

# Looking Ahead to the 2005–2006 Term

*Jonathan H. Adler\**

## I. Introduction

The 2005–2006 term may be as notable for what it says about the future direction of the Supreme Court as it is for specific decisions in any particular cases. As always, there are high profile cases of doctrinal or political significance, but no genuine blockbusters—at least not yet. As has been noted before, the Court has a tendency of accepting and deciding some of the most important cases later in the term.<sup>1</sup> *Lawrence v. Texas*,<sup>2</sup> *Kelo v. City of New London*,<sup>3</sup> the Michigan affirmative action cases,<sup>4</sup> and last term’s Ten Commandments decisions<sup>5</sup> are but a few recent examples.

This is not to say the 2005–2006 term lacks important cases. Far from it. This coming year the Court will consider the constitutionality of the Solomon Amendment, address the application of the Religious Freedom Restoration Act to religious use of drugs, and determine whether the federal government can effectively preempt Oregon’s decision to legalize doctor-assisted suicide. It will revisit contemporary federalism and abortion doctrines, clarify the scope of the Racketeer

---

\*Jonathan H. Adler is associate professor of law and associate director of the Center for Business Law & Regulation at the Case Western Reserve University School of Law, where he teaches courses in environmental and constitutional law.

<sup>1</sup>See Thomas C. Goldstein, *The Upcoming 2004–2005 Term*, 2003–2004 *Cato Sup. Ct. Rev.* 493 (2004) (noting that “for several years, the most notable cases have coincidentally been selected and argued late in the term”); Michael A. Carvin, *Coming Up: October Term 2003*, 2002–2003 *Cato Sup. Ct. Rev.* 280 (2003) (“the most significant cases of a Term often include some in which the Court granted certiorari during the course of the Term”).

<sup>2</sup>539 U.S. 558 (2003).

<sup>3</sup>125 S. Ct. 2655 (2005).

<sup>4</sup>*Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>5</sup>*McCreary County v. ACLU*, 125 S. Ct. 2722 (2005); *Van Orden v. Perry*, 125 S. Ct. 2854 (2005).

Influenced and Corrupt Organizations Act (RICO), and address important questions in antitrust and criminal procedure. Nonetheless, the most striking thing about the upcoming term is that we will see a change in the Court's composition for the first time in over a decade.

Until Justice Sandra Day O'Connor announced her retirement in July, there had been no change in the Court's composition for eleven years. This is the longest period nine justices have sat together as a Court in the nation's history. Indeed, not since the 1820s, when the Court had only seven justices, has the Court gone more than six years without any turnover.<sup>6</sup> This period of continuity has had several important, if somewhat underappreciated, effects. As Thomas Merrill observed, a Court without turnover becomes a "Court in stasis" with remarkably stable institutional norms.<sup>7</sup> After years together, the justices can predict their colleagues' votes, dispositions, and inclinations—and therefore the outcomes of individual cases—with tremendous confidence.

A change in the Court's lineup, even one that does not appear to alter the ideological make-up of the Court, has the potential to disrupt this equilibrium, change institutional norms, and alter the course of existing doctrines.<sup>8</sup> Even the shuffling of seniority can have important doctrinal effects, insofar as it places the responsibility to assign cases in different hands. As a result, it may be more difficult to predict outcomes in once-predictable cases. Even routine applications or clarifications of existing precedent hold the potential to take Court decisions in a new direction. This will make the decisions in upcoming cases that much more worth court-watchers' attention.

## II. Cases On the Docket

### A. *Expressive Association and Conditional Spending*

*Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)*<sup>9</sup> is almost certainly the case of greatest interest to legal academics, in

<sup>6</sup>Paul H. Edelman & Jim Chen, *The Most Dangerous Justice Rides Again: Revisiting the Power Pageant of the Justices*, 86 *Minn. L. Rev.* 131, 134 n.12 (2001).

<sup>7</sup>Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 *St. Louis. U. L.J.* 569, 573 (2003).

<sup>8</sup>*Id.*

<sup>9</sup>No. 04-1152.

no small part because many are themselves parties to the case. *Rumsfeld v. FAIR* presents a constitutional challenge to a federal requirement that universities receiving federal funds grant the military equal access to campus recruiting opportunities. As such, it presents issues of expressive association and Congress' power to impose conditions on the receipt of federal funds.

The case arose out of the controversy over the U.S. military's "don't ask, don't tell" policy, which excludes open homosexuals from military service.<sup>10</sup> This policy is quite controversial, but has been upheld repeatedly in federal court.<sup>11</sup> Most law schools have non-discrimination policies that protect sexual preference. On this basis, many sought to deny campus access to military recruiters. Congress responded by enacting the "Solomon Amendment," a provision requiring that universities receiving federal funds provide military recruiters with access to campus and students "that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer."<sup>12</sup> Law professors around the country, as well as several law schools, formed FAIR to challenge the amendment in court.

A divided panel of the U.S. Court of Appeals for the Third Circuit found that the Solomon Amendment violated the plaintiffs' First Amendment rights of expressive association and "compel[led] them to assist in the expressive act of recruiting."<sup>13</sup> There are several reasons to doubt whether this holding will be upheld on appeal. Most importantly, the Third Circuit adopted a significantly more expansive view of the right of association than has been recognized by federal courts to date. In addition, even if the Supreme Court were sympathetic to the expressive association claim at issue, the Solomon Amendment is not more intrusive than other funding conditions previously upheld in federal court.<sup>14</sup> Add the fact that the

<sup>10</sup>10 U.S.C. § 654 bars homosexuals from military service.

<sup>11</sup>See, e.g., *Able v. United States*, 155 F.3d 628, 634–36 (2d Cir. 1998); *Philips v. Perry*, 106 F.3d 1420, 1432 (9th Cir. 1997); *Richenberg v. Perry*, 97 F.3d 256, 262, 263, 264 (8th Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915, 934 (4th Cir. 1996) (en banc).

<sup>12</sup>10 U.S.C. § 983(b)(1). The Solomon Amendment exempts institutions with "a longstanding policy of pacifism based on historical religious affiliation." 10 U.S.C. § 983(c)(2).

<sup>13</sup>*FAIR v. Rumsfeld*, 390 F.3d 219, 230 (3d Cir. 2004).

