



GEORGETOWN UNIVERSITY LAW CENTER SUPREME COURT INSTITUTE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2005 OVERVIEW

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INTRODUCTION

The Supreme Court of the United States announced its final two decisions and concluded the October Term 2005 on Thursday, June 29, 2006. This report provides an overview of the Court's disposition of cases for the completed Term. Suggestions for revisions or corrections are welcome and may be sent via email to suptct@law.georgetown.edu. Information about the Supreme Court Institute and its moot court program is available at www.law.georgetown.edu/sci.

SECTION I: TERM OVERVIEW

Remarks and Observations

Consensus on the Court:

The percentage of unanimous cases was greater this Term than in the two most recent Terms, although not by as much as it had seemed possible at the beginning of the month. Unanimity was present in 37.7 percent of the argued cases in which a signed opinion was issued and another 11.6 percent were decided with all Justices concurring in the judgment. A total of 49.3 percent of the cases were decided without dissent in October Term 2005.

In comparison, during the October Term 2004 29.7 percent of cases were decided unanimously and another 8.1 percent were decided with all Justices concurring in the judgment, for a total of 37.8 percent of cases decided without dissent.

Similarly, during the October Term 2003, 27.4 percent of cases were decided unanimously and another 16.4 percent were decided with all Justices concurring in the judgment. A total of 43.8 percent of cases were decided without dissent.

Fewer Dissenting Votes:

When there were dissents, there were fewer Justices dissenting. There were a total of 99 dissenting votes in all argued cases (other than those decided Per Curiam) for October Term 2005. By comparison, there were 134 dissenting votes in 74 decided cases (excluding two argued cases decided Per Curiam) in October Term 2004.

This Term there were 16 cases decided by a five vote majority (22.9%). In October Term 2004 there were 23 cases decided by a split Court with a five vote majority (28.8%). The ten year average for October Term 1994 through October Term 2003 is 17.5 cases decided by a 5-4 vote (21.3%).

Note that nine Justices did not vote in every case during either the 2005 or the 2004 Term. Due to Chief Justice Rehnquist's illness during October Term 2004 and the transition between Justice O'Connor and Justice Alito this Term, a number of cases each Term were decided by eight or fewer Justices. In October Term 2004, eleven cases were decided without vote by Chief Justice Rehnquist. In October Term 2004, a total of seventeen cases were decided with the vote of eight Justices and one case was decided by the vote of seven Justices. Apart from those cases in which Justice O'Connor voted before Justice Alito joined the Court, seventeen cases were decided without vote by Justice Alito. Chief Justice

Roberts also took no part in one of the cases in which Justice Alito did not vote. Chief Justice Roberts also did not participate in three other cases, one of which was dismissed as improvidently granted, and Justice Thomas took no part in one case during the Term.

Fewer Separate Opinions:

This Term saw a significant decrease in the number of separate concurring and dissenting opinions authored. During the October Term 2005, 91 separate concurring or dissenting opinions were issued in addition to the majority opinion for each case. In contrast, for October Term 2004, 125 other opinions were issued.

Fewer dissenting opinions were written this Term; 55 separate dissents were written for October Term 2005, compared with 64 individual dissenting opinions written during the October Term 2004.

Justice Voting Patterns:

Of the nine Justices currently on the Court, the Justices who voted the most often together were Chief Justice Roberts and Justice Alito (90.9%). Of those Justices who were on the Court for the entire Term, the alignment of Justice Scalia and Justice Thomas was most frequent (86.8%). Chief Justice Roberts and Justice Scalia had a high percentage of votes in alignment (86.4%). Voting least often together were Justice Stevens and Justice Alito (41.2%). Justice Thomas voted with the frequency among those Justices who were on the Court for the entire Term equally with Justice Stevens, Justice Souter, and Justice Ginsburg (52.9%).

Comparing only the nonunanimous cases, the two Justices who voted together most often were again Chief Justice Roberts and Justice Alito (88.0%). The next highest percentage of voting agreement in nonunanimous cases was between Justice Scalia and Justice Thomas (79.1%). The voting pair that exhibited the least amount of agreement in nonunanimous cases was Justice Stevens and Justice Alito (23.1%). Of those who were on the Court for the entire Term, the votes that were most rarely aligned were between Justice Thomas and Justice Stevens and Justice Thomas and Justice Ginsburg (25.6%).

Cases decided by divided votes this Term were seldom composed of unusual alignments among the Justices. This may be due in part to the overall increase in consensus among the Justices and due to fewer cases decided by a five vote majority. There were 16 cases decided by a five vote majority this Term (22.9%) compared with 23 cases during October Term 2004 (28.8%). One notable exception is *Empire HealthChoice Assurance v. McVeigh*, in which Justice Ginsburg delivered the opinion of the Court, joined by Chief Justice Roberts, Justice Stevens, Justice Scalia, and Justice Thomas. Justice Breyer wrote the dissenting opinion, joined by Justice Kennedy, Justice Souter, and Justice Alito. Another somewhat unusual alignment is *Clark v. Arizona*, where the majority opinion was written by Justice Souter, and joined by Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito. Although Justice Breyer disagreed with the disposition of the case, he did agree with the legal reasoning expressed in the majority opinion with regard to evidence presented in an insanity defense. Justice Kennedy was joined in his *Clark* dissent by Justice Stevens and Justice Ginsburg.

O'Connor's Departure and Alito's Arrival:

Justice O'Connor was in the majority in every one of the twenty cases in which she participated before leaving the bench, including two that were decided by a 5 vote majority. Based on a ten year average, Justice O'Connor agreed most often with Chief Justice Rehnquist, in 81.3 percent of all cases. She agreed with Chief Justice Roberts in 88.2 percent of those cases in which she participated this Term. On average, Justice O'Connor agreed with Justice Kennedy (78.5%) more often than either Justice Thomas (70.4%) or Justice Scalia (70.2%).

Justice Alito agreed more often with Justice Kennedy (79.4%) than either Justice Thomas (76.5%) or Justice Scalia (73.5%). Of the nonunanimous cases in which Justice Alito participated, the difference is similar. Justice Alito and Justice Kennedy agreed in 73.1 percent of cases that were decided by a divided vote in the judgment. In contrast, Justice Alito and Justice Thomas agreed in 69.2 percent and Justice Alito and Justice Scalia agreed in 65.4 percent of those cases.

The Roberts' Effect:

The Chief Justice was a majority vote in 92.4 percent of the October Term 2005 cases, which also means that he assigned the "opinion of the Court" in the vast majority of the cases decided this Term. Chief Justice Roberts and Justice Alito have the highest percentage voting agreement of any two Justices in all cases (90.9%) and in nonunanimous cases (88.0%), excluding Justice O'Connor. By contrast, Chief Justice Rehnquist was in the majority in only 78.3 percent of the cases decided during October Term 2004, in which he participated.

The Roberts Court has disposed of a number of cases on narrower grounds than anticipated, or dismissed cases outright. For example, *Ayotte v. Planned Parenthood* and *eBay v. MercExchange* were both expected to be controversial and divisive for the Court, yet both were decided unanimously on narrow grounds. Also, two cases were dismissed as improvidently granted and one was vacated and remanded in light of another decision from the Term.

Justice Stevens wrote the most opinions of any Justice this Term (27) and the most dissenting opinions of any Justice this Term (14). He was also in the majority the least of any Justice (73.9%). Justice Stevens wrote seven majority opinions, one of which was a "high profile" case, *Hamdan v. Rumsfeld*.

Justice Thomas and Justice Stevens combined to write 31 of the separate dissenting and concurring opinions issued this Term, 34.1 percent of the opinions written in addition to the majority. Of these, 23 were dissenting opinions, accounting for 41.8 percent of all dissents issued in decided cases. Among their separate opinions, Justice Thomas joined one dissenting opinion by Justice Stevens, in *Volvo Trucks NA, Inc. v. Reeder-Simco GMC, Inc.* and joined none of his concurring opinions. Justice Stevens never joined a dissenting or concurring opinion by Justice Thomas. The two Justices voted together in 52.9 percent of all cases and in 25.6 percent of nonunanimous cases.

