

Winter 2005

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### Recommended Citation

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 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol41/iss2/5>

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# DESTABILIZED DOCTRINE AT THE END OF THE REHNQUIST ERA AND THE BUSINESS RELATED CASES IN ITS FINAL TERM

Barbara K. Bucholtz\*

*May you live in interesting times.*

Unknown<sup>1</sup>

*I have one final thought. We have become used to the idea that, in literature and the arts, there are alternating rhythms of classicism and romanticism. During classical periods . . . everything is neat, tidy and logical; theorists and critics reign supreme; [and] formal rules of structure and composition are stated to the general acclaim. . . . But the classical aesthetic, once it has been formulated, regularly breaks down in a protracted romantic agony. The romantics spurn the exquisitely stated rules of the preceding period. . . . At the height of a romantic period, everything is confused, sprawling, formless and chaotic—as well as, frequently, extremely interesting. Then, the romantic energy having spent itself, there is a new classical reformulation—and so the rhythms continue.*

*Perhaps we should admit the possibility of such alternating rhythms in the process of the law.*

Grant Gilmore<sup>2</sup>

## I. INTRODUCTION

Earlier this year, Professor Laurence Tribe wrote a letter to Justice Stephen Breyer which stated, in part:

Dear Steve:

I appreciate your asking about the projected second volume of the third edition of *American Constitutional Law*. After considerable thought, I recently concluded . . . that I should suspend work on the balance of that volume . . . .

I've suspended work on a revision because, in area after area, we find ourselves at a fork in the road—a point at which it's fair to say things could go in any of several

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1. See generally BBC, *The Quote 'May You Live in Interesting Times,'* <http://www.bbc.co.uk/dna/hub/A807374> (last accessed Nov. 9, 2005) (stating the quote is not of Chinese origin as widely believed).

2. Grant Gilmore, *The Death of Contract* 102–03 (Ohio State U. Press 1974).

directions—and because conflict over basic constitutional premises is today at a fever pitch . . . with little common ground from which to build agreement.

[I]f one is aiming at [drafting a treatise] that organizes the corpus of decisional law—that identifies, and reflects critically on, the major themes and directions of movement—then this isn't the moment.

Happily, many of the same factors that make ours a peculiarly *bad* time to be going out on a limb to propound a Grand Unified Theory—or anything close—contribute to a ferment and excitement that make this a particularly *good* time, challenging and even thrilling, to be writing about, teaching,<sup>3</sup> briefing and arguing constitutional law—all of which I remain enthusiastic about doing.<sup>3</sup>

Professor Tribe's description of the current state of constitutional doctrine recalls Grant Gilmore's characterization of similar eras—in law, literature, and the arts—as “romantic” (or, in Tribe's words, conflicted but also quite thrilling).<sup>4</sup> For dedicated scholars like Gilmore and Tribe, it is exciting to witness the nascent possibilities for a renewed consensus and a broadened perspective that intellectual conflict can create.

The response of the business community to the doctrinal cacophony of a “romantic era” in law, however, is not so sanguine. Business famously prefers stability and predictability in its markets and in the legal framework that regulates its market activity. A romantic era in constitutional law can have little appeal for the business community. However, business has been thrust into the maelstrom of this romantic turn in constitutional law. Most constitutional law and federal law cases have no *direct* bearing on market activity, of course. But it is worth noting that between a third to a half of the Court's decisions, in any given Term, are business-related,<sup>5</sup> and that some of the Rehnquist Court's most divisive decisions have been directly related to business activity.<sup>6</sup> Thus, the confession of a legal scholar with the credentials of Professor Tribe that he is perplexed about the direction of American Constitutional Law gives no comfort

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3. Ltr. from Laurence H. Tribe, Prof., Harv. L. Sch., to Stephen G. Breyer, Assoc. J., U.S. S. Ct. (Apr. 29, 2005), in Laurence H. Tribe, *The Treatise Power*, 8 Green Bag 3, 292–93 (2005) (emphasis in original). Also included in *Green Bag*, following the letter to Justice Breyer, is Professor Tribe's “Open Letter to Interested Readers of American Constitutional Law.” *Id.* at 294–306. Laurence H. Tribe is the Carl M. Loeb University Professor at Harvard Law School.

4. Nonetheless, the irony of characterizing the current era as a rebellion by a “romantic” Rehnquist Court (with all the rule-spurning and creative self-expression that the term “romantic” seems to imply) against the doctrines established by the “classical” Warren Court (with all the structure and rigidity that the term “classical” seems to imply) should escape neither our attention nor our contemplation.

5. For example, in the 2000–2001 Term, thirty-six out of the seventy-nine decisions reached were business-related, and during the Rehnquist era business-related cases represented between one-third to one-half of the decisions rendered in a given Term.

6. See for example, *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), which made it clear that “business interests seeking redress against state action will have significantly diminished legal territory in which to maneuver.” Barbara K. Bucholtz, *Private Sector Issues in a Public Sector Retro-lution: The Supreme Court's Business-Related Decisions in the October 1999 Term*, 36 Tulsa L.J. 153, 179 (2000) [hereinafter Bucholtz, *Private Sector Issues*]. *Florida Prepaid* was an important case in the Court's evolving Federalism doctrine. With respect to the Rehnquist Court's bold assault on the Americans With Disabilities Act (“ADA”), see for example, *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), a case which limited the availability of the ADA for plaintiff-employees when it held that the threshold standard for remedial relief under the ADA “exclude[s] impairments which, like myopia, can be corrected.” Barbara K. Bucholtz, *Employment Rights and Wrongs: ADA Issues in the 2001–2002 Supreme Court Term*, 38 Tulsa L. Rev. 363, 365–66 (2002) (footnote omitted) [hereinafter Bucholtz, *Employment Rights*].

to the business community. Nonetheless, Tribe's perspicuous account of the current state of constitutional doctrine and federal law would be hard to refute today,<sup>7</sup> even though the disarray we now witness would have been difficult to predict at the beginning of the Rehnquist era.

The 2004–2005 Term heralds the end of the long-lived Rehnquist era of the Supreme Court. It was an era of conflicting, and conflicted, demeanors: distinguished at its inception by its moderately conservative, and with two notable exceptions,<sup>8</sup> restraintist approach. Its reputation, in the early years, as a restraintist and centrist Court was attributable, in the first instance, to the cases it chose to consider. That is to say, it was apparent to observers during that period that the Court evinced a distinct preference for granting the writ of certiorari to cases that did not address divisive issues.<sup>9</sup> But, the Court's early centrist approach was also reflected in its moderately conservative doctrinal approach to the cases it did decide. In those early years, it appeared that the Court intended, for the most part, to retain established liberal precedent.<sup>10</sup> Furthermore, not only did the Court select relatively non-divisive issues for review, but it also addressed those issues in the most restrained manner: "by rigorous textual analysis rather

7. The current tenor of doctrinal disarray in constitutional law reflects a destabilizing ideological divide in the polity generally. For the perspective of another perplexed and eminent legal scholar, see Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 29, 31, 39 (2004) (arguing that we are engaged in a "transformation in constitutional law" that "lacks a general structure that would properly organize the emerging 'law of politics'").

8. (Then) Justice Rehnquist's earliest forays into activism were limited to restricting the rights of criminal defendants. See e.g. *Ill. v. Batchelder*, 463 U.S. 1112 (1983) (per curiam) (reversing a state court decision premised on Fourth Amendment protections); *Ill. v. Andreas*, 463 U.S. 765 (1983) (reversing a state court ruling on warrantless searches and ruling in favor of the prosecution); *Ill. v. Lafayette*, 462 U.S. 640 (1983) (revising a state court ruling on inventory searches and holding for the prosecution). For a thorough discussion of the Rehnquist Court's dismantling of Warren Court doctrine establishing "a minimum level of protection for all criminal defendants below which neither state nor federal courts may venture," see Timothy P. O'Neill, "Stop Me Before I Get Reversed Again": *The Failure of Illinois Appellate Courts To Protect Their Criminal Decisions from United States Supreme Court Review*, 36 Loy. U. Chi. L.J. 893, 895, 912 n. 121 (2005). For a review of recent Supreme Court decisions implicating constitutional rights of criminal defendants, see Stanley E. Adelman, *Safe at Home, but Better Buckle Up on the Road—Supreme Court Search and Seizure Decisions, 2000–2001 Term*, 37 Tulsa L. Rev. 347 (2001). Clearly, the Rehnquist Court has made significant encroachments on *Mapp v. Ohio*, 367 U.S. 643 (1961), as well as the progeny of that case and its protective shield, the exclusionary rule. See e.g. *U.S. v. Leon*, 468 U.S. 897 (1984) (establishing a "reasonable reliance" exception to the rule which presaged this "good faith" exception). The other focus of (then) Justice Rehnquist's early activism was securities law plaintiffs. See e.g. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). These early examples of Rehnquist activism have endured. His early efforts are now settled law and have had the effect of narrowing the rights of criminal defendants and of investor plaintiffs.