<sup>14</sup>See, e.g., *Grove City College v. Bell*, 465 U.S. 555, 563 (1984) (rejecting First Amendment challenge to conditions imposed on federal funding of educational institutions under Title IX).

Supreme Court does not have a long record of challenging military policy determinations, and that the parent universities themselves are not challenging the funding condition,<sup>15</sup> and it seems FAIR is destined to be overturned.

The Supreme Court has never recognized an absolute right to freedom of association. *Boy Scouts of America v. Dale*<sup>16</sup> and *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*<sup>17</sup> recognized a right to expressive association, but one that is more limited than FAIR's asserted expressive association claim.<sup>18</sup> *Dale*, for instance, held that governmental action violates the right of expressive association where it "affects in a significant way the group's ability to advocate public or private viewpoints."<sup>19</sup> Forcing the Boy Scouts to accept gay scoutmasters had such an effect because it restricted the Boy Scouts' ability to select their own members and leadership. Here, however, universities are not being told whom to admit or hire, or whose message to endorse. Rather they must allow the military to recruit on campus to the same degree as a multitude of other employers, representing a multitude of interests and perspectives, are so allowed. Moreover, there is no claim that universities or their faculty are in any way prevented or discouraged from criticizing the military's "don't ask, don't tell" policy by the government. The Solomon Amendment focuses solely on whether military recruiters are given "equal access" on campus. The policy does, however, effectively prevent law schools from expressing their institutional values by providing some employers—those that do not discriminate against homosexuals—preferential treatment.

If the Court were to accept FAIR's expressive association claim, its Spending Clause charge may have more force. Assuming that the federal government could not simply require all universities to

<sup>15</sup>See Andrew P. Morriss, *The Market for Legal Education & Freedom of Association: Why the "Solomon Amendment" Is Constitutional and Law Schools Aren't Expressive Associations*, Case Research Paper Series in Legal Studies No. 05-20 (August 2005), available at <http://lawwww.cwru.edu/ssrn/>.

<sup>16</sup>530 U.S. 640 (2000).

<sup>17</sup>515 U.S. 557 (1995).

<sup>18</sup>For a libertarian critique of the limited right of expressive association recognized in *Dale*, see Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. Cal. L. Rev. 119 (2000).

<sup>19</sup>*Dale*, 530 U.S. at 648.

permit military recruiting on campus,<sup>20</sup> it is not clear why the federal government should be able to leverage its substantial funding of universities, much of it for research, to overcome the First Amendment rights of universities or university faculties to control the educational environment. Conditions placed upon federal funding must “bear some relationship to the purpose of the federal spending.”<sup>21</sup> The relationship between, for example, federal funding of particle physics or medical research and military access to law school career service offices is not particularly direct, especially given that the Solomon Amendment applies to non-military funding.

The government’s strongest argument here is that the amendment enforces a non-discrimination rule, much like that contained in civil rights laws such as Title VI<sup>22</sup> and Title IX.<sup>23</sup> Such conditions, the government will claim, ensure that federal money is not used to support discriminatory activities. Whereas the civil rights laws prevent racial and gender-based discrimination, the argument goes, the Solomon Amendment bars discrimination against the military in a way that undermines Congress’ ability to “raise and support” armies.<sup>24</sup> The Court has upheld the application of such conditions to university admissions, where the expressive association claim is stronger than in *FAIR*.<sup>25</sup> A university’s expressive association interest in whom it admits, graduates, and hires is greater than a law faculty’s or affiliated law school’s interest in whom is allowed to interview students on campus. Moreover, the policy does not impose a significant burden on judicially recognized rights of expressive association because law faculties and law schools are not required to forego criticism of military policies. Thus, even if the Court does reach the conditional spending question, it seems unlikely that *FAIR* will prevail.

<sup>20</sup>This assumption has never been tested and may be questioned given the deference often shown to the military by federal courts, and in particular to Congress’ power to “raise and support” military forces. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) (“judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged”).

<sup>21</sup>*New York v. United States*, 505 U.S. 144, 167 (1992).

<sup>22</sup>42 U.S.C. §§ 2000d et seq.

<sup>23</sup>20 U.S.C. §§ 1681 et seq.

<sup>24</sup>U.S. Const. art. I, § 8, cl. 12.

<sup>25</sup>See note 14, *supra*.

*B. Drug Use and Religious Freedom*

In *Employment Division v. Smith*,<sup>26</sup> the Supreme Court held that the First Amendment's Free Exercise Clause did not prevent the State of Oregon from prohibiting the religious use of peyote.<sup>27</sup> In the process, the Court rejected the application of strict scrutiny to such free exercise claims and held there was no religious exemption to valid and neutral laws of general applicability.<sup>28</sup> Congress responded by enacting the Religious Freedom Restoration Act (RFRA), which provides that the federal government may "substantially burden a person's exercise of religion" only if the state burden serves a "compelling governmental interest" and is the "least restrictive means" of furthering that interest.<sup>29</sup>

In *Gonzales v. O Centro Espirita Beneficente Uniao*,<sup>30</sup> the Court confronts the question whether RFRA requires the federal government to permit the importation, possession, and use of hoasca, a tea containing the hallucinogen DMT, in religious ceremonies. This question divided the U.S. Court of Appeals for the Tenth Circuit, sitting en banc, which held that members of a religious group were entitled to a preliminary injunction barring federal enforcement of the Controlled Substances Act (CSA) as applied to hoasca in religious ceremonies.<sup>31</sup>

The federal government maintains that it has compelling interests in the uniform enforcement of federal drug laws and in compliance with a United Nations drug control treaty that outweigh the religious freedom claim at issue. All DMT-containing substances are listed as "schedule I"—controlled hallucinogens under the CSA, and Congress asserted that schedule I substances have "a high potential for abuse" and lack any "currently accepted medical use."<sup>32</sup> While Congress,

<sup>26</sup>494 U.S. 872 (1990).

<sup>27</sup>*Id.* at 890.

<sup>28</sup>*Id.* at 879–82 (rejecting religious exemption from valid and neutral laws of general applicability); *id.* at 886–89 (rejecting strict scrutiny).

<sup>29</sup>42 U.S.C. § 2000bb-1. As enacted by Congress, RFRA applied to all levels of government. RFRA's application to states was, however, struck down in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), for exceeding the scope of Section 5 of the Fourteenth Amendment.

