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THE 2004-2005 SESSION

Court's Term a Turn Back to the Center

By [LINDA GREENHOUSE](#)

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WASHINGTON, July 3 - Justice Sandra Day O'Connor's unexpected retirement announcement last week shifted public attention toward her legacy and the Supreme Court's future and away from the term that just concluded. But the term - apparently not the Rehnquist Court's last, after all - contained its share of notable developments that, taken together, cast a shadow of ambiguity over Chief Justice William H. Rehnquist's legacy.

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Ten people have been mentioned as possible nominees to the

The court's federalism revolution stalled, while the revival of property rights, which appeared to be taking off not long ago, crashed and burned on a riverbank in New London, Conn.

The court displayed a growing concern about the death penalty, with the majority suggesting that lower courts had taken the Supreme Court's impatience with prolonged appeals too far toward short-circuiting defendants' rights. The justices also gave broad interpretations to three

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federal antidiscrimination laws.

Justice Stephen G. Breyer displaced Justice O'Connor at the court's center of gravity, casting the fewest dissenting votes - 10, to Justice O'Connor's 11 - in the 74 cases that were decided with full opinions.

As the Rehnquist Court ended a 19th year and appeared poised, unexpectedly, to begin a 20th, it was almost as if a constitutional centripetal force had been at work in recent years, pulling the court back toward the middle in many areas of its docket, including federalism, affirmative action, religion and abortion. The result frustrated conservatives and raised the stakes for the appointment of Justice O'Connor's successor.

The court's six discrimination cases from this past term provide an example. Three were brought under the Constitution's guarantee of equal protection, and the others required an

interpretation of three different federal statutes.

In all six cases, with Justice O'Connor in the majority in four, the court adopted a broader reading of the relevant provision, not necessarily handing victory to the particular individuals but keeping avenues of legal redress open for the future.

Beyond these case-specific trends, the voting patterns this term were unusual.

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In recent terms, the five most conservative members of the court, Chief Justice Rehnquist, Justice O'Connor, and Justices Antonin Scalia, Anthony M. Kennedy and Clarence Thomas, displayed a striking degree of cohesion. They voted together, for example, in half of the 18 5-to-4 decisions in the 2003-2004 term. In the past five terms, their alliance in the most closely divided cases ranged from a low of just over one-third of the cases in one term to a high of 70 percent of them in another.

But in the latest term, which began Oct. 4 and ended June 27, the five voted together in only 18 percent of the cases decided by five-member majorities, 4 out of 22. (Four of the 22 cases were decided by votes of 5 to 3, with the chief justice not participating.)

Although theories were available to explain votes that looked anomalous, some of the alignments turned heads. For example, Justices Scalia and Kennedy joined Justice Breyer and Justices John Paul Stevens, David H. Souter and Ruth Bader Ginsburg to reject the states' rights position in the California medical marijuana case. Justice Breyer provided the crucial fifth vote for Chief Justice Rehnquist's opinion upholding the Ten Commandments monument on the grounds of the Texas State Capitol.

In 48 split decisions this past term, Justices Ginsburg and Breyer, President Bill Clinton's two Supreme Court appointments (and the only two current justices to have been appointed by a Democratic president), were on opposite sides in 11. Justices Scalia and Thomas, who are often mistakenly viewed as ideologically inseparable, were on opposite sides in 12.

After their 11 years together, what has gotten into these nine justices?

Nelson Lund of the George Mason University School of Law, who was a law clerk for Justice O'Connor during the court's 1987 term, said in an interview that there was a tendency to blame her for outcomes that have disappointed Professor Lund's fellow conservatives. "But the easy explanations are not quite adequate," he said.

Pointing out that courts proceed incrementally, informed by precedent and by the facts of each case, Professor Lund continued: "There is a deep current of common-law thinking that pervades our legal system. Our courts rarely

make a lot of big lurches. Usually when they make a big step, it's because people didn't realize how big a step it was, and then they pull back."

Kathleen M. Sullivan, a liberal legal scholar and former dean of Stanford Law School, offered a similar observation. The court's recent behavior may be "as much psychological as jurisprudential," she said in an interview.

Professor Sullivan said some of the term's more surprising outcomes may reflect the fact that the Supreme Court, its membership stable while the lower federal courts have had considerable turnover, is now by some measures to the left of some of the federal appeals courts.

