Introduction

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The fifth volume of the *Cato Supreme Court Review* arrives during a transitional time on the Court, evidenced by the cacophony of conflicting predictions about where the Court, under its new chief justice, is headed. Will it be a ''Kennedy Court,'' dominated by the new Court's new power-brokering swing vote, as *Slate*'s Dahlia Lithwick suggests;[1] a humble, minimalist Court—the qualities prized by Chief Justice John Roberts; or something entirely unforeseen? This edition of the *Review* probes several points of doctrinal uncertainty and change—from the ongoing debate over executive and judicial power in wartime, to the aftermath of *Gonzales v. Raich*, to the internal debate among advocates of religious liberty over the direction of Free Exercise and Establishment Clause jurisprudence, to the scope of federal statutory preemption, the future of the exclusionary rule, and the politically and morally charged debate over capital punishment.

Nadine Strossen, the president of the American Civil Liberties Union, focuses on one example of change and uncertainty: the drift of the Court's reading of the Establishment and Free Exercise Clauses. Specifically, her article, adapted from her 2005 B. Kenneth Simon lecture at the Cato Institute, argues that the Court in the last forty years has re-interpreted the Religion Clauses in a way that renders them redundant of equal protection principles by treating religious liberty as synonymous with the right to be free from religious discrimination. As a result, the Court has muddied the bright line between church and state and obscured the content of individual First Amendment rights to freedom of conscience in ways contrary, she argues, to the intent of the Framers.

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[1]Dahlia Lithwick, Swing Time, Slate (Jan. 17, 2006), available at http://www.slate.com/id/2134421.

Professors Martin Flaherty and John Yoo begin review of the term by focusing on a divided, important legal decision: *Hamdan v. Rumsfeld*, which struck down the Bush administration's framework for trying captured enemy combatants held in Guantanamo, Cuba. In separate articles, Yoo and Flaherty take opposing positions on the case. Professor Flaherty argues that *Hamdan*'s result, while imposing a welcome curb on presidential excess, didn't pick the right tools to do the job. Precedent, constitutional structure, and the comparative experience of other countries all argue, he contends, for a far more robust conception of legislative and judicial power in the realm of national security than the Court was willing to forthrightly acknowledge.

Professor Yoo, by contrast, argues that *Hamdan* represents an unprecedented, and dangerous, power grab by the Supreme Court. The president, he argues, has acted with restraint: The military commissions used in Guantanamo are sanctioned by Congress, tradition, and the customary laws of war and are constituted with a scope narrower than that employed by presidents in past wars. By comparison, says Yoo, the Supreme Court has acted imperially, not only ignoring clear legislative restraints on its power to hear the appeal in *Hamdan*, but also departing from a long tradition of judicial deference to presidents in wartime sanctioned by precedent, constitutional text, and structure.

Presidential power is not the only difficult fault line in the Court this term. In *Gonzales v. Oregon* and *Rapanos v. United States*, the Court struggled with the fallout from *Gonzales v. Raich*, the 2005 decision that appeared, to many commentators, to gut the Rehnquist Court's halting efforts to revive a restraining reading of the Commerce Clause. Many had hoped *Oregon* and *Rapanos* would reaffirm and extend the federalism-respecting ''clear statement'' rules that the Court has from time to time imposed on Congress when it acts at the edge of its constitutional power. Ilya Somin finds no evidence of any such determination on the part of the Court in either case. Moreover, he argues, even if the Court had reinvigorated clear statement rules in one of these cases, the payoffs for federalism would have been uncertain at best.

Defenders of federalism paid relatively little attention to the Court's decision in *Merrill Lynch v. Dabit*, in which it upheld federal statutory preemption of a subset of securities fraud claims under

state securities laws. But, as constitutional limits on federal power recede in the wake of *Raich*, the battleground over federalism will shift to the realm of statutory interpretation. Unfortunately, the Court's preemption caselaw is applied inconsistently—a trend evident in securities regulation and corporate governance. Bucking conventional wisdom, Professor Larry Ribstein argues that the Court can promote better regulatory outcomes in the long term in the realm of corporate and securities law if it applies a stronger presumption against preemption across the board.

Balancing state autonomy and national interests are, of course, also the province of the Dormant Commerce Clause, considered this term in *DaimlerChrysler Corp. v. Cuno*, a closely-watched challenge to preferential state tax incentives for in-state investment. *Cuno* was dismissed on standing grounds, leaving the constitutional status of state tax incentives in doubt. Professor Brannon Denning argues that the narrow ruling in *Cuno* stems from the difficulty the Court has had defining when state laws impermissibly ''discriminate'' against out-of-state goods or out-of-state economic actors. To resolve this conundrum, he suggests the Court must reexamine the rationale behind the doctrine, which, he argues, was driven by the Framers' concerns about political disharmony caused by economic competition during the Articles of Confederation era, rather than by an ideological affinity for free trade.