<sup>30</sup>No. 04-1084.

<sup>31</sup>*O Centro Espirita Beneficente Uniao v. Ashcroft*, 389 F.3d 973, 976 (10th Cir. 2004).

<sup>32</sup>21 U.S.C. § 812 (b)(1)(A)–(C).

by enacting RFRA, clearly sought to overturn the standard set forth in *Smith*, the government asserts that RFRA was not intended to change the specific result in that case. To the contrary, Congress noted its agreement with pre-*Smith* cases, many of which upheld the application of federal drug laws to religious practices.<sup>33</sup>

In a powerful opinion below, Judge Michael McConnell argued that courts cannot simply defer to government's broad assertion of an interest in enforcing its criminal laws. Rather, he argued, RFRA requires a case-by-case evaluation of the government's interest and whether a given limitation on religious practice advances the government's interest in the least restrictive way possible.<sup>34</sup> Wrote McConnell, courts "are not free to decline to enforce [RFRA], which necessarily puts courts in the position of crafting religious exemptions to federal laws that burden religious exercise without sufficient justification."<sup>35</sup> Congress made no specific findings about the use of hoasca, so courts have less confidence that the blanket prohibition on its importation, possession, and use is the least restrictive means of fulfilling the government's interest in drug prohibition.<sup>36</sup> Given that hoasca is a substance little used outside of specific, uncommon religious ceremonies, it is also questionable whether a ruling against the government here would open the floodgates for claims of religious exemptions to the CSA. As Judge McConnell noted, it may be easier to justify a blanket prohibition on substances that are used more widely.<sup>37</sup> Moreover, a decision against the government here would not preclude Congress from amending either RFRA or the CSA to strengthen federal limitations on the religious use of schedule I drugs.

### C. Federalism and Assisted Suicide

The CSA is also front and center in this term's premier federalism case, *Gonzales v. Oregon*,<sup>38</sup> much as it was last term in *Gonzales v.*

<sup>33</sup>Brief for the Petitioners at 16–17, *Gonzales v. O Centro Espirita Beneficiente Uniao*, No. 04-1084 (U.S. filed July 2005).

<sup>34</sup>*O Centro Espirita*, 389 F.3d at 1018–31 (McConnell, J., concurring).

<sup>35</sup>*Id.* at 1020.

<sup>36</sup>Of course, the government's interest in drug prohibition is itself a question of fierce debate. See, e.g., *The Crisis in Drug Prohibition* (David Boaz ed., 1990).

<sup>37</sup>*O Centro Espirita*, 389 F.3d at 1022–23 (McConnell, J., concurring).

<sup>38</sup>No. 04-623.

*Raich*.<sup>39</sup> Whereas *Raich* focused on California's decision to legalize the medical use and possession of marijuana, *Oregon* concerns the Oregon Death with Dignity Act, a state law twice-approved by Oregon voters that legalizes doctor-assisted suicide.<sup>40</sup> While the issue in *Raich* was the pure constitutional issue of whether federal Commerce Clause authority could reach non-commercial marijuana possession and use for medicinal purposes where authorized by state law, *Oregon* presents a narrower issue of statutory construction.<sup>41</sup> Under current Commerce Clause doctrine, there is little question that Congress *could* prohibit doctors from prescribing drugs to help their patients kill themselves, yet it has never done so in explicit terms.<sup>42</sup> Therefore, the question in *Oregon* is whether an administrative official, in this case the attorney general, can interpret the CSA to achieve the same result absent clear congressional assent.

The CSA erects a comprehensive regulatory scheme covering the manufacture, distribution, and sale of controlled substances. In order to prevent drug trafficking and abuse, it prohibits the dispensing of regulated drugs without a federal registration. Registered doctors are further required to dispense controlled substances only "in the course of professional practice or research."<sup>43</sup> In addition, longstanding federal regulations implementing the CSA require that drug prescriptions "be issued for a legitimate medical purpose."<sup>44</sup> In 2001, then-Attorney General John Ashcroft issued an interpretive rule declaring that assisting suicide is "not a 'legitimate medical purpose,'" even if authorized under state law.<sup>45</sup> In effect, the Ashcroft

<sup>39</sup>125 S. Ct. 2195 (2005) (Commerce Clause challenge to federal regulation of medical marijuana use and possession authorized by state law).

<sup>40</sup>Or. Rev. Stat. §§ 127.800–127.995.

<sup>41</sup>Compare Petition for Certiorari at (I), *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) (No. 03-1454) (U.S. filed August 2004) (question presented), with Petition for Certiorari at (I), *Gonzales v. Oregon*, No. 04-623 (U.S. filed May 2005) (question presented).

<sup>42</sup>Of course, current Commerce Clause doctrine has departed from the original meaning of the clause. See, e.g., Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847 (2003); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387 (1987).

<sup>43</sup>21 U.S.C. § 802(21).

<sup>44</sup>21 C.F.R. § 1306.04(a).

<sup>45</sup>66 Fed. Reg. 56,607 (November 9, 2001).



directive preempted Oregon's decision to authorize doctors to write prescriptions for the purpose of assisting suicides.

Oregon successfully challenged this directive before the U.S. Court of Appeals for the Ninth Circuit, which found that the rule exceeded the scope of federal authority under the CSA.<sup>46</sup> The key legal issue is not the federal government's constitutional authority, but the extent to which the CSA authorizes administrative action that displaces state authority in areas traditionally left under state control, such as the practice of medicine. In 1991, the Supreme Court held that federal statutes should not be interpreted to displace state authority unless Congress' authorization for such action is "unmistakably clear."<sup>47</sup> On this basis, the Court has refused to defer to an agency interpretation of federal law intruding on traditional state authority.<sup>48</sup>

Weighed against these arguments is the federal government's assertion that the CSA creates a comprehensive and *uniform* regulatory scheme that already confines medical authority to prescribe drugs and is administered by the Department of Justice.<sup>49</sup> According to the federal government, allowing Oregon doctors to prescribe federally controlled substances to assist suicides threatens the uniformity of the federal scheme. In addition, there is ample authority to support the Justice Department's claim that assisting suicide has rarely, if ever, been considered a "legitimate medical purpose" by medical authorities.<sup>50</sup> Although Oregon doctors may have more difficulty assisting suicide if they cannot prescribe drugs regulated by the CSA, the federal government further argues it is not preempting state action, as other means of doctor-assisted suicide (however impractical) remain legal under Oregon law.<sup>51</sup>

Although the *Oregon* case turns on the questions of statutory interpretation, it is an important federalism case. As the breadth of the government's asserted regulatory authority under the CSA and

<sup>46</sup>368 F.3d 1118 (9th Cir. 2004).