Both Justice Stevens and Justice Thomas wrote fewer separate opinions this Term than in the prior Term, but they accounted for a slightly smaller percentage (38.4%) of the separate opinions issued in October Term 2004. During the 2004 Term, Justice Stevens

wrote a total of 13 dissents and nine concurrences and Justice Thomas wrote 14 dissents and 12 concurrences, combining for a total of 48 separate opinions.

Justice Breyer was the only Justice to increase the number of dissenting opinions he wrote this Term over last. During the October Term 2004 Justice Breyer wrote four dissenting opinions, whereas this Term he wrote 12 dissents. But the total number of separate concurring and dissenting opinions that he wrote this Term was the same (15) in 2004.

Court of Origin Statistics:

The Ninth Circuit continued to generate the highest volume of the Court's cases during the October Term 2005. Fifteen individual cases that were argued before the Court originated in the Ninth Circuit and an additional four cases were summarily reversed or vacated absent any argument. The Second Circuit saw an increase in grants of certiorari, but a significant part of this increase was due to the three consolidated campaign finance cases in *Randall v. Sorrell*.

The Court issued fewer affirmances and vacated a greater number of cases this Term than in October Term 2004. During October Term 2005, 24.1 percent of argued cases were affirmed and 23.0 percent cases were vacated. In October Term 2004, affirmances measured 28.8 percent while vacated cases comprised only 11.3 percent of the total dispositions. In October Term 2003, only 13.2 percent of argued cases were vacated.

The Court also dismissed two argued cases, *Maryland v. Blake* and *Laboratory Corp. v. Metabolite Laboratories*, as improvidently granted. A Per Curiam opinion dismissing a petition as improvidently granted was issued in *Mohawk Industries, Inc. v. Williams*, but the Court simultaneously granted the petition, and vacated and remanded the case for further consideration in light of the Court's decision this Term in *Anza v. Ideal Steel Supply Corp.* Therefore, *Mohawk* is not included with cases dismissed as improvidently granted.

October Term 2006:

The Court has granted 29 cases (two of these include consolidated cases) for plenary review during October Term 2006, as of June 29, 2006. At the close of October Terms 2003 and 2004, the Court had granted 39 and 37 cases, respectively.

Origins and Disposition of Cases

Cases Granted Certiorari:	87
Individual Oral Argument Sessions ¹ :	75
<hr/>	
Unargued Cases:	13
Summary Affirmances	0
Summary Reversals/Vacates ²	11
Decided by Decree	1
Dismissed ³	1

Origins⁴:

	Cases	% of total	Ten Year Average
Federal Court	70	80.5	70.6
State Court	17	19.5	11.7
Original Jurisdiction	0	0	2.8

Disposition of Argued Cases⁵:

	Cases	% of total
Affirmed	21	24.1
Reversed	44	50.6
Vacated	20	23.0
DIG ⁶	2	2.3

¹ This depicts the number of cases that were argued before the Court in individual argument sessions, counting consolidated cases as one case and excluding reargument sessions. *Davis v. Washington* and *Hammond v. Indiana* are counted separately in this chart because they were argued in tandem, not as consolidated cases, even though the Court issued one opinion when announcing its decision.

² This includes both cases in which the judgment was formally reversed and cases in which the judgment was vacated.

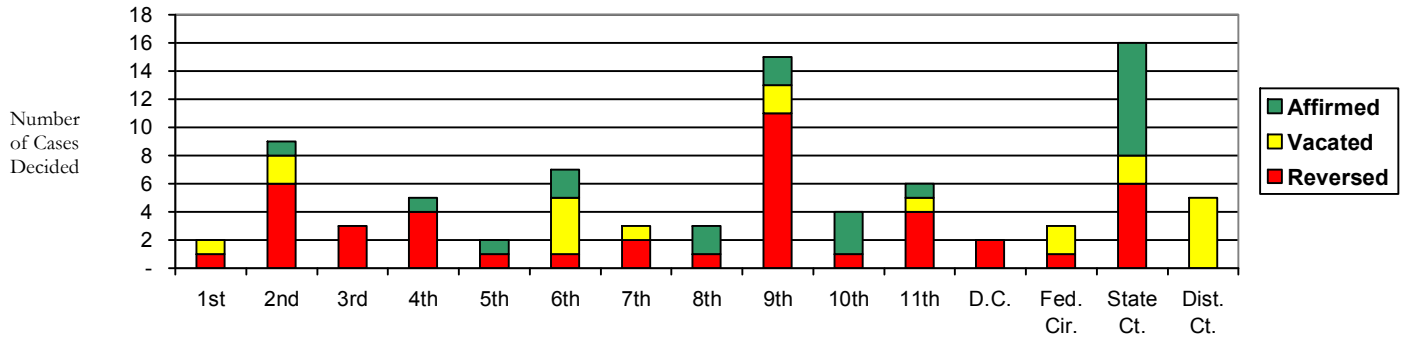
³ *Bank of China, NY Branch v. NBM LLC* (03-1559) was originally scheduled to be argued on January 9, 2006, but the case was dismissed before the argument occurred.

⁴ For this chart, and the two that follow, the information displayed counts cases decided based on individual court of origin. Only cases decided after argument are included. The bar graph does not include those cases that were Dismissed as Improvidently Granted.

⁵ This chart includes the disposition of all argued cases, including those in which a Per Curiam opinion was issued. Each case is counted individually by origin, as noted *supra* in n. 4.

⁶ As noted above, only *Maryland v. Blake* and *Laboratory Corp. v. Metabolite Laboratories* are included here. The Court issued a Per Curiam opinion in *Mohawk Industries v. Williams* dismissing the petition as improvidently granted, but simultaneously granting, vacating, and remanding the case in light of its decision in *Anza v. Ideal Steel Supply Corp.*

Origin and Disposition by Court



Unanimity and Dissent⁷

	Unanimous ⁸		With Concurrence ⁹		With Dissent ¹⁰		5 Vote Majority ¹¹	
	2005	Average 1994-2003	2005	Average 1994-2003	2005	Average 1994-2003	2005	Average 1994-2003
Number of Cases	26	29.2	8	6.4	35	46.7	16	17.5
Annual Percentage	37.7%	35.5%	11.6%	7.8%	50.7%	56.7%	22.9%	21.3%

⁷ All ten year statistics presented in this report for the purposes of comparison represent the 1994–2003 Terms and are derived from data reported in *Nine Justices, Ten Years: A Statistical Retrospective*, 118 HARV. L. REV. 510 (2004). For relational purposes, the method of analysis for the 2005 Term replicates the method in that study wherever applicable and unless otherwise noted. All decimals are rounded to the nearest tenth throughout. Per Curiam opinions issued on argued cases are not included in these calculations.

⁸ A decision is considered unanimous when all the Justices joined in the opinion of the Court and no Justice dissented, even in part. Opinions in which all Justices concurred in the judgment but one or more concurring opinions were filed are not counted as unanimous decisions.

⁹ Cases in which all Justices agreed on the disposition but one or more Justice filed an opinion concurring with the judgment.

¹⁰ *Davis v. Washington* and *Hammon v. Indiana* are treated as one case for purposes of dissenting votes because they were decided in one opinion.

¹¹ Due to the transition on the Court between Justice O'Connor and Justice Alito, there are 16 cases in which Justice Alito did not vote because Justice O'Connor heard argument but decisions were announced after her departure from the Court. Justice Alito also took no part in *Beard v. Banks*, which was argued in March. In addition, Chief Justice Roberts did not take part in *Holmes v. South Carolina*, *Schaffer v. Weast*, *Laboratory Corp. v. Metabolite Laboratories*, or *Hamdan v. Rumsfeld*. Justice Thomas took no part in *Wachovia Bank v. Schmidt*. In keeping with the “getting to five” tradition of the split decision, we have included the 5-3 and 5-2 cases from the Term in our calculation of split decisions. The 5-3 decisions are indicated with an asterisk (*) above; 5-2 decisions are marked with a cross (†). Justice O'Connor voted in two 5-4 decisions and was in the majority for both: *Brown v. Sanders* and *Central Virginia Community College v. Katz*.

