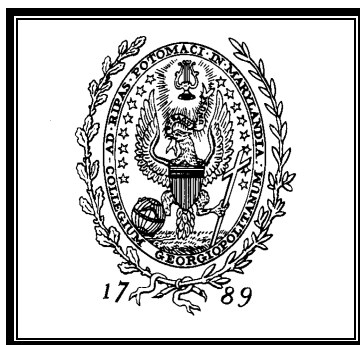


# GEORGETOWN UNIVERSITY LAW CENTER SUPREME COURT INSTITUTE



## SUPREME COURT OVERVIEW OCTOBER TERM 2004

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## INTRODUCTION:

The Georgetown University Law Center Supreme Court Institute conducts moot court practice sessions for attorneys with arguments before the United States Supreme Court. These moot courts are provided on a pro bono basis as a public service, irrespective of the position that is being advocated. During the October 2004 Term, over 60% of the cases argued before the Court first participated in a moot court conducted by the Institute. For more information visit our website at [www.law.georgetown.edu/sci](http://www.law.georgetown.edu/sci).

The Supreme Court of the United States adjourned on June 27, 2005, after announcing decisions in the final six cases of the October 2004 Term. Below is an overview of the Term, including statistical analyses of voting patterns and topical overviews of high profile cases. Any such analysis invariably requires some judgment calls concerning what constitutes a high profile case and even, in light of cases presenting multiple legal issues and opinions, what constitutes a 5-4 ruling. Accompanying footnotes identify those judgments and attempt to clarify any anomalies within them.

## SECTION I: TERM OVERVIEW

Cases granted certiorari:	80
Cases decided after oral argument:	76
Summary reversals:	4
Summary affirmances:	0
Dismissed as Improvidently Granted:	2

### Origins and Disposition of Cases:<sup>1</sup>

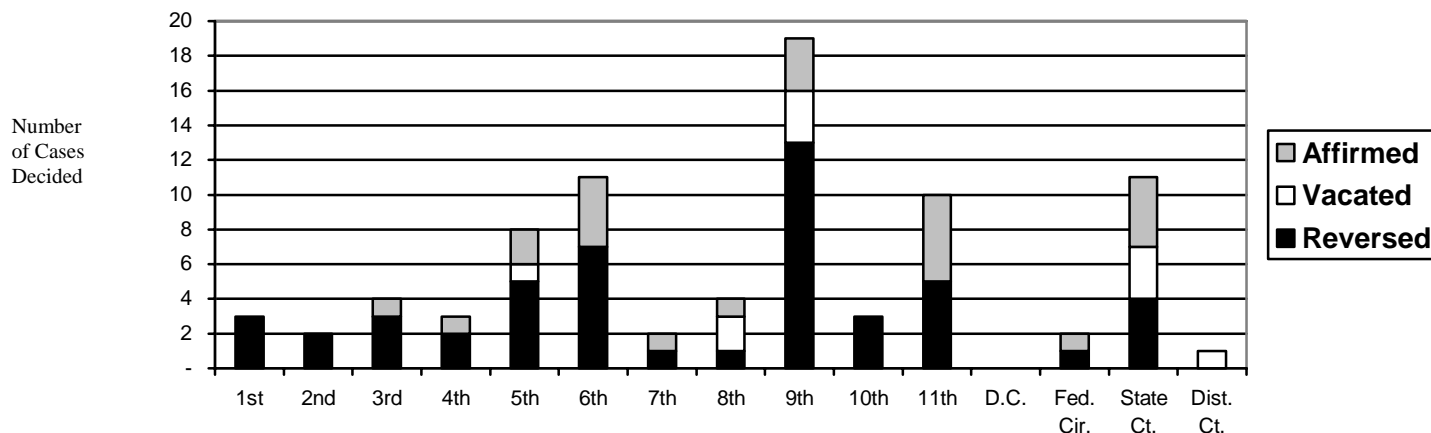
#### *Origin:*

	Cases	% of total	Ten Year Average
Federal Court	67	83.8	70.6
State Court	11	13.8	11.7
Original Jurisdiction	2	2.5	2.8

<sup>1</sup> All ten year statistics presented in this memorandum 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 2004 Term replicates the method in that study wherever applicable and unless otherwise noted. All decimals are rounded to the nearest tenth.

*Disposition:*

	Cases	% of total	Ten Year Average
Affirmed	23	28.8	20.2
Reversed	48	60.0	65.1
Vacated	9	11.3	14.2

**Origin and Disposition by Circuit:<sup>2</sup>****Unanimity and Dissent:**

	Unanimous <sup>3</sup>		With Concurrence <sup>4</sup>		With Dissent		5-4 Split <sup>5</sup>	
	2004	Average 1994-2003	2004	Average 1994-2003	2004	Average 1994-2003	2004	Average 1994-2003
Number of cases	17	29.2	8	6.4	45	46.7	23	17.5
Annual percentage	21.3%	35.5%	10%	7.8%	56.3%	56.7%	28.8%	21.3%

<sup>2</sup> In consolidated cases, the disposition was counted as to the disposition of each circuit court decision, therefore the total number of dispositions in the bar graph will add up to greater than the total number of cases heard and decided in the Term. In the consolidated case of *United States v. Booker / United States v. Fanfan*, the *Booker* case was brought from a judgment in the Seventh Circuit and the *Fanfan* case was granted certiorari prior to judgment in the First Circuit. The judgment as to *Fanfan* vacated the decision of the United States District Court for the District of Maine and is reflected as a District Court disposition. *Howell v. Mississippi* from the Supreme Court of Mississippi was dismissed and is not reflected among the state court dispositions.

<sup>3</sup> 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 joined in the majority but one or more concurring opinions were filed are not counted as unanimous decisions.

