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SYMPOSIUM: 2004–2005 SUPREME COURT REVIEW

SYMPOSIUM FOREWORD

The Honorable Tim Leonard*

The University of Tulsa College of Law is to be commended for undertaking, yet again, a review of the recent Term of the United States Supreme Court. Each year scholars from the University dissect and analyze the Court's most important and, often times, controversial decisions. The symposium this year marks, not only the end of this Term of Court, but also, the end of an era. With the death of Chief Justice William Rehnquist and the resignation of Justice Sandra Day O'Connor, the personality and makeup of the Court will change dramatically.

Chief Justice Rehnquist took the oath of office as an Associate Supreme Court Justice in 1972 and served fourteen years in that capacity before assuming his new office of Chief Justice in 1986.¹ By serving nineteen years as the Chief Justice, Rehnquist became the fourth longest serving Chief Justice in the history of the United States, and the second oldest man to preside over the nation's highest Court.² A disciple of judicial restraint, Rehnquist helped move the Supreme Court in a consistently conservative direction. While in recent years we have seen the Court express highly divergent legal views, there is unanimity among members of the Court as to Rehnquist's leadership and administrative stewardship; his fellow Justices praised him for his consistency and fairness in preserving harmony in their dealings with one another.³ Rehnquist's introduction to the Supreme Court began after law school when he served as a law clerk for former Justice Robert Jackson.⁴ It is interesting to note that one of his former law

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1. Supreme Court of the United States, *Members of the Supreme Court of the United States*, <http://www.supremecourtus.gov/about/members.pdf> (last updated Mar. 6, 2006).

2. *See id.*

3. U.S. Cts. Off. Pub. Affairs, *The Rehnquist Court on their Chief Justice*, 37 *The Third Branch* (newsletter of the federal courts) (Sept. 2005), http://www.uscourts.gov/ttb/sep05ttb/rehnquist_court/index.html.

4. S. Ct. Historical Socy., *History of the Court: Timeline of the Justices: William H. Rehnquist*, http://www.supremecourthistory.org/02_history/subs_timeline/images_chiefs/016.html (accessed Mar. 7, 2006).

clerks, new Chief Justice John Roberts, is now replacing Rehnquist.⁵

While the replacement of Rehnquist by Roberts may change the Court's overall philosophy, the greatest potential change in the personality of the Court could occur with the appointment of a new Justice to replace Justice Sandra Day O'Connor. O'Connor, more than any other Justice, has been the swing vote in numerous five-to-four decisions. In the present Term, there are many potential landmark cases in front of the Court dealing with campaign finance laws,⁶ assisted suicide,⁷ abortion,⁸ the war on terrorism,⁹ and other controversial issues¹⁰ that O'Connor could play the decisive role as a pivotal fifth swing vote. At this time, President George W. Bush has nominated Samuel Alito, Jr., a judge on the Third United States Circuit Court of Appeals, to fill this vacancy.¹¹ It is anticipated that Judge Alito's confirmation process will be lengthy, divisive, and politically charged. O'Connor has vowed to remain on the Court until her replacement has been confirmed; she could, thus, serve only a few months, or throughout the entire Term. Therefore, some cases could be argued in front of the Court with O'Connor sitting as a Justice, and with no decision reached prior to her replacement's confirmation. In that event, it is possible that cases could be re-argued in front of the Court with a new Justice. With a delicate balance on the Court, the political divisiveness in the country, the attacks by some members of the legislative branch on the federal judiciary, and the continual personal and religious issues that are in front of the Court, the next few Terms could prove tumultuous.

In its 2004 Term, the U.S. Supreme Court decided eighty cases—seventy-four with signed opinions, and six per curiam decisions.¹² Sixty-five of those eighty cases were on certiorari to the federal courts of appeals, thirteen were on certiorari from state courts, and two were on original jurisdiction.¹³ The Supreme Court affirmed the lower court in twenty-two cases, reversed in fifty-four, and with accompanying explanatory opinions dismissed two cases as improvidently granted.¹⁴

The Court decided nineteen cases by unanimous vote, and in eleven other cases all participating Justices agreed on the disposition.¹⁵ The Court decided seventeen cases by a five-to-four majority¹⁶ (including one, *Van Orden v. Perry*,¹⁷ in which there was no

5. S. Ct. Historical Socy., *History of the Court: The Current Court: John G. Roberts, Jr.*, http://www.supremecourthistory.org/02_history/subs_current/images_b/001.html (accessed Mar. 7, 2006).