Split Decisions (Five Vote Majority)¹²

- *Brown v. Sanders*
- *CVCC v. Katz*
- *Day v. McDonough*
- ***Garcetti v. Ceballos***
- ***Georgia v. Randolph****
- *Jones v. Flowers**
- ***House v. Bell****
- *Empire HealthChoice Assurance v. McVeigh*
- *Hudson v. Michigan*
- ***Rapanos v. United States***
- *Kansas v. Marsh*
- *United States v. Gonzalez-Lopez*
- ***League of United Latin American Citizens v. Perry***¹³
- ***Clark v. Arizona***
- ***Hamdan v. Rumsfeld****

SECTION II: JUSTICE OVERVIEW

Opinions and Votes by Justice

	Opinions Written				Voting ¹⁴		
	Majority	Concurrence	Dissent	Total	OT 2005 % in Majority	OT 2004 % in Majority	Ten Year Average
Roberts	8	3	2	13	92.4	N/A	N/A
Stevens	7	6	14	27	73.9	75.0	69.5
O'Connor	3	0	0	3	100	86.3	88.9
Scalia	9	6	5	20	88.4	80.0	77.2
Kennedy	8	7	2	17	88.4	85.0	89.3
Souter	7	2	4	13	81.2	81.3	80.3
Thomas	8	2	9	19	79.4	77.5	77.4
Ginsburg	8	3	5	16	81.2	78.8	78.4
Breyer	7	4	12	23	76.8	86.3	78.4
Alito	4	3	2	9	88.2	N/A	N/A
Per Curiam	5	---	---	5			

¹² Cases in bold represent those considered “high profile” and are summarized in a later section of this report.

¹³ For purposes of this report *League of United Latin American Citizens v. Perry* is classified as a 5-4 decision, though the vote is much more nuanced and splintered than this suggests. For purposes of disposition in the charts above, each underlying case is characterized as “vacated,” though the consolidated case was affirmed in part, reversed in part, vacated in part, and remanded. Several of the issues crossed each of the lower court cases and the consolidated case does not easily fit the categories required for the statistics this report attempts to provide. As noted below in the case description, and following the comment in Justice Kennedy’s opinion, the treatment of the case here is simplified for the “sake of convenience.” Voting alignment of the Justices in this case was tabulated according to the concurring opinions, with Kennedy alone and aligning Chief Justice Roberts with Justice Alito, Justice Stevens with Justice Breyer, Justice Souter with Justice Ginsburg, and Justice Scalia with Justice Thomas.

¹⁴ For the purpose of this table, a Justice is considered to have voted in the majority if he or she joined in the majority opinion *or* concurred, including concurrences in the judgment. Justice O’Connor’s and Justice Alito’s percentages are based on the total number of cases in which they each participated. Because only one opinion was issued for *Davis v. Washington* and *Hammon v. Indiana*, these cases are counted as one vote here, even though the cases were not consolidated for oral argument.

Voting in Split Decisions

	% in Majority	% in Majority OT 2004	Ten Year Average	5-4 (5-3; 5-2) Opinions Written OT 2005
Roberts	71.4	N/A	N/A	Jones v. Flowers
Stevens	50.0	60.9	41.7	CVCC v. Katz; Hamdan v. Rumsfeld
O'Connor	100	65.2	77.1	
Scalia	56.3	56.5	60.6	Brown v. Sanders; Hudson v. Michigan; Rapanos v. United States ; United States v. Gonzalez-Lopez
Kennedy	68.8	60.9	73.1	Garcetti v. Ceballos ; House v. Bell ; League of United Latin American Citizens v. Perry
Souter	62.5	69.6	41.7	Georgia v. Randolph ; Hartman v. Moore; Clark v. Arizona
Thomas	50.0	56.5	63.4	Kansas v. Marsh
Ginsburg	53.6	65.2	38.9	Day v. McDonough; Empire HealthChoice Assurance v. McVeigh
Breyer	37.5	65.2	40.0	
Alito	77.8	N/A	N/A	

Voting in High Profile Cases

	% in Majority ¹⁵	Number Written	High Profile Majority Opinions Written
Roberts	81.3	3	Gonzales v. O Centro Espirita BUV; Rumsfeld v. FAIR; Sanchez-Llamas v. Oregon
Stevens	64.7	1	Hamdan v. Rumsfeld
O'Connor	100	1	Ayotte v. Planned Parenthood of No. New England
Scalia	70.6	1	Rapanos v. United States
Kennedy	94.1	5	Garcetti v. Ceballos; Gonzales v. Oregon; Hill v. McDonough; House v. Bell; League of United Latin American Citizens v. Perry
Souter	76.5	2	Georgia v. Randolph; Clark v. Arizona
Thomas	70.6		
Ginsburg	70.6	1	Marshall v. Marshall
Breyer	70.6	3	Scheidler v. NOW; Randall v. Sorrell; Burlington N. & Santa Fe Ry. Co. v. White
Alito	90.0		

¹⁵ Percentages are based on number of cases in which each Justice actually participated. For example, Justice Alito participated in only six of the thirteen cases described as “high profile” in this report that were decided as of June 26, 2006. Justice O'Connor participated in two of the “high profile” cases.

SECTION III: VOTING ALIGNMENT

2005 Term Voting Alignment¹⁶

<i>% of Agreement</i>		Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer	Alito
Roberts	05	60.6	88.2	86.4	80.3	69.7	81.5	68.2	69.7	90.9
Stevens	05 <i>Av</i>	-----	77.8 57.0	56.5 44.3	63.8 58.7	81.2 76.2	52.9 45.3	78.3 78.0	73.9 75.6	41.2
O'Connor	05 <i>Av</i>		-----	88.9 70.2	83.3 78.5	94.4 71.3	82.4 70.4	83.3 66.1	88.9 71.6	-----
Scalia	05 <i>Av</i>			-----	72.5 72.9	62.3 55.4	86.8 86.7	59.4 53.5	60.9 51.7	73.5
Kennedy	05 <i>Av</i>				-----	72.5 67.9	69.1 73.7	68.1 66.7	68.1 65.6	79.4
Souter	05 <i>Av</i>					-----	52.9 54.1	79.7 85.6	82.6 81.5	58.8
Thomas	05 <i>Av</i>						-----	52.9 52.2	55.9 51.0	76.5
Ginsburg	05 <i>Av</i>							-----	72.5 82.1	50.0
Breyer	05 <i>Av</i>								-----	50.0

¹⁶ Percentages represent the frequency with which one Justice votes (either in the majority, concurrence or dissent) for the same reasoning as another Justice. For instance, a Justice who joins the majority opinion but writes his own concurrence will count as having voted with the majority, whereas a Justice who concurs only in the judgment or dissents will not have voted with those in the majority. Similarly, two dissenting Justices will only be counted as having voted with one another when one joins the other's opinion. Percentages are calculated by dividing the total number of cases in which the Justices agree by the total number of cases in which they both participated. The row marked "05" indicates the voting alignment for the October Term 2005. "Av" represents the average voting alignment of those Justices over ten terms, from 1994 through 2003, derived from 118 HARV. L. REV. 510. The cells displaying highest and lowest alignments in 2005 are noted in bold font.

