is about. Maine's Tobacco Delivery Law was designed to regulate direct-to-consumer sales of tobacco via the Internet, etc., and made it illegal to knowingly deliver tobacco products to a Maine consumer if those products were purchased from an unlicensed seller. The effect of this rule was to require carriers to treat tobacco products differently from other products, making timely deliveries more difficult. Carriers sued, arguing that these requirements were preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA).⁴³ The FAAAA provides that a state

may not enact or enforce a law . . . related to a price, route or service of any motor carrier . . . with respect to the transportation of property.⁴⁴

Further, a state

may not enact or enforce a law . . . related to a price, route or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle.⁴⁵

Package delivery services like UPS are covered by these provisions, raising the question of whether the Maine provision "related to a price, route, or service." Both the district court⁴⁶ and the court of appeals for the First Circuit held that it did.⁴⁷

⁴²448 F.3d 66 (1st Cir. 2006).

⁴³Pub. L. 103-305, § 601, 108 Stat. 1569, 1605 (2006).

⁴⁴49 U.S.C. § 14501(c)(1) (2007).

⁴⁵49 U.S.C. § 41713(b)(4)(A) (2007).

⁴⁶*New Hampshire Motor Transport Ass'n v. Rowe*, 377 F. Supp. 2d 197 (D. Me. 2005).

⁴⁷448 F.3d 66 (1st Cir. 2006).

The State of Maine argued before those courts that the FAAAA was intended to preempt only *economic* regulation, and not regulation based on the state's police powers. This argument has a certain force, but also offers the potential for a drastic narrowing of FAAAA preemption, since state police powers are virtually boundless. Maine's argument also stresses that caselaw on FAAAA preemption is based on cases involving preemption under the Employee Retirement Income Security Act (ERISA), and that the scope of ERISA preemption has since narrowed. The First Circuit found this argument unpersuasive, but perhaps the Supreme Court will feel differently. Its treatment of this issue, at any rate, is likely to shed light on the Roberts Court's general views on statutory construction and state-federal relations.

VII. Right to Keep and Bear Arms

This year's wild-card case is one that, as of this writing, is not even on the certiorari docket.⁴⁸ But it is a case that, in some ways, may actually be more influential if the Supreme Court doesn't get around to hearing it.

The case is *Parker v. District of Columbia*,⁴⁹ a D.C. Circuit case involving the District's draconian anti-gun laws. The result—an individual rights decision striking down those laws—was unusual. The Supreme Court has said little on the Second Amendment since its opinion in *United States v. Miller*,⁵⁰ which left things rather unsettled,⁵¹ and court of appeals caselaw on the meaning of the Second Amendment was for many years rather shallow and conclusory.⁵² More recently, there have been some signs⁵³ that

⁴⁸Indeed, as I write this, the petition for certiorari has not been filed, but such a filing is expected. See Lyle Denniston, Second Amendment Case Headed to Court, *ScotusBlog*, July 16, 2007, at http://www.scotusblog.com/movabletype/archives/2007/07/second_amendmen.html.

⁴⁹478 F.3d 370 (2007).

⁵⁰307 U.S. 174 (1939).

⁵¹For more on the Miller opinion, see Brannon P. Denning & Glenn H. Reynolds, *Telling Miller's Tale*, 65 *Law & Contemp. Probs.* 113 (2002).

⁵²Brannon P. Denning, *Can the Simple Cite be Trusted? Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 *Cumb. L. Rev.* 961 (1996).

⁵³See, e.g., *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) (finding an individual right to arms under the Second Amendment).

the circuit courts are taking notice of new scholarship⁵⁴ suggesting an individual right to arms under the Second Amendment, but not much action in terms of striking actual federal firearms laws.

In *Parker*, however, the D.C. Circuit faced something that other courts had not—a federal law, avoiding any questions of incorporation posed by state laws, and one that went well beyond any conception of mere “reasonable regulation,” as the District’s gun law effectively prohibited private ownership and use of firearms.