6. See e.g. *Wis. Right to Life, Inc. v. Fed. Election Commn.*, 126 S. Ct. 1016 (2006); *Randall v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), cert. granted, 126 S. Ct. 35 (2005).

7. See e.g. *Gonzales v. Or.*, 126 S. Ct. 904 (2006).

8. See e.g. *Ayotte v. Planned Parenthood of N. New Eng.*, 126 S. Ct. 961 (2006).

9. See e.g. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), cert. granted, 126 S. Ct. 622 (2005).

10. See e.g. *Rumsfeld v. Forum for Academic & Instn. Rights*, 126 S. Ct. 1297 (2006) (addressing the constitutionality of the Solomon Amendment, which required Department of Defense to deny federal funding to universities that prohibited military recruiting); *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 126 S. Ct. 1211 (2006) (addressing the interrelationship of the Controlled Substances Act and Religious Freedom Restoration Act of 1993).

11. Justice Alito was sworn in as a Supreme Court Justice on January 31, 2006.

12. S. Ct., *2004 Term Opinions of the Court*, <http://www.supremecourtus.gov/opinions/04slipopinion.html> (last updated June 27, 2005) [hereinafter *Term Opinions of the Court*].

13. *Id.*

14. *Id.* The remaining two cases were before the Court on its original jurisdiction.

15. *Id.*

16. *Id.*

majority opinion, and one, *United States v. Booker*,¹⁸ in which there were two different five-to-four majorities). For these seventeen decisions, the most common combination of Justices in the majority was Justices Breyer, Ginsburg, O'Connor, Souter, and Stevens (occurring three times).¹⁹ Justices Breyer, Ginsburg, Kennedy, Souter, and Stevens constituted the majority twice.²⁰ No other combination of Justices in the five-to-four majority decisions occurred more than once.²¹

Justices O'Connor and Souter appeared most often in the majority of the most narrowly decided cases, and Justices Ginsburg and Stevens least often.²² Justice Kennedy wrote the most majority opinions in this group, five, followed by Justice Souter, four.²³ In the last Term, Justice Breyer cast the fewest dissenting votes in opinions by his colleagues, ten.²⁴ Justice Thomas was by far the most frequent dissenter, casting twenty dissenting votes and writing the largest number of dissents, fourteen.²⁵ In terms of voting alignments, the Ginsburg-Souter match up continues with a high degree of agreement, as does the Scalia-Thomas alignment.²⁶

Perhaps the case having the most impact on the federal judiciary, and the one which will in all likelihood be revisited in the future by the High Court, and even by Congress, is *United States v. Booker*,²⁷ in which the United States Sentencing Guidelines were determined to violate, in certain respects, the Sixth Amendment right to trial by jury.²⁸ This case resulted in the unusual situation of two separate five-to-four majority opinions, with Justice Ginsburg joining Justice Stevens's majority opinion in declaring the Guidelines unconstitutional,²⁹ but also joining Justice Breyer's majority opinion with respect to the remedy.³⁰ Justice Breyer's opinion declared the Guidelines to be advisory and only one of the factors a sentencing court must consider under title 18, section 3553 of the United States Code in fashioning a reasonable sentence.³¹ As a result of this case, district courts and circuit courts have reached differing conclusions as to the impact of the Guidelines on sentencing.³² Under the mandatory Guidelines, the burden of proof

17. 125 S. Ct. 2854 (2005).

18. 543 U.S. 220 (2005).

19. *Term Opinions of the Court*, *supra* n. 12.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Term Opinions of the Court*, *supra* n. 12.

25. *Id.*

26. *Id.*

27. 125 S. Ct. 738 (2005).

28. For an additional discussion of *United States v. Booker*, see Carol A. Pettit, Student Author, *Writing the Book[er] on Blakely: The Challenge to the Federal Sentencing Guidelines*, 41 *Tulsa L. Rev.* 365 (2005).

29. *Booker*, 125 S. Ct. at 745–46 (Stevens, J., delivering the opinion of the Court in part, Scalia, Souter, Thomas & Ginsburg, JJ., joining).

30. *Id.* at 756 (Breyer, J., delivering the opinion of the Court in part, O'Connor, Kennedy & Ginsburg, JJ. & Rehnquist, C.J., joining).

31. *Id.* at 756–57.

