



GEORGETOWN UNIVERSITY LAW CENTER SUPREME COURT INSTITUTE

SUPREME COURT OF THE UNITED STATES OCTOBER TERM 2006 OVERVIEW

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INTRODUCTION

The Supreme Court of the United States announced its three final decisions for argued cases during the October Term 2006 on Thursday, June 28, 2007, before recessing for the summer. The Court is expected to issue one more order list on pending petitions and appeals, on Friday, June 29th.

This report provides an overview of the Court's disposition of cases for the Term, including both a discussion of the highlights of the Court's rulings on jurisdiction and the merits as well as a statistical analysis of the votes of individual Justices. Any statistical analysis necessarily requires a host of judgments that simplify what are in fact more often complex distinctions drawn by the Court and individual Justices in their respective opinions. To the extent, moreover, that this Report, like others, uses terms like "liberal" and "conservative" to describe and compare possible outcomes across a wide spectrum of legal issues, there is inevitably the risk that quantitative analysis based on such labels fails to capture the Court's ruling or is even misleading in application to some cases. Suggestions for revisions are welcome and may be sent via email to supt@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

October Term 2006 is the first full Term of the Court with both the new Chief Justice John Roberts and Justice Samuel Alito on the Bench and, therefore, provides an early glimpse of possible directions for the new Court. As described below, a few preliminary conclusions can be drawn. The Court does not appear to be reversing its longer term trend of the past few decades of reducing the number of argued cases. Nor does the Court appear to be less divided when it addresses the legal issues that have divided the Justices during those same years. Finally, on those issues where the Court remains sharply divided, the Court's rulings are generally more and not less conservative, which is not surprising given Justice O'Connor's departure from the Court. Moreover, in the short period in which the new Court has taken form – less than two years – the most recently-appointed Justices, have joined with the traditionally conservative members of the Court to shape several areas of law in significant ways, particularly under the First and Fourteenth Amendments. As discussed more fully below, this deepening of a conservative majority on the Court has led to a series of closely divided votes favoring the more conservative position and a corresponding increase in the apparent frustration with the Court's rulings by liberal Justices relegated to written and oral dissents.

It is important to stress, however, that no truly meaningful conclusions can be made about the longer term significance of a new Court based on the results of one Term. This new Court and especially the new Chief Justice and Associate Justice who have joined it are just beginning to form and develop as Justices and as a Court. There is no substitute for time for learning the role the new Court will play in the nation's future. Any predictions of that future based on a few early rulings rooted in longstanding legal disputes are, at best speculative, and with the passage of time risk being foolish. With that essential caveat, the new Court has plainly already confronted a host of significant legal issues in the short period of time since it began.

The Kennedy Effect:

As underscored by his concurring opinion in the “school race” cases read from the bench on the Court’s final day of opinions, Justice Kennedy has more than fully assumed Justice O’Connor’s role as the swing vote in the Court’s 5-4 decisions; he has surpassed it. He has been in the majority in all 23 split decisions this Term (see Table 8), which includes 22 5-4 rulings, and one 5-3 ruling in *Watters v. Wachovia* (see Table 8). In the 17 cases that have broken along the usual conservative/ liberal lines, Justice Kennedy has “swung” six times to the left and twelve times to the right (see “The Split Decisions”). In the October Term 2005, 16 argued cases (22.9%) were decided by a five-vote majority, compared with 23 cases decided by a split court (28.8%) in the October Term 2004 (see Table 5). During the October Term 2005, the Court’s traditionally conservative Justices were in the majority five times and the liberal Justices were in the majority four times, with the votes of Justice Kennedy, Justice O’Connor or both in the majority. During her last full term on the Court, Justice O’Connor was in the majority of split decisions 62.5 percent of the time, the same frequency as Justice Kennedy (see Table 8).

Not only did Justice Kennedy determine the disposition of more than a dozen cases this Term as the Court’s swing vote, he aligned with the majority in 97 percent of cases, indicative of a remarkably high ratio of majority votes to dissenting votes (see Table 7). He has dissented only twice this Term, and authored a single dissenting opinion (*Cunningham v. California*). Chief Justice Roberts was most often in the majority in October Term 2005 with 92.4 percent of his votes cast with the majority, while Justice Breyer was in the majority 86.3 percent of the time in October Term 2004 (see Table 7). Justice O’Connor was most often in the majority in October Term 2003 (82%).

Notably, Justice Kennedy has been in 100 percent of the Court’s “high profile” decisions this Term. Justice Kennedy authored two “high profile” opinions, the highest number written for an Associate Justice.¹ While Justice O’Connor voted with the majority in 100 percent of the Court’s high profile decisions during her last term, she only participated in two such cases. In a more telling comparison, during the October Term 2004, Justice O’Connor joined the majority in just 47.1 percent of the Term’s high-profile decisions. (See Table 9)

The Court’s Increasing Conservatism:

The confirmation of two new Justices in place of Chief Justice Rehnquist and Justice O’Connor has left Court-watchers speculating whether these changes in personnel will result in an ideological shift in the Court’s rulings. Decisions and voting alignments this Term provide further evidence that while Chief Justice Roberts generally votes similarly to his predecessor, Chief Justice Rehnquist, Justice Alito is consistently more conservative than Justice O’Connor.

Using Justice Scalia as a conservative pole, the voting alignment between Justice Scalia and the prior and current Justices is demonstrative of the political sway of the Court. A ten-year average of voting alignments from October Term 1994 to October Term 2003 reveals that Chief Justice Rehnquist voted with Justice Scalia in 78 percent of cases this Term, while Justice O’Connor joined Justice Scalia in 70 percent of cases. Chief Justice Roberts topped his

¹ Chief Justice Roberts authored three high profile opinions this Term.

predecessor by voting with Justice Scalia in 83.1 percent of cases, compared with Chief Justice Rehnquist's alignment with Justice Scalia in 69.6 percent of cases in October Term 2004. Justice Alito also bolstered the conservative alliance by joining Justice Scalia in 77.6 percent of cases this Term, compared with Justice O'Connor's alignment with Justice Scalia in 57.5 percent of cases in October Term 2004.

Despite his more conservative voting trends, Justice Alito did step directly into Justice O'Connor's shoes in one opinion this Term. Justice Alito's dissent in *Cunningham v. California*, joined by Justices Kennedy and Breyer, echoed the concerns voiced in Justice O'Connor's *Blakeley* dissent, joined by the same Justices in October Term 2003. Justice O'Connor took the position in *Blakeley* that the effect of the Court's decision as to state sentencing guidelines would be to invalidate all sentencing guideline schemes, a position borne out of the following term in *Booker*. Justice Alito applied the argument in reverse, arguing that the California sentencing scheme was indistinguishable from the post-*Booker* federal system, thus placing *Cunningham* on a collision course with Justice Breyer's remedial opinion in *Booker*, which Justice O'Connor joined.

Chief Justice Roberts noticeably parted from the former Chief's vote on the constitutional implications of sentencing guidelines, joining Justice Ginsburg's majority in *Cunningham*, invalidating a California practice of permitting judges discretion to increase sentences based on additional facts found by a preponderance of the evidence. Chief Justice Rehnquist dissented in both *Apprendi* and *Blakeley*, maintaining that the Sixth Amendment did not require that all facts bearing on criminal punishment be proved beyond a reasonable doubt.

The new Justices have also defied expectations in a number of 5-4 cases by failing to sign on to a hard-line conservative opinion. In both *Ayers* and *Carhart*, Chief Justice Roberts and Justice Alito did not join a Scalia/Thomas concurrence reiterating strict originalist constitutional interpretation, first with regard to Eighth Amendment mitigating evidence and later attacking the Court's abortion jurisprudence under substantive due process. Chief Justice Roberts and Justice Alito went even further in *Philip Morris*, endorsing the majority position over a Justice Thomas dissent accusing the majority of inventing substantive constitutional rights. And in keeping with his swing-vote predecessor, Justice Alito may prove to be a particularly unpredictable conservative, voting opposite his federalist colleagues on a state powers issue in *Watters v. Wachovia Bank* and joining an extra-textual statutory interpretation majority in *Zuni Public School District No. 89 v. Dept. of Education* over the strongly worded objections of Justice Scalia.

This Term's line of dissenting opinions announced from the Bench by the Court's more liberal Justices further indicates that last Term's cohesion has been laid to rest, and is a potential sign of the increasingly conservative shift of the Court. October Term 2006 observed the highest number of oral recitations of dissenting opinions at least since October Term 2002. Further, a review of the Court since October Term 2002 demonstrates that this is the first Term since then during which the greatest number of dissenting opinions read from the Bench were all by the Court's liberal members. Since October Term 2002, this is the first Term in which Justice Scalia has not read a dissent from the Bench. October Term 2004 was the last Term in which a Justice recited two dissents in the same Term.

This Term, Justice Ginsburg, speaking for Justices Stevens, Souter, and Breyer, announced her dissents in *Gonzales v. Carhart* and *Ledbetter v. Goodyear Tire & Rubber Co.*, Justice Stevens delivered his lone dissent in *Scott v. Harris* and his dissenting opinion in *Uttecht v. Brown*, speaking

for Justices Souter, Ginsburg and Breyer, and Justice Souter read his dissent most recently in *FEC v. Wisconsin Right to Life*, with Justices Stevens, Ginsburg and Breyer joining. Finally, in reaction to two of the last three decisions issued on the final opinion day of the Term, Justice Breyer recited two dissents from the Court Bench in *Leegin Creative Leather Products v. PSKS, Inc.* and in *Parents Involved in Community Schools v. Seattle School District / Meredith v. Jefferson County Board of Education*, speaking for the liberal wing of the Court. Also on the final opinion day, Justice Kennedy read his opinion in the “school race” cases, concurring in the Chief Justice’s opinion in part, thereby creating a majority and opinion of the Court for that part, and concurring in the judgment.