The District of Columbia’s attorneys argued that the Second Amendment protected only a right to bear arms while actively serving in a state militia, a right that would leave no private conduct protected, leading the D.C. Circuit to observe: “In short, we take the District’s position to be that the Second Amendment is a dead letter.” After an extensive review, the D.C. Circuit concluded that the Second Amendment protects an individual right to arms, and that such a right includes a right to own handguns, and that the District of Columbia gun laws in question infringed that right.

For gun-rights advocates, *Parker* was a big win, as was the D.C. Circuit’s denial of *en banc* review. As this is written, the Supreme Court has not yet docketed a petition for certiorari in this case, though it is likely that one will be filed: A loss for the District of Columbia in the Supreme Court would be a major defeat for backers of gun control, since it would mean that every gun control law would be subject to some degree of constitutional scrutiny. Though many gun control laws would undoubtedly withstand any degree of scrutiny likely to be imposed by the Court, merely having to acknowledge the constitutional issue would complicate matters considerably, and the more intrusive forms of gun control might well be found unconstitutional. Concern about these consequences is probably why the District of Columbia took so long to make a decision on filing for certiorari that it was forced to ask for an extension of time.⁵⁵

⁵⁴See, e.g., Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, 62 Tenn. L. Rev. 461 (1995); William Van Alstyne, The Second Amendment and the Personal Right to Arms, 43 Duke L.J. 1236 (1994). See also David B. Kopel, What State Constitutions Teach about the Second Amendment, 29 N. Ky. L. Rev. 827 (2002).

⁵⁵See Second Amendment Case Headed to Court, *supra* note 48. (“[The] petition would have been due Aug. 7, but city officials said Monday that they would ask Chief Justice John G. Roberts, Jr., for a 30-day extension of time to file the case.”)

How likely is that? Experts as eminent as Laurence Tribe and Mark Tushnet disagree:

Tushnet believes that if the Court grants certiorari, it will ultimately overturn the decision of the D.C. panel. "My gut feeling is that there are not five votes to say the individual-rights position is correct," he says. "[Justice Anthony] Kennedy comes from a segment of the Republican Party that is not rabidly pro-gun rights and indeed probably is sympathetic to hunters but not terribly sympathetic to handgun owners. Then the standard liberals will probably say 'collective rights.'"

But Tribe is less confident of that prediction. Should the case reach the Supreme Court, he told *The New York Times*, "there's a really quite decent chance that it will be affirmed."⁵⁶

Supreme Court vote counting is a perilous business, but I don't see five clear votes to sustain *Parker*. On the other hand, I was surprised by the outcome in the D.C. Circuit, and Laurence Tribe's skills at Supreme Court vote counting certainly exceed mine.

The legal commentariat seems to regard this as an important case, with Mike O'Shea suggesting that *Parker* might overshadow the rest of the Court's caseload in the coming term:

It's not often that the Supreme Court takes up the core meaning of an entire Amendment of the Bill of Rights, in a context where it writes on a mostly clean slate from the standpoint of prior holdings. If the Court takes the case, then October Term 2007 becomes The Second Amendment Term. *Parker* would swiftly overshadow, for example, the Court's important recent cert grant in the Guantanamo cases.

How many Americans would view *District of Columbia v. Parker* as the most important court case of the last thirty years? The answer must run into seven figures. The decision would have far-reaching effects, particularly in the event of a reversal . . . there is a way more straightforward comparison that a whole lot of average Americans would be making. That's a comparison between the Court's handling of the

⁵⁶ Elaine McArdle, *Lawyers, Guns and Money*, Harvard Law School Bulletin, Summer 2007, available at http://www.law.harvard.edu/alumni/bulletin/2007/summer/feature_3.php.

enumerated rights claim at issue in *Parker*, and its demonstrated willingness to embrace even non-enumerated individual rights that are congenial to the political left, in cases like *Roe* and *Lawrence*. “So the Constitution says *Roe*, but it doesn’t say I have the right to keep a gun to defend my home, huh?”⁵⁷

O’Shea suggests that the pressure that this case might bring may encourage the Court to deny certiorari rather than face such a comparison. Of course, the calculus on these issues may vary among individual justices, and there are likely to be consequences to *not* granting certiorari as well.