She said some justices may have been alarmed to find that the appeals courts were carrying their opinions further than intended or were applying them in unanticipated ways. This, in turn, may explain why in several decisions this year, including rulings for defendants in death penalty cases, the Supreme Court did not articulate new legal principles so much as correct what it saw as erroneous lower court opinions, a role it usually avoids. "The middle justices have seen themselves as guardians of the court's integrity even at the price of inconsistency," Professor Sullivan said.

The term was something of a triumph for Justice Stevens, the longest-serving associate justice and a vigorous 85-year-old who has no plans to retire; in fact, this week he is interviewing applicants for clerkships for the court's term that begins in October 2006.

Of his several major opinions, by far the sweetest for him must have been his majority opinion in *Gonzales v. Raich*, declaring that federal authority trumped California's medical marijuana initiative. Justice Stevens, a Republican named to the court by President Gerald Ford and now arguably the most liberal justice, has been adamant in resisting the states' rights tilt of the court in a series of federalism cases. He also wrote for the majority in the eminent domain case, *Kelo v. City of New London*, and in an important age discrimination case, *Smith v. City of Jackson*.

Justice Stevens filed one particularly notable dissenting opinion during the term, in a case that prohibited states from discriminating against out-of-state wineries. In

Justice Stevens' view, the intent of the 21st Amendment, adopted in 1933, was to give states free rein in regulating alcohol use and commerce within their borders. To support his argument, he drew on a resource no other justice had available: a memory of the repeal of Prohibition. "My understanding (and recollection) of the historical context reinforces my conviction" about the meaning of the amendment, he said.

Course corrections were made by justices across the ideological spectrum, even in areas of the docket not usually seen as lightning rods. For example, the court upheld the federal beef marketing program that finances the "Beef, it's what's for dinner" advertising campaign through assessments on cattle producers, even on those who object to paying.

A Supreme Court decision four years earlier had found that a similar program amounted to compelled speech in violation of the First Amendment. The decision used language that, if taken to a logical conclusion, suggested a new constitutional basis for attacking a range of government programs, even taxation.

So in an opinion by Justice Scalia, who had joined the earlier decision, the court tacked back, shutting the door on that First Amendment theory before it could gain momentum. Chief Justice Rehnquist also changed sides.

In the constant dynamic of stability and change inside the court, justices find different comfort levels. With Justice O'Connor's departure, change will now come, for the first time in 11 years, from outside the court as well.

Criminal Law and Sentencing

The court's continuing re-examination of the respective roles of judges and juries in criminal sentencing produced a transformation in federal guidelines.

The decision in *United States v. Booker*, No. 04-104, was really two separate 5-to-4 opinions supported by two different coalitions of justices. First, Justices Stevens, Scalia, Souter, Thomas and Ginsburg held that the federal sentencing guidelines were unconstitutional because they gave judges power that, under the Sixth Amendment's right to a trial by jury, belonged to the jurors - namely, the power to make the factual findings that determine the

sentence.

A second coalition, composed of Chief Justice Rehnquist and Justices Breyer, Kennedy, O'Connor and Ginsburg, then ruled that the problem could be fixed by making the guidelines advisory rather than mandatory, restoring to federal judges some of the discretion that Congress had taken away 21 years earlier.

In another case, the court ruled 5 to 4 that the Constitution categorically bars capital punishment for crimes committed before the age of 18. Justice Kennedy's opinion in the case, *Roper v. Simmons*, No. 03-633, overturned a 1989 precedent that had set the age at 16. The *Roper* decision also concluded that the American public, as well as the world, had turned against the death penalty for juveniles. Justices Scalia, Thomas and O'Connor dissented, along with Chief Justice Rehnquist.

For only the third time in 20 years, the court overturned a death sentence on the ground that the defendant had received a constitutionally inadequate defense. Justice Souter's 5-to-4 opinion in *Rompilla v. Beard*, No. 04-5462, was joined by Justices Stevens, Ginsburg, Breyer and O'Connor.

In *Deck v. Missouri*, No. 04-5293, the court ruled 7 to 2 that it is unconstitutional to use shackles to restrain a prisoner during a death penalty sentencing hearing unless there is a particular reason for doing so. Justice Breyer said for the majority that shackling was inherently prejudicial and required "adequate justification." Justices Thomas and Scalia dissented.

The court also ruled that in making a routine traffic stop, the police can allow a trained dog to sniff the car for drugs without the need for any particular suspicion of a narcotics violation. Justices Souter and Ginsburg dissented in the case, *Illinois v. Caballes*, No. 03-923, and the chief justice did not vote.