<sup>47</sup>*Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991) (internal quotation omitted).

<sup>48</sup>See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

<sup>49</sup>See Brief for the Petitioners at 24–37, *Gonzales v. Oregon*, No. 04-623 (U.S. filed May 2005).

<sup>50</sup>*Id.* at 21–24.

<sup>51</sup>*Id.* at 13–14.

other comprehensive regulatory statutes illustrates, a Court ruling addressing federal agencies' authority to preclude state choices will have significant ramifications. If courts are to give Congress a wide berth in determining the proper exercise of federal power—as the *Raich* decision suggests<sup>52</sup>—clear statement rules are particularly important. If the primary limitation on federal power is to come through the political process, then it is that much more important that Congress be required to go on record when federal law will contravene the policy choices citizens make in their respective states.

#### D. State Sovereign Immunity

The contours of state sovereign immunity may be clarified by two additional federalism cases this term. In *Central Virginia Community College v. Katz*,<sup>53</sup> the Court will consider whether Congress may abrogate state sovereign immunity pursuant to the Bankruptcy Clause. The U.S. Court of Appeals for the Sixth Circuit held Congress may do so because the Bankruptcy Clause explicitly empowers Congress to enact “uniform Laws on the subject of Bankruptcies throughout the United States.”<sup>54</sup> In *Seminole Tribe v. Florida*,<sup>55</sup> *Board of Trustees v. Garrett*,<sup>56</sup> and other cases, however, the Court suggested Congress can never abrogate state sovereign immunity when acting pursuant to the powers enumerated in Article I, Section 8.<sup>57</sup> The Court has accepted certiorari on this question before, only to dispose of the case on jurisdictional grounds.<sup>58</sup> In *Central Virginia*, the Court may finally determine whether states may be subject to suit for money damages under the Bankruptcy Clause, or whether Congress is wholly precluded from abrogating state sovereign immunity other than through the Fourteenth Amendment.

<sup>52</sup>See, e.g., Jonathan H. Adler, *Federalism Up in Smoke?*, National Review Online, June 7, 2005, available at <http://www.nationalreview.com/adler/adler200506070921.asp>.

<sup>53</sup>No. 04-885.

<sup>54</sup>U.S. Const. art. I, § 8, cl. 4; *In re Hood*, 319 F.3d 755 (6th Cir. 2003).

<sup>55</sup>517 U.S. 44 (1996).

<sup>56</sup>531 U.S. 356, 364 (2001).

<sup>57</sup>*Seminole Tribe*, 517 U.S. at 73 (“Article I cannot be used to circumvent the constitutional limits placed upon federal jurisdiction.”); *Garrett*, 531 U.S. at 364 (“Congress may not . . . base its abrogation of the States’ Eleventh Amendment immunity upon the powers enumerated in Article I.”).

<sup>58</sup>*Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004).

A second sovereign immunity case in which certiorari was granted requires the Court to revisit the precise scope of abrogation under Title II of the Americans with Disabilities Act (ADA).<sup>59</sup> In 2001, the Court held that Congress did not validly abrogate state sovereign immunity under Title I of the ADA.<sup>60</sup> In 2004, however, the Court upheld the abrogation of state sovereign immunity under Title II of the ADA with respect to “the class of cases implicating the accessibility of judicial services” in *Tennessee v. Lane*.<sup>61</sup> The *Lane* holding was limited, however, in that it did not uphold Title II of the ADA “as an undifferentiated whole.”<sup>62</sup> Whereas the government sought to uphold the ADA as equal protection legislation, the Court stressed that the case implicated the “fundamental right of access to the courts” and not just discrimination against the disabled.<sup>63</sup> In this way, *Lane* muddied the waters of the Court’s sovereign immunity jurisprudence.

In *United States v. Georgia* (consolidated with *Goodman v. Georgia*),<sup>64</sup> the Court may restore some clarity as it considers whether Title II of the ADA abrogates state sovereign immunity in suits by disabled prisoners challenging discrimination by state-operated prisons. The federal government seeks a ruling that Title II abrogates state sovereign immunity across the board.<sup>65</sup> Barring such a broad ruling, the federal government seeks recognition that the poor prison conditions alleged implicate fundamental constitutional rights, such as those protected by the Fifth, Sixth, and Eighth Amendments, that Congress may protect through its Section 5 power, just as the lack of court access allowed for abrogation in *Lane*.<sup>66</sup> Georgia, on the other hand, will argue that the scope of Title II is far broader than necessary to address any constitutional concerns and is therefore not the sort of congruent and proportional remedy authorized by Section 5.

<sup>59</sup>42 U.S.C. §§ 21131 et seq.

<sup>60</sup>Garrett, 531 U.S. at 374.

<sup>61</sup>541 U.S. 509, 531 (2004).

<sup>62</sup>*Id.* at 530.

<sup>63</sup>*Id.* at 533–34. For more on the *Lane* ruling, see Robert A. Levy, *Tennessee v. Lane: How Illegitimate Power Negated Non-Existent Immunity*, 2003–2004 *Cato Sup. Ct. Rev.* 161, 164–68 (2004).

<sup>64</sup>Nos. 04-1203 and 04-1236.

<sup>65</sup>Petition for a Writ of Certiorari at 12 n.6, *United States v. Georgia*, No. 04-1203 (U.S. filed March 2005).

<sup>66</sup>*Id.* at 14–15.

Moreover, whereas the federal government will seek to frame the issue as one concerning a broad “class of cases,”<sup>67</sup> Georgia will seek to focus on the specific claims at issue in this specific case and argue that prison conditions for the disabled do not implicate constitutional rights protected by the Fourteenth Amendment. As in *Central Virginia*, the outcome may indicate whether the Court intends to stand by its decisions upholding state sovereign immunity.