32. See e.g. *U.S. v. Crosby*, 397 F.3d 103 (2d Cir. 2005) (declining to fashion a per se rule as to reasonableness); *U.S. v. Kristl*, 437 F.3d 1050 (10th Cir. 2006) (holding Guideline sentence is presumptively reasonable); *U.S. v. Jaber*, 362 F. Supp. 2d 365 (D. Mass. 2005) (holding individualized determination of weight to be given to Guidelines); *U.S. v. Coney*, 390 F. Supp. 2d 844, 850 n. 15 (D. Neb. 2005) (holding preponderance of the evidence standard applies after *Booker*); *U.S. v. Okai*, 2005 WL 2042301 at *10 (D. Neb.

placed on the government was preponderance of the evidence with respect to factors a judge might use to enhance a sentence.³³ Many now believe that the *Booker* decision requires a higher burden, and some believe that only a finding by a jury may be used to enhance a sentence. The great majority of courts are still requiring a preponderance of the evidence in determining the appropriate Guideline sentencing range. While some judges now view the advisory nature of the Guidelines as allowing them much wider discretion in sentencing, others are treating the Guidelines with almost the same deference they were given while still mandatory.

Sentencing within the Guideline range has remained fairly stable, with some decline in the percentage of cases outside that range.³⁴ Prior to the *Booker* decision, approximately 69% of sentences were within the Guideline range; while post-*Booker*, approximately 62% of sentences are within the determined Guideline range.³⁵ The great majority of departures from the sentencing range (approximately 24%) are a result of a government motion for downward departure for cooperation or other substantial reasons.³⁶

Prior to the *Booker* decision, there was concern by some in Congress that the courts were ignoring the sentencing mandates set forth in the Congressional legislation, and after the *Booker* decision, there is even greater concern and calls by some in Congress to increase the number of mandatory minimum sentences which would allow the courts little or no discretion in sentencing. After the Court had issued its ruling in *Blakely v. Washington*,³⁷ which struck down a state guideline system in the state of Washington, many defendants preserved their right to appeal their sentence under the Federal Guidelines, anticipating that the Court would later strike down the Guidelines as unconstitutional, as it did in *Booker*.

There is a split among the circuits as to the retroactivity of *Booker*, and it is anticipated there will be a continuing split over what “reasonableness” means in determining a sentence, as well as the procedures to follow by the sentencing court and the burden of proof required for the enhancement of sentences. While some defendants have been remanded back to the district court for re-sentencing as a result of *Booker*, there has not been the flood of re-sentencings that the district courts feared, as many of the sentences have been upheld even though they were sentenced under the mandatory Guidelines. Certainly, the confusion caused by these two majority opinions will create more litigation, which the Supreme Court will ultimately have to decide in the upcoming Term, or a future Term.

Two other cases relating to constitutional law discussed in this symposium are *Gonzalez v. Raich*,³⁸ analyzed by Professor Steven Balman,³⁹ and *Illinois v. Caballes*,⁴⁰

Aug. 22, 2005) (mem.) (holding beyond a reasonable doubt standard applies after *Booker*); *U.S. v. Wilson*, 350 F. Supp. 2d 910, 912 (D. Utah 2005) (holding Guidelines entitled to “heavy” weight).

33. *See Booker*, 125 S. Ct. at 746.

34. U.S. Senten. Commn., *Special Post-Booker Coding Project 7–11*, www.ussc.gov/blakely/postbooker_101305.pdf (Oct. 13, 2005).

35. *Id.* at 7.

36. *Id.*

37. 542 U.S. 296 (2004).

38. 125 S. Ct. 2195 (2005).

reviewed by Professor Chris Blair.⁴¹ The *Raich* case was a six-to-three ruling⁴² that held people who smoke marijuana because their doctors recommend it to ease pain can be prosecuted for violating federal drug laws. While Justice Stevens, in writing for the Court, held that the ruling was not passing judgment on the potential medical benefits of marijuana,⁴³ he did hold that the Constitution allows federal regulation of homegrown marijuana as interstate commerce.⁴⁴

In the *Caballes* case, in a six-to-two opinion,⁴⁵ the Justices ruled that drug-sniffing dogs could be used to check out motorists even if officers have no reason to suspect they may be carrying narcotics. *Caballes* was stopped by Illinois police for driving faster than the speed limit, and a drug-sniffing dog found \$250,000 worth of marijuana in the trunk of the car.⁴⁶ The Court held “a dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.”⁴⁷ The analysis of the Court in the *Caballes* case could have sweeping implications on the privacy rights of individuals as new technologies are invented, such as x-ray devices and other sensory methods that are designed to detect illegal items.