In *Castle Rock v. Gonzales*, No. 04-278, the court held that the police do not have a constitutional duty to enforce a court-issued domestic order of protection. The 7-to-2 decision overturned an appeals court ruling that allowed a woman to sue a Colorado police department for failing to take action after her estranged husband violated a restraining order by kidnapping their three daughters, whom

he then murdered.

The mandatory arrest language on the order could not displace the police department's ordinary exercise of discretion, the court held in an opinion by Justice Scalia, over the dissenting votes of Justices Stevens and Ginsburg.

Property Rights

In what was perhaps the term's most disputed decision, the court ruled that fostering economic development is an appropriate use of the government's power of eminent domain. The 5-to-4 decision in *Kelo v. City of New London*, No. 04-108, upheld a plan in the economically depressed Connecticut city to replace an old residential neighborhood with office space and a conference hotel. The majority opinion by Justice Stevens was joined by Justices Kennedy, Souter, Ginsburg and Breyer.

The court also unanimously upheld Hawaii's rent-control law for gasoline stations, rejecting the oil companies' argument that limiting their rate of return amounted to an unconstitutional "taking" of private property. The case was *Lingle v. Chevron U.S.A. Inc.*, No. 04-163.

Religion

Two decisions on government display of the Ten Commandments looked in opposite directions, with only Justice Breyer joining the majority in each of the 5-to-4 rulings.

In *Van Orden v. Perry*, No. 03-1500, the court found that the display of a six-foot-high Ten Commandments monument on the grounds of the Texas State Capitol did not amount to an unconstitutional "establishment" of religion. Chief Justice Rehnquist wrote the opinion, joined by Justices Breyer, Kennedy, Scalia and Thomas.

In *McCreary County v. American Civil Liberties Union*, No. 03-1693, the court held that the framed display of the Ten Commandments on the walls of two Kentucky county courthouses, although surrounded by other texts of historical interest and secular content, was unconstitutional. Justices Souter, O'Connor, Ginsburg and Stevens, along with Justice Breyer, voted in the majority.

Also, the court ruled unanimously that a new federal law, the Religious Land Use and Institutionalized Persons Act,

does not violate the separation of church and state in requiring prison officials to meet inmates' religious needs. Justice Ginsburg's opinion in *Cutter v. Wilkinson*, No. 03-9877, warned, however, that prison security remained a "compelling state interest" and that demonstrated problems in accommodating inmates' requests would be resolved in favor of prison officials.

Discrimination

The federal law that bars sex discrimination in schools and colleges also prohibits school officials from retaliating against those who bring complaints of such discrimination, the court ruled in *Jackson v. Birmingham Board of Education*, No. 02-1672. The 5-to-4 decision expanded the scope of the law known as Title IX to include protection for whistle-blowers. Justice O'Connor's majority opinion was joined by Justices Stevens, Souter, Ginsburg and Breyer.

Also, employees who sue for age discrimination do not have to prove that the discrimination was intentional, the court ruled. The 5-to-3 decision in *Smith v. City of Jackson*, No. 03-1160, applied to the Age Discrimination in Employment Act, the "disparate impact" theory of liability long familiar under the laws against race and sex discrimination. Employees need not produce a smoking gun, but can win by showing that a policy has the effect of discriminating against older workers, regardless of an employer's motivation. The dissenters were Justices Thomas, Kennedy, and O'Connor. Chief Justice Rehnquist did not participate.

In *Spector v. Norwegian Cruise Line Ltd.*, No. 03-1388, the court ruled 6 to 3 that the Americans With Disabilities Act protects the rights of passengers who sail on cruise ships that call at American ports, even ships that fly under foreign flags, as most do. However, ships will not be required to make major structural alterations. The dissenters were Justices Scalia and O'Connor and Chief Justice Rehnquist.

The court also overturned a 20-year-old murder conviction in Texas on the ground that the jury selection had been infected by racial discrimination. The 6-to-3 decision in *Miller-El v. Dretke*, No. 03-9659, was the court's second ruling on behalf of the death row inmate, Thomas Miller-El. The dissenters were Justices Thomas and Scalia and

Chief Justice Rehnquist.

In another case, the court ruled that a California prison policy that temporarily segregates new or newly transferred inmates by race, for the stated purpose of preventing gang violence, was constitutionally suspect and not entitled to the judicial deference that is usually accorded to prison administration policies. The vote in *Johnson v. California*, No. 03-636, was 5 to 3, with Chief Justice Rehnquist not participating. Justice Stevens said in his dissent that the policy was flatly unconstitutional. Justices Scalia and Thomas, dissenting on different grounds, said the court should have deferred to prison officials.