9. Professor Doug Kmiec, for example, once remarked:

"What better way to manifest a narrower, more constrained role for the judiciary than to select cases inscrutable [and uninteresting] to the general public? . . . In a way, it's saying if you really think this is the least dangerous branch of government, then it should play its role with a decidedly lower profile than the selected branches, and so it will confine itself to clarifying difficulties in statutory enactments . . ."

Barbara K. Bucholtz, *Business as Usual in a "Dollar Democracy": A Review of Business-Related Cases in the 1998–1999 Supreme Court Term*, 35 Tulsa L.J. 485, 486 n. 4 (2000) (ellipses in original); see also Barbara K. Bucholtz, *Taking Care of Business: A Review of Business-Related Cases in the 1995–1996 Supreme Court Term*, 32 Tulsa L.J. 449, 452 ("In the long run, a retrospective of the business-related cases the Court chose to reject may be the best mechanism for [evaluating it].")

10. See Barbara K. Bucholtz, *Sticking To Business: A Review of Business-Related Cases in the 1997–98 Supreme Court Term*, 34 Tulsa L.J. 207, 208 (1999) [hereinafter Bucholtz, *Sticking to Business*].

than by reference to broad policy considerations.”<sup>11</sup> In sum, the early Rehnquist Court acquired a reputation as a moderately conservative, centrist Court with “a very real preoccupation with forming and maintaining a stabilizing consensus.”<sup>12</sup>

But a radical metamorphosis began to take shape in 1992 and finally emerged by the 1996–1997 Term as a “full-fledged revisionist federalism. The seminal Federalism cases, now recognized as a defining feature of Rehnquist jurisprudence, also opened up a clear ideological fault line that the Court previously appeared at pains to avoid.”<sup>13</sup> At the same time, the three indicia by which the Court had been deemed “moderate” began to take on a new cast and hue. The same Court that once eschewed broad policy considerations and divisive political issues seemed to reach for them, in the cases it selected for review.<sup>14</sup> Further, the decisions rendered in those cases presented a frontal challenge to the Warren Court’s doctrinal approach, especially with regard to the boundaries of federal-state jurisdiction.<sup>15</sup> Cases were, in contradistinction from the early era, decided on the broadest Constitutional and the most divisive policy grounds.<sup>16</sup> Finally, textual interpretation became not a device for maintaining a restraintist posture with regard to federal legislation, but an effective tool for advancing broad policy goals under a restraintist guise.<sup>17</sup> What emerged was an activist majority with a clear conservative agenda to roll back and replace what it considered to be distinctly liberal doctrine. And federalism seemed to be the first priority among several candidates for doctrinal reversal on the majority’s conservative agenda. Clearly, the construction of a conservative doctrinal edifice upon the ruins and remains of its liberal predecessor was in process—or was it?

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11. Barbara K. Bucholtz, *Gestalt Flips by an Acrobatic Supreme Court and the Business-Related Cases on its 2000–2001 Docket*, 37 *Tulsa L. Rev.* 305, 306 [hereinafter Bucholtz, *Gestalt Flips*].

12. Bucholtz, *Sticking to Business*, *supra* n. 10, at 227.

13. Bucholtz, *Gestalt Flips*, *supra* n. 11, at 306 (footnotes omitted). At that juncture, it appeared the Federalism cases would consistently be won by the slimmest of majorities and pluralities: Chief Justice Rehnquist, and Justices O’Connor, Scalia, Thomas, and Kennedy. See e.g. *Alden v. Me.*, 527 U.S. 706 (1999); *Fla. Prepaid*, 527 U.S. 666. A 1992 case that was a harbinger of the Court’s emergent states’ rights proclivities was *N.Y. v. U.S.*, 505 U.S. 144 (1992) (holding the Federal Radioactive Waste Policy Amendments Act of 1985 unconstitutionally forced states into administering a federal program).

14. By the mid-1990s the Court’s preference for policy redefinition was apparent by its selection of, and decisions in, for example, *Printz v. United States*, 521 U.S. 898 (1997) (holding that interim background checking procedures imposed on state law enforcement officers by the Brady Act constituted an unconstitutional exercise of federal power over state officials not authorized by the Necessary and Proper Clause or by the Commerce Clause), *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding the federal Religious Restoration Act exceeded Congressional Power under section 5 of the Fourteenth Amendment), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding Congress had no authority under the Commerce Clause to abrogate states’ Eleventh Amendment immunity from private suits in federal courts).

15. See *Printz*, 521 U.S. 898; *City of Boerne*, 521 U.S. 507; *Seminole Tribe of Fla.*, 517 U.S. 44.

16. See e.g. Steven G. Calabresi, *Textualism and the Counter-majoritarian Difficulty*, 66 *Geo. Wash. L. Rev.* 1373 (1998) (extolling the virtues of this unabashed radicalism and locating its doctrinal roots, not in anti-federalist precepts, but in pre-1937 case law); accord Peter M. Shane, *Federalism’s “Old Deal”: What’s Right and Wrong with Conservative Judicial Activism*, 45 *Vill. L. Rev.* 201 (2000) (noting that the Rehnquistian Revolution could have been predicted by the strong states’ rights proclivities of (then) Justice Rehnquist in his first two terms); see also Bucholtz, *Private Sector Issues*, *supra* n. 6.

17. One of the most dramatic instances of this approach is to be found in the several decisions in which the Court has addressed (and narrowed) coverage of the Americans with Disabilities Act. See Bucholtz, *Employment Rights*, *supra* n. 6, at 363 (arguing that “[s]tatutory construction, considered the most technical, neutral, and deferential ground for interpreting and applying law [became] an effective vehicle for the Court’s conservative activism and a subtle method for advancing its conservative agenda”).

Just as we had braced ourselves for a forthrightly activist Court with a clear revisionist agenda, the Court seemed to metamorphose once again. The exemplar of this new turn was the Court's "gestalt flip" on the federalism issue in *Bush v. Gore*.<sup>18</sup> Rehnquistian doctrine in this third configuration seemed conflicted and elusive. While the Court maintained an activist posture, its activism lacked the doctrinal rigor we might have anticipated. Increasingly it was "activist," not in the sense of doctrine-building, but rather in the sense of result-oriented. As a consequence, in case after case, emergent doctrine failed to cohere, and the interpretive rules adopted to construe extant law seemed internally inconsistent. It became difficult—in any number of arenas—to tell what doctrine was being constructed, and what doctrine was being deconstructed. In this third, and final, phase of the Rehnquist era it has, indeed (as Professor Tribe suggested), become difficult to see where we are going. While the Court's legacy will undoubtedly include its successes in dismantling some of the Warren Court's oeuvre, it is unclear how much of its own work will survive and develop.

Interestingly, a notable constant in the Court's approach throughout all three of its doctrinal configurations is that it began, and has remained, a moderately pro-business Court. With few exceptions, no radical changes were wrought in most business-related law. This relative stability, even at the cost of a more strenuously pro-business approach, is surely reassuring to the business community despite that the broader doctrinal milieu in which these decisions reside is discomfiting. The last Supreme Court Term illustrates the point. High profile decisions by the Court, which indirectly impact business, seemed destabilizing; decisions more directly related to the business community were moderately pro-business.

## II. LABOR AND EMPLOYMENT ISSUES

### A. Anti-Discrimination Laws

#### 1. Americans with Disabilities Act of 1990<sup>19</sup>

One hallmark of the Rehnquist Court was its use of statutory interpretation over a period of several years to curtail workers' statutorily protected rights, especially those

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18. 531 U.S. 98 (2000). In *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000), the United States Supreme Court remanded for clarification and explanation the Florida Supreme Court's decision to extend, by twelve days, the deadline to certify the Florida vote in the 2000 Presidential election. When the Florida Supreme Court ordered a recount of ballots statewide, the Bush Campaign appealed the order. *Palm Beach County*, 531 U.S. at 73. In *Bush v. Gore*, the U.S. Supreme Court ruled that the recount order of the highest court in Florida did not secure adequate Fourteenth Amendment equal protection to Bush, and there was no time to correct the problem. 531 U.S. at 103; see Bucholtz, *Gestalt Flips*, *supra* n. 11 (arguing that by pro-actively asserting a problematic use of the federal Constitution's Fourteenth Amendment in contravention of a reasonable interpretation of applicable state law by the highest court in the state, the Rehnquist Court seemed to contradict and, thus, compromise its nascent states' rights federalism). As it turned out, *Bush v. Gore* was a harbinger of the Court's abrupt shift from doctrine-building to result-driven decisions. This shift called into question the Court's claim to principled decision-making and it undercut the development of its own doctrine. See Bucholtz, *Employment Rights*, *supra* n. 6 (asserting that the Court's decisions seem increasingly driven by outcome rather than by doctrine).