In comparison, in October Term 2005, three Justices – Justices Stevens, Scalia and Thomas – delivered their dissents from the Bench in two cases – *Carabell v. U.S. Army Corps of Engineers* and *Hamdan v. Rumsfeld*. In October Term 2004, Justice Scalia read two dissenting opinions. In October Term 2003, Justice Stevens voiced his disagreement with the Court in two of that Term’s 5-4 decisions, and Justices Ginsburg, O’Connor, and Scalia each announced a dissenting opinion in three separate cases. In October Term 2002, Justices Ginsburg and Breyer announced their dissents in two cases, and Justice Scalia read his dissent from the Bench in the high-profile case, *Lawrence v. Texas*.

Decreased Unanimity:

Unlike last Term, when the Court’s remarkable unanimity manifested itself in seven unanimous opinions of the first ten authored opinions of the Term, October Term 2006 started with a 5-4 split, and has remained contentious ever since.² Of the first ten authored opinions of this Term, only two were unanimous. Although the number of unanimous decisions issued steadily increased throughout the Term, so did the number of split decisions with most of the 23 five-vote majorities split between the traditional alliances. The final day of opinions ended with three more 5-4 votes.

This Term, 23.9 percent of the argued cases in which a signed opinion was issued were decided unanimously and another 13.4 percent were decided with all Justices concurring in the judgment (see Table 5). Combining these two numbers, the Court decided a total of 37.3 percent of cases without dissent during October Term 2006. In comparison, during October Term 2005, unanimity was present in 37.7 percent of the argued cases and an additional 11.6 percent were decided with all Justices concurring in the judgment, for a total of 49.3 percent of cases decided without dissent. While it does not appear to be a lasting trend, last Term’s unanimity was a notable shift from recent terms under Chief Justice Rehnquist’s leadership. In the October Term 2004 a total of 37.8 percent of cases were decided without dissent (see Table 5), while a review of the October Term 2003 reveals that a total of 43.8 percent of cases were decided without dissent. (See Table 5)

Last Term, only four decisions were authored with a single dissent. Of the eight cases that came out with one lone dissent this Term, Justices Thomas and Stevens authored three dissents

² For purposes of comparison, the first 5-4 decision last term was announced on January 10 and it was the eleventh authored opinion of the term.

each, and Justice Scalia authored one, suggesting last Term's unanimity is losing hold at the political poles. (See Table 6)

Fewer Dissents and Splintered Decisions:

A noteworthy effect of Chief Justice Roberts' arrival on the Court last Term was the decrease in the number of dissenting votes and splintered decisions. It is now apparent this decrease was likely attributable to the spike in unanimous decisions issued, as the number of dissenting votes for this Term is more reflective of the record in October Term 2004. By comparison, there were a total of 124 dissenting votes in 67 rulings on argued cases (other than those decided Per Curiam) for October Term 2006 (1.9 dissenting votes/case) and 99 dissenting votes in 69 argued cases in October Term 2005 (1.4 dissenting votes/case). There were 134 dissenting votes in 74 decided cases (excluding two argued cases decided Per Curiam) in October Term 2004 (1.8 dissenting votes/case).

In contrast, a potentially enduring effect of the new Court dynamic is the decrease in the number of separate concurring and dissenting opinions authored. During October Term 2006, 98 separate opinions were issued in addition to the majority opinion for 67 cases (1.5 opinions/case). By comparison, for October Term 2005, 91 other opinions were issued for 75 cases (1.2 opinions/case). For October Term 2004, 125 other opinions were issued for 75 cases decided with majority opinions (1.7 opinions/case).

More specifically, for October Term 2006, the Justices penned 54 separate dissents, compared with 55 individual dissenting opinions written during October Term 2005 and 64 dissents written during October Term 2004. The number of opinions concurring in the judgment also declined from 18 authored in October Term 2005 to 14 issued this Term. Notably, the number of opinions concurring or concurring in part increased from 18 (11.3% of opinions authored) last Term to 30 (18%) during October Term 2006.

Shrinking Docket:

The number of cases decided by the Court with a signed opinion decreased significantly over the twenty years when William Rehnquist served as Chief Justice. Since John Roberts became Chief Justice in September 2005, the number of cases decided by the Court has remained low, but has not decreased significantly. In October Term 2004, the Court granted plenary review in 87 cases, and after consolidating related cases, heard 76 oral arguments. In October Term 2005, the Court granted plenary review in 88 cases, and after consolidating related cases and dismissing one case, scheduled 75 oral arguments for their consideration. This Term, the Court granted plenary review in 80 cases and, after consolidating seven related cases and dismissing two cases, the Court heard oral arguments in 71 argument hours. (See Table 1) Given the slow pace of cert grants for October Term 2007, it is unlikely that the number of cases reviewed will increase next Term.

The Court disposed of four cases this Term summarily in Per Curiam opinions by either reversing or vacating the lower court's decision. In October Term 2005, the Court issued 11

summary reversals or vacatur. In October Term 2004, the Court summarily reversed four cases in total. (See Table 2)

Traditional Alliances:

The traditional conservative alliance of Justices Thomas and Scalia remained strong this Term in general voting patterns. They voted together in 81.8 percent of the cases, which is more frequent than most other pairs of Justices, but slightly lower for the conservative duo compared to last year, when they agreed in 86.8 percent of cases (see Table 10). The Justices noticeably parted at times, writing separate solo opinions for the same outcome. In two such cases (*James v. United States* and *United Haulers*), the ideological schism appeared to occur over Scalia's willingness to bend to stare decisis while Thomas reiterated a strict originalist constitutional reading. Notably, the Justices parted over two longstanding originalist issues, with Scalia failing to sign on to a dissent in *Philip Morris USA v. Williams*, inveighing against substantive due process and a concurrence in the judgment in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, vehemently rejecting a long line of dormant commerce clause jurisprudence. In October Term 2004, Scalia and Thomas authored a total of nine dissents or concurrences in which they alone joined; this Term the number decreased to seven.

Non-Traditional Alliances:

This Term has witnessed five never-before-seen voting alignments on split decisions.³ Among the more surprising of them was Justice Breyer's majority opinion for the Court in *Philip Morris USA v. Williams*, joined by Chief Justice Roberts and Justices Kennedy, Souter and Alito, holding the Due Process Clause limits punitive damages to harms caused to the plaintiffs and not third parties. The Court's newest Justices were again severed from their conservative counterparts in *James v. United States*, in which Justice Alito's majority opinion for the Court was joined by Chief Justice Roberts and Justices Kennedy, Souter and Breyer, in holding that attempted burglary under Florida law is a "violent felony" within the meaning of the federal Armed Career Criminal Act.

Justice Voting Patterns:

The Justices who voted most often together were the Court's latest additions: Chief Justice Roberts and Justice Alito (87.8%). The next highest frequency in agreement was between Justice Ginsburg and Justice Souter (82.1%). Justice Stevens and Justice Thomas voted least often together (31.8%). While Justice Thomas voted with Justice Stevens, Justice Souter, and Justice Ginsburg equally in October Term 2005 (52.9%), those percentages decreased this Term to 31.8 percent, 40.9 percent, and 40.9 percent, respectively. (See Table 10)

Comparing only the nonunanimous cases, the two Justices who voted together most often were again Chief Justice Roberts and Justice Alito (84.0%). Still, this is a drop in alignment from last Term (88.0%). The next highest percentage of voting alignment in nonunanimous cases was

³ *Philip Morris, Limtiaco v. Camacho, Watters v. Wachovia, James v. United States, and Zuni Public School Dist.*

between Chief Justice Roberts and Justice Scalia (80.0%) with Justice Ginsburg and Justice Souter not trailing too far behind (78.0%). The voting pair exhibiting the least amount of agreement in nonunanimous cases was Justice Stevens and Justice Thomas (10.0%). (See Table 11)

Justice Alito aligned with Justice Kennedy more frequently (74.0%) than he did with his more conservative counterparts, Justice Scalia (68.6%) and Justice Thomas (64.0%) in nonunanimous cases this Term. Chief Justice Roberts agreed with Justice Kennedy more often in cases that were decided by a divided vote in the judgment (71.4%) than he did with Justice Thomas (67.3%) in the same cases. Chief Justice Roberts and Justice Alito both agreed with Justice Stevens in the least number of nonunanimous cases (20.0% and 25.5%) than they did with any other Justice. (See Table 11)

A Business Friendly Court:

Yet another potentially lasting change in the Roberts' Court that became increasingly apparent this Term is the increase in "business-type" cases on the Court's plenary docket, especially in the areas of patent and antitrust law. These are both areas of law from which the Court has generally shied away in the past two decades. Even more striking is the Court's voting record in such cases – all of the Court's rulings have been in favor of the petitioner, advancing the business interest – and only one has been decided by the narrow 5-4 margin that has defined almost a third of the rulings this Term. The Court seems persuaded by the complaints of many in the business community that erroneous rulings by lower federal courts are unduly harming business interests. As happened in the Court's final day decision in *Leegin Creative Leather Products v. PSKS, Inc.*, the Court has further agreed with business parties that sometimes the source of the error is the Court's own precedent, thus prompting the Court to overrule a prior decision that had stood for 96 years.

In October Term 2006, the Court decided four antitrust cases⁴, compared with three in October Term 2005, zero in October Term 2004, and three in October Term 2003. This Term, the Court considered and ruled on three patent law cases⁵, while the Court decided on a patent law issue in one case in October Term 2005 and another solo case in October Term 2004 – both rulings falling on the side of the business interest. The Court did not consider any patent law issues during October Term 2003. While these figures may be indicative of a broader trend incepted by the Court in October Term 2005 and carried into October Term 2006, whether the Court's recent interest in antitrust and patent law will play out in future Terms is uncertain. As of June 28, 2007, the Court has not granted certiorari in any such cases for review during the October Term 2007.

⁴ *Weyerhaeuser Co. v. Ross-Simmons* (9-0); *Bell Atlantic v. Twombly* (7-2); *Credit Suisse v. Billing* (7-1); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (5-4).

⁵ *KSR International v. Teleflex* (9-0); *Medimmune v. Genentech* (8-1); *Microsoft v. AT&T* (7-1).