<sup>4</sup> Cases in which all Justices agreed in the judgment but one or more Justice filed a concurring opinion.

<sup>5</sup> Due to illness, Chief Justice Rehnquist was absent from November arguments and did not vote in eleven cases where his vote would not have affected the outcome. *Pasquantino v. United States* is the only November case in which the Chief Justice voted. In keeping with the “getting to five” tradition of the split decision, we have included the 5-3 cases from November arguments in our calculation of split decisions. The 5-3 decisions are indicated with an asterisk (\*) in the following list. Speculations regarding the likely vote alignment had the Chief Justice participated are discussed *infra* in Section IV.

### Split Decisions (5-4)<sup>6</sup>:

- Brown v. Payton\*
- Bell v. Thompson
- Dodd v. United States
- Exxon v. Allapattah
- **Granholt v. Heald**
- **Jackson v. Birmingham**
- Jama v. Immigrations
- Johnson v. California\*
- Johnson v. United States<sup>7</sup>
- **Kelo v. New London**
- **McCreary County v. ACLU**
- Medellin v. Dretke
- Pace v. DiGugliermo
- Pasquantino v. United States
- Rompilla v. Beard
- **Roper v. Simmons**
- Shepard v. United States\*
- Small v. United States\*
- Smith v. City of Jackson\*<sup>8</sup>
- Smith v. Massachusetts
- **Spector v. Norwegian**
- **United States v. Booker**<sup>9</sup>
- **Van Orden v. Perry**

### Decisions by Area of Law:

#### 1st Amendment:

*Establishment Clause:* **Cutter v. Wilkinson; Van Orden v. Perry; McCreary v. ACLU of Kentucky**

*Freedom of Association:* Clingman v. Beaver

*Freedom of Speech:* City of San Diego v. Roe; **Johanns v. Livestock Marketing Assoc.;** Tory v. Cochran

4th Amendment: Brosseau v. Haugen; Devenpeck v. Alford; Illinois v. Caballes; Muehler v. Mena

#### 5th Amendment:

*Double Jeopardy:* Smith v. Massachusetts

*Due Process:* Bradshaw v. Stumpf; Deck v. Missouri; Florida v. Nixon; Kowalski v. Tesmer; Tenet v. Doe; Wilkinson v. Austin; Halbert v. Michigan

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<sup>6</sup> Cases in bold represent those considered “high profile” and are summarized later in this memorandum. The 5-3 decisions are indicated with an asterisk (\*). Speculations regarding the likely vote alignment had the Chief Justice participated are discussed *infra* in Section IV.

<sup>7</sup> The dissent in *Johnson v. United States* actually agrees for the most part with the majority. The dissent disagrees only as to the matter of diligence.

<sup>8</sup> Although the vote on the judgment was 8-0 in *Smith v. City of Jackson*, the four justices in the majority plus Scalia concurring in the judgment reached a similar conclusion on the legal principle while the three dissenters reached the opposite conclusion. For this reason, *Smith* is treated as 5-3 in terms of the Court’s decision on the law and not on the facts.

<sup>9</sup> For the purposes of all 2004 Term analysis, the decision written by Justice Stevens in *United States v. Booker* is treated as the sole majority opinion.

<i>Takings:</i>	<b>Lingle v. Chevron; Kelo v. City of New London; San Remo Hotel v. San Francisco</b>
<u>8th Amendment:</u>	<b>Roper v. Simmons</b>
<u>Civil Rights:</u>	<b>Jackson v. Birmingham Board of Education; Johnson v. California (racial segregation of prisoners); Smith v. City of Jackson; Spector v. Norwegian Cruiselines</b>
<u>Commerce Clause:</u>	American Trucking v. MI Public Service/ Mid-Con Freight Systems v. MI Public Service Commission; <b>Gonzalez v. Raich; Granholm v. Heald</b>
<u>Criminal:</u>	
<i>Trial Procedure:</i>	Brown v. Payton; Rompilla v. Beard; Smith v. Texas
<i>Elements of crime:</i>	<b>Andersen v. United States; Dura Pharmaceuticals v. Broudo; Whitfield v. United States</b>
<i>Jury Selection:</i>	Johnson v. California (discriminatory jury selection); Miller-El v. Dretke
<i>Habeas:</i>	Bell v. Cone; Bell v. Thompson; Gonzalez v. Crosby, Mayle v. Felix; Pace v. DiGugliemo; Rhines v. Weber
<i>Sentencing:</i>	Johnson v. United States; Shepard v. United States; <b>United States v. Booker/ United States v. Fanfan</b>
<u>Environmental Law:</u>	Alaska v. United States; <b>Bates v. Dow; Cooper Industries v. Aviall Services; Orff v. United States</b>
<u>Employment:</u>	Graham County Water Dist. v. United States; Smith v. City of Jackson
<u>Federal Jurisdiction:</u>	Exxon Mobile v. Saudi Basic Industries; Exxon Corp v. Allapattah/ Ortega v. Starkist Foods; Grable & Sons v. Darue Engineering; Howell v. Mississippi
<u>Intellectual Property:</u>	KP Permanent Make-up v. Lasting Impressions; Merck v. Integra Lifesciences; <b>MGM Studios v. Grokster</b>
<u>International Law:</u>	Medellin v. Dretke; Pasquantino v. United States; Small v. United States
<u>Immigration Law:</u>	Clark v. Martinez; Jama v. Immigration and Customs Enforcement; Leocal v. Ashcroft

Original Jurisdiction: Alaska v. United States; Kansas v. Colorado

Property Rights: City of Rancho Palos Verdes v. Abrams; City of Sherrill v. Oneida Indian Nation; **Kelo v. City of New London**; **Lingle v. Chevron**; San Remo Hotel v. San Francisco