#### E. Abortion

The Court wades into the unending controversy over abortion once again in *Ayotte v. Planned Parenthood of Northern New England*.<sup>68</sup> The U.S. Court of Appeals for the First Circuit struck down the New Hampshire Parental Notification Prior to Abortion Act<sup>69</sup> on the grounds that it lacked an explicit health exception and its life exception was drawn too narrowly.<sup>70</sup> While the statute lacks explicit language allowing a doctor to perform an abortion where necessary to protect a minor’s health, New Hampshire argued that the statute’s judicial bypass provision provides an equivalent safeguard. The First Circuit rejected this argument on the ground that the time required for a minor to avail herself of the judicial bypass, even if only a few days, could place an undue burden on her ability to obtain an abortion and, in a non-trivial number of cases, may increase risks to the minor’s health.<sup>71</sup>

Also at issue in *Ayotte* is the proper standard of review in abortion cases. Under *United States v. Salerno*,<sup>72</sup> courts confronted with a facial challenge to a validly enacted statute must uphold the law unless there is “no set of circumstances” under which it could be constitutional.<sup>73</sup> In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>74</sup>

<sup>67</sup>*Id.* at 15 (“[T]he court of appeals here should have assessed Title II’s constitutionality as applied to the entire ‘class of cases’ . . . implicating, in this Court’s words, ‘the administration of . . . the penal system.’”).

<sup>68</sup>No. 04-1144.

<sup>69</sup>N.H. Rev. Stat. Ann. §§ 132:24–28 (2003).

<sup>70</sup>*Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53, 62 (1st Cir. 2004).

<sup>71</sup>*Id.*

<sup>72</sup>481 U.S. 739 (1987).

<sup>73</sup>*Id.* at 745. First Amendment challenges to speech restrictions are an obvious exception to this rule.

<sup>74</sup>505 U.S. 833 (1992).

however, the Court seemed to adopt a different standard for abortion cases, holding that any law that has “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus” imposes an “undue burden” on a woman’s right to an abortion, and is therefore unconstitutional.<sup>75</sup> The First Circuit adopted this approach in considering the New Hampshire law, following the approach adopted in most circuits.<sup>76</sup> Of those to consider the question, only the Fifth Circuit has held that the *Salerno* “no set of circumstances” test survives *Casey* in the abortion context.<sup>77</sup>

The Court is also likely to reconsider the constitutional protection of partial-birth abortion. In *Stenberg v. Carhart*,<sup>78</sup> the Court narrowly struck down Nebraska’s ban on the dilation and extraction method of abortion, commonly known as “D&X” or “partial-birth abortion.”<sup>79</sup> Among other reasons, the Court held the law unconstitutional because it failed to include an exception for cases in which the procedure was necessary to preserve the health of the mother.<sup>80</sup> In response to *Stenberg*, Congress enacted a federal ban on partial-birth abortion.<sup>81</sup> Like the Nebraska law, the federal act contains a life exception, but no health exception.<sup>82</sup> Unlike the Nebraska law, it also includes express congressional findings that partial-birth abortion is “never medically necessary” and that the procedure itself can pose a risk to the mother’s health.<sup>83</sup>

<sup>75</sup>*Id.* at 877.

<sup>76</sup>See, e.g., *Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127, 142–43 (3d Cir. 2000); *Planned Parenthood of Southern Arizona v. Lawall*, 180 F.3d 1022, 1025–26 (9th Cir. 1999), amended on denial of rehearing, 193 F.3d 1042 (9th Cir. 1999); *Women’s Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 193–96 (6th Cir. 1997); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456–58 (8th Cir. 1995).

<sup>77</sup>See *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096, 1102–03 (5th Cir. 1997); *Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir. 1992). Cf. *A Woman’s Choice-East Side Women’s Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002) (attempting to reconcile the apparent conflict between *Salerno* and *Casey*).

<sup>78</sup>530 U.S. 914 (2000).

<sup>79</sup>*Id.* at 945–46.

<sup>80</sup>*Id.* at 938.

<sup>81</sup>Pub. L. No. 108-105, 117 Stat. 1201 (2003), codified at 18 U.S.C. § 1531.

<sup>82</sup>18 U.S.C. § 1531(a).

<sup>83</sup>Pub. L. No. 108-105, § 2, 117 Stat. 1201.

Despite these findings, the U.S. Court of Appeals for the Eighth Circuit struck down the law earlier this year.<sup>84</sup> It held that *Stenberg* established a per se constitutional rule that all abortion restrictions must contain a health exception, even if the legislature believes that a given procedure is never necessary to protect the mother's health. As of this writing, a petition for certiorari is likely, and the Court typically agrees to review lower court decisions striking down federal statutes. As Justice O'Connor provided the fifth vote to strike down the Nebraska statute in *Stenberg*, this is one area in which the impact of her departure from the Court may be seen immediately.

#### F. Civil RICO

In a 1989 speech at a Cato Institute conference, Judge David Sentelle famously remarked that RICO—the Racketeer Influenced and Corrupt Organizations Act—was “the monster that ate jurisprudence.”<sup>85</sup> Although written to combat organized crime, the statute's civil and criminal provisions have become powerful weapons against all manner of targets, expanding the scope and severity of federal criminal law. In the coming term, the Supreme Court may determine whether the beast's size, and appetite, will continue to grow in the civil context.

The 2005–2006 term includes round three of perhaps the most infamous civil RICO case of all time, *Scheidler v. National Organization for Women*. Nearly two decades ago, the National Organization for Women (NOW) and a nationwide class of abortion clinics sued abortion protesters under RICO's civil provisions. NOW and its co-plaintiffs averred that abortion protests including blockades of clinic entrances amounted to a “pattern” of “racketeering activity,” including the RICO predicate offense of “extortion” under the federal Hobbs Act,<sup>86</sup> entitling the plaintiffs to substantial monetary relief. In 1994, the Supreme Court held that RICO did not require that the alleged “racketeering activity” have an economic motive, allowing the case to proceed to trial.<sup>87</sup> After an extensive trial, which resulted

<sup>84</sup>Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005).

<sup>85</sup>David B. Sentelle, RICO: The Monster that Ate Jurisprudence, Remarks at the Cato Institute Conference: RICO, Rights & the Constitution (Oct. 18, 1989) (copy on file with author).

<sup>86</sup>18 U.S.C. § 1951.