19. 42 U.S.C. §§ 12101–12213 (2000).

granted pursuant to the American with Disabilities Act (“ADA”).<sup>20</sup> From 1998 through 2002, the Court consistently narrowed coverage of the ADA by a restrictive reading of its provisions.<sup>21</sup> The ADA case on the Court’s docket last Term can be viewed as an end to, if not a reversal of, that trend. In *Spector v. Norwegian Cruise Line Ltd.*<sup>22</sup> a divided Court held that title III of the ADA covers a cruise ship line operating ships under foreign flags, so long as it does not conflict with principles of international law.<sup>23</sup> Justice Kennedy, who authored the opinion, stated that the ADA “prohibits discrimination against the disabled in the full and equal enjoyment of public accommodations, 42 U.S.C. § 12182(a), and public transportation services, § 12184(a)”<sup>24</sup> and that “there can be no serious doubt that the . . . cruise ships in question fall within . . . the statutory definitions of ‘public accommodation’ and ‘specified public transportation’ . . . under conventional principles of interpretation.”<sup>25</sup> This liberal interpretation of the Act’s coverage stands in stark contrast to the Court’s earlier ADA decisions where the majority was at pains to parse the statute so as to restrict its coverage.<sup>26</sup> The Court also broadened coverage of the ADA in another case, *Tennessee v. Lane*,<sup>27</sup> when it held that states have an obligation, under the ADA, to make their courthouses wheelchair accessible.<sup>28</sup> The case is surprising in two respects: (1) it broadens ADA coverage, and (2) it refuses to recognize the case as one which implicates the states’ immunity from federal law. Both of these aspects of *Spector* are in contravention of the Court’s earlier proclivities. It remains to be seen, however, whether a citizen’s ADA rights against state discrimination go beyond the courthouse.

## 2. Age Discrimination in Employment Act<sup>29</sup>

In *Smith v. City of Jackson*<sup>30</sup> a unanimous Court held that the Age Discrimination in Employment Act (“ADEA”) authorizes disparate-impact claims, thus allowing a colorable claim brought by older police and public safety officers alleging the City’s salary increase package had a disparate impact on them.<sup>31</sup> Nonetheless, the City

20. For a discussion of the Court’s Rehnquistian ADA decisions, see Bucholtz, *Employment Rights*, *supra* n. 6. Covered in some detail in that article are a number of decisions discussing various employment issues. The ADA cases of that term were: *Barnes v. Gorman*, 536 U.S. 181 (2002); *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002); *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002). Early ADA precedents of the Rehnquist Court are also discussed in the article: *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Resources*, 532 U.S. 598 (2001); *Bd. of Trustees of the U. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Sutton*, 527 U.S. 471; *Cleveland v. Policy Mgt. Sys. Corp.*, 526 U.S. 795 (1999); *Bragdon v. Abbott*, 524 U.S. 624 (1998). See also Bucholtz, *Employment Rights*, *supra* n. 6.

21. For the cases included in this effort, see *supra* n. 20.

22. 125 S. Ct. 2169 (2005).

23. *Id.* at 2184.

24. *Id.* at 2176.

25. *Id.* at 2177.

26. See *supra* n. 20 (listing cases limiting the reach of the ADA).

27. 541 U.S. 509 (2004).

28. See *id.* at 533–34.

29. See 29 U.S.C. §§ 621–634 (2000).

30. 125 S. Ct. 1536 (2005).

31. *Id.* at 1539–40.

proffered evidence that the disparate treatment of the pay plan was “based on reasonable factors other than age discrimination,”<sup>32</sup> a permissible exception under the statute.<sup>33</sup> The case, however, established the right to proceed on a disparate-impact claim under the ADEA, a broader reading of the statute than that of the lower courts.<sup>34</sup>

But the Court, narrowed coverage of the ADEA in *General Dynamics Land Systems, Inc. v. Cline*<sup>35</sup> when it refused to recognize a “reverse discrimination” claim by younger workers of a corporation who alleged that the corporation’s collective bargaining agreement with the union impermissibly eliminated health benefit coverage for retirees, except for those current employers who were at least fifty years old.<sup>36</sup> The Court held that the ADEA did not cover younger employees.<sup>37</sup>

### 3. Title VII of the Civil Rights Act of 1964<sup>38</sup>

In *Pennsylvania State Police v. Suders*,<sup>39</sup> Justice Ginsberg, writing for an eight-to-one majority, clarified the standards for finding a constructive discharge under Title VII.<sup>40</sup> She explained that while an employer can defend a claim by demonstrating that it had instituted adequate anti-discriminatory policies and procedures, that defense may be rebutted by a showing of specific official harassment, in a particular case.<sup>41</sup> A relatively pro-employee decision, but it does little to change Title VII jurisprudence.

#### B. Other Statutes

A unanimous Court in *Stewart v. Dutra Construction Co.*<sup>42</sup> ruled that a dredge is a “vessel”<sup>43</sup> for purposes of the Longshore and Harbor Workers’ Compensation Act;<sup>44</sup> therefore an injured marine engineer was entitled to recover on a negligence suit against his employer when its dredge collided with another vessel.<sup>45</sup> This is obviously an employee-friendly suit which expands the coverage of the Act; however, its applicability is extremely narrow.

In *Aetna Health Inc. v. Davila*<sup>46</sup> the Court unanimously held that Congressional authority to enact a “patients bill of rights” trumps states’ authority to provide patients with a right to sue health management organizations that refuse to cover “medically necessary” treatments.<sup>47</sup> This case stands as an anomaly to the Court’s earlier federalism

32. *Id.* at 1543 (quoting Pub. L. No. 20-202, § 4, 81 Stat. 603 (1967) (codified at 29 U.S.C. § 623(f)(a))).

33. *Id.* at 1543-44.

34. *Id.* at 1539-40.

35. 540 U.S. 581 (2004).

36. *Id.* at 584-85.

37. *Id.* at 583.

38. 42 U.S.C. §§ 2000e-2000e-17 (2000).

39. 542 U.S. 129 (2004).

40. *Id.* at 133-34.

41. *Id.* at 134.

42. 125 S. Ct. 1118 (2005).

43. *Id.* at 1121.

44. 33 U.S.C. §§ 901-950 (2000).

45. *Stewart*, 125 S. Ct. at 1121-23, 1129.

46. 542 U.S. 200 (2004).

47. *Id.* at 204.



doctrine and it is one, among several cases last Term, that have been criticized for favoring the federal government's right to regulate at the expense of state law claims protecting individual rights.<sup>48</sup> Here, federal authority preempted state negligence claims.

### III. TAXATION

*Commissioner of Internal Revenue v. Banks*<sup>49</sup> raised the issue of whether a successful litigant's taxable litigation settlement proceeds included contingent fees paid to his or her attorneys.<sup>50</sup> In holding that they did, the Court analyzed the issue under the "anticipatory assignment doctrine,"<sup>51</sup> finding that because the litigant-taxpayer retained "dominion over the income-generating asset"<sup>52</sup> (i.e., the lawsuit), if not "dominion over the income at the moment of receipt"<sup>53</sup> (i.e., the contingent fee), the contingent fee was taxable income for the taxpayer.<sup>54</sup>

In reversing a twenty-year practice of the Tax Court to withhold the special trial judge report from the public and from the record on appeal, the Court held, in *Ballard v. Commissioner of Internal Revenue*<sup>55</sup> that the practice violated the Tax Court's own Rules<sup>56</sup> as well as "generally prevailing practice"<sup>57</sup> in federal civil and bankruptcy courts.<sup>58</sup>

*Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*<sup>59</sup> was a quiet title action by a taxpayer against the tax sale purchaser asserting that the Internal Revenue Service failed to give the taxpayer adequate notice of the sale.<sup>60</sup> The issue on appeal was whether the case was removable to federal court.<sup>61</sup> Because the suit presented a federal question,<sup>62</sup> and because federal tax litigation implicates a national interest, the Court held that it was.<sup>63</sup>

### IV. PATENT AND COPYRIGHT LAW

The case of *Merck KGAA v. Integra Lifesciences I, Ltd.*<sup>64</sup> called for an interpretation of the safe harbor exemption of patent protection found at section 271 of

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48. See e.g. *infra* nn. 174–187 and accompanying text.

49. 125 S. Ct. 826 (2005).

50. *Id.* at 828–29.

51. *Id.* at 831 ("A taxpayer cannot exclude an economic gain from gross income by assigning the gain in advance to another party." (citing *Commr. of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948); *Helvering v. Horst*, 311 U.S. 112 (1940); *Lucas v. Earl*, 281 U.S. 111 (1930))).

52. *Id.* at 832.

53. *Id.* at 831.

54. *Banks*, 125 S. Ct. at 831–32.

55. 125 S. Ct. 1270, 1283 (2005).

56. *Id.* at 1282.

57. *Id.* at 1284.

58. *Id.*

59. 125 S. Ct. 2363 (2005).

60. *Id.* at 2365–66.

61. *Id.* at 2365.

62. *Id.* at 2367.

63. *Id.* at 2365.