2005 Term Voting Alignment in Nonunanimous Cases¹⁷

<i>% of Agreement</i>	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer	Alito
Roberts	35.0	71.4	77.5	67.5	50.0	70.0	47.5	50.0	88.0
Stevens	-----	50.0	30.2	41.9	69.8	25.6	65.1	58.1	23.1
O'Connor		-----	75.0	62.5	87.5	62.5	62.5	75.0	-----
Scalia			-----	55.8	39.5	79.1	34.9	39.5	65.4
Kennedy				-----	55.8	51.2	48.8	46.5	73.1
Souter					-----	30.2	67.4	72.1	46.2
Thomas						-----	25.6	30.2	69.2
Ginsburg							-----	55.8	34.6
Breyer								-----	34.6

SECTION IV: DECISION DIGEST

Decisions by Area of Law

Presidential Powers:

Hamdan v. Rumsfeld

1st Amendment:

Freedom of Association:

Rumsfeld v. Forum for Academic and Institutional Rights

Freedom of Speech:

Garcetti v. Ceballos; *Hartman v. Moore*; *Wisconsin Right to Life, Inc. v. FEC*; *Beard v. Banks*; **Randall v. Sorrell**

4th Amendment:

Brigham City v. Stuart; **Georgia v. Randolph**; *Hudson v. Michigan*; *Samson v. California*; *United States v. Grubbs*

5th Amendment:

Due Process:

Holmes v. South Carolina

Miranda:

Maryland v. Blake

¹⁷ Because 37.7 percent of the cases in the October Term 2005 were unanimous, removing unanimous cases produces a lower rate of agreement and a better picture of how the Justices vote in divisive cases. For purposes of voting alignment, a case is considered unanimous when all Justices joined in the majority opinion and no Justice filed a separate opinion concurring only in the judgment, or dissenting.

<u>6th Amendment:</u>	Davis v. Washington; Hammon v. Indiana; United States v. Gonzalez-Lopez
<u>8th Amendment:</u>	Brown v. Sanders; Hill v. McDonough ; Kansas v. Marsh; Oregon v. Guzek
<u>14th Amendment:</u>	Clark v. Arizona ; Jones v. Flowers; League of United Latin American Citizens v. Perry ; Ayotte v. Planned Parenthood of No. New England
<u>Administrative Law:</u>	Whitman v. Dep't of Transportation; Woodford v. Ngo
<u>Antitrust:</u>	Illinois Tool Works, Inc. v. Independent Ink, Inc.; Texaco Inc. v. Dagher; Volvo Trucks NA, Inc. v. Reeder-Simco GMC, Inc.
<u>Arbitration:</u>	Buckeye Check Cashing, Inc. v. Cardegna
<u>Bankruptcy:</u>	Central Virginia Community College v. Katz; Howard Delivery Service v. Zurich American Insur. Co.
<u>Civil Procedure:</u>	
<i>Federal Jurisdiction:</i>	Empire HealthChoice Assurance v. McVeigh; Lincoln Property Co. v. Roche; Marshall v. Marshall ; Wachovia Bank, NA v. Schmidt
<i>Fees:</i>	Martin v. Franklin Capital Corp.
<u>Civil Rights - Employment:</u>	Arbaugh v. Y & H Corp.; Domino's Pizza, Inc. v. McDonald; Burlington N. & Santa Fe Ry. Co. v. White
<u>Commerce Clause:</u>	DaimlerChrysler Corp. v. Cuno
<u>Criminal:</u>	
<i>Actual Innocence:</i>	House v. Bell
<i>Burden of Proof:</i>	Dixon v. United States
<i>Habeas:</i>	Day v. McDonough; Evans v. Chavis; Rice v. Collins
<i>Sentencing:</i>	Washington v. Recuenco
<u>Environmental Law:</u>	S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.; Rapanos v. United States
<u>International Law:</u>	Sanchez-Llamas v. Oregon

<u>Immigration Law:</u>	Fernandez-Vargas v. Gonzales
<u>Patent Law:</u>	Laboratory Corp. v. Metabolite Laboratories; eBay v. MercExchange, LLC; Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.
<u>Sovereign Immunity:</u>	Northern Ins. Co. of NY v. Chatham County; United States v. Georgia
<u>Statutory Interpretation:</u>	
<i>Controlled Substance Act:</i>	Gonzales v. O Centro Espirita BUV; Gonzales v. Oregon
<i>Fair Labor Standards:</i>	IBP, Inc. v. Alvarez
<i>Federal Tort Claims Act:</i>	Dolan v. U.S. Postal Service; United States v. Olson; Will v. Hallock
<i>IDEA:</i>	Arlington Central School Dist. v. Murphy; Schaffer v. Weast
<i>RICO:</i>	Anza v. Ideal Steel Supply Co.; Mohawk Industries v. Williams; Scheidler v. NOW
<i>Securities Litigation Reform:</i>	Kircher v. Putnam Funds Trust; Merrill Lynch v. Dabit
<i>Other:</i>	Arkansas DHHS v. Ahlborn; Lockhart v. United States; Sereboff v. Mid Atlantic Medical Services, Inc.; Zedner v. United States
<u>Tribal Sovereignty:</u>	Wagnon v. Prairie Band Potawatomi Nation

The Split (Five Vote Majority) Decisions

Brown v. Sanders

Holding: Reversed and remanded. An invalidated sentencing factor will render a death penalty unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances. Here, the consideration of two invalid special circumstances is not unconstitutional because two other valid special circumstances remain and these factors were not weighed.

Vote: **5-4, Scalia** with Roberts, O'Connor, Kennedy, and Thomas. Stevens dissenting with Souter. Breyer dissenting with Ginsburg.

Central Virginia Community College v. Katz

Holding: Affirmed. A bankruptcy trustee's proceeding to set aside the debtor's preferential transfers to state agencies is not barred by sovereign immunity. The Bankruptcy Clause is intended to grant authority to Congress and subordinate state sovereign immunity for bankruptcy issues. States are bound by a bankruptcy court order discharging a debtor, just as are other creditors. Because bankruptcy jurisdiction is principally *in rem* it does not implicate State sovereignty to the same extent as other types of jurisdiction.

Vote: 5-4, **Stevens** with O'Connor, Souter, Ginsburg, and Breyer. Thomas dissenting with Roberts, Scalia, and Kennedy.

Clark v. Arizona

Holding: Affirmed. Arizona's use of an insanity test defined in terms of the defendant's capacity to distinguish whether the act charged as a crime was right or wrong does not violate due process. Arizona's consideration of evidence to determine a defendant's state of mind does not violate due process.

Vote: 5-4, **Souter**, with Roberts, Scalia, Thomas, and Alito. Breyer concurred in part and dissented from the Court's ultimate disposition of the case. Kennedy dissenting with Stevens and Ginsburg.

Note: Justice Breyer agreed with the majority opinion with respect to the manner in which it categorized evidence related to insanity, but asserted that the distinction among these types of evidence may be unclear and would have remanded the case. His vote is counted as a dissenting vote in this report because he does not concur in the judgment.

Day v. McDonough

Holding: Affirmed. A federal court has discretion to *sua sponte* correct a State's erroneous computation of the timeliness of a habeas petition under AEDPA's one-year statute of limitation, provided the court provides the parties fair notice and an opportunity to present their positions. The court must also ensure that the interests of justice are best served, either by addressing the merits or dismissing the petition as time barred.

Vote: 5-4, **Ginsburg** with Roberts, Kennedy, Souter, and Alito. Stevens dissenting from the judgment with Breyer. Scalia dissenting with Thomas and Breyer.

Empire HealthChoice Assurance v. McVeigh

Holding: Affirmed. The reimbursement claim here stems from personal-injury recovery and is plainly governed by state law and does not arise the Federal Employees Health Benefits Act does not provide federal subject matter jurisdiction for this suit.

Vote: 5-4, **Ginsburg** with Roberts, Stevens, Scalia, Thomas. Breyer dissenting with Kennedy, Souter, and Alito.

Garcetti v. Ceballos

Holding: Reversed. When public employees speak pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and the Constitution does not protect the employee from discipline by the employer for such speech.

Vote: **5-4, Kennedy** with Roberts, Scalia, Thomas, and Alito. Stevens dissenting. Souter dissenting with Stevens and Ginsburg. Breyer dissenting.