Professors Allison Hayward, Dale Carpenter, and co-authors Richard Garnett and Joshua Dunlap separately examine three of the Court's high-profile First Amendment rulings. Hayward takes on the free speech challenges to campaign finance regulations in *Wisconsin Right to Life v. FEC* and *Randall v. Sorrell*. In both cases, the Court ruled in favor of the challenger. But Hayward argues that both decisions have a dark side: In each case, the Court kept within the framework of *Buckley v. Valeo*, the flawed fount of the Court's modern First Amendment law governing campaign finance regulation. Indeed, in *Randall* the Court went out of its way to explain why fidelity to *Buckley* is necessary, promoting Hayward to consider whether *Buckley* has now become a ''superprecedent''—a precedent immune to overruling.

In *Rumsfeld v. FAIR*, the Supreme Court unanimously rejected a First Amendment challenge mounted by law schools against the Solomon Amendment, a law conditioning federal funding on the

schools' acceptance of military recruiters on campus. Many right-leaning commentators applauded the decision. But, says Dale Carpenter, that applause is misplaced. In *FAIR*, the Supreme Court weakened key free-speech restraints on government power defended by many right-of-center commentators, including the compelled speech doctrine and the right of expressive association recognized in *Boy Scouts of America v. Dale*.

Richard Garnett and Joshua Dunlap consider what they call a deceptive ''mid term sleeper'': *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, a unanimous decision interpreting the Religious Freedom Restoration Act. In an article that provides a thought-provoking contrast to Professor Strossen's, Garnett and Dunlap argue that *O Centro* is worth our attention because it marks the definitive emergence of a consensus on the Court that the Constitution allows—even invites—governments to ease the burdens on religious exercise that a neutral official can impose. *O Centro*, they argue, therefore decisively puts to rest the notion that legislative religious accommodations unconstitutionally privilege, endorse, or establish religion.

In the realm of criminal law, the Court created confusion in two areas: First, by throwing doubt on the scope of the exclusionary rule in *Hudson v. Michigan*, and, second, by opening lethal injection to a wave of new Eighth Amendment challenges in *Hill v. McDonough*. Professor David Moran, who argued *Hudson v. Michigan* before the Court, surveys the term's Fourth Amendment cases with a special focus on *Hudson*. He shows how the Court's opinion in that case calls into question the entire rationale of the exclusionary rule, not just in the knock-and-announce context before the Court in *Hudson*, but in all types of Fourth Amendment violations.

Next, criminal procedure guru Douglas Berman dissects *Hill v. McDonough*, in which the Court considered whether the federal constitutional tort statute, 42 U.S.C. § 1983, may be used to challenge a state's method of execution. Because the Court has previously decided this question in the affirmative, the Court's cert. grant seems like a waste of time. But, argues Berman, the Court's cert. grant and ruling in *Hill* yield two benefits: (1) the cert. grant triggered greater scrutiny of the particulars of lethal injection protocols, while (2) the narrow ruling gave state political branches space to deliberate about

capital punishment generally. As such, Berman suggests, *Hill* is an example of what Alexander Bickel called the Court's ''passive virtues''—its ability to use appellate procedure to provoke legislative deliberation about a politically and morally contested issue.

Turning to regulatory law, Professor Joshua Wright explores the Court's missed opportunity in *Illinois Tool Works Inc. v. Independent Ink, Inc*. There, the Court rejected a presumption of antitrust market power in patent tying cases, eliminating threat of unnecessary liability hanging over firms that invest in intellectual property. The economic logic underlying the Court's result, says Wright, also suggests that price discrimination does not imply antitrust market power and, by itself, does not threaten consumer welfare. By failing to squarely address the economic logic behind its decision, the Court missed a tailor-made opportunity to end the misguided view that price discrimination is anticompetitive.

Finally, Professor Peter Bowman Rutledge examines the coming Supreme Court term, in light of the voting trends revealed in the term just ended. Rutledge focuses on five areas that will be hotly litigated next term—constitutional limits on punitive damages, equal protection implications of affirmative action in public high schools, partial birth abortion, criminal procedure, and environmental law. He examines what the decisions on the Court's docket in each these areas may reveal about the changing dynamics of the new Roberts Court.

A round of heartfelt thanks are in order. First, and foremost, thanks go to Marla Kanemitsu, my miraculous, long suffering partner, who generously donated her time and sage advice to this edition of the *Review*. Without her, this *Review* would not have been completed.[2] Second, thanks to Anne Marie Dao, my research assistant, and to interns Michael Shiba, Alex Harris, Andrew Perraut, and Kari DiPalma.

We hope you enjoy the fifth volume of the *Cato Supreme Court Review*.

[2]''Love is too weak a word for what I feel—I luuurve you, you know, I loave you, I luff you, two F's . . . '' Woody Allen & Marshall Brinkman, Annie Hall (United Artists 1977).