64. 125 S. Ct. 2372 (2005).

the patent statute.<sup>65</sup> The case involved the use of patented components in preclinical studies covered by the Federal Food, Drug, and Cosmetic Act (“FDCA”).<sup>66</sup> The Court ruled that the FDCA studies were covered by the section 271 exemption, and it remanded the case for further proceedings.<sup>67</sup>

Whether peer-to-peer file sharing software constitutes copyright infringement was at issue in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*<sup>68</sup> Justice Souter writing for a unanimous Court, with concurrences, held that where the apparent reason for distribution of a product is to promote copyright infringement, then the distributor is liable pursuant to the provisions of title 35, section 271(c) of the United States Code.<sup>69</sup>

## V. FEDERAL SECURITIES LAWS

Two cases in the last term implicated federal securities laws. The accounting firm, Arthur Andersen L.L.P., was convicted of obstructing justice in the Securities and Exchange Commission’s investigation of the Enron debacle because Arthur Andersen instructed its employees to shred documents relevant to the investigation.<sup>70</sup> The issue before the Court in the well-publicized case of *Arthur Andersen LLP v. United States*<sup>71</sup> was whether the jury instructions explaining the obstruction of justice statute<sup>72</sup> properly conveyed its meaning.<sup>73</sup> Writing for the Court, Chief Justice Rehnquist found that they did not in two critical respects: first, they failed adequately to illuminate the intent element of the statute, and, second, they failed to explain the requisite nexus between the impermissible act of obstruction and any particular legal proceedings (here, that the alleged directive to shred in anticipation of the investigation).<sup>74</sup> Therefore, the case was reversed and remanded.<sup>75</sup>

The second securities law case was brought under the Securities Exchange Act of 1934.<sup>76</sup> The Court granted the petition for writ of certiorari in *Dura Pharmaceuticals, Inc. v. Broudo*<sup>77</sup> to resolve a split in the circuits about the proof of loss (i.e., “loss causation”)<sup>78</sup> in section 10(b)<sup>79</sup> cases alleging material misrepresentations.<sup>80</sup> In *Dura Pharmaceuticals*, investors argued that false statements given by Dura to the Food and

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65. *Id.* at 2376 (citing 35 U.S.C. § 271 (e)(1) (2000)).

66. *Id.* at 2377 (citing 21 U.S.C. §§ 301–397 (2000)).

67. *Id.* at 2383–84.

68. 125 S. Ct. 2764 (2005).

69. *Id.* at 2770, 2777.

70. See *Arthur Andersen LLP v. U.S.*, 125 S. Ct. 2129, 2131 (2005).

71. 125 S. Ct. 2129 (2005).

72. *Id.* at 2131 (citing 18 U.S.C. § 1512(b)(2)(A), (B) (2000)).

73. *Id.* at 2131–32.

74. *Id.* at 2131, 2136.

75. *Id.* at 2137.

76. 15 U.S.C. § 78u-4(b)(4) (2000).

77. 125 S. Ct. 1627 (2005).

78. *Id.* at 1630.

79. Section 10(b) of the Securities Exchange Act of 1934 proscribes deception in the sale of securities, see also 15 U.S.C. § 78j(b) (2000), and Rule 10b-5 promulgated by the Commission pursuant to the statute prohibits an “untrue statement of material fact” or its omission in connection therewith. *Id.* at 1631 (quoting 17 C.F.R. § 240.10b-5 (2004)).

80. *Id.* at 1629–30.

Drug Administration, in connection with the agency's approval of Dura's new asthmatic spray device, raised the price of its stock artificially and consequently caused investors to pay an artificially inflated price.<sup>81</sup> Following (then) Justice Rehnquist's early, but enduringly restrictive, reading of Rule 10b-5 in *Blue Chip Stamps v. Manor Drug Stores*,<sup>82</sup> the Court decided that the tale of deceit reported by the investors failed both to allege, and to prove, a 10b-5 claim.<sup>83</sup>

#### VI. FEDERAL LAW RELATING TO THE ENVIRONMENT

*Cooper Industries, Inc. v. Aviall Services, Inc.*<sup>84</sup> proves, once again, that no good deed goes unpunished. The case was brought under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").<sup>85</sup> The issue before the Court was whether a purchaser of an aircraft engine maintenance company could recover the costs it incurred in voluntarily cleaning up four sites contaminated with hazardous substances by the seller.<sup>86</sup> The Court ruled that the voluntary nature of a purchaser's actions precluded its claim for contribution or indemnification under CERCLA.<sup>87</sup> Only where the purchaser (i.e., a "potentially responsible person"<sup>88</sup> as defined by CERCLA) has been sued under CERCLA, may it seek contribution for its liability exposure from another party.<sup>89</sup>

A dispute over title to submerged lands was resolved in *Alaska v. United States*.<sup>90</sup> The Court recognized that "States [hold presumptive] title to submerged lands beneath inland navigable waters within their boundaries and beneath territorial waters within three nautical miles of their coasts."<sup>91</sup> The presumption arises from the "equal footing doctrine"<sup>92</sup> and from provisions in the Submerged Lands Act.<sup>93</sup> However, the federal government can rebut the presumption by showing it expressly reserved the submerged lands at issue by demonstrating an intent to retain them when statehood was granted.<sup>94</sup> The Alaska Statehood Act sufficiently demonstrated that intent.<sup>95</sup>

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81. *Id.* at 1630.

82. 95 S. Ct. 1917 (1975).

83. *Dura Pharm.*, 125 S. Ct. at 1629; *id.* at 1632 (citing *Blue Chip Stamps*, 95 S. Ct. 1917).

84. 543 U.S. 157 (2004).

85. *Id.* at 160–61 (citing 42 U.S.C. §§ 9601–9675 (2000)).

86. *Id.* at 160–62.

87. *Id.* at 164–65.

88. *Id.* at 161.

89. *Cooper Indus.*, 543 U.S. at 165.

90. 125 S. Ct. 2137 (2005).

91. *Id.* at 2143.

92. *Id.* (declaring that all states enter the Union on an equal basis with the thirteen original Colonies).

93. *Id.* (citing 43 U.S.C. §§ 1301–1356a (2000)).

94. *Id.* at 2144.

95. *Ala.*, 125 S. Ct. at 2144–61; see also e.g. *U.S. v. United Foods, Inc.*, 533 U.S. 405 (2001); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997).

VII. COMMUNICATION: COMPELLED COMMERCIAL SPEECH,  
TRUTH IN LENDING LAWS, AND TELECOMMUNICATIONS

A. *Compelled Commercial Speech*

A tenacious and recurring issue on the Court's docket during the Rehnquist era concerned mandatory contributions to generic trade advertising projects.<sup>96</sup> Last Term the Court considered the issue in *Johanns v. Livestock Marketing Assn.*<sup>97</sup> where it was presented with something of a new variation on the theme. In *Johanns*, the Court decided for the first time whether a "government-compelled subsidy of the government's own speech"<sup>98</sup> violates the First Amendment.<sup>99</sup> The case challenged the right of the federal government, under the provisions of the Beef Promotion and Research Act<sup>100</sup> that established a federal marketing and promotion program of "beef and beef products,"<sup>101</sup> to be funded by an assessment upon "cattle sales and importation."<sup>102</sup> Noting that both compelled speech and compelled subsidy precedents have routinely distinguished compelled support for government from compelled support for private association,<sup>103</sup> the Court concluded that this was an example of the former instance, more in the nature of a tax, which may be imposed without taxpayers' consent, than of a free speech issue, which implicates the First Amendment.<sup>104</sup>

B. *Truth in Lending Laws*

*Koons Buick Pontiac GMC, Inc. v. Nigh*<sup>105</sup> called upon the Court for an interpretation of the civil liability provision of the federal Truth in Lending Act ("TILA"),<sup>106</sup> which authorizes both a floor and a ceiling for an award of damages for violations of the Act.<sup>107</sup> The Court found that the liability provision at subsection (i) of the Act extends only to loans collateralized by personal property and to consumer leases.<sup>108</sup>

96. See *Johanns v. Livestock Mktg. Assn.*, 125 S. Ct. 2055, 2058 (2005) (stating the case was the "third time in eight years" the Court has considered similar issues).

97. 125 S. Ct. 2055, 2060 (2005).

98. *Id.*

99. *Id.*

100. *Id.* at 2058 (citing 7 U.S.C. §§ 2901–2911 (2000)). The case also implicated "Beef Order" regulations promulgated under the Act, at 7 C.F.R. § 1260.172(a)(5) (2004). *Id.*

101. *Johanns*, 125 S. Ct. at 2058 (quoting 7 U.S.C. § 2901(b)) (internal quotation marks omitted).

102. *Id.* (citing 7 U.S.C. § 2901(b)).

103. *Id.* at 2061–62.

104. *Id.*

105. 543 U.S. 50 (2004).

106. *Id.* at 50–52 (citing 15 U.S.C. § 1640 (2000)).

107. *Id.* at 58–59 (citing 15 U.S.C. § 1640(a)(2)(A)(i)).

108. *Id.* at 58–63. That is, when Congress revised the Act by adding a subsection (iii) of section 1640(a)(2)(A) to the Act, the Congress did not intend "to alter the [well-established] meaning of clause (i) . . . [Rather, by] adding clause (iii), Congress sought to provide *increased recovery* when a TILA violation occurs in the context of a loan secured by real property." *Id.* at 63 (emphasis in original). Statutorily mandated recovery when the violation involves personal property remains unchanged. *Koons Buick Pontiac GMC, Inc.*, 543 U.S. at 63–64.