Note: *Garvetti* was originally argued on October 12, 2005 with Justice O'Connor on the Court. It was reargued on March 21, 2006 with Justice Alito's participation

Georgia v. Randolph

Holding: Affirmed. A physically present co-occupant's clear, stated refusal to permit police entry for the purposes of searching a residence renders the entry warrantless and the search unreasonable and invalid as to him.

Vote: **5-3, Souter** with Stevens, Kennedy, Ginsburg, and Breyer. Stevens and Breyer concurring. Roberts dissenting with Scalia. Scalia and Thomas dissenting. Alito took no part.

Hamdan v. Rumsfeld

Holding: Reversed and remanded. The Court has jurisdiction to decide this claim. The military commission at issue is not expressly authorized by any Act of Congress and it lacks the power to proceed because it violates the Uniform Code of Military Justice and the Geneva Conventions of 1949 in both its structure and procedural rules.

Vote: **5-3, Stevens**, with Kennedy (except Part V and VI(D)(iv)), Souter, Ginsburg, and Breyer. Breyer concurring with Kennedy, Souter, and Ginsburg. Kennedy concurring with Ginsburg and Breyer as to Parts I and II. Scalia dissenting with Thomas and Alito. Thomas dissenting with Scalia and, except for Parts I, II(C)(1) and III(B)(2), Alito. Alito dissenting with Scalia and Thomas as to Parts I-III.

Hartman v. Moore

Holding: Reversed and remanded. A plaintiff in a retaliatory-prosecution action must plead and show the absence of probable cause to support the underlying criminal charges, otherwise qualified immunity will protect the government official who urged that charges be pressed.

Vote: **5-2, Souter** with Stevens, Scalia, Kennedy, and Thomas. Ginsburg dissenting with Breyer. Roberts and Alito took no part.

House v. Bell

Holding: Reversed and remanded. The stringent requirement under *Schlup* for a claim of actual innocence is that new evidence establish that it is more likely than not that no reasonable juror would have found the defendant guilty beyond a reasonable doubt is met here, allowing petitioner's federal habeas action to proceed. But, the higher standard of freestanding innocence required under *Herrera* to render his confinement and planned execution unconstitutional was not met.

Vote: **5-3, Kennedy** with Stevens, Souter, Ginsburg, and Breyer. Roberts dissenting with Scalia and Thomas. Alito took no part.

Note: Chief Justice Roberts concurred in the judgment with respect to the Court's disposition of petitioner's claim of freestanding innocence, finding that such a claim, if one existed, did not meet the higher *Herrera* threshold.

Hudson v. Michigan

Holding: Affirmed. An entry that violates the “knock-and-announce” rule is unlawful, but does not require application of the exclusionary rule to evidence found in an authorized search where the illegal entry was not the “but-for” cause of obtaining the evidence.

Vote: **5-4 (4-1-4)**, **Scalia** with Roberts, Thomas, Alito. Kennedy concurring in judgment. Breyer dissenting with Stevens, Souter, and Ginsburg.

Note: This case was originally argued on January 9, 2006 with Justice O’Connor on the Court. It was reargued during a special session on May 18, 2006 and decided with Justice Alito’s participation.

Jones v. Flowers

Holding: Reversed and remanded. When a mailed notice of a tax sale is returned unclaimed, a State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if practicable. Here, additional reasonable steps were available to the State and the effort to provide notice was insufficient to satisfy due process, given the individual property owner’s interest in his home.

Vote: **5-3**, **Roberts** with Stevens, Souter, Ginsburg, and Breyer. Thomas dissenting with Scalia and Kennedy. Alito took no part.

Kansas v. Marsh

Holding: Reversed and remanded. The Kansas capital sentencing statute is constitutional because the range of discretion granted a State in imposing the death penalty allows it to assign the defendant the burden to prove that mitigating circumstances outweigh aggravating circumstances. A statute that requires the imposition of the death penalty when the sentencing jury determines that the weight of such circumstances is in equipoise does not violate the Constitution.

Vote: **5-4**, **Thomas** with Roberts, Scalia, Kennedy, and Alito. Scalia concurring. Stevens dissenting. Souter dissenting with Stevens, Ginsburg, and Breyer.

League of United Latin American Citizens v. Perry

Holding: Affirmed in part, reversed in part, vacated in part, and remanded. The Texas redistricting plan violates section 2 of the Voting Rights Act with respect to plan 1374C change to District 23 because it amounts to vote dilution of the Latino population for that district. Claims of partisan gerrymandering are rejected. Mid-decade redistricting is permissible and the Texas redistricting plan, apart from the alterations to District 23, is not invalid.

Vote: **5-4 (1-2-2-2-2)** **Kennedy** delivered the opinion of the Court with respect to Parts II(A) and III. Roberts and Alito joined Parts II(B) and II(C). Souter and Ginsburg joined Part II(D). Stevens concurring in part and dissenting in part with Breyer as to Parts I and II. Souter concurring in part and dissenting in part with Ginsburg. Breyer concurring in part and dissenting in part. Roberts concurring in part, concurring in the judgment in part, and dissenting in part with Alito. Scalia concurring in the judgment in part and dissenting in part with Thomas and with Roberts and Alito as to Part III.

Note: This case is complex and the decisions splintered. Six separate opinions were issued, with various Justices joining parts of different opinions. As Justice Kennedy

notes on page two of his opinion, “Though appellants do not join each other as to all claims, for the sake of convenience we refer to appellants collectively.” So too, we treat the case collectively and attempt to provide a single categorization for the votes and disposition of the case for statistical purposes.

Rapanos v. United States

Holding: Vacated and remanded. The Court vacated the judgment of the lower courts in favor of the federal government’s assertions of Clean Water Act jurisdiction over the plaintiff landowners’ property. The Court’s disposition was supported by a four-Justice plurality opinion authored by Justice Scalia and a separate concurring opinion, joining only in the judgment written by Justice Kennedy. Justice Scalia’s plurality opinion concluded that the plain meaning of the statutory language limited the meaning of “navigable waters” to “only those relatively permanent, standing, or continuously flowing bodies of water ‘forming geographic features.’” Justice Kennedy’s concurring opinion, however, endorsed a potentially broad reading of Clean Water Act jurisdiction over both wetlands and nonnavigable tributaries, faulting the Corps of Engineers regulations and the lower courts’ reasoning for not tying jurisdiction to such wetlands and nonnavigable tributaries more closely to their impacts on traditional navigable waters. Because Justice Stevens’ dissent for four Justices endorsed a jurisdictional theory broader than either Justice Scalia’s or Kennedy’s the Corps can now rely on either of those theories to support jurisdiction Vote: 5-4(4-1-4), **Scalia** with Roberts, Thomas, and Alito. Roberts concurring. Kennedy concurring in the judgment. Stevens dissenting with Souter, Ginsburg, and Breyer. Breyer dissenting.

United States v. Gonzalez-Lopez

Holding: Affirmed and remanded. The erroneous deprivation of a criminal defendant’s choice of counsel violates his Sixth Amendment right to counsel. This violation is not subject to harmless-error analysis; it is a structural error in the framework of the trial and entitles the defendant to reversal of his conviction. Vote: 5-4, **Scalia** with Stevens, Souter, Ginsburg, and Breyer. Alito dissenting with Roberts, Kennedy, and Thomas.

Dismissed as Improvidently Granted¹⁸

Maryland v. Blake – The question presented in *Maryland v. Blake*, which arose on a writ of certiorari to the Court of Appeals of Maryland, was “When a police officer improperly communicates with a suspect after invocation of the suspect’s right to counsel, does *Edwards* permit consideration of curative measures by the police, or other intervening circumstances, to conclude that a suspect later initiated communication with the police?” The case was dismissed as improvidently granted

¹⁸ *Mobank Industries v. Williams* is not included here because, although the petition was dismissed as improvidently granted in a Per Curiam opinion, the Court simultaneously granted the petition, vacated the judgment, and remanded *Mobank* to the Eleventh Circuit for reconsideration in light of its ruling in *Anza v. Ideal Steel Supply Corp.* In *Anza*, the Court ruled that there must be proof of causation between the business injury asserted and the challenged wrongful conduct in a RICO claim.

without comment and without dissent in a Per Curiam opinion issued on November 14, 2005, just two weeks after oral argument.

