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I. INTRODUCTION

A. THE STATISTICS

There were seventy-four cases decided by full opinions, one more than in the previous term. Eighteen of the seventy-four cases were decided by five person majorities compared to twenty-one 5-4 decisions last term. In many ways, Justice Stephen Breyer shared with out-going Justice Sandra Day O’Connor the central position on the Court. Justice Breyer wrote the fewest dissenting opinions, ten to O’Connor’s eleven.

In only four of the 5-4 decisions did the usual conservative bloc—O’Connor, Kennedy, Rehnquist, Scalia, and Thomas—prevail. This is a far cry from recent terms of the Court when this conservative bloc has so often been the majority in 5-4 decisions.

B. THE THEMES

In many ways, the most important event of the term was the resignation of Justice O’Connor. None of the cases in this term of tinkering and fine tuning is likely to be as important as the fact that, after eleven years of stable Court membership, there will finally be a new appointment. The resignation of Justice O’Connor and the nomination of Judge John Roberts of the District of Columbia Circuit to fill her vacancy overshadow any of the decisions of the 2004-2005 term.

As one commentator has put it:

There are memorable Supreme Court terms and then there are Supreme Court terms like the one we have just witnessed. . . . There were no seminal decisions affecting the legal war on terrorism. No grand constitutional crises were averted. And nothing the justices decided is likely to fundamentally alter the political, cultural or religious tensions that now reign.

Every term, just like this term, the court reapportions, in ways large and small, rights and responsibilities, power and priorities, rules and standards, liabilities and limitations. Under the Constitution, the [J]ustices more often tinker than they dismantle, and this past term surely was a term of tinkering.2

These are all important rulings; they just aren’t game-changers.

Probably nothing typifies this term of Court better than the cases parsing the meaning of the word “any” in two federal criminal statutes, predictably reaching opposite interpretations.3 This instinct for the capillaries is the hallmark of the term. Consider the four cases interpreting the one-year statute of

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1. Chief Justice Rehnquist’s death occurred after the completion of this article.


limitations under the Anti-Terrorism and Effective Death Penalty Act of 1996. Each case was decided upon its own peculiar facts and having little or no general application beyond the particular case.

Further, as Professor Erwin Chemerinsky has noted:

The Supreme Court’s term . . . produced remarkably little change in the law. In the most controversial areas—such as whether the government may take private property to increase economic development, whether Ten Commandments displays on government property violate the Establishment Clause, whether federal law may criminally prohibit and punish private possession of marijuana for medicinal purposes—the Court made no new law, but instead applied long-standing precedent.  

The law was taken in no new directions. Even when the issues were larger, as in the takings cases and the Ten Commandments cases, the holdings and analyses were firmly rooted in prior precedent.

The first theme then is that this was a term of tinkering and fine-tuning where stare decisis ruled.

The second theme was that the center of the Court prevailed. In many ways, the term can be considered the Stevens term. By joining O’Connor and Kennedy, and sometimes Scalia, Stevens was able to command majorities in some of the most important cases of the term.

If it was a term of triumph for Stevens and the center, it was a term of dissent and dissatisfaction for the Chief Justice and his allies. In over a dozen key rulings of the term, the Chief Justice voted in the minority. He did not write any fiery dissenting opinions—indeed, he wrote only one—but he was in the minority far more often than in previous terms.

A third theme was the continuing battle over the relevance of foreign law and jurisprudence to the interpretation of the United States Constitution. There were three main areas of conflict this term in this ongoing battle: First, the force international treaties to which America is a signatory have in domestic American cases; second, the Supreme Court’s use of foreign law and international customs as precedent for American constitutional interpretation; and third, how far overseas American law and courts can reach.

A quick example of this battle, which often pits Breyer or Kennedy against Scalia, is the juvenile death penalty case Roper v. Simmons. In his majority opinion prohibiting the death penalty for individuals who committed their crimes under the age of eighteen, Kennedy noted that other nations had abolished capital punishment for crimes committed by people under eighteen, stating: “Our determination that the death penalty is disproportionate punishment for offenders under [eighteen] finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”

That assertion drew a sharp response from Justice Scalia in his dissent: “I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners . . .”

In criminal cases, this term continued the Court’s concern about the operation of the death penalty,

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7. See e.g. Linda Greenhouse, Court’s Term A Turn Back To the Center, 53 N.Y. Times A10 (July 4, 2005); David G. Savage, Court’s Liberal Bloc Stands Firm, L.A. Times A32 (July 3, 2005).
8. See e.g. McCreary, 125 S. Ct. at 2671; Kelo, 125 S. Ct. at 2661; Rompilla v. Beard, 125 S. Ct. 2456, 2471 (2005); Miller-El v. Dretke, 125 S. Ct. 2317, 2344 (2005).
11. Id. at 1198.
12. Id. at 1217 (Scalia, J., dissenting).
particularly in the context of race, and criminal sentencing in both the capital and non-capital contexts.