Court of Origin Statistics:

As in past Terms, the highest number of cases this Term came from the Ninth Circuit (see Graph 1). Much like in recent Terms, the Ninth Circuit reversal rate is significantly higher than the overall reversal rate (52.6%) this Term. In October Term 2004, the Court reversed 13 of 19 (68%) cases decided by the Ninth Circuit and in October Term 2005, the Court reversed 11 of 15 (73%) cases. This Term, while the Court has continued to review a disproportionately large number of cases from the Ninth Circuit – 21 cases – the Court has reversed only 13 of the 21 cases (61.9%) that it has decided this Term (see Graph 2). While the Ninth Circuit reversal rate has been noticeably lower this Term, four of the reversals were 9-0 rulings. Further, in considering all Ninth Circuit cases reviewed by the Court this Term – cases granted plenary review as well as summary review -- the Court of Appeals had a particularly rough start this Term, with their first nine cases reversed or vacated (including one summary reversal and one per curiam vacatur).

The number of cases heard from state courts significantly decreased this Term, dropping to eight cases from 17 in October Term 2005 and 11 in October Term 2004 (see Table 4). Alternatively, the number of cases granted certiorari originating in federal court increased by almost 10 percent this Term (69/77) as compared with October Term 2005 (70/87) (see Table 4).

While the Court issued more affirmances and reversals this Term from October Term 2005, the Court has vacated fewer cases this Term than in October Term 2005. During October Term 2006, the Court affirmed 25.6 percent of all argued cases, reversed 52.6 percent of cases, and vacated 15.4 percent of argued cases (see Table 3). In October Term 2005, affirmances measured 24.1 percent, while reversed and vacated cases comprised 50.6 percent and 23.0 percent of the total dispositions, respectively (see Table 3). In October Term 2004, 28.8 percent of cases were affirmed, 60.6 percent of cases were reversed, and only 11.3 percent of argued cases were vacated.

The Court dismissed two argued cases, *Toledo-Flores v. United States* and *Roper v. Weaver*, as improvidently granted in per curiam opinions. The Court also dismissed *Dayton v. Hanson* and *Burton v. Stewart* for lack of jurisdiction. The Court vacated *Claiborne v. United States* as moot upon petitioner's death three months after the case was argued before the Court.

A Glance Ahead at October Term 2007:

The Court's pace of cert grants for next Term has, like this past Term, been slow. In recent years, the Court has filled the docket through the December argument calendar by its summer recess. For instance, at the close of October Terms 2003 and 2004, the Court had granted plenary review in 39 and 37 cases, respectively. At the end of June 2006, the Court had granted in 29 cases, but had 32 hours of argument to fill through the December 2006 session. The Court has granted 26 petitions for next Term to fill 25 hours of argument. To fill all the potential argument days through the December argument session, the Court would have to grant review in cases that would require 34 hours of argument.

In April 2007, the Court notably denied cert in the much-watched Guantanamo Bay detainee cases (*Al-Odah v. Bush* and *Boumediane v. Bush*), though by a narrow margin. Justices Stevens and Kennedy issued a joint statement respecting denial of cert in which they noted that the petitioners had not yet exhausted all available remedies by failing to challenge their enemy combatant status in federal court, but expressed a willingness to intervene should the government unnecessarily delay such proceedings. Justices Breyer, Souter and Ginsburg voted to hear the cases, noting that the D.C. Circuit had already held that detainees have no constitutional protections, rendering further appeals unnecessary. In response to a petition to reconsider the denial of the detainees' appeals filed by the lawyers of the detainees, Solicitor General Paul Clement urged the Court to deny the rehearing pleas, arguing that lower courts are already reviewing challenges and working to establish a framework for processing such claims. In a final push by the detainees' lawyers on the pending rehearing requests before the Court, the lawyers filed pleas attacking the military panels that determine the detainees' status as "enemy combatants." The Supreme Court has not yet issued a decision on the detainee' rehearing pleas.

Origins and Disposition of Cases

Table 1: *Overview of Argued Cases:*

	OT 2006	OT 2005	OT 2004
Cases Granted Plenary Review	80	88	87
Individual Oral Arguments ⁶	71	75	76
Cases Argued	78	87	87
Signed/Judgment Opinions	66	69	74
Per Curiam Opinions	4	5	2
Other Opinions ⁷	1	0	0

Table 2: *Overview of Unargued Cases:*

	OT 2006	OT 2005	OT 2004
Total Cases:	6	13	4
Summary Affirmances	0	0	0
Summary Reversals/Vacates ⁸	4	11	4
Decided by Decree	0	1	0
Dismissed ⁹	2	1	0

Table 3: *Disposition of Argued Cases¹⁰:*

	Cases	% of total	% in 2005
Affirmed	20	25.6	24.1
Reversed	41	52.6	50.6
Vacated	12	15.4	23.0
DIG	2	2.6	2.3
Otherwise Dismissed	3	3.8	0

⁶ This depicts the number of cases that were argued before the Court in individual argument sessions, counting consolidated cases as one case. For example, *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood* are counted separately in this chart because they were argued in tandem, but not consolidated, despite being decided in a single opinion.

⁷ The unanimous decision to dismiss *Dayton v. Hanson* for want of jurisdiction was authored by Justice Stevens.

⁸ This includes both cases in which the judgment was formally reversed and cases in which the judgment was vacated.

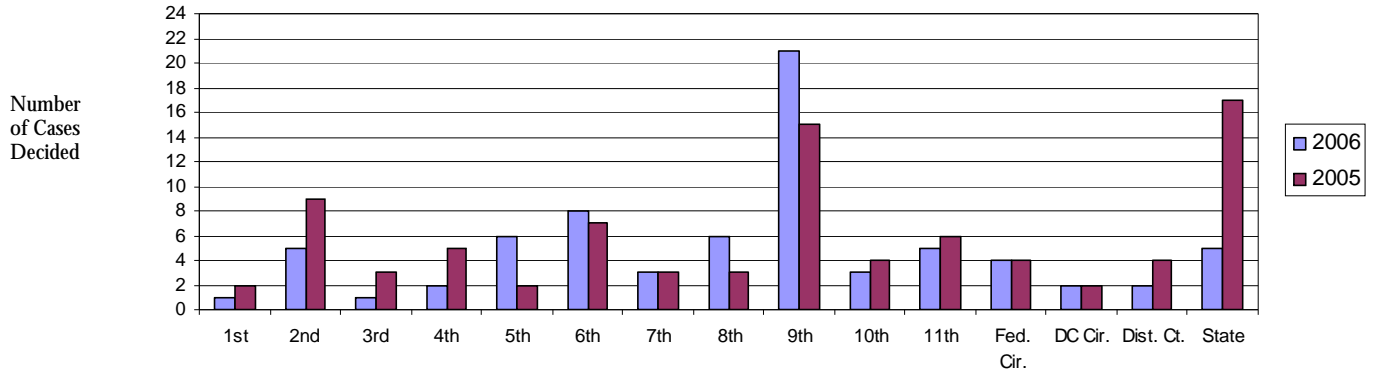
⁹ *BCI Coca-Cola Bottling Co. v. EEOC* (06-341) and *Altadis USA v. Sea Star Line, LLC* (06-606) were originally scheduled to be argued on April 18, 2007 and March 27, 2007, respectively, but the cases were dismissed before the arguments occurred.

¹⁰ This chart denotes the disposition of all argued cases, including those in which a Per Curiam or other opinion was issued. Each case is counted individually by origin, even if it was consolidated for argument. The total for reversed and vacated decisions includes those cases that were reversed in part or vacated in part, respectively.

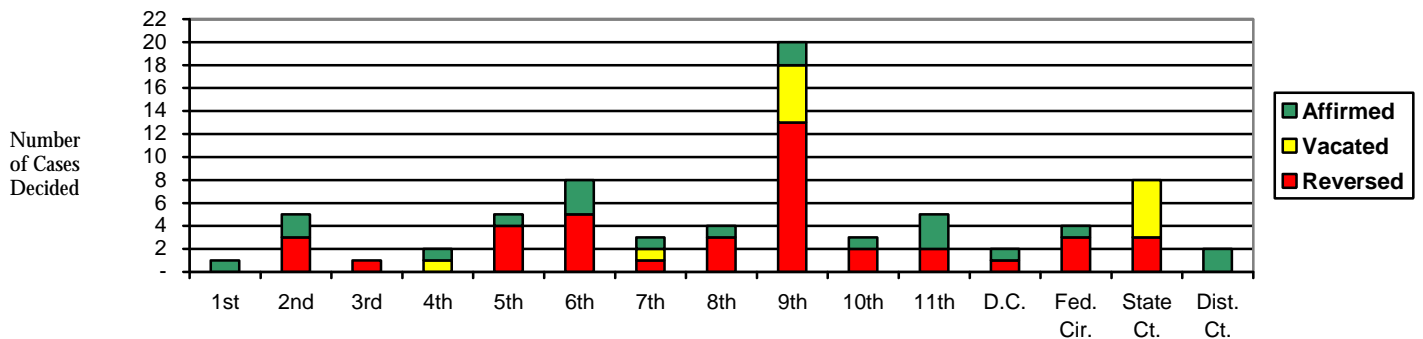
Table 4: *Origins of Argued Cases*¹¹:

	Cases	% of total	% in 2005
Federal Court	69	89.6	80.5
State Court	8	10.4	19.5
Original Jurisdiction	0	0	0

Graph 1: *Origin by Court*:



Graph 2: *Origin and Disposition by Court*¹²:



¹¹ The information displayed in this chart and the two bar graphs that follow count cases granted certiorari based on individual court of origin. Because certiorari was denied in *Dayton v. Hanson* after argument, the case is not included in these calculations.

¹² This bar graph includes only cases decided on the merits after argument. Dismissals are not included.