Sovereign Immunity: Castle Rock v. Gonzalez; Orff v. United States

Statutory Interpretation: Cherokee Nation v. Leavitt; Commission of IRS v. Banks; **FCC v. Brand X**; Koons Buick Pontiac v. Nigh; Norfolk Southern RR v. Kirby; Rousey v. Jacoway; Stewart v. Dutra Construction;

## SECTION II: JUSTICE OVERVIEW

### Opinions and Votes by Justice:

	Opinions Written				Voting <sup>1</sup>	
	Majority	Concurrence	Dissent	Total	% in Majority In 2004	Ten Year Average
Rehnquist	7	1	1	9	78.3	84.9
Stevens	8	9	13	30	75.0	69.5
O'Connor	8	5	6	19	85.0	88.9
Scalia	9	9	7	25	80.0	77.2
Kennedy	9	4	5	18	85.0	89.3
Souter	8	4	7	19	81.3	80.3
Thomas	8	12	14	34	77.5	77.4
Ginsburg	8	6	7	21	78.8	78.4
Breyer	9	11	4	24	86.3	78.4
Per Curiam	6					

<sup>1</sup> For the purpose of this table, a justice is considered to have voted in the majority whether he or she joined in the majority opinion or concurred, including concurrences in the judgment. Chief Justice Rehnquist's percentages are based on the total number of cases in which he participated.

### Voting on 5-4 Decisions:

	% in Majority	Ten Year Average	5-4 Opinions Written
Rehnquist	52.6	63.4	Pace v. DiGugliemo, <b>Van Orden v. Perry</b>
Stevens	58.3	41.7	<b>Kelo v. City of New London, United States v. Booker</b> , Smith v. City of Jackson
O'Connor	62.5	77.1	Dodd v. United States, <b>Jackson v. Birmingham Board of Education</b> , Johnson v. California,
Scalia	58.3	60.6	Jama v. Immigration and Customs Enforcement, Smith v. Massachusetts
Kennedy	62.5	73.1	Bell v. Thompson, Brown v. Payton, Exxon v. Allapattah, <b>Granholm v. Heald, Roper v. Simmons, Spector v. Norwegian Cruiselines</b>
Souter	66.7	41.7	Johnson v. United States, <b>McCreary County v. ACLU</b> , Rompilla v. Beard, Shepard v. United States
Thomas	58.3	63.4	Pasquantino v. United States,
Ginsburg	62.5	38.9	
Breyer	62.5	40.0	Small v. United States

### Voting on High Profile Cases:

	% in Majority	Number Written	High Profile Opinions Written
Rehnquist	50.0	2	Andersen LLP v. United States, Van Orden v. Perry
Stevens	76.5	5	Bates v. Dow, Gonzales v. Raich, Kelo v. City of New London, Smith v. City of Jackson, United States v. Booker/ Fanfan,
O'Connor	47.1	1	Lingle v. Chevron
Scalia	64.7	1	Johanns v. Livestock Marketing,
Kennedy		3	Granholm v. Heald, Roper v. Simmons, Spector v. Norwegian Cruiselines
Souter	70.6	2	McCreary County v. ACLU, MGM v. Grokster
Thomas	52.9	1	FCC v. Brand X
Ginsburg	88.2	1	Cutter v. Wilkinson
Breyer	88.2	0	

## SECTION III: VOTING ALIGNMENT

2004 Term Voting Alignment<sup>1</sup>:

		Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer
Rehnquist	04	43.5	76.8	69.6	78.3	47.8	72.5	47.8	56.5
	Av	51.9	81.3	78.0	84.9	63.8	79.4	63.2	63.0
Stevens	04	-----	61.3	40.0	56.3	73.8	<b>36.3</b>	77.5	68.8
	Av		57.0	44.3	58.7	76.2	<b>45.3</b>	78.0	75.6
O'Connor	04		-----	57.5	75.0	61.3	60.0	57.5	75
	Av			70.2	78.5	71.3	70.4	66.1	71.6
Scalia	04			-----	62.5	50.0	76.3	48.8	50.0
	Av				72.9	55.4	86.7	53.5	51.7
Kennedy	04				-----	58.8	60.0	58.8	66.3
	Av					67.9	73.7	66.7	65.6
Souter	04					-----	40.0	<b>81.3</b>	76.3
	Av						54.1	<b>85.6</b>	81.5
Thomas	04						-----	<b>36.3</b>	43.8
	Av							<b>52.2</b>	51.0
Ginsburg	04							-----	77.5
	Av								82.1

## 2004 Term Voting Alignment in Non-Unanimous Cases:

	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer
Rehnquist	30.4	71.4	62.5	73.2	35.7	66.1	35.7	46.4
Stevens	-----	50.8	23.8	44.4	66.7	<b>19.0</b>	71.4	60.3
O'Connor		-----	46.0	68.3	50.8	49.2	46.0	68.3
Scalia			-----	52.4	36.5	69.8	34.9	36.5
Kennedy				-----	47.6	49.2	47.6	57.1
Souter					-----	23.8	<b>76.2</b>	69.8
Thomas						-----	<b>19.0</b>	28.6
Ginsburg							-----	71.4

<sup>1</sup> 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 but writes his own concurrence will count as having voted with the majority, whereas a justice who writes a concurrence without joining the majority, concurs only in the judgment or dissents will not have voted with those in the majority. "04" indicates the voting alignment for the October Term 2004. "Av" represents the average voting alignment of those justices over the past ten terms. Boxes in bold highlight the highest and lowest alignments in 2004. Because 21.3 % of the cases in the 2004 Term were unanimous, removing unanimous cases in the second chart produces a lower rate of agreement and a better picture of how the justices vote in the divisive cases. Cases where removed where all Justices joined in the majority opinion and no Justice filed a separate concurring or dissenting opinion.