Laboratory Corp. v. Metabolite Laboratories, Inc. – The write of certiorari in this case was succinctly dismissed as improvidently granted by a Per Curiam opinion in which Chief Justice Roberts took no part. The case involved a patent claim for diagnostic processes designed to detect vitamin deficiencies and affecting use of those processes by health care researchers and practitioners. Justice Breyer wrote a dissent, joined by Justice Stevens and Justice Souter, asserting that the Court should have decided the case to clarify this area of patent law and to help medical professionals better understand their related legal obligations. Justice Breyer deemed this particular patent invalid because it was an “unpatentable ‘natural phenomenon.’”

SECTION V: SUMMARIES OF HIGH PROFILE CASES

• ABORTION

Ayotte v. Planned Parenthood of No. New England

Issues¹⁹:

- (1) Did the United States First Circuit Court of Appeals apply the correct standard in a facial challenge to a statute regulating abortion when it ruled that the undue burden standard cited in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 876-77 (1992) and *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) applied rather than the “no set of circumstances” standard set forth in *United States v. Salerno*, 481 U.S. 739 (1987)?
- (2) Whether the New Hampshire Parental Notification Prior to Abortion Act, N.H. Rev. Stat. Ann. § 132:24-28 (2003) preserves the health and life of the minor through the Act’s judicial bypass mechanism and/or other state statutes.

Holding: Vacated and remanded.

Invalidating in its entirety a statute that regulates access to abortions in a manner that would be unconstitutional in medical emergencies is not appropriate here as lower courts may be able to render narrower relief.

Vote: 9-0

O’Connor (Unanimous).

Scheidler v. NOW

Issues:

- (1) Whether the Seventh Circuit, on remand, disregarded this Court’s mandate by holding that “all” of the predicate acts supporting the jury’s finding of a RICO violation were not reversed, that the “judgment that petitioners violated RICO” was not necessarily reversed, and that the “injunction issued by the District Court” might not need to be vacated.
- (2) Whether the Seventh Circuit correctly held, in conflict with decisions of the Sixth and Ninth Circuits, that the Hobbs Act, 18 U.S.C. § 1951(a), can be read to punish

¹⁹ Issues are adapted from the Question Presented posted for each case on the Supreme Court of the United States’ web site under the Docket section. Available at <http://www.supremecourtus.gov/docket/docket.html> (last visited June 21, 2006).

acts or threats of physical violence against “any person or property” in a manner that “in any way or degree * * * affects commerce,” even if such acts or threats of violence are wholly unconnected to either extortion or robbery.

(3) Whether this Court should again grant certiorari to resolve the deep and important intercircuit conflict over whether injunctive relief is available in a private civil action for treble damages brought under RICO, 18 U.S.C. § 1964(c).

Holding: Reversed and remanded.

The Hobbs Act was not intended to create a freestanding physical violence offense and physical violence unrelated to robbery or extortion falls outside the scope of the Act.

Vote: 8-0

Breyer (Unanimous; Alito took no part).

- **FIRST AMENDMENT**

Rumsfeld v. Forum for Academic and Institutional Rights

Issue:

Whether the court of appeals erred in holding that the Solomon Amendment’s equal access condition on federal funding likely violates the First Amendment to the Constitution and in directing a preliminary injunction to be issued against its enforcement.

Holding: Reversed and remanded.

The Solomon Amendment does not violate the First Amendment because it regulates conduct not speech and because it does not interfere with the freedoms of association and speech when it requires that a law school offer military recruiters the same access provided to other recruiters in order for the law school and its university to receive federal funding.

Vote: 8-0

Roberts (Unanimous; Alito took no part)

Garcetti v. Ceballos

Issues:

(1) Should a public employee’s purely job-related speech, expressed strictly pursuant to the duties of employment, be cloaked with First Amendment protection simply because it touches on a matter of public concern, or should First Amendment protection also require the speech to be engaged in “as a citizen,” in accordance with this Court’s holdings in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983)?

(2) Is immediate review by this Court necessary to address the growing inter-circuit conflict on the question of whether a public employee’s purely job-related speech is constitutionally protected, especially where the lack of uniformity dramatically impacts the ability of all public employers to effectively manage their respective agencies?

Holding: Reversed.

When public employees speak pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and the Constitution does not protect the employee from discipline by the employer for such speech.

Vote: 5-4

Kennedy with Roberts, Scalia, Thomas, and Alito. Stevens dissenting. Souter dissenting with Stevens and Ginsburg. Breyer dissenting.

Randall v. Sorrell

Issues:

(1) Whether Vermont's mandatory candidate expenditure limits violate the freedom of political speech guaranteed by the First and Fourteenth Amendments to the United States Constitution.

(2) Whether Vermont's \$200-\$400 limits per election cycle on campaign contributions to state candidates violate the freedoms of political speech and association guaranteed by the First and Fourteenth Amendments to the United States Constitution because they are unconstitutionally low.

(3) Whether Vermont's presumption of coordination, which provides that an expenditure made by a political party or political committee that primarily benefits six or fewer candidates is presumed to be a related expenditure subject to contribution limits, violates the freedoms of political speech and association guaranteed by the First and Fourteenth Amendments to the United States Constitution.

Holding: Reversed and remanded.

The campaign expenditure limits imposed by Vermont's Act 64 violate the First Amendment's free speech guarantees under *Buckley*. The campaign contribution limits imposed by Vermont's Act 64 violate the First Amendment because those limits are too restrictive and burden protected interests in a manner disproportionate to the public purposes they seek to advance. The Act is not severable.

Vote: 6-3 (3-1-2-3)

Breyer with Roberts and Alito. Alito concurring in part and concurring in judgment. Kennedy concurring in judgment. Thomas concurring in judgment with Scalia. Stevens dissenting. Souter dissenting with Ginsburg and with Stevens in part.

- **FOURTEENTH AMENDMENT**

Clark v. Arizona

Issues:

(1) Whether Arizona's insanity law, as set forth in A.R.S. § 13-502 (1996) and applied in this case, violated Petitioner's right to due process under the United States Constitution, Fourteenth Amendment.

(2) Whether Arizona's blanket exclusion of evidence and refusal to consider mental disease or defect to rebut the state's evidence on the element of *mens rea* violated Petitioner's right to due process under the United States Constitution, Fourteenth Amendment?

Holding: Affirmed.

Arizona's use of an insanity test defined in terms of the defendant's capacity to distinguish whether the act charged as a crime was right or wrong does not violate due process. Arizona's consideration of evidence to determine a defendant's state of mind does not violate due process.

Vote: 5-4

Souter, with Roberts, Scalia, Thomas, and Alito. Breyer concurred in part and dissented from the Court's ultimate disposition of the case. Kennedy dissented with Stevens and Ginsburg.

Note: Justice Breyer agreed with the majority opinion with respect to the manner in which it categorized evidence related to insanity, but asserted that the distinction among these types of evidence may be unclear and would have remanded the case. His vote is counted as a dissenting vote in this report because he does not concur in the judgment.

League of United Latin American Citizens v. Perry

Issues:

- (1) Does the Texas legislature's 2003 replacement of a legally valid congressional districting plan with a statewide plan, enacted for "the single-minded purpose" of gaining partisan advantage, satisfy the stringent constitutional rule of equipopulous districts by relying on the 2000 decennial census and the fiction of inter-censal population accuracy?
- (2) Whether the Equal Protection Clause and the First Amendment prohibit States from redrawing lawful districting plans in the middle of the decade, for the sole purpose of maximizing partisan advantage.
- (3) Whether section 2 of the Voting Rights Act permits a State to destroy a district effectively controlled by African-American voters, merely because it is impossible to draw a district in which African-Americans constitute an absolute mathematical majority of the population.
- (4) Whether, under *Bush v. Vera*, 517 U.S. 952 (1996), a bizarre-looking congressional district, which was intentionally drawn as a majority Latino district by connecting two far-flung pockets of dense urban population with a 300-mile-long rural "land bridge," may escape invalidation as a racial gerrymander because drawing a compact majority Latino district would have required the mapmakers to compromise their political goal of maximizing Republican seats elsewhere in the State.
- (5) Whether the District Court erred by requiring section 2 demonstrative districts to be more compact and to offer greater electoral opportunity to minority voters than the corresponding districts in the challenged redistricting plan.