Table 5: Unanimity and Dissent¹³:

	Unanimous ¹⁴			With Concurrence ¹⁵			With Dissent ¹⁶			5 Vote Majority		
	2006	2005	2004	2006	2005	2004	2006	2005	2004	2006	2005	2004
Number of Cases	16	26	22	9	8	6	42	35	46	23	16	23
Annual Percentage	23.9	37.7	29.7	13.4	11.6	8.1	62.7	50.7	62.2	34.3	22.9	31.1

Table 6: *Dissenting Votes*:

	1 Dissent		2 Dissents		3 Dissents ¹⁷		4 Dissents	
	2006	2005	2006	2005	2006	2005	2006	2005
Number of Cases	8	4	8	9	4	11	22	11
Annual Percentage	11.9	5.8	11.9	13.0	6.0	15.9	32.8	15.9

Split Decisions (Five Vote Majority)¹⁸:

- **Ayers v. Belmontes**
- Philip Morris USA v. Williams
- **Lawrence v. Florida**
- **Marrama v. Citizens Bank of Massachusetts**
- **Limtiaco v. Camacho**
- **Massachusetts v. EPA**
- **Gonzales v. Carhart / Gonzales v. Planned Parenthood**
- **Watters v. Wachovia¹⁹**
- **James v. United States**
- **Zuni Public School District No. 89 v. Department of Education**
- **Smith v. Texas**
- **Brewer v. Quarterman**
- **Abdul-Kabir v. Quarterman**
- **Shriro v. Landrigan**
- **Ledbetter v. Goodyear Tire & Rubber Co.**
- **Uttecht v. Brown**
- **Bowles v. Russell**
- **Hein v. Freedom From Religious Foundation, Inc.**
- **National Assn. of Home Builders v. Defenders of Wildlife**
- **FEC v. Wisconsin Right to Life**
- **Panetti v. Quarterman**
- **Leegin Creative Leather Products, Inc. v. PSKS, Inc.**
- **Parents Involved in Community Schools v. Seattle School District / Meredith v. Jefferson County Board of Education**

¹³Per Curiam opinions issued on argued cases are not included in these calculations.

¹⁴A 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.

¹⁵Cases in which all Justices agreed on the disposition but one or more Justice filed an opinion concurring with the judgment.

¹⁶*Abdul-Kabir v. Quarterman* and *Brewer v. Quarterman* are treated as two cases for purposes of dissenting votes because they were decided in two majority opinions, despite being consolidated for argument. Similarly, *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood* are treated as one case because they were decided in a single opinion.

¹⁷*Morse v. Frederick* is included in this category as a 6-3 ruling after consideration of Justice Breyer's opinion.

¹⁸Cases in **red** represent rulings decided by the traditional conservative alliance and cases in **blue** represent rulings with the traditional liberal alliance in the majority. Cases in bold represent those considered "high profile" and are summarized in a later section of this report.

¹⁹Justice Thomas was recused from this case, making the final vote 5-3. Had Justice Thomas participated in the case, he would likely have joined Justice Stevens' federalist dissent, signed on to by Chief Justice Roberts and Justice Scalia.

SECTION II: JUSTICE OVERVIEW

Table 7: Opinions and Votes by Justice:

	Opinions Written				Voting ²⁰		
	Majority	Concurrence	Dissent	Total	OT 2006 % in Majority	OT 2005 % in Majority	OT 2004 % in Majority
Roberts	7	0	3	10	87.7	92.4	N/A
Stevens	7	8	14	29	61.2	73.9	75.0
Scalia	8	7	8	23	80.9	88.4	80.0
Kennedy	8	6	1	15	97.0	88.4	85.0
Souter	7	4	6	17	76.1	81.2	81.3
Thomas	8	8	7	23	78.8	79.4	77.5
Ginsburg	7	2	5	14	70.1	81.2	78.8
Breyer	8	5	6	19	75.4	76.8	86.3
Alito	7	4	4	15	86.6	88.2	N/A
Per Curiam	4	---	---	165			

Table 8: Voting in Split Decisions:

	Number Written in OT 2006	% in Majority OT 2006	% in Majority OT 2005	% in Majority OT 2004	Five Vote Majority Opinions Written OT 2006
Roberts	2	65.2	71.4	N/A	FEC v. Wisconsin Right to Life; Parents Involved in Community Schools v. Seattle School District/Meredith v. Jefferson County Board of Education
Stevens	4	30.4	50.0	60.9	Marrama v. Citizens Bank of Mass.; Massachusetts V. EPA; Brewer v. Quarterman; Abdul-Kabir v. Quarterman
Scalia	0	56.5	56.3	56.5	
Kennedy	6	100.0	68.8	60.9	Ayers v. Belmontes; Gonzales v. Carhart/Gonzales v. Planned Parenthood; Smith v. Texas; Uttecht v. Brown; Panetti v. Quarterman; Leegin Creative Leather Products, Inc. v. PSKS, Inc.
Souter	0	39.1	62.5	69.6	
Thomas	4	59.1	50.0	56.5	Lawrence v. Florida; Limtiaco v. Camacho; Schriro v. Landrigan; Bowles v. Russell
Ginsburg	1	34.8	53.6	65.2	Watters v. Wachovia
Breyer	2	47.8	37.5	65.2	Philip Morris USA v. Williams; Zuni Public School Dist. No 89 v. Dept. of Education
Alito	4	69.6	77.8	N/A	James v. United States; Ledbetter v. Goodyear Tire & Rubber; Hein v. Freedom From Religious Foundation, Inc.; National Assn. of Home Builders v. Defenders of Wildlife

²⁰ 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.

Table 9: Voting in High Profile Cases:

	% in Majority in OT 2006	Number Written in OT 2006	% in Majority in OT 2005	Number Written in OT 2005	High Profile Majority Opinions Written in OT 2006
Roberts	88.9	3	81.3	3	FEC v. Wisconsin Right to Life; Morse v. Frederick; Parents Involved in Community Schools v. Seattle School District; Meredith v. Jefferson County Board of Education
Stevens	22.2	1	64.7	1	Massachusetts v. EPA
Scalia	77.8	1	70.6	1	Scott v. Harris
Kennedy	100.0	2	94.1	5	Gonzales v. Carhart; KSR International v. Teleflex, Inc.
Souter	55.6	0	76.5	2	
Thomas	77.8	0	70.6	0	
Ginsburg	44.4	0	70.6	1	
Breyer	55.6	1	70.6	3	Philip Morris USA v. Williams
Alito	88.9	1	90.0	0	Hein v. Freedom From Religious Foundation, Inc.

SECTION III: VOTING ALIGNMENT

Table 10: 2006 Term Voting Alignment²¹:

<i>% of Agreement</i>		Stevens	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer	Alito
Roberts	06 05	36.9 60.6	81.5 86.4	78.1 80.3	56.9 69.7	75.0 81.5	50.8 68.2	50.0 69.7	87.8 90.9
Stevens	06 05	-----	35.8 56.5	53.0 63.8	71.6 81.2	31.8 52.9	80.6 78.3	69.2 73.9	43.3 41.2
Scalia	06 05		-----	68.2 72.5	50.7 62.3	81.8 86.8	47.8 59.4	44.6 60.9	77.6 73.5
Kennedy	06 05			-----	51.5 72.5	63.1 69.1	60.6 68.1	65.6 68.1	80.3 79.4
Souter	06 05				-----	40.9 52.9	82.1 79.7	78.5 82.6	52.2 58.8
Thomas	06 05					-----	40.9 52.9	39.1 55.9	72.7 76.5
Ginsburg	06 05						-----	76.9 72.5	50.7 50.0
Breyer	06 05							-----	56.9 50.0

²¹ Percentages represent the frequency with which one Justice votes (either in the majority, concurrence or dissent) for the same reasoning as another Justice in signed/judgment opinions. 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. The cells displaying highest and lowest alignments in 2006 are noted in bold font in the bold box.

Table 11: 2006 Term Voting Alignment in Nonunanimous Cases²²:

<i>% of Agreement</i>		Stevens	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer	Alito
Roberts	06 05	20.0 35.0	80.0 77.5	71.4 67.5	44.0 50.0	67.3 70.0	36.0 47.5	40.8 50.0	84.0 88.0
Stevens	06 05	-----	17.6 30.2	38.0 41.9	62.7 69.8	10.0 25.6	74.5 65.1	60.0 58.1	25.5 23.1
Scalia	06 05		-----	58.0 55.8	35.3 39.5	76.0 79.1	31.4 34.9	28.0 39.5	68.6 65.4
Kennedy	06 05			-----	56.0 55.8	50.0 51.2	48.0 48.8	55.1 46.5	74.0 73.1
Souter	06 05				-----	22.0 30.2	78.0 67.4	72.0 72.1	37.3 46.2
Thomas	06 05					-----	22.0 25.6	20.4 30.2	64.0 69.2
Ginsburg	06 05						-----	70.0 55.8	33.3 34.6
Breyer	06 05							-----	44.0 34.6

²² Because 23.9 percent of the cases in the October Term 2006 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. The row marked "05" indicates the voting alignment for the October Term 2005. The cells displaying highest and lowest alignments in 2006 are noted in bold font in the bold box.

SECTION IV: SUMMARIES OF HIGH PROFILE CASES

- FIRST AMENDMENT

FEC v. Wisconsin Right to Life

Issue²³:

Whether the federal statutory prohibition on a corporation's use of general treasury funds to finance "electioneering communications" is unconstitutional as applied to three broadcast advertisements that appellee proposed to run in 2004.

Holding: Affirmed.

The cases are not moot because they fall into the exception to mootness for disputes likely to arise again; these cases are justiciable. Chief Justice Roberts, joined by Justice Alito, concluded that the Bipartisan Campaign Reform Act of 2002 ("BCRA") § 203 is unconstitutional as applied to the advertisements at issue. The ads are not express advocacy or its "functional equivalent" because they are not susceptible to a reasonable interpretation of supporting or opposing a specific candidate, and the FEC does not have a sufficiently compelling interest to justify burdening the speech. An objective test must be applied to as-applied challenges to BCRA § 203, and the benefit of the doubt must be afforded to the protection of speech over suppression of speech.