### Alignment Observations:

- Over the past eleven terms, Stevens and Souter have shown the greatest consistent increase in voting alignment. More noteworthy, however, is the number of justices who have been moving apart in their voting patterns. A considerable majority of alignments (29 out of 36 possible alignments or 80.5%) show a general negative trend in agreement, suggesting that voting alliances across the board are breaking down.
- In seventeen cases this term (22% of those decided after arguments), Justices Scalia and Thomas voted together in either a concurrence or dissenting opinion. Of those cases, all but one opinion was authored by either Scalia or Thomas and only eight were joined by any other member of the Court, usually Rehnquist. In other words, in nearly 12% of the cases decided after arguments, either Scalia or Thomas wrote a separate opinion in which only the two of them joined.
- Three split decisions this term consisted of majorities that have not aligned in a 5-4 vote during the previous ten terms. The majority in *Granholt v. Heald* consisted of Kennedy, Scalia, Souter, Ginsburg and Breyer. The majority in *Johnson v. United States* consisted of Rehnquist, O'Connor, Souter, Thomas and Breyer. The majority in *Pasquantino v. United States* consisted of Rehnquist, Stevens, O'Connor, Kennedy and Thomas.
- Justices Rehnquist, O'Connor, Scalia, Kennedy and Thomas have made up the majority in 82 out of 175 (46.9%) split decisions in the last ten years. However, this year that combination of justices aligned as the majority in only four out of twenty-three split decisions, *Bell v. Thompson*, *Dodd v. United States*, *Jama v. Immigration and Customs Enforcement* and *Pace v. DiGuegliemo*.<sup>2</sup>

## SECTION IV: NOTEWORTHY ANOMALIES

### The 5-3 Decisions:

As noted above, Chief Justice William Rehnquist was absent from November arguments and did not vote in eleven cases where his vote would not have affected the outcome of the Court. Statistically these cases create an anomaly in that they could have been decided 5-4 or 6-3. Below are some speculations on the likely outcome of the vote had Chief Justice Rehnquist participated.

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<sup>2</sup> The traditional conservative alliance also made up the majority in *Muehler v. Mena*, where the other four justices concurred in the judgment.

***Brown v. Payton:***

Holding: This case involved the introduction of mitigating evidence at a sentencing hearing and the level of deference given to state supreme court decisions on federal habeas appeal. The majority deferred to the state supreme court determination.

Vote: **K** (O, Sc, T, B) Rehnquist likely would have joined Kennedy's majority opinion that the California Supreme Court acted reasonably and in accordance with federal law.

Precedent: The Chief Justice filed an opinion concurring in part and dissenting in part in *Williams v. Taylor* (2000) in which he agreed with the Court's level of deference to the state supreme court, but disagreed that the state court had acted unreasonably.

Additionally, Chief Justice Rehnquist has voted with Justices O'Connor, Scalia, Kennedy and Thomas to make up the 5-4 majority in nearly half (46.9%) of the split decisions over the past ten years.

***Johnson v. California:***

Holding: Strict scrutiny is appropriate in evaluating policies of routine racial segregation of prisoners.

Vote: **O** (K, So, G, B) It is difficult to speculate in this case whether Rehnquist would have voted with O'Connor in the majority or joined Thomas' dissent arguing for the application of intermediate scrutiny.

Precedent: Rehnquist joined Kennedy's opinion in *Overton v. Bazzetta* (2003) in which the Court ruled that the increased need for security in prisons justified a reduced level of scrutiny when the constitutional rights of prisoners are infringed by prison policies.

However, Kennedy's majority vote in *Johnson* may have been influenced by the Court's observation that racial discrimination is not vital to proper prison administration. When addressing policies of racial discrimination, the Chief Justice has consistently argued for the application of strict scrutiny (*Gratz v. Bollinger* (2003)).

***Shepard v. United States:***

Holding: Evidence of prior offenses under the Armed Career Criminal Act must be found in the judicial record.

Vote: **So** (St, Sc, G, T) Rehnquist likely would have joined in O'Connor's dissent expressing skepticism at the Court's involvement in defining the statutory elements of a crime.

Precedent: O'Connor's dissent in *Shepard* is similar in principle to the dissent she wrote in *Apprendi v. New Jersey* (2003) in which Rehnquist joined.

***Small v. United States:***

Holding: Ban on firearm possession by felons applies only to domestic convictions.

Vote: **B** (St, O, So, G) Rehnquist likely would have voted with Thomas in the dissent.

Precedent: Rehnquist stepped in to prevent a 4-4 decision in *Pasquantino* to rule that federal criminal statutes apply outside of the territorial jurisdiction of the U.S. Thomas' dissent points out the inconsistency of the *Small* majority's position with the holding in *Pasquantino*.

***Smith v. City of Jackson***<sup>3</sup>:

Holding: The majority concluded that workers can prevail on a theory of disparate impact under the Age Discrimination in Employment Act. However, all of the Justices agreed that in the case at bar the petitioners failed to state a claim.

Vote: **St** (So, G, B, Sc) Scalia joined the majority in part and concurred in the judgment, basing his conclusion on EEOC regulations. O'Connor, joined by Kennedy and Thomas, dissented, arguing that disparate impact was not cognizable under the ADEA. One can fairly anticipate that Rehnquist would have voted with the dissent, and arguably should have as the existing majority relies on the consistency of EEOC regulations.

Precedent: Rehnquist wrote a dissent from denial of certiorari in *Markham v. Geller* (1981) where he argued that the Second Circuit erred in recognizing a claim under the ADEA in the absence of proof of discriminatory intent. The Chief Justice also joined Souter's opinion in *General Dynamics Land Systems v. Cline* (2004) where the Court declined to defer to EEOC interpretations of the ADEA when it found the statute to be unambiguous.