Holding: Affirmed in part, reversed in part, vacated in part, and remanded.

The Texas redistricting plan violates section 2 of the Voting Rights Act with respect to plan 1374C change to District 23 because it amounts to vote dilution of the Latino population for that district. Claims of partisan gerrymandering are rejected. Mid-decade redistricting is permissible and the Texas redistricting plan, apart from the alterations to District 23, is not invalid.

Vote: 5-4 (1-2-2-2-2)

Kennedy delivered the opinion of the Court with respect to Parts II(A) and III. Roberts and Alito joined Parts II(B) and II(C). Souter and Ginsburg joined Part II(D). Stevens concurring in part and dissenting in part with Breyer as to Parts I and II. Souter concurring in part and dissenting in part with Ginsburg. Breyer concurring in part and dissenting in part. Roberts concurring in part, concurring in the judgment in part, and dissenting in part with Alito. Scalia concurring in the judgment in part and dissenting in part with Thomas and with Roberts and Alito as to Part III.

Note: This case is complex and the decisions splintered. Six separate opinions were issued, with various Justices joining parts of different opinions. As Justice Kennedy notes on page two of his opinion, “Though appellants do not join each other as to all claims, for the sake of convenience we refer to appellants collectively.” So too, we treat the case collectively and attempt to provide a single categorization for the votes and disposition of the case for statistical purposes.

- **CIVIL RIGHTS**

Burlington N. & Santa Fe Ry. Co. v. White

Issue:

Whether an employer may be held liable for retaliatory discrimination under Title VII for any “materially adverse change in the terms of employment” (including a temporary suspension rescinded by the employer with full back pay or an inconvenient reassignment, as the court below held); for any adverse treatment that was “reasonably likely to deter” the plaintiff from engaging in protected activity (as the Ninth Circuit holds); or only for an “ultimate employment decision” (as two other courts of appeals hold).

Holding: Affirmed.

An employer may be held liable for retaliatory discrimination under Title VII for those actions that would be materially adverse to a reasonable employee. Liability for retaliation is not limited to actions that are related to employment or occur in the workplace under Title VII.

Vote: 9-0

Breyer (Alito concurring in judgment).

- **CRIMINAL JUSTICE**

Georgia v. Randolph

Issue:

Should this Court grant certiorari to resolve the conflict among federal and state courts on whether an occupant may give law enforcement valid consent to search the common areas of the premises shared with another, even though the other occupant is present and objects to the search?

Holding: Affirmed.

A physically present co-occupant’s clear, stated refusal to permit police entry for the purposes of searching a residence renders the entry warrantless and the search unreasonable and invalid as to him.

Vote: 5-3

Souter with Stevens, Kennedy, Ginsburg, and Breyer. Stevens and Breyer concurring. Roberts dissenting with Scalia. Scalia and Thomas dissenting.

Hill v. McDonough

Issues:

(1) Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the

chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254.

(2) Whether, under this Court's decision in *Nelson*, a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983?

Holding: Reversed and remanded.

Under *Nelson*, a claim challenging the method of execution may seek to enjoin the state from carrying out that execution in an allegedly unconstitutional manner through a section 1983 action.

Vote: 9-0

Kennedy (Unanimous).

House v. Bell

Issues:

(1) Did the majority below err in applying this Court's decision in *Schlup v. Delo* to hold that Petitioner's compelling new evidence, though presenting at the very least a colorable claim of actual innocence, was as a matter of law insufficient to excuse his failure to present that evidence before the state courts – merely because he had failed to negate each and every item of circumstantial evidence that had been offered against him at the original trial?

(2) What constitutes a “truly persuasive showing of actual innocence” pursuant to *Herrera v. Collins* sufficient to warrant freestanding habeas relief?

Holding: Reversed and remanded.

The stringent requirement under *Schlup* for a claim of actual innocence is that new evidence establish that it is more likely than not that no reasonable juror would have found the defendant guilty beyond a reasonable doubt is met here, allowing petitioner's federal habeas action to proceed. But, the higher standard of freestanding innocence required under *Herrera* to render his confinement and planned execution unconstitutional was not met.

Vote: 5-3

Kennedy with Stevens, Souter, Ginsburg, and Breyer. Roberts with Scalia and Thomas dissenting. Alito took no part.

- **PRESIDENTIAL POWERS**

Hamdan v. Rumsfeld

Issues:

(1) Whether the military commission established by the President to try petitioner and others similarly situated for alleged war crimes in the “war on terror” is duly authorized under Congress's Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224, the Uniform Code of Military Justice (UCMJ), or the inherent powers of the President.

(2) Whether petitioner and others similarly situated can obtain judicial enforcement from an Article III court of rights protected under the 1949 Geneva Convention in an action for a writ of habeas corpus challenging the legality of their detention by the Executive branch.

Holding: Reversed and remanded.

The Court has jurisdiction to decide this claim. The military commission at issue is not expressly authorized by any Act of Congress and it lacks the power to proceed because it violates the Uniform Code of Military Justice and the Geneva Conventions of 1949 in both its structure and procedural rules.

Vote: 5-3

Stevens, with Kennedy (except Part V and VI(D)(iv)), Souter, Ginsburg, and Breyer. Breyer concurring with Kennedy, Souter, and Ginsburg. Kennedy concurring with Ginsburg and Breyer as to Parts I and II. Scalia dissenting with Thomas and Alito. Thomas dissenting with Scalia and, except for Parts I, II(C)(1) and III(B)(2), Alito. Alito dissenting with Scalia and Thomas as to Parts I-III. (Roberts took no part).

- **ENVIRONMENTAL LAW**

Rapanos v. United States; Carabell v. U.S. Army Corps of Engineers

Issues:

- (1) Does the Clean Water Act prohibition on unpermitted discharges to “navigable waters” extend to nonnavigable wetlands that do not even abut, or are hydrologically isolated from, a navigable water?
- (2) Does extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress’ constitutional power to regulate commerce among the states?

Holding: Vacated and remanded.

The Court vacated the judgment of the lower courts in favor of the federal government’s assertions of Clean Water Act jurisdiction over the plaintiff landowners’ property. The Court’s disposition was supported by a four-Justice plurality opinion authored by Justice Scalia and a separate concurring opinion, joining only in the judgment written by Justice Kennedy. Justice Scalia’s plurality opinion concluded that the plain meaning of the statutory language limited the meaning of “navigable waters” to “only those relatively permanent, standing, or continuously flowing bodies of water ‘forming geographic features.’” Justice Kennedy’s concurring opinion, however, endorsed a potentially broad reading of Clean Water Act jurisdiction over both wetlands and nonnavigable tributaries, faulting the Corps of Engineers regulations and the lower courts’ reasoning for not tying jurisdiction to such wetlands and nonnavigable tributaries more closely to their impacts on traditional navigable waters. Because Justice Stevens’ dissent for four Justices endorsed a jurisdictional theory broader than either Justice Scalia’s or Kennedy’s the Corps can now rely on either of those theories to support jurisdiction.

Vote: 5-4 (4-1-4)

Scalia with Roberts, Thomas and Alito. Roberts concurring. Kennedy concurring in judgment. Stevens with Souter, Ginsburg, and Breyer dissenting. Breyer dissenting.

- **FEDERALISM AND PREEMPTION**

Gonzales v. O Centro Espirita BUV

Issue:

Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb et seq., requires the government to permit the importation, distribution, possession, and use of a Schedule I hallucinogenic controlled substance, where Congress has found that the substance has a high potential for abuse, it is unsafe for use even under medical supervision, and its importation and distribution would violate an international treaty.