<sup>87</sup>National Organization for Women v. Scheidler, 510 U.S. 249 (1994) (Scheidler I).

in a nationwide injunction against abortion clinic blockades and a verdict for the plaintiffs, the Supreme Court overturned the verdict, holding that the abortion protesters' actions did not constitute "extortion" under the Hobbs Act because they had not wrongfully "obtained" any "property."<sup>88</sup>

Now the *Scheidler* case is back again, after the U.S. Court of Appeals for the Seventh Circuit held that a small portion of NOW's original case—that involving four of the 121 alleged predicate acts—survived *Scheidler II* because it was not included in the previous grant of certiorari.<sup>89</sup> Petitioners in *Scheidler III* claim that the Seventh Circuit's order was explicitly precluded by *Scheidler II* and would be happy with a summary reversal. Yet the cert. grant includes two additional questions that may catch the Court's attention: (1) whether the Hobbs Act criminalizes acts or threats of physical violence that are unconnected to either extortion or robbery as the Seventh Circuit suggested (though did not decide) and (2) whether injunctive relief is available in a private civil action under RICO for treble damages.<sup>90</sup>

The first question is interesting insofar as it induces the Court to consider the scope of federal criminal law. If the Hobbs Act were to extend to all acts or threats of violence that obstruct or affect commerce in some way, it would become an incredibly sweeping federal criminal statute. It would also bring all manner of local violent crimes within RICO's reach as potential predicate acts. The Court may avoid this question, however, on the ground that the Seventh Circuit's order did not squarely present the issue. The second question was before the Court in *Scheidler II*, but was never reached because the Court reversed the underlying judgment. As a consequence, this case provides the Court with another opportunity to consider whether RICO allows private litigants to seek equitable relief to enjoin criminal acts.

A second RICO case, *Bank of China v. NBM LLC*,<sup>91</sup> presents the question whether a civil RICO plaintiff alleging mail, wire, or bank

<sup>88</sup>*Scheidler v. National Organization for Women*, 537 U.S. 393 (2003) (*Scheidler II*).

<sup>89</sup>*National Organization for Women v. Scheidler*, 91 Fed. Appx. 510 (7th Cir. 2004) (unpublished order), petition for reh'g en banc denied, 396 F.3d 807 (7th Cir. 2005).

<sup>90</sup>See, e.g., Petition for Certiorari at (i), *Scheidler v. National Organization for Women*, No. 04-1244 (U.S. filed March, 16, 2005) (question presented).

<sup>91</sup>No. 03-1559.

fraud as a predicate act must demonstrate “reasonable reliance.” The U.S. Court of Appeals for the Second Circuit held that unless there was reliance upon the alleged fraud, a civil RICO plaintiff cannot show that the alleged fraud was the “proximate cause” of the alleged injury.<sup>92</sup> The petitioners argue that such a showing is not required under the text of the statute, which requires that the alleged fraud be the “reason” for the plaintiff’s injury, whereas the respondents argue that fraud cannot be the cause of a given injury unless there was reliance by someone. Although the Justice Department often argues for a more expansive interpretation of the RICO statute,<sup>93</sup> the solicitor general’s office sided with the respondent in *Bank of China*, defending the Second Circuit’s holding and opposing the grant of certiorari.<sup>94</sup>

Over the summer, the Justice Department petitioned for certiorari in a third civil RICO case that the Court may be likely to grant, *United States v. Philip Morris USA*.<sup>95</sup> In 1999, the federal government filed suit against the tobacco industry alleging the industry engaged in a criminal enterprise to cover up the health risks of smoking. Among other things, the Justice Department sought equitable relief under 18 U.S.C. § 1964(a), which authorizes federal courts to fashion injunctive relief “to prevent and restrain” RICO violations. As part of the requested relief, the Justice Department sought disgorgement of all proceeds obtained through RICO violations, an estimated \$280 billion—an amount greater than the tobacco companies’ combined net worth.<sup>96</sup>

On an interlocutory appeal, a divided panel of the U.S. Court of Appeals for the D.C. Circuit held that section 1964(a) is limited to “forward-looking remedies” that actually “prevent and restrain” future RICO violations. Because disgorgement is, by its very nature, “a remedy aimed at past violations,” the majority held, it “does not so prevent or restrain.”<sup>97</sup> The D.C. Circuit rejected both the federal

<sup>92</sup>359 F.3d 171, 176 (2d Cir. 2004).

<sup>93</sup>See *infra* notes 96–98 and accompanying text.

<sup>94</sup>Brief for the United States as Amicus Curiae, *Bank of China v. NMB LLC*, No. 03-1559 (U.S. filed May 2005).

<sup>95</sup>No. 05-92.

<sup>96</sup>See, e.g., *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1193 (D.C. Cir. 2005).

<sup>97</sup>*Id.* at 1192.



government's aggressive interpretation of the RICO statute, as well as the interpretation of the U.S. Court of Appeals for the Second Circuit, which had previously held that section 1964(a) allows the government to seek disgorgement of those proceeds that "are being used to fund or promote the illegal conduct, or constitute capital available for that purpose."<sup>98</sup> The resulting circuit split increases the likelihood that the Supreme Court will grant certiorari, even though a refusal to hear the case virtually guarantees a settlement between the industry and federal government.

RICO is already an exceedingly broad statute. This case threatens to broaden it even further. The federal government has ample authority under RICO to seek disgorgement or other punitive sanctions through its criminal provisions. Proceeding under those provisions, however, requires the government to abide by costly procedural safeguards that attend to a criminal prosecution, not the least of which is the government's higher burden of proof. By pursuing this case under RICO's civil provisions, however, the government gets to take advantage of a lower burden of proof—"preponderance of evidence" instead of "beyond a reasonable doubt"—even though it seeks what amounts to a criminal remedy. Were the Court to uphold this tactic, it would greatly increase the pressure the federal government could bring in civil RICO cases against all manner of defendants and make RICO an even bigger monster than it already is.

### *G. Criminal Procedure*

If a man's home is his castle, may his wife consent to a police search of the premises over his objection? When the police arrived at the Randolph household on July 6, 2001 in response to a domestic call, they asked Scott Randolph for permission to search the house for drugs. He refused. The police then turned to his wife, Janet Randolph, who had made the initial police call. Not only did Janet consent, she led the police into the home to a room containing drug paraphernalia. A subsequent search of the premises uncovered twenty-five drug-related items.<sup>99</sup>

The trial court denied Scott Randolph's effort to suppress the evidence, on the ground that his wife had "common authority" to

<sup>98</sup>United States v. Carson, 52 F.3d 1173, 1182 (2d Cir. 1995).