### C. Telecommunications

Justice Thomas wrote the six-to-three majority opinion in *National Cable and Telecommunications Assn. v. Brand X Internet Services*.<sup>109</sup> The case called for a reprise of *Chevron*'s<sup>110</sup> framework for deference to agency interpretation and the mandates of the Administrative Procedure Act ("APA").<sup>111</sup> At issue was the Federal Communications Commission's conclusion that cable companies "that sell broadband Internet service do not provide 'telecommunications servic[e]' as [title II of] the Communications Act defines that term, and hence are exempt from mandatory common-carrier regulation under Title II."<sup>112</sup> The majority held that, under *Chevron* and APA standards, the Commission's ruling was a permissible interpretation of the Communications Act.<sup>113</sup> Therefore it was entitled to the Court's deference.<sup>114</sup> The unusual split of the Justices in the case is notable. The Chief Justice and Justices Stevens, O'Connor, Kennedy, and Breyer joined the Thomas opinion (Justices Stevens and Breyer filed concurrences); while Justice Scalia filed a dissent, joined by Justices Souter and Ginsburg.<sup>115</sup> Justice Scalia declaimed that the Commission's interpretation evinced an agency attempt "to establish a whole new regime of *non*-regulation, which will make for more or less free-market competition."<sup>116</sup> He added that the "Commission has chosen to achieve this through an implausible reading of the statute . . . thus exceed[ing] the authority given it by Congress."<sup>117</sup> Scalia also declared that the majority opinion was a continuation of the "administrative-law improvisation project it began four years ago in *United States v. Mead Corp.*"<sup>118</sup>—a case, he said, "drastically limited"<sup>119</sup> the kinds of agency ruling entitled to deference.<sup>120</sup> Justice Breyer's concurrence refused to give Scalia the last word. Breyer pointed out that, in his opinion, Scalia's critique of the *Mead* approach was misplaced because the majority in *Mead* stood for the opposite proposition, i.e., that any "*indication of . . . congressional intent*"<sup>121</sup> triggers *Chevron* deference.<sup>122</sup> It was Scalia's dissent in *Mead* that called for a narrowing of *Chevron* deference, said Breyer.<sup>123</sup> Thus, in this interesting case, Stevens, Breyer, and the "swing Justices" (Kennedy and O'Connor) joined part of the conservative block, while Souter and Ginsburg joined Scalia. And Scalia, arguably, disagreed with himself. The significance of the case for business interests is that, in a narrow arena, this unusual

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109. 125 S. Ct. 2688 (2005).

110. *Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

111. *National Cable*, 125 S. Ct. at 2695 (citing 5 U.S.C. §§ 555–561 (2000)).

112. *Id.* at 2695 (citing 47 U.S.C. § 153(46) (2000)) (first bracket in original).

113. *See id.* at 2711–12.

114. *See id.* at 2712.

115. *Id.* at 2693.

116. *National Cable*, 125 S. Ct. at 2713 (Scalia, Souter & Ginsburg, JJ., dissenting) (emphasis in original).

117. *Id.*

118. *Id.* at 2178 (citing 533 U.S. 218 (2001)).

119. *Id.*

120. *Id.*

121. *National Cable*, 125 S. Ct. at 2712 (Breyer, J., concurring) (quoting *Mead*, 533 U.S. at 227) (emphasis in original).

122. *Id.*

123. *Id.* at 2712–13.

majority affirmed an anti-regulatory ruling by a regulatory agency. No wonder Professor Tribe sees multiple possibilities for Constitutional jurisprudence.

The other telecommunications case was *City of Rancho Palos Verdes v. Abrams*.<sup>124</sup> There, Justice Scalia, writing for the Court,<sup>125</sup> concluded that even assuming, *arguendo*, that section 332(c)(7) of the Communications Act of 1934, as amended,<sup>126</sup> creates an individual right against certain local government impediments to installation of facilities for wireless communications (like antenna towers),<sup>127</sup> Congress did not intend this statutory right to create a remedy under title 42, section 1983 of the U.S. Code.<sup>128</sup> Justice Scalia reached his conclusion by noting that section 332 does specify a remedy for its violation and by applying the maxim for statutory construction, *expressio unius est exclusio alterius*.<sup>129</sup> Applied here, the maxim can be interpreted to say that “[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.”<sup>130</sup> Both telecommunications cases this Term reached moderately pro-business decisions through ostensibly traditional conventions of statutory construction.

#### VIII. CONTRACTS

There are two contracts law cases from the last Term and, in each of them, third parties attempted to cast themselves as intended beneficiaries of the contracts at issue. In *Orff v. United States*,<sup>131</sup> a unanimous Court ruled that the Reclamation Reform Act<sup>132</sup> did not waive the federal government’s sovereign immunity and, therefore, barred a claim that farmers were intended third-party beneficiaries of the government’s contract with a California water district.<sup>133</sup> In so ruling, the Court distinguished this situation from joinder of the federal government as a necessary party defendant in a suit between other parties, where joinder is required “to permit a complete adjudication of rights under a reclamation contract.”<sup>134</sup>

Two bills of lading were found to be maritime contracts and, therefore, subject to federal court interpretation in *Norfolk Southern Railway Co. v. Kirby*,<sup>135</sup> despite that the ultimate destination of the shipment was inland (at Huntsville, Alabama).<sup>136</sup> Noting that the nature of the contract (whether it contemplates a maritime transaction), not the locale of the performance (whether at sea or on land) giving rise to the dispute, determines its

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124. 125 S. Ct. 1453 (2005).

125. *Id.* at 1455. Justices Stevens and Breyer filed concurring opinions. *Id.*

126. *Id.* at 1458 (citing 47 U.S.C. § 332(c)(7) (2000)).

127. *Id.*

128. *Id.*

129. *Abrams*, 125 S. Ct. at 1458.

130. *Id.* (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)) (bracket in original, internal quotation marks omitted).

131. 125 S. Ct. 2606 (2005).

132. *Reclamation Reform Act of 1982*, 43 U.S.C. § 390uu (2000).

133. *Orff*, 125 S. Ct. at 2611.

134. *Id.*

135. 125 S. Ct. 385, 388 (2004).

136. *Id.* at 389.

maritime status for purposes of federal question jurisdiction (here, admiralty law),<sup>137</sup> and that the particular issues in this case require uniformity,<sup>138</sup> the Court concluded that it had jurisdiction to reach the substantive issue: whether the limitations on liability clause in the first bill of lading applied to the sub-subcontractor (Norfolk Railway) of the shipper.<sup>139</sup> Applying relevant provisions of the Carriage of Goods by Sea Act,<sup>140</sup> the Court ruled that Norfolk was an intended beneficiary of, and therefore was covered by, the limitations of liability provision.<sup>141</sup> The dispute concerning the second bill of lading raised a *Hadley v. Baxendale*<sup>142</sup> question of foreseeable damages and whether the owner of the goods was bound by the limitation of liabilities clause negotiated between the original shipper and a subsequent carrier.<sup>143</sup> In holding that it was, the Court explained that because the subsequent inland carrier (Norfolk) must have been contemplated by the original shipper and the cargo owner, Norfolk was protected by the second bill, as well, and the cargo owner had a claim against the original shipper for any discrepancies between the terms of the first bill and the second bill.<sup>144</sup>

#### IX. FEDERAL PRACTICE

While *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*<sup>145</sup> raised substantive issues about the alleged breach of a joint venture agreement, the Court was asked to address a procedural issue in the case about concurrent federal jurisdiction.<sup>146</sup> Here, the Saudi company filed a state court declaratory judgment action two weeks before Exxon Mobil and its subsidiaries filed suit in federal court.<sup>147</sup> The state court action was resolved first and the question was whether the federal action must be dismissed because under the *Rooker-Feldman* doctrine<sup>148</sup> the issues had already been litigated. Noting that the doctrine has rarely been invoked by the Supreme Court,<sup>149</sup> Justice Ginsburg ruled that the doctrine applies only to cases brought by losing parties in state court where the losing parties ask federal courts to overrule the state court decisions.<sup>150</sup> Hence it had no application to this concurrent jurisdiction case, in which the disposition of the federal

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137. *See id.* at 394–95.

138. *See id.* at 395–96.

139. *See id.* at 396–97.

140. 46 U.S.C. app. § 1303 (2000).

141. *Norfolk S. Ry. Co.*, 125 S. Ct. at 398.

142. 156 Eng. Rep. 145 (1854).

143. *Norfolk S. Ry. Co.*, 125 S. Ct. at 398 (citing *Hadley v. Baxendale*, 156 Eng. Rep. 145).

144. *Id.* at 399–400.

145. 125 S. Ct. 1517 (2005).

146. *Id.* at 1521.

147. *Id.* at 1525.

148. In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923), the Court held that a *concurrent* federal court suit—alleging the state court action was erroneous—cannot be used to challenge the ruling of a state court decision. “Federal district courts, the *Rooker* Court recognized, lacked the requisite appellate authority, for their jurisdiction was ‘strictly original.’” *Saudi Basic*, 125 S. Ct. at 1522 (quoting *Rooker*, 263 U.S. at 416).