Holding: Affirmed and remanded.

The government failed to demonstrate a compelling interest sufficient to justify barring the sacramental use of a substance regulated by the Controlled Substances Act and violates the Religious Freedom Restoration Act.

Vote: 8-0

Roberts (Unanimous).

Gonzales v. Oregon

Issue:

Whether the Attorney General has permissibly construed the Controlled Substances Act, 21 U.S.C. 801 et seq., and its implementing regulations to prohibit the distribution of federally controlled substances for the purpose of facilitating an individual's suicide, regardless of a state law purporting to authorize such distribution.

Holding: Affirmed.

The plain language of the Controlled Substances Act excludes the Attorney General to make medical policy decisions and it is unlawful for the Attorney General to prohibit doctors from prescribing regulated drugs for the purpose of physician-assisted suicide under a state law permitting the procedure.

Vote: 6-3

Kennedy with Stevens, O'Connor, Souter, Ginsburg, and Breyer. **Scalia** with **Roberts** and **Thomas** dissenting. **Thomas** dissenting.

Marshall v. Marshall

Issues:

- (1) What is the scope of the probate exception to federal jurisdiction?
- (2) Did Congress intend the probate exception to apply where a federal court is not asked to probate a will, administer an estate, or otherwise assume control of property in the custody of a state probate court?
- (3) Did Congress intend the probate exception to apply to cases arising under the Constitution, laws, or treaties of the United States (28 U.S.C. § 1331), including the Bankruptcy Code (28 U.S.C. § 1334), or is it limited to cases in which jurisdiction is based on diversity of citizenship?
- (4) Did Congress intend the probate exception to apply to cases arising out of trusts, or is it limited to cases involving wills?

Holding: Reversed and remanded.

The probate exception does not reach a tortious interference counter claim and federal court adjudicatory authority was properly asserted here.

Vote: 9-0

Ginsburg (Stevens concurring in judgment).

- **INTERNATIONAL LAW**

- ***Sanchez-Llamas v. Oregon***

Issues:

- (1) Does the Vienna Convention convey individual rights of consular notification and access to a foreign detainee enforceable in the Courts of the United States?
- (2) Does the state's failure to notify a foreign detainee of his rights under the Vienna Convention result in the suppression of his statements to police?

Holding: Affirmed.

Article 36(1)(b) of the Vienna Convention on Consular Relations provides that a person detained from a foreign country shall have access to consular officers. The Court did not resolve the question of whether the Convention grants enforceable individual rights, but assumed that even if it did, suppression is not an appropriate remedy for a violation of Article 36(1)(b). A State may apply its regular procedural default rules to claims resulting from Article 36(1)(b) of the Convention.

Vote: 6-3

Roberts with Scalia, Kennedy, Thomas, and Alito. Ginsburg concurring in judgment. Breyer dissenting with Stevens and Souter; Ginsburg joining Part II.

Note: Justice Ginsburg joined the portion of Justice Breyer's dissent in which he asserts that the Court should have decided the question of whether Article 36(1)(b) of the Convention confers enforceable individual rights and found that it does.

SECTION VI: CASES TO WATCH IN 2006

The Court has granted certiorari in 29 cases for the October Term 2006 (two of these include consolidated cases), as of June 29, 2006. Five of the cases granted thus far should generate significant interest:

Parents Involved in Community Schools v. Seattle School District #1 (05-908) and Meredith v. Jefferson Cty. Bd. of Ed. (05-915)

Issues:

- (1) How are the Equal Protection rights of public high school students affected by the jurisprudence of *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003);
- (2) Is racial diversity a compelling interest that can justify the use of race in selecting students for admission to public high schools; and
- (3) May a school district that is not racially segregated and that normally permits a student to attend any high school of her choosing deny a child admission to her chosen school solely because of her race in an effort to achieve a desired racial balance in particular schools, or does such racial balancing violate the Equal Protection Clause of the Fourteenth Amendment? (*Seattle School District*)

(1) Under this Court’s jurisprudence in *Grutter*, *Bakke*, and *Gratz*, may race be used as the sole factor for assigning students to the regular (non-traditional) schools in the Jefferson County Public Schools; (2) Under the Fourteenth Amendment, does a race-conscious quota plan for assignment of African-American students strictly comply with the requirement that race be used only to satisfy a compelling governmental interest in a narrowly tailored manner; and (3) Did the District Court abuse and/or exceed its remedial judicial authority in maintaining “desegregative attractiveness” in the Public Schools of Jefferson County? (Adapted from *Jefferson County*)

Case Citations Below: 426 F.3d 1162 (9th Cir. 2005); 416 F.3d 513 (6th Cir. 2005).

***Gonzales v. Carhart* (05-380) and
Gonzales v. Planned Parenthood (05-1382)**

Issue:

Whether, notwithstanding Congress’s determination that a health exception was unnecessary to preserve the health of the mother, the Partial-Birth Abortion Ban Act of 2003 is invalid because it lacks a health exception or is otherwise unconstitutional on its face.

Case Citations Below: 413 F.3d 791 (8th Cir. 2005); 435 F.3d 1163 (9th Cir. 2006).

***Massachusetts v. EPA* (05-1120)**

Issue:

(1) Whether the Environmental Protection Agency (“EPA”) may decline to issue emission standards for motor vehicles based on policy considerations not enumerated in section 202(a)(1) of the Clean Air Act; and (2) Whether the EPA Administrator has authority to regulate carbon dioxide and other air pollutants associated with climate change under section 202(a)(1).

Case Citation Below: 415 F.3d 50 (D.C. Cir. 2005).

A number of other cases that have been granted will also be closely watched.

- ***Burton v. Waddington* (05-9222)** – Whether *Blakely v. Washington*, 542 U.S. 296 (2004) applies retroactively in collateral proceedings filed under 28 U.S.C. § 2254 to cases where the state court judgment became final, and the state court adjudication of the merits of the claim occurred, prior to the issuance of the Court’s decision in 2004; and, assuming *Blakely v. Washington* does apply retroactively, whether the state court adjudication of Burton’s claim was contrary to or an unreasonable application of the holding in *Blakely* where each individual sentence imposed on Burton did not exceed the standard sentencing range for the particular offense.
- ***Environmental Defense v. Duke Energy Corp.* (05-848)** – (1) Whether the Fourth Circuit’s decision violated Section 307(b) of the Act, which provides that national Clean Air Act regulations are subject to challenge “only” in the D.C. Circuit by petition for review filed within 60 days of their promulgation, and “shall not be subject to judicial review” in enforcement proceedings, 42 U.S.C. 7607(b); and (2) Whether the Act’s definition of “modification,” which turns on whether there is an “increase” in emissions and which applies to both the New Source Performance Standards (“NSPS”) and Prevention of Significant Deterioration (“PSD”) programs,

rendered unlawful EPA's longstanding regulatory test defining PSD "increases" by reference to actual, annual emissions.

- ***Lopez v. Gonzales*** (05-547) / ***Toledo-Flores v. United States*** (05-7644) – Whether the commission of a controlled substance offense that is a felony under state law, but that is generally punishable under the Controlled Substances Act only as a misdemeanor, constitutes an “aggravated felony” under the Immigration and Nationality Act where the alien was sentenced under state law to more than one year of imprisonment.
- ***Philip Morris USA v. Williams*** (05-1256) – (1) If a court finds that a company's misconduct was outrageous, does that override the constitutional limit that requires punitive damages to closely adhere to the actual harm done; and (2) Whether the Constitution forbids juries from awarding punitive based on the effects of company's conduct when such conduct is not directly before the court?
- ***United States v. Resendiz-Ponce*** (05-998) – Whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error.
- ***Wallace v. Chicago*** (05-1240) – When does a claim for damages arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment accrue when the fruits of the search were introduced in the claimant's criminal trial and he was convicted?