<sup>99</sup>See Randolph v. State, 590 S.E.2d 834, 835 (Ga. Ct. App. 2004) (summarizing facts).

consent to a police search of the marital home. The Supreme Court of Georgia disagreed.<sup>100</sup> Had Scott not been present, however, the search would have been upheld. Under *United States v. Matlock*,<sup>101</sup> the police may obtain consent to a search from a third party who has “common authority over or other sufficient relationship to the premises or effects sought to be inspected.”<sup>102</sup> As generally understood, if a reasonable police officer would believe that the consenting party has authority over the premises, the search is permissible. *Georgia v. Randolph*<sup>103</sup> presents a related question: whether such consent can be given over the present objection of the criminal suspect who himself has common authority over the premises to be searched?

Were the question simply a matter of property law, and who has actual authority to consent to a search of the premises, the police would have a strong case. If, on the other hand, what matters is whether a reasonable police officer would believe there is actual consent—in a sense, whether one occupant is speaking for the household—*Randolph* presents a trickier question. There is no reason for police to assume that one occupant speaks for the other when he is objecting then and there. A homeowner may assume the risk that another occupant may vicariously consent to a search when the owner is away, but that assumption cannot be made when the owner is present and objecting. Georgia claims the defense seeks a rule under which the validity of a search is contingent upon the police’s timing, as there would have been no problem if the police had asked Janet Randolph to search the house before Scott came home, or after he left.<sup>104</sup> According to the state, such a rule would focus “arbitrarily on the rights of the objecting occupant, to the detriment of the consenting occupant . . . who ha[s] just as much access and control over the home.”<sup>105</sup> Perhaps so, but in *Randolph* and similar cases,

<sup>100</sup>604 S.E.2d 835 (Ga. 2004).

<sup>101</sup>415 U.S. 164 (1974).

<sup>102</sup>*Id.* at 171.

<sup>103</sup>No. 04-1067.

<sup>104</sup>See Petition for a Writ of Certiorari, *Georgia v. Randolph*, No. 04-1067, 2005 WL 309364 (U.S. filed Feb. 4, 2005).

<sup>105</sup>*Id.*

it is the objecting occupant's Fourth Amendment rights that are at issue.

In *Wilson v. Arkansas*,<sup>106</sup> the Court held the Fourth Amendment requires police to “knock and announce” before entering a home, absent exigent circumstances.<sup>107</sup> *Hudson v. Michigan*<sup>108</sup> presents the question left unanswered in *Wilson*: whether evidence obtained after a “knock and announce” violation is subject to the exclusionary rule, or whether, as the Michigan Supreme Court has held, “suppression of evidence is not the appropriate remedy” for such violations.<sup>109</sup>

Ultimately at issue in *Hudson* is whether “knock and announce” violations are to have any meaningful remedy at all. Whereas evidence obtained after a Fourth Amendment violation is typically excluded from trial, prosecutors may seek to have evidence admitted that would have been “inevitably discovered” had the police complied with relevant constitutional requirements.<sup>110</sup> The doctrine does not excuse the police from obtaining a warrant, however, as such a rule would effectively make warrants irrelevant to evidentiary admissibility. In a sense, the doctrine operates to put the police, and the defendant, in the same position as if the constitutional violation, and accompanying search, had never occurred. If the evidence would have been discovered *independently* of the violation, it gets in; otherwise it's suppressed.

In *Hudson*, the government maintained that evidence uncovered during the search of Hudson's home would have been inevitably discovered because the police had a valid warrant, even if they did not “knock and announce” before they entered the home.<sup>111</sup> If accepted by the Court, this reasoning has the potential to expand

<sup>106</sup>514 U.S. 927 (1995).

<sup>107</sup>*Id.* at 936–37.

<sup>108</sup>No. 04-1360.

<sup>109</sup>See *People v. Hudson*, No. 246403, 2004 WL 1366947 (Mich. Ct. App. June 17, 2004) (unpublished order) (citing *People v. Vasquez*, 602 N.W.2d 376 (Mich. 1999), and *People v. Stevens*, 597 N.W.2d 53 (Mich. 1999)), appeal denied, 692 N.W.2d 385 (Mich. 2005). See also *People v. Hudson*, No. 230594 (Mich. Ct. App. May 1, 2001) (unpublished order) (same).

<sup>110</sup>See *Nix v. Williams*, 467 U.S. 431, 448 (1984) (“when, as here, the evidence in question would inevitably have been discovered without reference to the police error or misconduct . . . the evidence is admissible”).

<sup>111</sup>See Answer of Respondent, *Hudson v. Michigan*, No. 04-1360 (U.S. filed April 13, 2005).

the “inevitable discovery” doctrine. Just as applying inevitable discovery to the warrant requirement itself could eliminate the incentive to obtain a valid warrant, civil liberties advocates worry that an inevitable discovery rule could eviscerate the “knock and announce” requirement. It is one thing to allow police to show why “knock and announce” was inappropriate in a given case, perhaps because a suspect would have fled or destroyed evidence. It is quite another to hold, as has the Michigan Supreme Court, that the inevitable discovery doctrine creates an across-the-board exception to the exclusionary rule for “knock and announce” violations.<sup>112</sup>

Turning to the Fifth Amendment, in *Maryland v. Blake*<sup>113</sup> the Court will consider the circumstances under which a court will presume a criminal suspect voluntarily initiated communication with the police after initially invoking his right to counsel. As every American—or at least every American who watches cop shows on television—knows, criminal suspects must be informed of their *Miranda* rights, including the right to refuse to answer police questions without the presence of an attorney, and must also voluntarily waive such rights before the police may interrogate them.<sup>114</sup> Any statement made to the police absent such a waiver is inadmissible in court.

To address concerns that police might badger criminal suspects into waiving their *Miranda* rights before the arrival of counsel, the Court subsequently held that the simple reiteration of the *Miranda* warning provides insufficient evidence that subsequent statements to police made without counsel are voluntary and therefore admissible in court.<sup>115</sup> While a suspect may, of his own volition, re-initiate communication with the police, once the right to counsel is invoked, police must refrain from any conduct that could resemble interrogation. The question in *Blake* is whether curative measures, other than a break in custody or significant lapse in time, can neutralize the harm of improper questioning and render subsequent statements made without the presence of counsel admissible. Rather than a strong presumption that subsequent uncounseled statements were

<sup>112</sup>See *supra* note 109.