**Dismissed as Improvidently Granted: *Medellin v. Dretke*:**

In an unusual use of the DIG, the Court dismissed a case where a presidential memorandum issued after the petition was granted renewed the possibility of the petitioner's appeal at the state level. Petitioner, Medellin, is a Mexican national who was sentenced to death in Texas. Under the Vienna Convention, Medellin should have had the opportunity to consult with someone from his home consulate after being arrested on murder charges. The District Court and Fifth Circuit Court both denied his certificate of appealability on the Vienna Convention claim. The ICJ ruled in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States) (Avena)*, 2004 ICJ 128 (Mar.31) that Medellin and fifty other Mexican nationals on death row in the U.S. must be permitted to appeal under the Vienna Convention. The Supreme Court granted certiorari on the question of whether a federal court is bound by the ICJ's ruling. The Memorandum for the Attorney General was issued by President Bush February 28, 2005, after the case had been granted certiorari but before oral arguments. In it, President Bush stated that the U.S. would discharge its "international obligation" under the ICJ ruling in *Avena* by giving effect to the decision in state courts. Hoping to take advantage of the Presidential intervention, Medellin filed a new challenge in Texas state court. A narrow 5-4 majority of the Court read this renewed state action as grounds to dismiss the case. The Court did not rule on the constitutional authority of the president to order state courts to abide by the ruling of an international court, though O'Connor noted in the principal dissent that the majority remained "rightfully agnostic" of this constitutional question.

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<sup>3</sup> As noted *supra*, although the vote in the judgment was 8-0 in *Smith v. City of Jackson*, the four justices in the majority plus Scalia concurring in the judgment reached a similar conclusion on the legal principle while the three dissenters reached the opposite conclusion. For this reason, we are treating the case as 5-3 in terms of the Court's decision on the law and not on the facts.

## SECTION V: SUMMARIES OF HIGH PROFILE CASES

- **CRIMINAL LAW**

### *Andersen LLP v. United States*

**Issue:** Whether Arthur Andersen LLP's conviction for witness tampering under 18 U.S.C. § 1512(b) must be reversed because the jury instructions upheld by the Fifth Circuit misinterpreted the elements of the offense, in conflict with decisions of the Supreme Court and the Courts of Appeals for the First, Third, and D.C. Circuits.

**Holding:** Reversed and remanded. The federal statute requires consciousness of wrongdoing and the jury instruction failed to adequately convey this element of intent. The instructions also failed to convey the requirement of proof of a nexus between the corrupt persuasion and a particular government proceeding.

**Vote: 9-0, Rehnquist** (unanimous)

### *United States v. Booker* (with)

### *United States v. Fanfan*

**Issue:** (1) Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant. (2) Whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.

**Holding:** (Stevens) The Sixth Amendment, as interpreted by the Court in *Blakely* and *Apprendi*, requires that any fact other than a prior conviction that was necessary to support a sentence exceeding the maximum authorized by the facts established by a guilty plea or a jury verdict had to be admitted by a defendant or proved to a jury beyond a reasonable doubt. This interpretation also applies to the federal Sentencing Guidelines because they are binding on all judges with the force and effect of law. (Breyer) 18 U.S.C.A. § 3553(b)(1) which makes the Federal Sentencing Guidelines mandatory is incompatible with the Sixth Amendment and must be excised from the Sentencing Reform Act. Sentencing Guidelines are effectively advisory rather than mandatory; district courts are required to take the Guidelines into account but are not bound to apply them. Review of sentencing decisions is to be subject to an unreasonableness standard.

**Vote: 5-4**, split majority—**Stevens** (Scalia, Souter, Thomas, Ginsburg); **Breyer** (Rehnquist, O'Connor, Kennedy, Ginsburg). Stevens (Souter, Scalia) concurring. Scalia dissenting. Thomas dissenting. Breyer (Rehnquist, O'Connor, Kennedy) dissenting.

**Points of Interest:** As Chief Counsel to the Senate Judiciary Committee, Justice Breyer played a key role in the Sentencing Reform Act (1984). While serving as a First Circuit judge, Breyer was on the Sentencing Commission that created the

Federal Sentencing Guidelines. His split majority opinion in *Booker* attempts to excise only those parts of the guidelines that make them mandatory, and thereby unconstitutional under the reasoning of Stevens' majority.

### ***Roper v. Simmons***

**Issue:** (1) Once this Court holds that a particular punishment is not "cruel and unusual" and thus barred by the Eighth and Fourteenth Amendments, can a lower court reach a contrary decision based on its own analysis of evolving standards? (2) Is the imposition of the death penalty on a person who commits a murder at age seventeen "cruel and unusual," and thus barred by the Eighth and Fourteenth Amendments?

**Holding:** Capital punishment for juveniles who committed the crime when they were under the age of eighteen is "cruel and unusual punishment" under by the Eighth Amendment. As the Court ruled in *Atkins*, those incapable of full responsibility for their crimes cannot be subject to capital punishment; juvenile mentality can be analogized to the mentally retarded in terms of capacity for responsibility. The brutality of a juvenile's crime makes it likely that mitigating factors based on youth would be overlooked by a jury. The weight of international opinion against the juvenile death penalty as well as the small number of states that have enacted and enforced juvenile death penalty statutes provides confirmation that the penalty is inconsistent with evolving standards. Affirmed.

**Vote: 5-4, Kennedy** (Stevens, Souter, Ginsburg, Breyer). Stevens (Ginsburg) concurring. O'Connor dissenting. Scalia (Rehnquist, Thomas) dissenting.

**Points of Interest:** *Roper* overturned *Stanford v. Kentucky* (1989) where Kennedy voted with majority in holding that the death penalty for sixteen and seventeen year-olds was constitutional.