Should the Supreme Court wind up hearing this case, it will be an interesting test of the power of academic legal thought. Second Amendment caselaw is sparse, and many of the opinions are unenlightening. On the other hand, there is a comparatively large body of legal scholarship on the Second Amendment, with most—though by no means all—of it tending toward supporting the reasoning and outcome in *Parker*. In the absence of precedent, it will be interesting—and, to some law professors, perhaps humbling—to discover how much impact this scholarship has on the Supreme Court’s thinking.

VIII. Taking it Easy: The Supreme Court’s Workload

One trend that has not shown any alteration since the appearance of the Roberts Court is the Supreme Court’s reduced caseload. In the past term, the Supreme Court produced 68 decisions after argument, plus four summary opinions, for a total of 72 decisions on the merits.⁵⁸ This number of 68 decisions after argument is the lowest in the Court’s recent history, with the previous year seeing 71. By contrast, October Term 1990 saw 106 decisions on the merits, a number that itself was lower than the Court’s output in the 1970s: in the 1973 term, the Court produced 129.⁵⁹

⁵⁷Mike O’Shea, *The Second Amendment Term?*, Concurring Opinions, at http://www.concurringopinions.com/archives/2007/07/the_second_amen_1.html.

⁵⁸ScotusBlog, figures at <http://www.scotusblog.com/movabletype/archives/Workload.pdf>.

⁵⁹Glenn Harlan Reynolds, *Marbury’s Mixed Messages*, 71 *Tenn. L. Rev.* 303 (2004). I make a similar point in this piece, but as Mike Graetz once told me, you have to say something three times in print before anyone pays attention. This is number two.

By contrast, the caseload of the federal courts of appeal, whose work is nominally supervised by the Supreme Court, has skyrocketed. In 2006, the federal courts of appeal produced 34,580 decisions on the merits.⁶⁰ In 1973, by contrast, the courts of appeal produced a mere 777 decisions on the merits.⁶¹ A Court that decided 129 cases on the merits could plausibly oversee a system of inferior courts that decided 777. But can a Court that decides 68 cases on the merits plausibly oversee a system that decides 34,580? Perhaps it can, if the federal judicial system is running like a piece of perfectly functioning machinery, with a failure rate of a fraction of one percent. I will leave it to the reader whether that is a plausible account of the current situation. My own feeling, however, is that it is not, which is why I characterized the Supreme Court's supervision as nominal.

Indeed, although—as the habeas cases above demonstrate—the Supreme Court is capable of overseeing a court of appeals closely on occasion, it seems that the federal courts of appeal may in some cases exercise control in the other direction. The Supreme Court's Commerce Clause jurisprudence in *Lopez* and *Morrison*, for example, seems to have succumbed to foot-dragging by the courts of appeals,⁶² leading ultimately to retrenchment and a “false dawn” of federalism.⁶³ Like a puma with a herd of buffalo, the Supreme Court may pick off the occasional outcast or straggler, and perhaps encourage the herd to stick more tightly together, but it is not in a position to choose the direction the herd will take tomorrow, or even to halt a stampede.

To be fair, the enormous expansion of the courts of appeals' caseload has probably contributed more to the Supreme Court's limited ability to exercise any real supervision than has the Supreme Court's own unwillingness to hear more cases. And the problem has gotten

⁶⁰ Administrative Office of the U.S. Courts, available at <http://www.uscourts.gov/cgi-bin/cmsa2006.pl>.

⁶¹ See Reynolds, *supra* note 59.

⁶² Glenn H. Reynolds & Brannon P. Denning, Lower Court Readings of *Lopez*, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?, 2000 Wis. L. Rev. 369; Brannon P. Denning & Glenn H. Reynolds, Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts, 55 Ark. L. Rev. 1253 (2003).