This Term, the Court revisited three important death penalty issues. One of the most controversial was *Roper v. Simmons*,⁴⁸ which held that the Eighth Amendment’s Cruel and Unusual Punishment Clause bars executing people who committed crimes when they were younger than eighteen years of age. The Court had rejected this position in 1989,⁴⁹ but a bare majority stated that the “standards of decency” had evolved over the past sixteen years to the point where such punishment was no longer constitutionally acceptable.⁵⁰ This was in keeping with the Court’s reasoning in *Atkins v. Virginia*,⁵¹ where the Court made a similar holding as it related to mentally retarded defendants. *Roper* was controversial because Justice Scalia denounced the notion that the Eighth Amendment’s dictates evolve as society’s values do.⁵² He also criticized the majority’s reference to international law.⁵³ This created a continuing furor over whether the Court should rely on international law, and has even resulted in a resolution passed in Congress that discourages the U.S. Supreme Court’s use of foreign law to interpret United States law.⁵⁴ In *Medellin v. Dretke*,⁵⁵ the Court dismissed the case as improvidently granted,

39. Steven K. Balman, *Constitutional Irony: Gonzales v. Raich, Federalism and Congressional Regulation of Intrastate Activities under the Commerce Clause*, 41 *Tulsa L. Rev.* 125 (2005).

40. 543 U.S. 405 (2005).

41. Chris Blair, *Illinois v. Caballes: Love Affair with a Drug-Sniffing Dog*, 41 *Tulsa L. Rev.* 179 (2005).

42. 125 S. Ct. at 2198.

43. *See id.* at 2211–12.

44. *Id.* at 2215.

45. 543 U.S. at 405.

46. *People v. Caballes*, 802 N.E.2d 202, 203–04 (Ill. 2003); *see Caballes*, 543 U.S. at 406–07.

47. *Caballes*, 543 U.S. at 410.

48. 543 U.S. 551 (2005).

49. *See Stanford v. Ky.*, 492 U.S. 361 (1989).

50. *Roper*, 543 U.S. at 551, 578–79.

51. 536 U.S. 304 (2002).

52. *Roper*, 543 U.S. at 607–08.

53. *Id.* at 622–28.

54. H.R. Res. 97, 109th Cong. (2005).

as discussed further by Professor Janet Levit in her article.⁵⁶ The *Medellin* case dealt with foreign national capital defendants who were not advised prior to trial of their right under the Vienna Convention on Consular Relations to consult with their nations' consulates.

In another decision that is going to greatly increase litigation, the Justices in *Smith v. City of Jackson*,⁵⁷ expanded job protection for roughly half the nation's work force, ruling that federal law allows people age forty and older to file age bias claims over salary and hiring, even if employers never intended any harm.⁵⁸ The Court made clear that employers may still prevail if they can cite a reasonable explanation for their policies, such as cost-cutting.⁵⁹ Again, what is reasonable and what is unreasonable will have to be decided on a case-by-case basis without much guidance from the Court. In one case which, in effect, overturned Tenth Circuit law, the Supreme Court eased access to the federal courts. In *Exxon Mobil Corp. v. Allapattah Services Inc.*,⁶⁰ the Court in a five-to-four opinion held that as long as at least one named plaintiff satisfies the amount in controversy requirement of diversity jurisdiction, the court has supplemental jurisdiction over other plaintiffs' claims arising from the same dispute.⁶¹ Therefore, one can assume that courts in the Tenth Circuit will see more class action lawsuits in the future. In addition, Congress has passed legislation that will allow more class action lawsuits to be tried in federal court.⁶²

Professor Marla Mansfield analyzes several cases involving the taking of private property.⁶³ In the highly controversial *Kelo v. City of New London*,⁶⁴ the Court allowed the City to condemn certain property, even though it was not located in a blighted neighborhood, for the use of an economic development project that included a hotel and conference center, marinas, retail stores, restaurants, and research and development space.⁶⁵ The owners of the property taken sued, claiming that the condemnation was not for public use under the Fifth Amendment's Taking Clause and was therefore unconstitutional.⁶⁶ The property owners had argued that economic development did not qualify as a public use.⁶⁷ In *San Remo Hotel v. San Francisco*,⁶⁸ the Justices in a unanimous ruling decided that people who lose state claims that the government had

55. 125 S. Ct. 2088 (2005).