Concurrences:

Justice Alito concurred in the opinion of the Court in that the judgment does not decide whether § 203 is facially unconstitutional, but suggested the Court may have occasion to revisit the issue in the future. Justice Scalia concurred in part because he agrees the Court has jurisdiction, and he concurred in the Court's judgment, asserting he would go further than the Chief Justice and overrule that part of *McConnell v. FEC* upholding BCRA § 203(a).

Dissent:

In his dissent, Justice Souter declared the Court's decision in *McConnell*, asserting the facial validity of the BCRA, is "effectively, and unjustifiably, overruled." He believes the ads are subject to regulation under *McConnell*.

Vote: 5-4

Roberts with Scalia, Kennedy, Thomas, and Alito (Parts I and II). Roberts with Alito (Parts III and IV). Alito concurring. Scalia concurring in part and concurring in the judgment, with Kennedy and Thomas. Souter dissenting, with Stevens, Ginsburg, and Breyer.

"Now, corporate and union treasury funds can be spent in unlimited amounts for campaign ads, at least through non-profit 'conduits'. The decision will most likely have a major impact on 2008's elections. Certainly, unsurprisingly, we'll see more litigation and a field-day for ad writers' creativity."

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²³ 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 20, 2007).

Morse v. Frederick

Issues:

- (1) Whether the First Amendment allows public schools to prohibit students from displaying messages promoting the use of illegal substances at school-sponsored, faculty-supervised events.
- (2) Whether a public high school principal was liable in a damages lawsuit under 42 U.S.C. § 1983 when, pursuant to the school district's policy against displaying messages promoting illegal substances, she disciplined a student for displaying a large banner with a slang marijuana reference at a school-sponsored, faculty-supervised event.

Holding: Reversed and remanded.

School officials did not violate the First Amendment by confiscating a student's banner stating "BONG HiTS 4 JESUS," and suspending the student. The event in question was a school-sponsored event at which the school's conduct rules for students applied because the event occurred during normal school hours and was sanctioned by the principal as an approved social event. The banner was "reasonably regarded" as promoting illegal drug use. A school may restrict student speech at a school event when that speech is interpreted as promoting drug abuse without violating the First Amendment. The government's interest in restricting drug abuse and "the special characteristics of the school environment" permit school districts to proscribe student expression that they regard as sanctioning such conduct.

Concurrences:

Justice Thomas wrote separately to express his view that because it has no constitutional basis, the Court should discard the standard set forth in *Tinker v. Des Moines Independent Community School Dist.* rather than chip away at it with exceptions. *Tinker* established the rule that prohibits schools from limiting students' free speech unless it would "materially and substantially interfere" in teaching the students. Justice Alito joined with the opinion of the Court, but wrote a concurring opinion to emphasize that the holding extends no further than authorizing a school official to restrict speech that may be reasonably interpreted as promoting illegal drug use. Justice Breyer concurred in the judgment in part and dissented in part because he believes the Court should have only decided the question of qualified immunity in favor of the school official and said nothing more.

Dissent:

Justice Stevens dissented, arguing that the student's banner should not be read to advocate drug use; it was nothing more than an oblique message with a reference to drugs.

Vote: 6-3 (5-1-3)

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

"Morse is a very limited holding -- essentially limited to the drug context. Debate, political and religious messages are protected. 'Celebration' of illegal activity -- drug use, anyway, is not. That's the upshot."
- Marty Lederman, Visiting Professor of Law, Georgetown University Law Center
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Hein v. Freedom From Religion Foundation, Inc.

Issue:

Whether taxpayers have standing under Article III of the Constitution to challenge on Establishment Clause grounds the actions of Executive Branch officials pursuant to an Executive Order, where the plaintiffs challenge no Act of Congress, the Executive Branch actions at issue are financed only indirectly through general appropriations, and no funds are disbursed to any entities or individuals outside the government.

Holding: Reversed.

In a plurality opinion authored by Justice Alito, and joined by Chief Justice Roberts and Justice Kennedy, the Court said the exception to the general rule barring federal taxpayers from challenging Federal Government expenditures, which authorizes plaintiffs to challenge the use of federal funds pursuant to congressional appropriation as violating the Establishment Clause, does not apply to the conduct of the Executive Branch. Because the action that the plaintiffs attack was not expressly authorized or mandated by Congress, the lawsuit is not aimed at an exercise of the delegated taxing and spending powers of Congress. For this reason, the plaintiff lacks the necessary “logical nexus” between the specific legislative action challenged and taxpayer status. Since most of the Executive Branch’s expenditures are funded by congressional appropriation, extending the reach of the exception to Executive action would effectively permit all federal taxpayers to challenge all federal action as violating the Establishment Clause. Expanding the exception, and relaxing standing requirements to challenge executive actions is contrary to the separation of powers doctrine because it would turn the role of the Judiciary into that of the Executive Branch’s supervisor.

Concurrences:

Justice Kennedy wrote a concurring opinion, adding to Justice Alito’s opinion, that even where plaintiffs have no standing to challenge Government action, the Executive and Legislative Branches must still make constitutional decisions in their respective day-to-day operations. Justice Scalia concurred in the judgment, but called for an overruling of the exception to taxpayer standing set forth in *Flast v. Coben* because it is without basis in the Constitution.

Dissent:

Justice Souter dissented, arguing that there is no difference in the Judiciary reviewing legislative spending decisions that support religion from judicial review of executive expenditures. The dissent would affirm the decision of the Court of Appeals below supporting taxpayer standing in this case.

Vote: 5-4 (3-2-4)

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

- FOURTH AMENDMENT

Scott v. Harris

Issue:

Whether a law enforcement officer's conduct is "objectively reasonable" under the Fourth Amendment when the officer makes attempts to terminate a high-speed pursuit by bumping the fleeing suspect's vehicle with his push bumper.

Holding: Reversed.

Because of the high likelihood of serious harm to others posed by the driver's conduct in the high speed chase, the officer was objectively reasonable in using deadly force to prevent such harm. The Fourth Amendment balances the nature and quality of the seizure against the governmental interests served by the intrusion. Here, the driver placed himself and other drivers at considerable risk, so that the officer's actions in attempting to terminate the chase were reasonable, despite the fact that the action posed a threat of death or serious injury to the fleeing driver.

Concurrences:

Justice Ginsburg concurred, stating that she did not read the majority opinion to establish a *per se* rule for all car chases, and that future cases would still require the Court to "slosh [its] way through the factbound morass of reasonableness." Breyer wrote separately to support the overruling of the requirement of *Saucier v. Katz*, that the Court must first decide the constitutional question before reaching the question of qualified immunity. He also echoed Ginsburg's concurrence that other factors must be taken into account before deciding whether a high-speed chase violates the Fourth Amendment.

Dissent:

Justice Stevens dissented, criticizing the majority's usurpation of the jury's factfinding function. While the majority held that no reasonable person could find the use of force unjustified, Justice Stevens himself, and three judges from the 11th Circuit did just that. This approach deviated, according to Justice Stevens, from the summary judgment standard and amounted to a "de novo review of a videotape" by the high Court.

Vote: 8-1

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

"While the decision offers police and the public no bright line, it does identify the relevant considerations, principally the risk to the lives and safety of others that the fleeing suspect presents and the alternatives available. The most unusual feature of the case was the Court's willingness to 'go to the videotape' of the car chase and discount the lower court's factual determinations on the basis of its own viewing of the tape. It was this feature that prompted Justice Stevens' lone dissent."

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- FIFTH AMENDMENT

Philip Morris USA v. Williams

Issues:

- (1) Whether, in reviewing a jury's award of punitive damages, an appellate court's conclusion that a defendant's conduct was highly reprehensible and analogous to a crime can "override" the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm.
- (2) Whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties.

Holding: Vacated and remanded.

Due Process imposes limits on both the amount that may be awarded in punitive damages and the process by which those damages are set. A jury is not permitted to base its punitive damages award in any part upon a desire to punish the defendant for harming persons who are not plaintiffs in the case, and the state courts have an obligation to assure that juries understand that. A jury can, however, consider third party harms in determining the risk to the general public and thus the reprehensibility of the defendant's conduct, which is a factor in setting punitive damages. State courts cannot authorize procedures which create an "unreasonable and unnecessary risk" of confusing reprehensibility considerations with damages for harm to third parties.

Dissents:

Justice Ginsburg dissented, arguing that the Oregon Supreme Court properly applied *BMW v. Gore* (1996) and *State Farm v. Campbell* (2003) in permitting the jury to consider third party harm as a measure of reprehensibility and not to punish directly for harm to non-parties. Justice Stevens dissented separately to note that the Court's distinction between consideration as to reprehensibility and direct application to punitive damages is specious. While awarding actual damages for third party harms would constitute a taking without due process, consideration of such harms in setting punitive damages is consistent with due process and the precedent set by *BMW v. Gore* (written by Justice Stevens). Justice Thomas dissented separately to argue that the majority's reliance on procedural due process is merely a veil over a "created" substantive due process limitation on the size of punitive damages awards.

Vote: 5-4

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

"The opinion ducked the issue that had attracted the greatest attention: would the Court affirm a punitive damages award that was 97 times the compensatory damages? The opinion effectively requires that juries be instructed on the use that can and can't be made of injury to others. It remains to be seen whether, in practice, juries – who are allowed to consider the injury to others in determining reprehensibility -- will award less than they would if they thought themselves punishing the defendant directly for those injuries."

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FOURTEENTH AMENDMENT

Gonzales v. Carhart / *Gonzales v. Planned Parenthood*

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.

Holding: Reversed.

The Partial-Birth Abortion Ban Act of 2003 ("Act"), which proscribes intact dilation and extraction abortion procedures ("D & X"), with limited exceptions, is not unconstitutionally vague, does not impose an undue burden on women seeking second-trimester abortions, and is not facially invalid. The Act's restrictions on intentional intact delivery of fetuses to specific anatomical landmarks are not too broad or unduly burdensome because the Act does not reach all forms of D & X abortions available to women in the second-trimester of pregnancy. The majority rejects the idea that Congress intended to impede women from obtaining abortions because the ban proscribes one specific type of procedure – intact D & X – leaving standard D & X procedures untouched. When the legislation is "rational and in pursuit of legitimate ends," the State is not barred from regulating procedures or balancing medical risks. The prohibition is not invalid on its face for not excepting situations in which the woman's health is endangered because other methods of abortion remain available, so that there is doubt that the barred procedure is necessary to preserve a woman's health.