⁶³ Ilya Somin, A False Dawn for Federalism: Clear Statement Rules After *Gonzales v. Raich*, 2005–2006 Cato Sup. Ct. Rev. 113 (2006).

bad enough that the Judicial Conference of the United States has begun to take a hand in trying to resolve circuit splits over statutory interpretation.⁶⁴ There have also been proposals to create a National Court of Appeals that would sit between the circuits and the Supreme Court,⁶⁵ though this is a cure that would likely dilute the Supreme Court's powers further.

What remedy is appropriate is beyond the scope of this Essay, which has already run long enough. But the vast growth of the court of appeals' caseload relative to that of the Supreme Court leads to conclusions that may be uncongenial in the context of this Essay, and this journal: It may be that the Supreme Court doesn't matter as much as it once did. Statistically, the odds that any particular court of appeals decision will reach the Supreme Court are negligible. Nor, as the *Lopez-Morrison* example illustrates, do Supreme Court precedents necessarily trickle down to affect decisions in the circuits. For the vast, vast majority of litigants, the court of appeals *is* the Supreme Court, in effect.

The glamour attending the Supreme Court tends to obscure this. But while everyone focuses on the Supreme Court, the real and in almost all cases effectively unreviewable power is exercised by the courts of appeals. That power is less controversial because it is exercised less often in ways that make waves: like good bureaucrats, the courts of appeals tend to avoid controversy, and to make their output sufficiently boring that few will bother to read it in search of the controversial bits anyway.

One response to this—and one that I certainly endorse—is to start paying more attention to lower courts. Unfortunately, it is not clear who besides the legal academy will be willing to do so, and it is not at all clear that the legal academy has any great interest in doing so either. Court of appeals scholarship is not booming in tandem with the caseload.

Another response is to pay far more attention to the confirmation process where appeals court judges are concerned. The political system has done just that in recent years, of course, and although

⁶⁴Jacob Scott, Article III En Banc: The Judicial Conference as an Advisory Intercircuit Court of Appeals, 116 Yale L.J. 1625 (2007).

⁶⁵See Fed. Judicial Ctr., Structural and Other Alternatives for the Federal Courts of Appeals: Report to the United States Congress and the Judicial Conference of the United States 75–83 (1993).

this has sometimes been portrayed as the creeping politicization of a process that was once less politicized, it turns out to make a good deal of sense: As the decisions of the courts of appeals become less and less subject to a realistic possibility of review, the question of who is making those decisions assumes much greater importance.

Yet another response—one likely to be more effective than the others, if it can be implemented—is to remedy the caseload explosion at the circuit court level. That explosion since the early 1970s is no doubt the product of many causes, but the “regulatory explosion” that came with the expansion of federal power under the Commerce Clause and the creation of new federal regulatory agencies like OSHA and EPA, and the accompanying rise in interest groups intended to lobby and influence them, undoubtedly played a major role.⁶⁶ It is probably just not possible for the Supreme Court to police a judicial system that itself is big enough to police a government as big as the federal government has become in the past half century or so. Reducing the extent of federal responsibilities, and returning them to a scope that more closely resembles the Framers’ intent,⁶⁷ would likely also reduce the caseload of the federal courts to something more manageable.

Such a change would be far more than a judicial reform, of course, and I see no great likelihood of its occurring any time soon. I hope, however, that I am wrong, as I doubt that the Supreme Court, in any plausible incarnation, can provide meaningful review over a judicial system as busy as the one we have now. That does not make the Supreme Court’s docket less interesting, perhaps, but it does suggest that it is less important than is generally believed.

⁶⁶Jonathan Rauch, *Demosclerosis: The Silent Killer of American Government* 50–57 (1994) (describing the rapid explosion of interest groups as a function of expanding government authority beyond traditional limits).

⁶⁷For more on this topic, see Glenn H. Reynolds, *Kids, Guns, and the Commerce Clause*, *Cato Policy Analysis* No. 216 (Oct. 10, 1994).