56. Janet Koven Levit, *Medellin v. Dretke: Another Chapter in the Vienna Convention Narrative*, 41 *Tulsa L. Rev.* 193 (2005).

57. 125 S. Ct. 1536 (2005).

58. *See id.* For a discussion of *Smith v. City of Jackson* and the other business related cases of the 2004–2005 Supreme Court Term, see Barbara K. Bucholtz, *Destabilized Doctrine at the end of the Rehnquist Era and the Business Related Cases in Its Final Term*, 41 *Tulsa L. Rev.* 219 (2005).

59. *Smith*, 125 S. Ct. at 1555.

60. 125 S. Ct. 2611 (2005).

61. *Id.* at 2615.

62. *Class Action Fairness Act of 2005*, Pub. L. No. 109-2, 119 Stat. 4 (2005).

63. Marla E. Mansfield, *Takings and Threes: The Supreme Court's 2004–2005 Term*, 41 *Tulsa L. Rev.* 243 (2005).

64. 125 S. Ct. 2655 (2005).

65. *Id.* at 2659.

66. *Id.* at 2660.

67. *Id.*

68. 125 S. Ct. 2491 (2005).

improperly taken their property cannot count on federal courts for help. In another unanimous opinion, *Lingle v. Chevron, U.S.A.*,⁶⁹ the Justices held that Hawaii did not overstep its authority when it moved to keep gasoline prices in line by imposing caps on rent paid by dealer-run stations. Chevron argued that the Hawaii law was an unconstitutional “taking” of the company’s profits because it failed to “substantially advance”⁷⁰ the state’s goal of lowering retail gasoline prices. The Court rejected this argument.

Professor Gary Allison comments on one Oklahoma case,⁷¹ *Clingman v. Beaver*.⁷² In this six-to-three ruling, the Justices held that states may bar political parties from opening their primary elections to members of other parties,⁷³ thereby upholding the restrictions in some twenty-four states. In *Clingman*, the Justices ruled against the Libertarian Party in its First Amendment challenge to Oklahoma’s primary system.⁷⁴ Justice Thomas, writing for the majority, said that states had broad powers to structure primaries as they see fit, and the Libertarian Party’s rights of free association were not violated by Oklahoma’s primary system.⁷⁵

Professor William Rice discusses another case from Oklahoma,⁷⁶ *Cherokee Nation of Oklahoma v. Leavitt*,⁷⁷ concerning Indian tribes and contracts. In this case, the Court resolved a split among the circuits, reversing the Tenth Circuit.

In conclusion, the last Rehnquist Court continued along the path that it has taken the last several Terms—hearing fewer cases overall, but focusing more on specific types of cases, such as death penalty and states’ rights, versus federalism issues. While many of the decisions were controversial and narrowly decided, most followed the trend of the Court’s prior decisions of earlier Terms. While most litigants in recent years have fashioned their arguments to appeal to the swing votes on the Court, it remains to be seen if the makeup of the new Court will be similarly divided. As the new Roberts Court emerges, the docket is already crowded with highly controversial and difficult issues. In addition, cases decided by the last Rehnquist Court—such as the separation of church and state, and sentencing issues—will in all likelihood be shortly revisited. Of course, Congress is already reacting to some of the Court’s recent decisions, such as the *Kelo* case, by introducing legislation regarding eminent domain;⁷⁸ other legislation relating to habeas proceedings and sentencing issues will no doubt follow. It is therefore assured that the next symposium hosted by The University of Tulsa College of Law will prove equally interesting and provocative.

69. 125 S. Ct. 2074 (2005).

70. *Id.* at passim.

71. Gary D. Allison, *Protecting Our Nation’s Political Duopoly: The Supremes Spoil the Libertarians’ Party*, 41 Tulsa L. Rev. 291 (2005).

72. 125 S. Ct. 2029 (2005).

73. *Id.* at 2042.

74. *Id.*

75. *Id.*

76. G. William Rice, *Federal Indian Law Cases in the Supreme Court’s 2004–2005 Term*, 41 Tulsa L. Rev. 341 (2005).

77. 125 S. Ct. 1172 (2005).

78. *Eminent Domain Limitation Act of 2005*, H.R. 3631, 109th Cong. (2005).