Concurrence:

Justice Thomas concurred, writing separately to reiterate his view that the Court's abortion cases, such as *Casey v. Planned Parenthood* and *Roe v. Wade*, have no Constitutional basis. He also noted that whether the Act is within Congress's Commerce Clause power to enact is not an issue in the case before the Court.

Dissent:

Justice Ginsburg dissented, arguing that abortion regulations cannot pass heightened scrutiny unless they incorporate an exception protecting a woman's health. A restriction on an abortion procedure must be evaluated with regard to all women for whom it is relevant, and when it is necessary to protect the health of a woman, it cannot be proscribed.

Vote: 5-4

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

"For the first time since *Roe v. Wade*, the Court upheld an abortion restriction lacking an exception to protect women's health, deciding that Congress itself may resolve genuine medical disputes against pregnant women and their doctors -- thereby effectively overruling *Stenberg v. Carhart* (2000). The Court invited as-applied challenges in cases in which a woman's particular health condition makes D & X superior to other methods. The dissenting opinion by Justice Ginsburg objected to the majority's sounded an equality theme, observing that abortion regulations restrict 'a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.'"

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Parents Involved in Community Schools v. Seattle School District / Meredith v. Jefferson County Board of Education

Issues:

- (1) 1. How are the Equal Protection rights of public high school students affected by the jurisprudence of *Grutter v. Bollinger* and *Gratz v. Bollinger*? 2. Is racial diversity a compelling interest that can justify the use of race in selecting students for admission to public high schools? 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? (*Parents Involved*)
- (2) 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 comply with the requirement that race be used only to satisfy a compelling governmental interest in a narrowly tailored manner? 3. Did the District Court abuse and/or exceed its remedial judicial authority in maintaining "desegregative attractiveness" in the Public Schools of Jefferson County? (*Meredith*)

Holding: Reversed and remanded.

The Court has jurisdiction in these cases. The school districts have not demonstrated that discriminating among individual students based on the students' race serves a compelling interest under strict scrutiny review. The holding in *Grutter v. Bollinger*, which held the government's interest in a diverse student body in higher education is compelling, is not applicable to these cases because the University's interest in student diversity in *Grutter*, unlike the school districts' here, was not based on race alone. Further, the holding in *Grutter* is limited to the context of higher education.

Concurrences:

Justice Thomas wrote a concurring opinion to respond to several points made in Justice Breyer's dissent: there is no resegregation in the areas at issue; the school boards are not interested in remedying past segregation; and no compelling state interest is served by these programs. Justice Kennedy wrote separately to assert his view that diversity is, in fact, a compelling interest that a school district may pursue. Justice Kennedy concurred in the judgment of the Court because he believes the race-based assignment programs were not narrowly tailored to achieve that compelling goal.

Dissents:

Justice Stevens penned a separate dissent, criticizing the Chief Justice for "rewriting the history of [*Brown v. Board of Education*]." Justice Breyer dissented, articulating his strong views against the distortion of precedent, and misapplication of constitutional principles. Justice Breyer accuses the plurality for obstructing desegregation efforts in contravention to the Equal Protection Clause of the Fourteenth Amendment.

Vote:

5-4, Roberts with Scalia, Kennedy, Thomas, and Alito (Parts I, II, III-A, and III-C). Roberts with Scalia, Thomas, and Alito (Parts III-B and IV). Thomas, concurring. Kennedy, concurring in part and concurring in the judgment. Stevens, dissenting. Breyer, dissenting with Stevens, Souter, and Ginsburg.

- ENVIRONMENTAL LAW

Massachusetts v. EPA

Issues:

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

Holding: Reversed and Remanded.

Massachusetts has standing to challenge the EPA’s refusal to regulate the emissions of greenhouse gases by new motor vehicles pursuant to the Clean Air Act because of the State’s interest in protecting its “quasi-sovereign interests” and its procedural rights authorized by Congress in the statute. Massachusetts has demonstrated that the EPA’s refusal to regulate gas emissions puts the State at risk of “actual” and “imminent” harm, and that an outcome favorable to Massachusetts will likely force the EPA to remedy the risk of further injury to the coastal lands. The EPA is authorized to regulate the emission of carbon dioxide from motor vehicles because the Clean Air Act empowers the EPA to regulate “emission of any air pollutant,” which includes such greenhouse gases. On remand, the EPA must undertake its statutory obligation to determine whether the greenhouse gases endanger the “public health or welfare” by affecting global climate change. Only an endangerment assessment finding the emissions do not contribute to climate change can excuse the EPA from taking further action. If the EPA does find a danger, it must regulate carbon dioxide emissions in accordance with the discretion afforded by Congress.

Dissents:

Chief Justice Roberts dissented, arguing the petitioners do not have standing to challenge EPA action under Article III of the Constitution. He criticizes the Court for its lenient application of the Constitution’s standing requirements to the Commonwealth by virtue of its “special solicitude” derived from its status as a State. Further, that there is actual injury, that EPA standards caused the injury, and that the EPA has the ability to redress the harm is speculative. Justice Scalia, in his dissent, asserted that the EPA has already explained it cannot make a “reasoned judgment” on whether the greenhouses gases actually contribute to global warming because of uncertainties in the science.

Vote: 5-4

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

"This decision ranks among the Court's most significant environmental rulings. The Court's rejection of EPA's unscientific 'policy' reasons for refusing to regulate motor vehicle emissions forces the agency to grapple squarely with the human health and welfare consequences of such emissions. The decision also helps advance many global warming cases now pending in state and federal court. In the legislative arena, the decision may spur Congress finally to take strong action to combat global warming. Finally, the Court's determination that Massachusetts had standing lends strong support to any state seeking legal remedies for pollution that originates beyond its borders."

- *Amanda Leiter, Visiting Associate Professor of Law, Georgetown University Law Center, acl22@law.Georgetown.edu • (202) 669-9939*

PATENT LAW

KSR International Co. v. Teleflex, Inc.

Issue:

Whether a claimed invention cannot be held “obvious” under the Patent Act, and thus unpatentable, in the absence of some proven “teaching, suggestion, or motivation” that would have led a person of ordinary skill in the art to combine the relevant prior art teachings in the manner claimed.”

Holding: Reversed and remanded.

A combination of prior patented designs is obvious when the resultant design and its benefits to the field are within the grasp of a “person having ordinary skill” in the art. The rigid “teaching, suggestion, or motivation” (TSM) test as applied to obviousness inquiries by the Court of Appeals for the Federal Circuit is incompatible with Supreme Court precedent.

Vote: 9-0

Kennedy (unanimous)

“The Court emphasized that the demands of the commercial marketplace are expected to provoke routine advancements in technology. In the view of the Court, the obviousness analysis should therefore focus upon the motivations that existed within the relevant marketplace, as well as the outcomes that could reasonably be expected when discrete knowledge within the state of the art is combined. The immediate impact of the KSR decision is the questionable validity of thousands of patents that have already issued in keeping with the more lenient obviousness standard established by the Federal Circuit. Over the longer term, the opinion will likely lead to obviousness analyses that are both more nuanced and more prone to dispute. The forthcoming law of obviousness will place greater stress upon the skills and creativity possessed by the person of ordinary skill in the art, with emphasis upon the tools at her disposal and the sorts of problems that she had resolved in the recent past.”

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SECTION V: DECISION DIGEST

Decisions by Area of Law²⁴:

1st Amendment:

Establishment Clause:

Hein v. Freedom from Religion Foundation, Inc.

Freedom of Speech:

FEC v. Wisconsin Right to Life; Morse v. Frederick;
Davenport v. Washington Education Assoc.; TN Secondary
School Athletic Assn. v. Brentwood Academy

4th Amendment:

Scott v. Harris; Brendlin v. California; Los Angeles County
v. Rettele

5th Amendment:

United States v. Resendiz-Ponce; Philip Morris USA v.
Williams; Wilkie v. Robbins

6th Amendment:

Carey v. Musladin; Cunningham v. California; Whorton v.
Bockting; Schriro v. Landrigan; Uttecht v. Brown

8th Amendment:

Ayers v. Belmontes; Smith v. Texas; Panetti v. Quarterman

14th Amendment:

Gonzales v. Carhart/Gonzales v. Planned Parenthood

Administrative Law:

Massachusetts v. EPA; Zuni Public School District No. 89
v. Department of Education

Antitrust:

Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.;
Bell Atlantic v. Twombly; Credit Suisse Securities v. Billing;
Leegin Creative Leather Products, Inc. v. PSKS, Inc.

Bankruptcy:

Marrama v. Citizens Bank of Massachusetts; Travelers
Casualty & Surety Co. of America v. Pacific Gas & Electric
Co.

Civil Procedure:

Appellate Procedure

Bowles v. Russell; Powerex Corp. v. Reliant Energy Services

Federal Jurisdiction:

Osborn v. Haley; Sinochem International v. Malaysia
International Shipping; Lance v. Coffman; Hinck v. United
States; Watson v. Philip Morris

Attorney Fees:

Sole v. Wyner

Pleading:

Bell Atlantic v. Twombly; Erickson v. Pardus

²⁴ In order to most accurately capture the area of law a decision falls under, some cases are listed in more than one category.