In *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 463 (1983), a District of Columbia decision was challenged in a suit brought in the federal court for the District. Again, the Court held that federal courts (with the exception of the U.S. Supreme Court) cannot act as appellate courts for state (and District of Columbia) court decisions. *Saudi Basic*, 125 S. Ct. at 1523 (citing *Feldman*, 460 U.S. at 486).

149. *See Saudi Basic*, 125 S. Ct. at 1521.

150. *Id.* at 1521–22.

action would be “governed by preclusion law [pursuant to the] Full Faith and Credit Act.”<sup>151</sup> That Act would give preclusive effect to the state court judgment but would permit the federal case to proceed on any independent claims it alleged.<sup>152</sup>

The other major federal practice case last Term also featured Exxon Mobil as a named party. In *Exxon Mobil Corp. v. Allapattah Services, Inc.*<sup>153</sup> Justice Kennedy, writing for the majority, held that

where the other elements of jurisdiction are present and at least one named plaintiff in the action satisfies the amount-in-controversy requirement [of title 28, section 1332(a) of the U.S. Code diversity jurisdiction], § 1367 [of title 28 of the U.S. Code] does authorize supplemental jurisdiction over the claims of other plaintiffs in the [case] even if those claims are for less than the jurisdictional amount specified in [section 1332].<sup>154</sup>

Justice Breyer joined a dissent filed by Justice Stevens.<sup>155</sup> Justices Stevens, O’Connor, and Breyer joined a dissent filed by Justice Ginsburg.<sup>156</sup> The dissenters view was that the majority’s interpretation of the intent and scope of the supplemental jurisdiction statute (section 1367(a)) was unsupportably broad and unnecessarily “disruptive of our jurisprudence.”<sup>157</sup> The dissenters agreed that a narrower reading of the statute, that the district court must “first have ‘original jurisdiction’ over a ‘civil action’ before supplemental jurisdiction can attach,”<sup>158</sup> is a better rendering of the text.<sup>159</sup> That interpretation of the statute is also buttressed by “the historical and legal context of Congress’ enactment of the supplemental jurisdiction statute . . . and it follows the sound counsel that ‘close questions of [statutory] construction should be resolved in favor of continuity and against change.’”<sup>160</sup> As Justice Ginsburg demonstrated, section 1367 has been considered basically “a codification”<sup>161</sup> of the “judicially developed doctrines of pendent and ancillary jurisdiction,”<sup>162</sup> “placing them under a single heading, but largely retaining their substance . . . . Supplemental jurisdiction, once the district court has original jurisdiction, would now include ‘claims that involve the joinder or intervention of additional parties.’”<sup>163</sup> The majority opinion “discard[s] entirely”<sup>164</sup> the view that the supplemental jurisdiction statute codifies pendent and ancillary jurisdiction along with the important cases developing this traditional view, Justice Ginsburg noted.<sup>165</sup> As

151. *Id.* at 1527 (citing 28 U.S.C. § 1738 (2000)).

152. *Id.*

153. 125 S. Ct. 2611 (2005).

154. *Id.* at 2615.

155. *Id.* at 2614.

156. *Id.*

157. *Id.* at 2632 (Ginsburg, Stevens, O’Connor & Breyer, JJ., dissenting).

158. *Allapattah Servs.*, 125 S. Ct. at 2632 (Ginsburg, Stevens, O’Connor & Breyer, JJ., dissenting).

159. *Id.*

160. *Id.* at 2640–41 (quoting David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. Rev. 921, 925 (1992)) (bracket in original).

161. *Id.* at 2638.

162. *Id.* at 2639 (internal quotation marks omitted).

163. *Allapattah Servs.*, 125 S. Ct. at 2638 (quoting 28 U.S.C. § 1367(a) (2000)).

164. *Id.*

165. *Id.* The majority ruled that section 1367 overruled two cases pivotal to the traditional rendition of supplemental jurisdiction: *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939) (“[W]hen federal-court jurisdiction is predicated on a specified amount in controversy, each plaintiff joined in the litigation must independently meet



Justice Stevens pointed out in his dissent, Justice Ginsburg's interpretation of section 1367 is also buttressed by its legislative history, and he included a quote from the applicable House Report (later adopted by the Senate), which preceded the statute's enactment, that "[i]n diversity cases, the district courts may exercise supplemental jurisdiction, except when doing so would be inconsistent with the jurisdictional requirements of the diversity statute."<sup>166</sup> This "uncommonly clear"<sup>167</sup> legislative history lends additional credence to Ginsburg's lucid rendering of the text and is a persuasive account of its jurisprudential context, Stevens opined.<sup>168</sup> Stevens was—to understate the matter—not persuaded by the majority's declaration that the statute unambiguously commanded the textual reading given by the majority.<sup>169</sup> Stevens counseled that it behooves judges to take a more inclusive approach to statutory construction: "Indeed, I believe that we as judges are more, rather than less, constrained when we make ourselves accountable to *all* reliable evidence of legislative intent."<sup>170</sup>

The split between the "liberal," broad reading of the statute given by the "conservative" Justices in the majority, juxtaposed against the constrained and narrow interpretation presented by the more liberal wing of the Court, calls to mind the insights of Grant Gilmore regarding "romantic" and "classical" forces within our jurisprudence and suggests a paradoxical irony.<sup>171</sup> It is not too much to predict that the majority's broad reading will meet the fate of *Finley v. United States*,<sup>172</sup> the case that inspired passage of section 1367 and was overruled by it.<sup>173</sup>

## X. CONSTITUTIONAL ISSUES

Undoubtedly, other articles in this law review symposium will give focused attention to the cases raising constitutional issues during the Supreme Court's 2004–2005 Term. Here, they are included as "business-related" cases.

### A. Commerce Clause

A state law prohibiting out-of-state wineries from shipping wine to in-state consumers, while allowing in-state wineries to do so brought a Commerce Clause challenge to the Supreme Court in *Granholm v. Heald*.<sup>174</sup> The majority ruled the state

the jurisdictional amount requirement."); *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973) (each member of the class in a class action must satisfy the jurisdictional amount). *Id.* at 2631.

166. *Id.* at 2628 (quoting H.R. Rep. 101-734 (Sept. 10, 1990)) (Stevens & Breyer, JJ., dissenting).

167. *Allapattah*, 125 S. Ct. at 2631 (Stevens & Breyer, JJ., dissenting).

168. *Id.*

169. *Id.*

170. *Id.* at 2628 (citing *Koons Buick Pontiac GMC, Inc.*, 543 U.S. at 54 n. 1) (emphasis in original). For an account of the vagaries of the interpretive maxims, see Barbara K. Bucholtz, *Rules, Principles, or Just Words? The Interpretive Project and the Problem of Legitimacy*, 11 Tex. Wes. L. Rev. 377 (2005).

171. See *supra* n. 2 and accompanying text.

172. 490 U.S. 545 (1989). *Finley* was a case about federal question jurisdiction, not directly relevant to the instant case.

173. With regard thereto, Justice Ginsburg wrote: "Section 1367, all agree, was designed to overturn this Court's decision in *Finley v. United States*." *Allapattah Servs.*, 125 S. Ct. at 2631 (Ginsburg, Stevens, O'Connor & Breyer, JJ., dissenting).

174. 125 S. Ct. 1885 (2005).

law was impermissibly discriminatory under Commerce Clause jurisprudence,<sup>175</sup> further the law was not protected by the Twenty-first Amendment.<sup>176</sup> The dissenting opinions<sup>177</sup> found that the majority opinion by-passed traditional approaches to dormant Commerce Clause analysis,<sup>178</sup> the legislative history of the Amendment,<sup>179</sup> the applicable statute and the Webb-Kenyon Act,<sup>180</sup> all of which are conclusive evidence that the Amendment “was intended to return ‘absolute control’ of liquor traffic to the States, free of all restrictions which the Commerce Clause might before that time have imposed.”<sup>181</sup> Without a whisper of federalism concerns or the demands of originalism, Justice Kennedy, joined, notably by Justice Scalia, and also by Justices Souter, Ginsburg, and Breyer,<sup>182</sup> justified the ruling on the basis of longstanding precedent;<sup>183</sup> its interpretation of Webb-Kenyon as “[empowering states] to forbid shipments of alcohol to consumers for personal use, provided that the States treated in-state and out-of-state liquor on the same terms”;<sup>184</sup> and recent cases that limit the reach of the Twenty-first Amendment by concluding that “state laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment.”<sup>185</sup> It is hard to avoid the conclusion that the majority is simply narrowing the originally intended reach of the Amendment in light of modern practice and commerce.

In *Gonzales v. Raich*,<sup>186</sup> Justice Stevens authored the majority opinion holding that Congress, under the Commerce Clause, has authority to prohibit the interstate, non-commercial cultivation and use of marijuana for medical purposes, even if it is in

175. *Id.* at 1897 (“We have no difficulty concluding that New York, like Michigan, discriminates against interstate commerce through its direct-shipping laws . . . State laws that discriminate against interstate commerce face a virtually *per se* rule of invalidity.” (internal quotation marks omitted)).

176. *Id.* at 1904 (“The central purpose of the [Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition.” (internal quotation marks omitted, bracket in original)).