In all, the Justices invalidated five death sentences, focusing on ineffective assistance of counsel and jury selection issues.\textsuperscript{13}

The Court’s continuing concern about the proper roles of judges and juries in criminal sentencing resulted in a rejection of the mandatory application of the \textit{Federal Sentencing Guidelines}.\textsuperscript{14}

The transformation of the \textit{Federal Sentencing Guidelines} from mandatory to advisory was the criminal decision with the most far-reaching consequences to the everyday administration of the criminal justice system.

Continuing with the fifth theme of this term, there were several pro-business decisions, but many of them greeted with joy in the business community may not, in the long run, produce happiness in the businesses affected by these apparent victories.\textsuperscript{15}

For example, in \textit{Arthur Andersen} the Court concluded the criminal conviction of the accounting firm must be overturned because the jury instructions did not adequately include a requirement of culpability.\textsuperscript{16} Little solace to a firm already driven out of business!

In \textit{Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.}, the Court held that a company shown to induce copyright infringement can be held liable for the infringements by its users even if its products have lawful uses.\textsuperscript{17} As \textit{The Economist} has observed:

[J]udged from a long-term perspective, this week’s victory for copyright holders seems likely to prove a Pyrrhic one. The internet and file sharing are disruptive technologies that give consumers vastly more ability to use all sorts of media content, copyrighted or not. Surely entertainment firms must devise ways to use this technology to sell their wares that will also allow copyright to be protected\textsuperscript{18}

Sixth, in the First Amendment cases, the Court concluded that the governmental display of the Ten Commandments is unconstitutional if done for a religious purpose or if it can be construed as a symbolic endorsement of religion.\textsuperscript{19} To decide whether a particular display is an unconstitutional establishment of religion, the Court held that lower courts must consider the history of the display, its purpose, and all the facts that supply its context.\textsuperscript{20} The constitutionality of religious symbols in public places will now be analyzed by focusing on the unique and particular facts and circumstances surrounding that display.\textsuperscript{21}

Seventh, the Supreme Court’s most misquoted and misunderstood case was \textit{Kelo v. City of New London}, holding that fostering economic development is within the government’s power of eminent domain.\textsuperscript{22} The Takings Clause of the Fifth Amendment permits the government to take private property for public use to foster economic development.\textsuperscript{23}

While the media presented this case as a radical departure from previous law, in reality it was firmly based on previous decisions from many years ago.\textsuperscript{24} No doubt, while some are opposed to taking private property for economic development, it is important to understand that the term’s decision was not a

\begin{itemize}
  \item See \textit{e.g. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.}, 125 S. Ct. 2764 (2005); \textit{Arthur Andersen LLP v. United States}, 125 S. Ct. 2129 (2005).
  \item 125 S. Ct. at 2136-37.
  \item 125 S. Ct. at 2781-82.
  \item \textit{Innovation and Intellectual Property: A Bad Week for Pirates}, 376 \textit{The Economist} 57, 57-58 (July 2, 2005).
  \item \textit{Van Orden v. Perry}, 125 S. Ct. 2854, 2863-64 (2005).
  \item Id.
  \item See \textit{id.} at 2863-64, 2867.
  \item See \textit{id.}
  \item See \textit{id.} at 2660-68 (citing \textit{Hawaii Housing Authority v. Midkiff}, 467 U.S. 229 (1984); \textit{Berman v. Parker}, 348 U.S. 26 (1954)).
\end{itemize}
dramatic change and created no new law.

Eighth, the federalism revolution—a hallmark legacy of the Chief Justice—foundered this term. The federalism revolution seeks to limit the power of Congress to legislate and restructure the balance of state and federal power more in the direction of states’ rights. Reasserting federal authority, the Court upheld the power of Congress under the Commerce Clause of the Constitution in cases in which it was challenged in the contexts of medical marijuana\textsuperscript{25} and state protectionism in the wine market.\textsuperscript{26} Finally, all of these thematic observations may pale in comparison to the impact on the Court’s future decisions that the resignation of Justice O’Connor may create. This Court has been together for eleven years without a change in membership—a modern record. Now, with one or more new Justices, it is inevitable that change is in the air, and that an era has been brought to an end.

\footnotesize{25. Gonzales v. Raich, 125 S. Ct. 2195, 2205-07 (2005).}
\footnotesize{26. Granholm v. Heald, 125 S. Ct. 1885, 1895, 1907 (2005).}