<u>Civil Rights:</u>	Ledbetter v. Goodyear Tire & Rubber; Wallace v. Kato; Los Angeles County v. Rettele
<u>Commerce Clause:</u>	United Haulers Assoc. v. Oneida-Herkimer Solid Waste Management Authority
<u>Criminal:</u>	
<i>Trial Procedure:</i>	Carey v. Musladin; Whorton v. Bockting; United States v. Resendiz-Ponce; Uttecht v. Brown
<i>Effective Counsel:</i>	Schriro v. Landrigan
<i>Habeas:</i>	Burton v. Stewart; Lawrence v. Florida; Brewer v. Quarterman; Abdul-Kabir v. Quarterman; Schriro v. Landrigan; Uttecht v. Brown; Fry v. Pliler
<i>Sentencing:</i>	Ayers v. Belmontes; Cunningham v. California; Smith v. Texas; Rita v. U.S.; Panetti v. Quarterman
<u>Damages:</u>	Philip Morris USA v. Williams
<u>Education Law:</u>	Winkelman v. Parma City School District; Zuni Public School District No. 89 v. Department of Education; Parents Involved in Community Schools v. Seattle School District; Meredith v. Jefferson County Board of Education
<u>Election Law</u>	Purcell v. Gonzales
<u>Environmental Law:</u>	Massachusetts v. EPA; National Assn. of Home Builders v. Defenders of Wildlife; Environmental Defense v. Duke Energy; United States v. Atlantic Research Corp.; United Haulers Assoc. v. Oneida-Herkimer Solid Waste Management Authority; BP America Production Co v. Burton; Wilkie v. Robbins
<u>Federalism:</u>	Watters v. Wachovia Bank
<u>Immigration Law:</u>	Lopez v. Gonzales
<u>International Law:</u>	Microsoft v. AT&T; Permanent Mission v. City of New York
<u>Labor Law</u>	Davenport v. Washington Education Assoc.; Long Island Care at Home v. Coke

<u>Patent Law:</u>	KSR International Co. v. Teleflex; Medimmune v. Genentech; Microsoft v. AT&T
<u>Securities Law</u>	Tellabs, Inc. v. Makor Issues & Rights Ltd.
<u>Sovereign Immunity</u>	Powerex Corp. v. Reliant Energy Services; Permanent Mission v. City of New York;
<u>Speech and Debate Clause:</u>	Dayton v. Hanson
<u>Statutory Interpretation:</u>	
<i>Armed Career Criminal Act:</i>	James v. United States
<i>AEDPA:</i>	Ayers v. Belmontes; Carey v. Musladin; Burton v. Stewart; Lawrence v. Florida; Brewer v. Quarterman; Abdul-Kabir v. Quarterman; Schriro v. Landrigan; Roper v. Weaver
<i>Clean Air Act:</i>	Massachusetts v. EPA; Environmental Defense v. Duke Energy
<i>Clean Water Act</i>	National Assn. of Home Builders v. Defenders of Wildlife
<i>Communications Act</i>	Global Crossing Telecommunications v. Metrophones Communications
<i>Controlled Substance Act:</i>	Lopez v. Gonzales
<i>Endangered Species Act</i>	National Assn. of Home Builders v. Defenders of Wildlife
<i>ERISA</i>	Beck v. Pace International Union
<i>Fair Credit Reporting Act</i>	Safeco Insurance Co. of America v. Burr
<i>Fair Labor Standards Act</i>	Long Island Care at Home v. Coke
<i>False Claims Act:</i>	Rockwell International Corp. v. United States
<i>IDEA:</i>	Winkelman v. Parma City School District
<i>Immigration and Nationality Act:</i>	Lopez v. Gonzales; Gonzales v. Duenas-Alvarez
<i>PLRA:</i>	Jones v. Bock
<i>Private Securities Litigation Reform Act</i>	Tellabs, Inc. v. Makor Issues & Rights Ltd.
<i>RICO</i>	Wilkie v. Robbins

Other: BP America Production Co v. Burton; Norfolk Southern Railway v. Sorrell; Osborn v. Haley; Limtiaco v. Camacho; Watters v. Wachovia; Zuni Public School District No. 89 v. Department of Education; United States v. Atlantic Research Corp.

Tax Law: EC Term of Years Trust v. United States; Hinck v. United States

The Split (Five Vote Majority) Decisions:²⁵

Traditional Conservative Alliance:

Ayers v. Belmontes

Holding: Reversed and remanded. The factor (k) instruction, which charges jurors to consider “[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime,” does not violate the Eight Amendment right to present mitigating evidence in capital sentencing proceedings.

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

Lawrence v. Florida

Holding: Affirmed. The AEDPA provision that the statute of limitations period is tolled while an application for State postconviction review is pending does not apply to Supreme Court petitions for certiorari, which are separate federal proceedings not part of state postconviction review.

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

**Gonzales v. Carhart/ Gonzales v. Planned Parenthood*

Holding: Reversed. The Partial Birth Abortion Act banning intact dilation and extraction abortion procedures is not unconstitutional. The State has wide discretion to act, including balancing medical risks, so long as the legislation is “rational and in pursuit of legitimate ends.” The statute does not place an undue burden on women seeking an abortion because other methods remain available. The state has a legitimate interest in regulating the medical profession and in promoting respect for the life of unborn fetuses.

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

Shriro v. Landrigan

Holding: Reversed and remanded. The district court did not abuse its discretion in refusing to grant an evidentiary hearing as to whether counsel’s failure to investigate additional mitigating evidence warranted habeas relief. Defendant here refused to permit

²⁵ Cases marked with an asterisk (*) are “high-profile” decisions and are explicated above in more detail.

the introduction of mitigating evidence, making the district court's conclusion that the hearing would not satisfy AEDPA's habeas requirements a reasonable determination. Vote: 5-4, Thomas with Roberts, Scalia, Kennedy, and Alito. Stevens dissenting with Souter, Ginsburg, and Breyer.

Ledbetter v. Goodyear Tire & Rubber

Holding: Affirmed. Subsequent effects of prior discriminatory acts do not restart the clock for purposes of administratively exhausting a claim of employment discrimination under Title VII. A paycheck that is not issued pursuant to a discriminatory pay structure, as in *Bazemore*, is not itself a discrete discriminatory act which can be independently exhausted. All Title VII claims must be raised within 180 days of the act of discrimination.

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

Uttecht v. Brown

Holding: Reversed and remanded. Courts reviewing claims that a potential juror was removed from a death penalty trial in error must defer to the trial court's findings of "substantial impairment" because the trial court is in a "superior position" to determine the potential juror's qualifications and demeanor.

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

Bowles v. Russell

Holding: Affirmed. Filing of a notice of appeal within the statutory time limit in a civil case is a mandatory jurisdictional requirement, to which the "unique circumstances" doctrine does not apply.

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

**Hein v. Freedom From Religion Foundation, Inc.*

Holding: Reversed. The exception that allows federal taxpayers to challenge the use of federal funds pursuant to congressional appropriation as violating the Establishment Clause does not apply to Executive Branch spending.

Vote: 3-2-4, Alito with Roberts and Kennedy. Kennedy concurring. Scalia concurring in the judgment, with Thomas. Souter dissenting, with Stevens, Ginsburg, and Breyer.

**FEC v. Wisconsin Right to Life*

Holding: Affirmed. Advertisements not reasonably interpreted as express advocacy promoting a vote for or against a federal election candidate are not subject to the limitations imposed by the Bipartisan Campaign Reform Act of 2002.

Vote: 5-4, Roberts with Scalia, Kennedy, Thomas, and Alito (Parts I and II). Roberts with Alito (Parts III and IV). Alito concurring. Scalia concurring in part and concurring in the judgment, with Kennedy and Thomas. Souter dissenting, with Stevens, Ginsburg, and Breyer.

Nat. Assn. of Home Builders v. Defenders of Wildlife

Holding: Reversed and remanded. The Endangered Species Act of 1973 does not provide an additional criterion on which the ability of the Environmental Protection Agency to transfer certain permitting powers to States pursuant to the Clean Water Act rests.

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

Leegin Creative Leather Products, Inc. v. PSKS, Inc.

Holding: Reversed and remanded. The rule set forth in *Dr. Miles Medical CO. v. John D. Park & Sons Co.* that makes it *per se* illegal under the Sherman Act for a manufacturer and distributor to set a minimum resale price on the goods is overruled. Vertical price restraints on the prices distributors can charge for the manufacturers' goods will be judged by the "rule of reason."

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

**Parents Involved in Community Schools v. Seattle School District/ Meredith v. Jefferson County Board of Education*

Holding: Reversed and remanded. Race cannot be among the only factors in a public school assignment program because it is not narrowly tailored, and therefore, is unconstitutional.

Vote: 5-4, Roberts with Scalia, Kennedy, Thomas, and Alito (Parts I, II, III-A, and III-C). Roberts with Scalia, Thomas, and Alito (Parts III-B and IV). Thomas, concurring. Kennedy, concurring in part and concurring in the judgment. Stevens, dissenting. Breyer, dissenting with Stevens, Souter, and Ginsburg.

Traditional Liberal Alliance:

Marrama v. Citizens Bank of Massachusetts

Holding: Affirmed. A debtor does not have an absolute right to convert a Chapter 7 bankruptcy proceeding into a Chapter 13 proceeding if the debtor has acted in bad faith.

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

Smith v. Texas

Holding: Reversed and remanded. When there is a reasonable likelihood that the jury believed it was not permitted to consider the defendant's mitigating evidence, the defendant is entitled to relief under the state harmless-error framework.

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

Brewer v. Quaterman

Holding: Reversed. Juries in death penalty trials must be permitted to take into account and weigh mitigating evidence in its determination of whether the defendant deserves a death sentence. The court rejected the Fifth Circuit's requirement that mitigating evidence be given only "sufficient effect."

Vote: 5-4, Stevens with Kennedy, Souter, Ginsburg, and Breyer. Roberts dissenting with Scalia, Thomas and Alito. Scalia dissenting with Thomas and Alito (only Part I).
Note: The part of Scalia's dissent that Alito did not sign on to reiterated Scalia and Thomas' longstanding position (stated previously this Term in their concurrence in *Ayers v. Belmontes*) that the 8th Amendment does not prevent states from restricting mitigating evidence at sentencing.