Federalism

Reasserting federal authority, the court upheld the power of Congress to prohibit and prosecute the possession and use of marijuana, even in California and the 10 other states that allowed it for medical purposes. A federal appeals court had ruled that the noncommercial cultivation and use of marijuana that did not cross state lines fell outside Congress's constitutional authority to regulate interstate commerce.

The vote in *Gonzales v. Raich*, No. 03-1454, was 6 to 3. The surprise was not that Justices Stevens, Ginsburg, Souter, and Breyer voted with the majority, but that Justices Kennedy and Scalia defected from their usual states' rights allies to vote to uphold federal power.

Rejecting state protectionism in the national wine market, the court overturned liquor laws in New York and Michigan and ruled that states that allow in-state wineries to ship directly to consumers must give the same privilege to out-of-state wineries. The vote in *Granholm v. Heald*, No. 03-1116, was 5 to 4, with Justices Kennedy, Scalia, Souter, Ginsburg and Breyer in the majority.

The court rejected a claim of federal pre-emption and allowed suits to go forward in state court claiming negligence in the design and manufacture of pesticides and herbicides. These products are regulated under a federal law, the Federal Insecticide, Fungicide and Rodenticide Act, and the Bush administration had argued that this statute, which does not allow private lawsuits in federal court, also implicitly blocked the states from opening their courts to such suits. The vote in *Bates v. Dow*

AgroSciences L.L.C., No. 03-388, was 7 to 2, with Justices Thomas and Scalia dissenting.

Immigration

The court ruled unanimously that driving under the influence of alcohol, even when serious injury results, is not a "crime of violence" for which an immigrant should face automatic deportation. Chief Justice Rehnquist wrote the opinion in *Leocal v. Ashcroft*, No. 03-583, which rejected the Bush administration's interpretation of federal immigration law.

Meanwhile, Cubans who entered the United States during the Mariel boatlift in 1980 and subsequently committed crimes cannot be subjected to open-ended detention, the court ruled in a 7-to-2 decision. Although these Cubans, as many as 1,000 of the 125,000 who arrived in the boatlift, are now deportable, Cuba will not take them back. They may not be held for more than six months without a special reason, Justice Scalia said for the court in *Clark v. Martinez*, No. 03-878. Justice Thomas and Chief Justice Rehnquist dissented.

Immigrants from Somalia may be deported despite the lack of a centrally functioning government in Somalia to receive them, the court ruled 5 to 4 in *Jama v. Immigration and Customs Enforcement*, No. 03-674. The dissenters were Justices Souter, Stevens, Ginsburg and Breyer.

Business

The court unanimously overturned the criminal conviction of the accounting firm Arthur Andersen for shredding documents related to its work for Enron as that company was collapsing in 2001. Chief Justice Rehnquist said for the majority in *Arthur Andersen v. United States*, No. 04-368, that the judge's instructions to the jury failed to require the necessary proof that the firm knew its actions were wrong. The victory came too late for Andersen, which lost its clients and its licenses and now has 200 employees, down from 28,000, wrapping up the firm's affairs.

In another unanimous opinion, the court reinstated a copyright-infringement suit by Hollywood studios and the music industry against two file-sharing services whose software enables users to download copyrighted movies and songs.

Overturing an appeals court ruling in favor of the services, Grokster and StreamCast Networks, the court held that a company shown to induce copyright infringement can be liable even if its products also have lawful uses. While sending the case, Metro-Goldwyn-Mayer Studios v. Grokster Ltd., No. 04-480, back to the lower courts, the justices made it clear that they believed the plaintiffs had presented ample evidence of inducement.

Upholding an interpretation by the Federal Communications Commission, the court ruled that cable companies do not have to allow rivals to offer high-speed Internet access over their systems. The 6-to-3 decision in National Cable & Telecommunications Association v. Brand X Internet Services, No. 04-277, was a victory for cable in the competition to provide broadband service. Justices Scalia, Souter and Ginsburg dissented.

In another case, the court ruled unanimously that federal bankruptcy law shields individual retirement accounts from creditors. The decision in Rousey v. Jacoway, No. 03-1407, extended the protection already provided to 401(k) accounts and company pension plans.

The court also raised the bar for investors bringing securities fraud cases. The mere accusation that a company's misrepresentations inflated the stock price is an insufficient basis for a suit, the court ruled unanimously in Dura Pharmaceuticals Inc. v. Broudo, No. 03-932. Instead, investors must claim at the outset that it was the artificially high stock price that actually caused their losses.

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