- **CIVIL RIGHTS and FREE SPEECH**

### ***Johanns v. Livestock Marketing Assoc.***

**Issue:** Whether the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. 2901 *et seq.*, and the implementing Beef Promotion and Research Order (Beef Order), 7 C.F.R. Part 1260, violate the First Amendment insofar as they require cattle producers to pay assessments to fund generic advertising with which they disagree.

**Holding:** Vacated and remanded. Compelled subsidy cases have consistently distinguished between compelled support of private speech and compelled support of government speech, assuming the latter does not raise First Amendment concerns. This is an instance of government speech in that the messages are controlled entirely by government entities and do not attribute the messages to the respondents. The fact that the speech is funded by targeted assessments creates no analytical distinction from a general tax, under which taxpayers have no First Amendment right not to fund government speech. Generic advertising funded by targeted assessment on beef producers is government speech and is not susceptible to a First Amendment compelled-subsidy challenge.

**Vote: 6-3, Scalia** (Rehnquist, O'Connor, Thomas, Breyer). Thomas concurring. Breyer concurring. Ginsburg concurring in the judgment. Kennedy dissenting. Souter (Stevens, Kennedy) dissenting.

### *Spector v. Norwegian Cruiselines*

**Issue:** Whether and to what extent Title III of the Americans with Disabilities Act banning discrimination in public accommodations against people with disabilities applies to companies that operate foreign-flag cruise ships in United States waters?

**Holding:** General statutes are presumed to apply to conduct aboard foreign-flag vessels in U.S. territory if the interest of U.S. citizens (rather than the internal interests of the ship) are at stake. Significant structural modifications are likely to constitute internal interests which would not be subject to U.S. laws. However, the restrictions built into Title III that accommodations be “readily achievable” probably preclude any significant structural modifications from being required.

**Vote: 6-3, plurality Kennedy** (Stevens, Souter). Ginsburg (Breyer) concurring. Thomas concurring. Scalia (Rehnquist, O'Connor) dissenting.

**Points of Interest:** The plurality opinion is controlling as the narrowest of the majority interpretations. Ginsburg’s concurrence argued that Title III applies except to the extent that the statute imposes requirements that conflict with treaty obligations. Thomas’ concurrence argued that applications of Title III that do not pertain to internal affairs apply to foreign-flag vessels. The dissenters maintained that Title III does not apply to foreign-flag cruise ships.

### *Smith v. City of Jackson*

**Issue:** Whether disparate impact claims are cognizable under the Age Discrimination in Employment Act (“ADEA”), or whether workers must show intentional age discrimination.

**Holding:** Affirmed. Workers can prevail on a theory that an employer's job practice had a more negative impact on older than younger workers. The scope of ADEA's protection in disparate impact cases is narrower than under Title VII because ADEA allows employers under certain circumstances to adopt policies that treat workers differently if based on factors other than age. The City has demonstrated a sufficient purpose for the policy enacted in the case at bar.

**Vote: 8-0, Stevens** (Souter, Ginsburg, Breyer, Scalia). Scalia concurring in the judgment. O'Connor (Kennedy, Thomas) dissenting. The Chief Justice took no part in this decision.

**Points of Interest:** Although all of the Justices agreed that in the case at bar the petitioners failed to state a claim, the four justices in the majority plus Scalia concurring in the judgment reached a similar conclusion on the legal principle, while the three dissenters reached the opposite conclusion. As discussed *supra* in Section IV, the majority relies on Scalia’s swing vote deferring to EEOC regulations. On the merits this was a judgment for the City, but in principle it was a victory for employment rights advocates.

### ***Jackson v. Birmingham Board of Education***

**Issue:** Whether the private right of action for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, encompasses redress for retaliation for complaints about unlawful sex discrimination.

**Holding:** A teacher has a private right under Title IX to bring a lawsuit for retaliation after complaining of sex discrimination against students where the school system's retaliation against the teacher was "an intentional response to the nature of the complaint." Title IX does not require that the victim of the retaliation also be the victim of the discrimination.

**Vote: 5-4, O'Connor** (Stevens, Souter, Ginsburg, Breyer). Thomas (Rehnquist, Scalia, Kennedy) dissenting.

- **ESTABLISHMENT CLAUSE**

### ***Cutter v. Wilkinson***

**Issue:** Whether the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1 through § 2000cc-5, which requires state officials to accommodate the religious exercise of institutionalized persons under their control, violates the Establishment Clause of the First Amendment.

**Holding:** Reversed and remanded. RLUIPA § 3 requires state institutions to alleviate substantial burdens that they impose on the religious exercise of persons they house, unless they can show that denial of the religious accommodation is the "least restrictive means" of advancing a "compelling governmental interest." An accommodation is permissible so long as it is "measured so that it does not override other significant interests." There is no such override of other significant interests under RLUIPA because, under the statute itself, security concerns are a compelling interest and deference is due to institutional officials' expertise in this area. Therefore a prison would generally satisfy RLUIPA's nominally strict scrutiny where there is a genuine security-related reason to deny the religious exemption.

**Vote: 9-0, Ginsburg** (unanimous). Thomas concurring.

**Points of Interest:** The Court didn't address the constitutionality of § 2 of the RLUIPA which deals with local land-use regulations redolent of those that the Court invalidated in *City of Boerne v. Flores* (1997). Though joining in the majority, Thomas' separate concurrence expounds his position that the Establishment Clause is not incorporated through the 14th Amendment and that Congress could not prevent a state from establishing a religion.

### ***Van Orden v. Perry***

**Issue:** Whether a monument presenting the Ten Commandments, located on government property between the Texas State Capitol and the Texas Supreme Court, is an impermissible establishment of religion in violation of the First Amendment Establishment Clause.