Abdul-Kabir v. Quarterman

Holding: Reversed and remanded. The jury must have a "meaningful basis" to consider any relevant mitigating evidence that bears on the defendant's "moral culpability" and supports a sentence of life rather than death. If the proffered special issues questions preclude such consideration, the sentencing is "fatally flawed."

Vote: 5-4, Stevens with Kennedy, Souter, Ginsburg, and Breyer. Roberts dissenting with Scalia, Thomas and Alito. Scalia dissenting with Thomas and Alito (only Part I).

Note: Though decided with separate majority opinions, the dissents in *Brewer* and *Abdul-Kabir* are consolidated.

**Massachusetts v. EPA*

Holding: Reversed and remanded. Massachusetts has standing to challenge the EPA's decision because it has lost coastal land to rising sea levels. The Clean Air Act empowers the EPA to regulate "emission of any air pollutant" which includes all greenhouse gases as "substances emitted into the ambient air." On remand the EPA must undertake the statutorily mandated endangerment assessment and, if it finds a danger, regulate carbon dioxide emissions in accordance with the discretion afforded by the statute.

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

Panetti v. Quarterman

Holding: Reversed and remanded. A State court must provide certain measures to a prisoner alleging incompetency to be executed, including a competency hearing. A reviewing Court may not be too restrictive in its consideration of the prisoner's claim of incompetency because of the Constitution limitations on the State's power to execute an insane prisoner.

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

Different Alignments:

**Philip Morris USA v. Williams*

Holding: Reversed and remanded. Due Process does not permit a jury to award punitive damages for harm caused to an individual other than the plaintiff. A jury can, however, consider third party harms in determining the reprehensibility of the defendant's conduct, which is a factor in setting punitive damages.

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

Limtiaco v. Camacho

Holding: Reversed and remanded. For purposes of calculating the total debt authorized by the Guam Organic Act, the “aggregate tax valuation” of the property in Guam refers to the assessed value as opposed to the appraised value of property.

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

Watters v. Wachovia

Holding: Affirmed. The National Bank Act preempts conflicting state bank regulations.

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

James v. United States

Holding: Affirmed. Attempted burglary in Florida is a “violent felony” under the federal Armed Career Criminal Act. The ACCA provides a mandatory 15-year sentence for a felon-in-possession conviction if the defendant has three prior crimes that constitute “burglary, arson, extortion, involve use of explosives, or otherwise involve conduct that presents a serious potential risk of physical injury to another.” The Court found that the risk of physical danger in attempted burglary is comparable to that of completed burglary, thus bringing attempted burglary within the definition of violent felony under the ACCA.

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

Zuni Public School District No. 89 v. Department of Education

Holding: Affirmed. The Department of Education’s use of the State’s student population in calculating the 5th and 95th percentiles of per-student spending to compare expenditures in the State’s school districts is lawful.

Vote: 5-4, Breyer with Stevens, Kennedy, Ginsburg, and Alito. Stevens concurring. Kennedy concurring with Alito. Scalia dissenting with Roberts, Thomas, and Souter (only Part I). Souter dissenting.

Dismissed as Improvidently Granted:

Two cases were DIG’d after argument this Term:

Roper v. Weaver – The writ of certiorari to the Court of Appeals for the Eight Circuit in this case was dismissed as improvidently granted by a Per Curiam opinion. In line with the recent decision in *Lawrence v. Florida*, the Court held that the District Court erroneously dismissed defendant’s petition for federal habeas relief. The decision to file a petition for writ of certiorari does not indicate the prisoner has exhausted state remedies for postconviction relief. The Chief concurred in the result, but stated he does not agree with all of the reasons stated to DIG the case. Scalia wrote a dissent, joined by Thomas and Alito, asserting that the Court should have decided that AEDPA applies to this case and reviewed the Eighth Circuit’s misapplication of the statute.

Toledo-Flores v. United States – *Toledo-Flores v. United States* arose on a writ of certiorari to the Court of Appeals for the Fifth Circuit, and was consolidated for oral argument with *Lopez v. Gonzales*. The case involved the question of whether a state “aggravated felony” conviction for possession of a controlled substance was erroneous, considering the same crime is a misdemeanor under federal law. The case was dismissed as improvidently granted without dissent in a Per Curiam opinion issued December 5, 2006, the same day the Court resolved the issue in the affirmative in *Lopez v. Gonzales*.

Otherwise Dismissed:

Three cases were subsequently disposed of after argument this Term:

Dayton v. Hanson – In a unanimous opinion written by Stevens, the appellant’s appeal was dismissed for want of jurisdiction and certiorari was denied. The case was appealed from the Court of Appeals for the D.C. Circuit under §413 of the Congressional Accountability Act of 1995. Stevens wrote the Court lacks jurisdiction under the Act because there was no ruling “upon the constitutionality” of the Act by the lower courts, as required by the Act for review by the Supreme Court. Chief Roberts took no part in the case. [*Cert denied; for Want of Jurisdiction*]

Claiborne v. United States – The Court’s Per Curiam opinion dated June 4, 2007 advised that because the petitioner died on May 30, 2007, the judgment of the Court of Appeals for the Eighth Circuit is vacated as moot.

Note: The issue in *Claiborne* concerning the legitimacy of below-guidelines sentencing will be decided in OT 2007 in *Gall v. U.S.* (06-7949).

Burton v. Stewart – In a Per Curiam opinion, the judgment of the Court of Appeals for the Ninth Circuit was vacated and the case remanded with instructions for the District Court to dismiss petitioner’s habeas petition for lack of jurisdiction. Because the petitioner failed to obtain authorization for his petition challenging his custody from the Court of Appeals pursuant to AEDPA, the District Court never had jurisdiction to hear his claims.

SECTION VI: CASES TO WATCH IN 2007

The Court has granted certiorari in 26 cases to fill 25 hours of argument for the October Term 2007, as of June 28, 2007. Some of the cases granted thus far should generate significant interest in the coming Term:

Washington State Grange v. Washington Republican Party (06-713) and
Washington v. Washington Republican Party (06-766)
Issues²⁶:

²⁶ 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 26, 2007).

- (1) Does the First Amendment prohibit top-two election systems that allow a candidate to disclose on the ballot the name of the party he or she personally prefers?
(*Washington State*)
- (2) Does Washington's primary election system in which all voters are allowed to vote for any candidate, and in which the top two candidates advance to the general election regardless of party affiliation, violate the associational rights of political parties because candidates are permitted to identify their political party preference on the ballot? (*Washington*)

Case Citation Below: 460 F.3d 1108 (9th Cir. 2006).

Medellin v. Texas (06-984)

Issues:

- (1) Did the President of the United States act within his constitutional and statutory foreign affairs authority when he determined that the states must comply with the United States' treaty obligation to give effect to the Avena judgment in the cases of the 51 Mexican nationals named in the judgment?
- (2) Are State courts bound by the Constitution to honor the undisputed international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to the Avena judgment in the cases that the judgment addressed?

Case Citations Below: 2006 WL 3302639 (Tex. Crim. App. Nov. 15, 2006).

Kimbrough v. United States (06-6330)

Issues:

- (1) In exercising its discretion to impose "sufficient but not greater than necessary" sentences, may a district court consider the impact of the "100:1 crack/power ratio" pursuant to the Sentencing Guidelines or the multiple reports of the Sentencing Commission regarding the ratio?
- (2) How is a district court to consider and balance the factors explicated in 18 U.S.C. § 3553(a), and in particular, the provision which addresses "the need to avoid unwarranted disparity among defendants with similar records who have been found guilty of similar conduct"?

Case Citation Below: 2006 WL 1233525 (4th Cir. May 9, 2006).

Rowe v. New Hampshire Motor Transport Assn. (06-457)

Issues:

- (1) Whether the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") preempts states from exercising their historic public health police powers to regulate carriers that deliver contraband such as tobacco and other dangerous substances to children.
- (2) Whether the FAAA preempts states from exercising their historic public health police powers to require shippers of contraband such as tobacco and other dangerous substances to utilize a carrier that provides age verification and signature services to ensure that such substances are not delivered to children.

Case Citation Below: 448 F.3d 66 (1st Cir. 2006).

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

Stoneridge Investment v. Scientific-Atlanta, Inc. (06-43)

Issue:

Whether the decision in *Central Bank, N.A. v. First Interstate Bank, N.A.*, forecloses claims for deceptive conduct under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5(a) and (c), 17 C.F.R. 240.10b-5(a) and (c), where Respondents engaged in transactions with a public corporation with no legitimate business or economic purpose except to inflate artificially the public corporation's financial statements, but where Respondents themselves made no public statements concerning those transactions.

Case Citations Below: 443 F.3d 987 (8th Cir. 2006).

Dept. of Revenue of KY v. Davis (06-666)

Issue:

Whether a state violates the dormant Commerce Clause by providing an exemption from its income tax for interest income derived from bonds issued by the state and its political subdivisions, while treating interest income realized from bonds issued by other states and their political subdivisions as taxable to the same extent, and in the same manner, as interest earned on bonds issued by commercial entities, whether domestic or foreign.

Case Citations Below: 197 S.W.3d 557 (KY 2006).

NY Bd. of Election v. Torres (06-766)

Issues:

- (1) In *American Party of Texas v. White*, the Supreme Court held that it is "too plain for argument" that a State may require intraparty competition to be resolved either by convention or primary. Did the Second Circuit run afoul of *White* by mandating a primary in lieu of a party convention for the nomination of candidates for New York State trial judge?
- (2) What is the appropriate scope of First Amendment rights of voters and candidates within the arena of intraparty competition, and particularly where the State has chosen a party convention instead of a primary as the nominating process? (a) Did the Second Circuit err, as a threshold matter, in applying *Storer v. Brown*, and related ballot access cases, which were concerned with the dangers of "freezing out" minor party and non-party candidates, to internal party contests? (b) If *Storer* does apply, did the Second Circuit run afoul of *Storer* in holding that voters and candidates are entitled to a "realistic opportunity to participate" in the party's nomination process as measured by whether a "challenger candidate" could compete effectively against the party-backed candidate?

Case Citations Below: 462 F.3d 161 (2d Cir. 2006).