177. Dissents were filed by Justice Stevens (joined by Justice O’Connor) and Justice Thomas (joined by Chief Justice Rehnquist, and Justices Stevens and O’Connor). *Id.* at 1891. Notice, again, the interesting split of the previously designated ideological camps of the Rehnquist Court.

178. *See e.g. id.* at 1907 (Stevens & O’Connor, JJ., dissenting).

179. *Granholt*, 125 S. Ct. at 1908. Justice Brandeis participated in the debates leading to the Amendment and stated, in part:

“The plaintiffs ask us to limit [section 2’s] broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it . . . .”

*Id.* (quoting *St. Bd. of Equalization of Cal. v. Young’s Mkt. Co.*, 299 U.S. 59, 62 (1936)).

180. *Id.* at 1910 (Thomas, Stevens, O’Connor, JJ. & Rehnquist, C.J., dissenting). Title 27, section 122 of the U.S. Code, which Justice Thomas explained in his dissent, “‘prevent[s] the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws.’” *Id.* (quoting *Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 324 (1917)) (bracket in original).

181. *Id.* at 1908 n. 2 (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 338 (1964) (Black & Goldberg, JJ., dissenting)) (Stevens & O’Connor, JJ., dissenting) (internal quotation marks omitted).

182. *Granholt*, 125 S. Ct. at 1891.

183. *See id.* at 1898.

184. *Id.* at 1900.

185. *Id.* at 1903 (citing *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484 (1996) (upholding First Amendment, commercial free speech); *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116 (1982) (upholding the Establishment Clause)).

186. 125 S. Ct. 2195 (2005).

compliance with state law.<sup>187</sup> One has to wonder what has become of the Rehnquist Court's restrictive approach to Congressional Commerce Clause authority and its expansive and deferential approach to states' rights.

### B. *Eminent Domain*

In *San Remo Hotel, L.P. v. City and County of San Francisco*,<sup>188</sup> the Supreme Court avoided a takings issue,<sup>189</sup> which it held was barred by the doctrine of issue preclusion.<sup>190</sup> The issue had been resolved in state court,—by the Full Faith and Credit Act<sup>191</sup>—which afforded no exception for claims raising a takings issue under the Fifth Amendment.<sup>192</sup>

The takings issue was also raised in *Lingle v. Chevron U.S.A., Inc.*<sup>193</sup> In *Lingle*, the Court clarified the meaning and coverage of a rule developed through case law, beginning with its enunciation in *Agins v. City of Tiburon*.<sup>194</sup> In *Agins*, the Court held that “[t]he application of a general zoning law to particular property effects a taking if the ordinance does not *substantially advance legitimate state interests* or denies an owner economically viable use of his land.”<sup>195</sup>

The “substantially advances” language, appearing, as it does, in the disjunctive, led credence to the view that it was an independent test for detecting a regulatory takings.<sup>196</sup> Justice O’Connor, writing for the Court, adamantly rejected that view.<sup>197</sup> Rather, she stated, the Takings Clause of the Fifth Amendment triggers the mandate of just compensation<sup>198</sup> whenever the government directly appropriates private property.<sup>199</sup> But it also embraces certain regulatory impositions on the use of private property, as per

187. *Id.* at 2199, 2201; *see also* Stephen K. Balman, *Constitutional Irony: Gonzales v. Raich, Federalism and Congressional Regulation of Intrastate Activities under the Commerce Clause*, 41 *Tulsa L. Rev.* 125 (2005).

188. 125 S. Ct. 2491 (2005).

189. *See id.* at 2506 (citing the Takings Clause of the Fifth Amendment).

190. *Id.* at 2499–500.

191. *Id.* at 2500 (citing 28 U.S.C. § 1738) (“This statute has long been understood to encompass the doctrines of *res judicata*, or ‘claim preclusion’ and collateral estoppel, or ‘issue preclusion.’”).

192. *Id.* at 2501–02. Here, the Court refused to create an exception to Full Faith and Credit requirements for takings issues and distinguishing *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). The Court decided that *England* involved

federal constitutional challenges to a state statute that can be avoided if a state court construes the statute in a particular manner. . . . [T]he purpose of *Pullman* abstention in such cases is to avoid resolving the federal question by encouraging a state-law determination that may moot the federal controversy.

*San Remo Hotel*, 125 S. Ct. at 2502 (footnote omitted). The instant case, the Court held, was inapposite because the petitioners included their various claims for takings violations in their state action. *Id.* at 2503.

193. 125 S. Ct. 2074 (2005).

194. 447 U.S. 255 (1980).

195. *Lingle*, 125 S. Ct. at 2082 (quoting *Agins*, 447 U.S. at 260) (bracket in original, emphasis added, citations omitted).

196. *Id.* at 2083–84.

197. *Id.* at 2084.

198. The Fourteenth Amendment makes the Clause applicable to the states as well as to the federal government. *Id.* at 2080.

199. *Id.* at 2081 (citing *U.S. v. Pewee Coal Co., Inc.*, 341 U.S. 114 (1951) (upholding the seizure of private coal mines)).

se takings, under two situations.<sup>200</sup> “First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—”,<sup>201</sup> and, second, where the regulations “completely deprive an owner of ‘all economically beneficial us[e]’ of her property.”<sup>202</sup> And, then, beyond these two categorical *per se* takings by way of government regulation, other regulations are evaluated by the factors considered in *Penn Central Transportation Co. v. City of New York*,<sup>203</sup> and developed in recent cases, like *Dolan v. City of Tigard*<sup>204</sup> and *Nollan v. California Coastal Commission*.<sup>205</sup> Justice O’Connor identified the *Penn Central* factors for evaluating regulatory takings to include: “economic impact,” i.e., “the extent to which the regulation has interfered with distinct investment-backed expectations”; and “character of the government action,” i.e., physical invasion or restrictions on use through “some public program adjusting the benefits and burdens of economic life to promote the common good.”<sup>206</sup>

It is notable that most of the Court’s doctrinal development of regulatory (as opposed to physical) takings has occurred during the Rehnquist Court era. While the *Agins* Court decision pre-dated, what we think of as the core years of the Rehnquist Court, as Justice O’Connor also points out, *Agins* was the first case to address a zoning regulation in decades and, she added, it is “understandable”<sup>207</sup> that the Court reached back to precedents dealing with zoning regulation.<sup>208</sup> Those precedents,<sup>209</sup> however, were premised upon due process considerations, not takings jurisprudence and, to that extent, *Agins* developed a due process approach that is “regrettably imprecise”<sup>210</sup> and seems inappropriately to “commingl[e]”<sup>211</sup> due process analysis with takings analysis.<sup>212</sup> Thus, the *Agins* test must be eliminated from takings analysis: “[S]uch a test is not a valid method of discerning whether private property has been ‘taken’ for purposes of the Fifth Amendment.”<sup>213</sup> Not only is the *Agins* “substantially advances” approach doctrinally inappropriate in a takings analysis, which “pre-supposes that the government has acted in pursuit of a valid public purpose,”<sup>214</sup> but the *Agins* formula would cast the courts in the improper role of second guessing the legislature as it did in

200. *Lingle*, 125 S. Ct. at 2081. The inclusion of regulation of the *use* of private property as a possible category of “takings” was noted in the seminal case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). See *id.* at 2081.

201. *Id.* at 2081 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

202. *Id.* (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)) (emphasis in original, bracket in original).

203. *Id.* at 2081–82 (citing 438 U.S. 104 (1978)).

204. *Lingle*, 125 S. Ct. at 2082 (citing 512 U.S. 374 (1994)).

205. *Id.* (citing 483 U.S. 825 (1987)).

206. *Id.* at 2081–82 (quoting *Penn Central*, 438 U.S. at 124) (internal quotation marks omitted).

207. *Id.* at 2083.

208. *Id.*

209. *Lingle*, 125 S. Ct. at 2083 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), as historic due process precedents upon which *Agins* erroneously relied).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 2084.

214. *Lingle*, 125 S. Ct. at 2084.

the instant case, *Lingle*.<sup>215</sup> In *Lingle*, Chevron argued that Hawaii's rent cap statute failed the *Agins* substantially advances test (the rent cap did not advance a legitimate state interest), and experts weighed in on both sides of that issue.<sup>216</sup> Holding that the *Agins* analysis was invalid in a takings case, the Court reversed and remanded.<sup>217</sup>

Without question, the most well-publicized takings decision last Term (and the case that inspired the strongest—mostly negative—public response) was *Kelo v. City of New London*.<sup>218</sup> At issue was a problem reminiscent of *Agins* concerns: The Takings Clause of the Fifth Amendment provides, in pertinent part, “private property [shall not] be taken for *public use*, without just compensation.”<sup>219</sup> The pivotal and undisputed facts in the case were that pursuant to a comprehensive revitalization program, the City condemned ninety acres of privately-held residential property, and that many (perhaps all) of the parcels condemned were in good repair.<sup>220</sup> The approval of the program in 2000, however, came *after* Pfizer, Inc., in 1998, announced the forthcoming construction of “a global research facility.”<sup>221</sup> The non-profit corporation hired by the City to prepare the plan announced that the parcels would be condemned “in order to complement the [Pfizer facility], create jobs, increase tax and other revenues, encourage public access to and use of the city’s waterfront, and eventually ‘build momentum’ for the revitalization of the rest of the city.”<sup>222</sup> The development program called for the construction of buildings for various types of commercial enterprise, including a hotel, restaurants, shops, and office space which would be leased to private developers under long-term leases.<sup>223</sup> A deeply divided Court upheld the program against a challenge that it violated the Takings Clause because it was not for “public use.”<sup>224</sup> Specifically, the question was: “Are economic development takings constitutional?”<sup>225</sup> The majority opinion, authored by Justice Stevens and joined by Justices Souter, Ginsburg, Breyer, and Kennedy (who also filed a concurrence), said that they could be, and were in this case.<sup>226</sup> Two dissents said they were not.<sup>227</sup> Justice O’Connor filed a dissenting opinion in which Justices Scalia, Thomas, and Chief Justice Rehnquist joined,<sup>228</sup> while Justice Thomas also filed a separate dissent.<sup>229</sup>

215. *See id.* at 2085.