**Holding:** There is a long history of government acknowledgement of religion's role in American life. While the Commandments are religious, they have an undeniable historical meaning. The fact that the monument has religious content does not per se

violate the Establishment Clause. *Lemon* is not useful in dealing with a passive monument. Instead, the analysis should be driven by the monument's nature and the Nation's history. The inclusion of the Commandments monument in this group of statues has a dual significance in both religion and government which cannot be said to violate the Establishment Clause. (Breyer concurring in the judgment) This type of analyses is necessarily fact-specific and does not lend itself to a rule. The circumstances surrounding the monument's placement on the capitol grounds and its physical setting provide a strong indication that the Commandments' text as used on this monument conveys a predominantly secular message.

**Vote: 5-4, Rehnquist** (Scalia, Kennedy, Thomas) plurality. Breyer concurring in the judgment. Scalia concurring. Thomas concurring.

### *McCreary County v. ACLU of Kentucky*

**Issue:** (1) Whether the Establishment Clause is violated by a display on government property that includes, among various symbols of American law and government, a framed document of the Ten Commandments. (2) Whether the *Lemon* test should remain the controlling test for Establishment Cause jurisprudence.

**Holding:** The Court declines to abandon *Lemon*'s purpose test. When the government acts with the ostensible and predominant purpose of advancing religion, it violates the central Establishment Clause value of official religious neutrality. The stated purpose of the display in this case demonstrates government intent to advance its secular content. Subsequent efforts to modify the display do not alter the reasonable conclusion that the intent of its placement was to advance a religious perspective.

**Vote: 5-4, Souter** (Stevens, O'Connor, Ginsburg, Breyer). O'Connor concurring. Scalia (Rehnquist, Kennedy, Thomas) dissenting.

- **FEDERALISM and PREEMPTION**

### *Gonzalez v. Raich*

**Issue:** Whether the Controlled Substances Act ("CSA"), 21 U.S.C. 801 *et seq.*, exceeds Congress's power under the Commerce Clause as applied to the cultivation and possession of marijuana for purported personal medicinal use in accordance with state laws.

**Holding:** A locally cultivated product that is used domestically rather than sold on the open market is still subject to federal regulation where failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity (*Wickard*). When a general regulatory statute bears a substantial relation to commerce, the character of individual instances arising under that statute is of no consequence. Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere and concerns about diversion into illicit channels, Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a hole in the CSA.

**Vote: 6-3, Stevens** (Scalia, Souter, Ginsburg, Breyer, Kennedy). Scalia concurring. O'Connor (Rehnquist, Thomas) dissenting.

*Granholm, Gov. of MI v. Heald* (with)  
*MI Beer & Wine Wholesalers v. Heald* (with)  
*Swedenburg v. Kelly*

**Issue:** Whether a State's regulatory scheme that permits in-state wineries to directly ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violates the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment.

**Holding:** Affirmed. The state laws discriminate against interstate commerce in violation of the Commerce Clause by giving economically preferential treatment to in-state wineries and virtually excluding small out-of-state wineries from the direct distribution market. The discrimination is neither authorized nor permitted by the 21<sup>st</sup> Amendment's grant of state authority to limit the import of liquor (reaffirming *Bacchus* that the 21<sup>st</sup> Amendment does not create state authority at the expense of other constitutional principles). This provision was not intended to supersede the Commerce Clause prohibition on discriminatory preference to in-state producers.

**Vote: 5-4, Kennedy** (Scalia, Souter, Ginsburg, Breyer). Stevens (O'Connor) dissenting. Thomas (Rehnquist, Stevens, O'Connor) dissenting.

*Bates v. Dow Agrosciences*

**Issue:** Whether tort liability in a state court that would induce a manufacturer to alter its label is pre-empted by FIFRA § 136b(b) forbidding states from requiring labeling "in addition to or different from" the requirements of the FIFRA.

**Holding:** Reversed and remanded. Although "requirements" include both enactments and common law duties, state tort liability that may induce action is not a "requirement" as forbidden in FIFRA. FIFRA does not preempt farmers from seeking a remedy under theories of defective manufacture, negligent testing, breach of express warranty and at least some claims under Texas consumer protection law. Congress did not state any explicit intent to deprive farmers of tort litigation against manufacturers, something they surely would have done given the long history of tort remedy against manufacturers of poisonous substances. State imposition of tort liability is not preempted by a federal statute which does not address the matter of civil liability.

**Vote: 7-2, Stevens** (Rehnquist, O'Connor, Kennedy, Souter, Ginsburg, Breyer). Breyer concurring. Thomas (Scalia) concurring in part and dissenting in part.

- **FIFTH AMENDMENT JUST COMPENSATION and PUBLIC USE DOCTRINE**

*Kelo v. New London*

**Issue:** Whether the Fifth Amendment's public use requirement forbids the taking of private property for the purpose of "economic development" that will increase tax revenues and improve the local economy.

**Holding:** Although local government may not take homeowners' property "simply to confer a private benefit on a particular private party," this project involved an extensive city development plan. The "public use" doctrine does not literally require that the outcome of development be open to the general public. This Court has a long

history of granting latitude to state legislatures in defining public use. A legislature need not find blight, and we defer to local determination that the area was sufficiently distressed to justify a program of economic rejuvenation.

**Vote: 5-4, Stevens** (Breyer, Ginsburg, Kennedy, Souter). Kennedy concurring. O'Connor (Rehnquist, Scalia, Thomas) dissenting.

**Points of Interest:** O'Connor wrote the majority opinion in *Hawaii Housing Authority v. Midkiff* (1984) in which the Court upheld an expansive condemnation power based on deference to the state legislative determinations of public use where "rationally related to a conceivable public purpose." Steven's majority in *Kelo* takes a similarly deferential approach, from which O'Connor now dissents.

### ***Lingle v. Chevron***

**Issue:** Whether the Takings Clause authorizes a court to invalidate state economic legislation on its face and enjoin enforcement of the law on the basis that the legislation does not substantially advance a legitimate state interest.

**Holding:** Reversed and remanded. Where the "substantially advances" inquiry probes a regulation's underlying validity, the question of whether a regulation effects a taking presupposes that the government acted in pursuit of a public purpose. The proper test for regulatory takings is still the *Penn Central* test assessing the burden on the particular property owner and reasonable expectations for property use and development.

**Vote: 9-0, O'Connor** (unanimous). Kennedy concurring.

**Points of Interest:** This case invalidates the test inadvertently announced in *Agins v. City of Tiburon* (1980), thus resolving a quarter-century of debate over the meaning of that decision in takings analyses. O'Connor's opening line may live in infamy: "On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined."

## • INFORMATION TECHNOLOGY

### ***MGM Studios, Inc. v. Grokster***

**Issue:** Whether the Internet-based "file sharing" services Grokster and StreamCast should be immunized from copyright liability for the acts of copyright infringement by third parties occurring on their server.

**Holding:** A party "who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." Nothing in *Sony* should be read to mean that courts cannot find contributory liability where there is evidence of intent to cause infringing use. Evidence of advertising an infringing use or instructing how to engage in an infringing use, shows an affirmative intent that the product be used to infringe, and overcomes the law's reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use.

**Vote: 9-0, Souter** (unanimous). Ginsburg (Rehnquist, O'Connor) concurring. Breyer (Stevens, O'Connor) concurring.

*Nat'l Cable & Telecomm. Assn. v. Brand X Internet* (with)  
*FCC v. Brand X Internet Service*

**Issue:** Whether cable operators offering "cable modem service" (high-speed Internet access over cable television systems) are exempt from common carrier regulation under the Communications Act.

**Holding:** Cable operators offering high-speed Internet access have no legal duty to open their service to customers of all Internet service providers. The FCC made a lawful determination that, for purposes of regulation under the Communications Act, high speed cable internet functions as an "information service" rather than a "telecommunications service" and is therefore exempt from the mandatory regulation of common carriers. The determination of the FCC was reasonable under *Chevron* and is due the deference of the Court.

**Vote: 6-3, Thomas** (Rehnquist, Steven, O'Connor, Kennedy, Breyer). Stevens concurring. Breyer concurring. Scalia (Souter, Ginsburg) dissenting.

## SECTION VI: CASES TO WATCH IN 2005

The Court has already granted certiorari in thirty-seven cases for the October Term 2005 which completes the argument calendar through early January. Three of the cases granted thus far are certain to generate significant interest:

*Gonzales v. Oregon* (04-623)

**Question:** 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.

**Lower Holding:** (368 F.3d 1118) Appellees, a doctor, a pharmacist, several terminally ill patients, and the State of Oregon, challenged the Ashcroft Directive which criminalized conduct authorized by Oregon's Death with Dignity Act. The Court of Appeals for the 9th Circuit held that the Ashcroft Directive was unlawful and unenforceable because it violated the plain language of the Controlled Substances Act (CSA), contravened Congress' legislative intent, and overstepped the bounds of the U.S. Attorney General's statutory authority. To the extent that the CSA authorized the federal government to make decisions regarding the conduct of state physicians, those decisions were delegated to the Secretary of Health and Human Services rather than the Attorney General.

*Ayotte v. Planned Parenthood* (04-1144)

**Question:** Whether the New Hampshire Parental Notification Prior to Abortion Act requiring parental notification before abortions can be performed on unemancipated minors is constitutional.

**Lower Holding:** (390 F.3d 53) The district court found the Act unconstitutional due to its lack of an explicit exception to protect the health of the pregnant minor. The court of appeals found that state interest did not override the Constitution's requirement of a health exception. The Act's judicial bypass procedure also contained

no health exception, and for a large fraction of minors eligible for judicial bypass, inadequate confidentiality would impose an undue burden. Additionally, the Act failed to safeguard a physician's good-faith medical judgment that a minor's life was at risk against criminal and civil liability,

***Rumsfeld v. Forum for Academic Rights (04-1152)***

**Question:** Whether the Solomon Amendment provision which withholds specified federal funds from institutions of higher education that deny military recruiters the same access to campuses and students that they provide to other employers violates the First Amendment.

**Lower Holding:** (390 F.3d 219) The district court denied plaintiffs' motion for a preliminary injunction to enjoin defendant federal agencies from enforcing the Solomon Amendment. The court of appeals reversed, holding that the law schools demonstrated a likelihood of success on the merits of its First Amendment claims. With respect to the compelled speech claim, the Amendment compelled the law schools to engage in expression in the form of propagation, accommodation, and subsidy. Further, the Government had not shown that the means were narrowly tailored to the interest. And, finally, the court held that irreparable harm was established by the likelihood of success of the law schools' First Amendment claim.

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

- *Garcetti v. Ceballos* (04-473)—Whether a public employee's job-related speech is cloaked with First Amendment protection.
- *Georgia v. Randolph* (04-1067)—Whether a present spouse may consent to a police search of the home when the other present spouse refuses.
- *Gonzales v. O Centro Espirita* (04-1084) – Whether the RFRA requires the government to permit the importation of controlled substances for use in religious ceremonies.
- *Goodman v. Georgia* (04-1236)—Whether Congress validly abrogated state sovereign immunity in Title II of the ADA.
- *Oregon v. Guzek* (04-928)—Whether a capital defendant may introduce evidence in support of a residual doubt claim during the sentencing phase.
- *Scheidler v. NOW* (04-1244)—Whether RICO may be used to prevent blockades of abortion clinics.
- *Texaco v. Dagher* (04-804)—Whether it is a per se illegal concerted action under §1 of the Sherman Act for economically integrated joint ventures to set the selling price of its products.