216. *Id.* at 2084–85.

217. *Id.* at 2087.

218. 125 S. Ct. 2655 (2005).

219. U.S. Const. amend. V (cited in *Kelo*, 125 S. Ct. at 2658 n. 1 (emphasis added)).

220. *Kelo*, 125 S. Ct. at 2659–62, 2660 (“There is no allegation that any of these properties is blighted or otherwise in poor condition.”).

221. *Id.* at 2671 (O’Connor, Scalia, Thomas, JJ. & Rehnquist, C.J., dissenting).

222. *Id.* (internal quotation marks omitted).

223. *Id.* at 2659–60 (majority).

224. *Id.* at 2668–69.

225. *Kelo*, 125 S. Ct. at 2673 (O’Connor, Scalia, Thomas, JJ. & Rehnquist, C.J., dissenting). Surprisingly, this was a question of first impression for the Court. *Id.*

226. *Id.* at 2658, 2668 (majority).

227. *Id.* at 2674, 2677 (O’Connor, Scalia, Thomas, JJ. & Rehnquist, C.J., dissenting); *id.* at 2677 (Thomas, J., dissenting).

228. *Kelo*, 125 S. Ct. at 2658.

229. *Id.* at 2677 (Thomas, J., dissenting).

Because the substance of the arguments developed in each of those opinions falls within the purview of Professor Marla Mansfield's paper in this symposium,<sup>230</sup> I will not explore them in any depth here. Nonetheless, for purposes of this article's thesis, these arguments are notable in several respects. First, to resurrect and redirect (then) Justice Rehnquist's famous aside in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*,<sup>231</sup> the ideological camps of the Court in *Kelo* seem to "[change] positions as nimbly as if dancing a quadrille."<sup>232</sup> The majority opinion of the liberal-leaning camp on the Court buttressed its conclusions by arguments premised on federalism,<sup>233</sup> judicial restraint<sup>234</sup> and, of course, selected precedent.<sup>235</sup> While the dissenting opinions, supported by the conservative-leaning camp on the Court, rested their views on appeals to a species of judicial activism and the kinds of arguments that are launched to legitimize it (along with, of course, other selected precedents).<sup>236</sup>

One unfortunate aspect of the case was that the issue, as drafted, posed an unnecessary dichotomy: "Are economic development takings [ever] constitutional?"<sup>237</sup> This calls, ineluctably, for a bright line rule. A better, more doctrinally-useful, rendition of the legal dispute in *Kelo* would be to cast the issue as an inquiry into whether the economic development takings described in the record of this case were constitutional. Nonetheless, I believe that as between two strong analyses of the issue, as it was presented in *Kelo*, Justice O'Connor's argument was more persuasive. When a takings primarily benefits private enterprise and may only confer incidental benefits (if any) on the public, then eminent domain has not been invoked for "public use." Justice Stevens, who subsequently acknowledged that he was reluctant to rule as he did but felt compelled to do so,<sup>238</sup> described a way around his ruling<sup>239</sup> which, following a firestorm

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

231. 435 U.S. 519 (1978).

232. *Id.* at 540 (quoting *Orloff v. Willoughby*, 345 U.S. 83, 87 (1953)) (footnote omitted). See Bucholtz, *Gestalt Flips*, *supra* n. 11 (discussing how the conservative camp of the Rehnquist Court dramatically "flipped" its position on its (still) emergent federalism doctrine and interjected itself into the Florida presidential election process).

233. *Kelo*, 125 S. Ct. at 2664 ("Our earliest cases in particular embodied a strong theme of federalism, emphasizing the 'great respect' that we owe to state legislatures and state courts in discerning local public needs.").

234. *Id.* at 2668 ("This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a 'public use' within the meaning of the Fifth Amendment to the Federal Constitution.").

235. See *id.* at 2666 n. 14.

236. *Id.* at 2673 ("An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.") (O'Connor, Scalia, Thomas, JJ. & Rehnquist, C.J., dissenting); *id.* at 2677 (stating the majority's deference in this case to local government is "an abdication of our responsibility"); see also *Kelo*, 125 S. Ct. at 2673–74 (O'Connor, Scalia, Thomas, JJ. & Rehnquist, C.J., dissenting).

237. *Id.* at 2673.

238. See Linda Greenhouse, *Justice Weighs Desire v. Duty (Duty Prevails)*, 154 *N.Y. Times* A1 (Aug. 25, 2005). This article reported that Justice Stevens believed two opinions he authored last Term were compelled but unwise. "The outcomes were 'unwise,' he said, but 'in each I was convinced that the law compelled a result that I would have opposed if I were a legislator.'" *Id.* With respect to *Kelo*, he said his decision was "entirely divorced from my judgment concerning the wisdom of the program" that was under constitutional attack." *Id.* The other opinion that Justice Stevens alluded to as being unwise but compelled was the medical marijuana case. *Id.*; *id.* at A16.

of headline-grabbing outrage, the public seems to have embraced.<sup>240</sup> And, finally, *Kelo* serves as additional evidence that ideological doctrine is being destabilized at the end of the Rehnquist era, leaving us with some uncertainty, as Professor Tribe has commented, about what direction our jurisprudence is headed. But this destabilization can also mean that a new consensus is in the works. A consensus that rests not on an ideological and unproductive split on the Court, but one built upon well-reasoned arguments in which all maxims and canons of constitutional and statutory construction are in play. But the legitimacy of a particular interpretation of a constitutional or statutory provision would reside in its ability to persuade us that this is the best interpretation under all the circumstances. Thus, interpretive devices like “original intent,” “plain meaning,” and “judicial restraint,” could not claim infallible powers of legitimacy. Rather, they would simply assume their proper place as three guiding principles among many others which can be employed in reaching a decision. As Justice Stevens has said, judges are constrained when they “make [themselves] accountable to *all* reliable evidence of legislative [or Constitutional] intent.”<sup>241</sup>

## XI. CONCLUSION

The final Term of the Rehnquist Court was a fascinating one. For cases affecting business interests directly it was “business as usual”: a moderately pro-business Court. From a broader perspective, it is difficult to say what the Term portends. Perhaps the ideological split that appeared during the Rehnquist years will continue, even deepen. But, given the destabilization of the majority’s own doctrine in the final years of the Rehnquist era (as illustrated, in part, by this final Term), there is reason to believe that a new, more inclusive and pragmatic (and, therefore more stable) consensus is in the offing. Or, to paraphrase Grant Gilmore’s vision at the end of his monumental *The Death of Contract*:

We have gone through our romantic agony—an experience peculiarly unsettling to people intellectually trained and conditioned as lawyers are. It may be that . . . some new [consensus] is already waiting in the wings to summon us back to the paths of

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239. Toward the end of his opinion, Justice Stevens wrote:

We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose “public use” requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. . . . [In any case] the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate.

*Kelo*, 125 S. Ct. at 2668 (footnotes omitted).

240. The public response was dramatic. See e.g. Judy Coleman, *Protests Against Eminent Domain Involve Trust*, Tulsa World G3 (Oct. 16, 2005); *House, Senate Lawmakers Begin to Push to Circumvent Eminent Domain Decision*, 74 U.S. L. Week (BNA) 2008 (July 5, 2005); Marie Price, *Eminent Domain Puts Lawmakers on a Tightrope*, Tulsa World A11 (Aug. 26, 2005); Marie Price, *Property Owners Heard on Eminent Domain Process*, Tulsa World A7 (Aug. 24, 2005); Marie Price, *Task Force to Review Eminent Domain in State*, Tulsa World A15 (July 17, 2005); World Capitol Bureau, *Capitol Roundup: Bills to Protect Property Planned*, Tulsa World A9 (June 28, 2005).

241. *Allapattah Servs.*, 125 S. Ct. at 2628 (citing *Koons Buick Pontiac GMC, Inc.*, 125 S. Ct. at 463 n. 1) (Stevens, Breyer, JJ., concurring) (emphasis in original); see *supra* n. 170 and accompanying text.

righteousness, discipline, order, and well-articulated theory. [The Rehnquist era has ended] but who knows what [the new Term may bring]?<sup>242</sup>

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242. Gilmore, *supra* n. 2, at 103.