<sup>113</sup>No. 04-373.

<sup>114</sup>See *Dickerson v. United States*, 530 U.S. 428 (2000); *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>115</sup>*Edwards v. Arizona*, 451 U.S. 477, 487 (1981).

involuntary, Maryland (and the federal government) urge a more flexible inquiry into whether other curative measures sufficiently reduce the risk of badgering or subtle coercion to make a suspect's statements admissible.<sup>116</sup>

#### *H. Freedom of Speech*

Two cases this term probe the proper standard for evaluating the constitutionality of alleged government retaliation for protected speech. The first case, *Hartman v. Moore*,<sup>117</sup> pits the constitutional values of separation of powers and the First Amendment against each other. In the decision under review, the U.S. Court of Appeals for the D.C. Circuit broke ranks with several other circuits to hold that law enforcement agents may be liable for retaliatory prosecution in violation of the First Amendment even if the prosecution was supported by probable cause.<sup>118</sup> Once a plaintiff can show that his protected speech—in this case, criticism of the U.S. Postal Service and related political activities—was the motivating factor in the government's decision to press charges, the D.C. Circuit held that the burden shifts to the government officials to demonstrate that they would have pursued the case anyway, reasoning that probable cause “usually represents only one factor among many in the decision to prosecute.”<sup>119</sup> While probable cause is all that is necessary to support a prosecution, and courts should not lightly intrude upon prosecutorial discretion, the D.C. Circuit refused to preclude liability “in those rare cases where strong motive evidence combines with weak probable cause,” reasoning that such circumstances allow a court to conclude that an individual had been prosecuted in retaliation for exercising constitutionally protected rights.<sup>120</sup> Yet, allowing this ruling to stand, the federal government maintains, could chill legitimate law enforcement actions against politically vocal individuals

<sup>116</sup>See Brief for Petitioner at 18–25, *Maryland v. Blake*, No. 04-373 (U.S. filed Jun. 9, 2005); Brief for the United States as Amicus Curiae Supporting Petitioner at 15–20, *Maryland v. Blake*, No. 04-373 (U.S. filed Jun. 9, 2005).

<sup>117</sup>No. 04-1495.

<sup>118</sup>*Moore v. Hartman*, 388 F.3d 871 (D.C. Cir. 2004).

<sup>119</sup>*Id.* at 878.

<sup>120</sup>*Id.* at 881.

and encourage excessive judicial investigation of executive branch decisionmaking at the expense of executive discretion.<sup>121</sup>

In *Garcetti v. Ceballos*,<sup>122</sup> the Court will reconsider the extent to which a public employee's job-related speech is protected by the First Amendment. Under *Pickering v. Board of Education*,<sup>123</sup> a court must balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>124</sup> Where a public employee is sanctioned for speech that is not part of her job, such as writing a letter to the editor critical of a government policy, the speech is clearly protected. Yet, where a government employee is speaking as part of her job responsibilities, the extent of First Amendment protection is less clear.

In *Garcetti*, a local prosecutor claims he was subject to adverse employment actions because he authored a memorandum questioning the veracity of a prosecution witness and was subsequently called to testify for the defense. The U.S. Court of Appeals for the Ninth Circuit held that the memorandum was protected speech because it addressed a matter of public concern, outweighing the government's interest as an employer.<sup>125</sup> Therefore the retaliation, if proven, could violate the prosecutor's First Amendment rights. Were this speech not protected, the court held, government employees could be sanctioned for exposing government malfeasance.<sup>126</sup> The government, for its part, maintains that the prosecutor's memo was not protected by the First Amendment, as it was merely one of his job-related duties and did not contain speech made "as a citizen," as opposed to as a government employee. Freedom of expression is a personal right, and "when a public employee speaks in carrying out his job duties, he has no personal interest in the speech."<sup>127</sup>

<sup>121</sup>See Petition for a Writ of Certiorari at 19–22, *Hartman v. Moore*, No. 04-1495 (U.S. filed May 2005).

<sup>122</sup>No. 04-473.

<sup>123</sup>391 U.S. 563 (1968).

<sup>124</sup>*Id.* at 568.

<sup>125</sup>*Ceballos v. Garcetti*, 361 F.3d 1168, 1180 (9th Cir. 2004).

<sup>126</sup>*Id.* at 1176.

<sup>127</sup>Brief for the United States as Amicus Curiae Supporting Petitioners at 9, *Garcetti v. Ceballos*, No. 04-473 (U.S. filed May 2005).

The government's position, in effect, is that any protection for such speech must come from whistleblower protection statutes, and the like, rather than from the Constitution. To paraphrase Justice Oliver Wendell Holmes, a government employee may have right to free speech, but he does not have a right to a job.<sup>128</sup>

### I. Antitrust

A trio of antitrust cases this term provides the Court with the opportunity to clarify and modernize the law governing competition. In each case, interestingly enough, the federal government is on the side of the petitioner, urging the Court to overturn outdated precedent, eschew formalist rules that ignore efficiency gains from what might otherwise appear to be anticompetitive conduct, and clarify the scope of antitrust scrutiny. Together, the three cases should continue the trend of rationalizing antitrust law and lessening its potential to impede business innovation and entrepreneurial activity.

Leading the pack is *Illinois Tool Works v. Independent Ink*,<sup>129</sup> a direct challenge to a long-standing, if outmoded, Supreme Court precedent concerning the legality of selling patented or copyrighted products subject to tying arrangements.<sup>130</sup> Illinois Tool Works (ITW) manufactures patented ink jet printheads used for printing barcodes and carton labels. ITW markets the printheads in conjunction with its own unpatented inks. Buyers of ITW printheads are contractually obligated to purchase ITW-supplied ink as well. Independent Ink, an ink manufacturer, alleged ITW committed a Sherman Act violation by tying the printhead and ink sales in this manner. According to Independent, ITW had market power, as a matter of law under existing precedent, due to its printhead patent.<sup>131</sup>

<sup>128</sup>*McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892) (Holmes, J.) (a policeman “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman”).

<sup>129</sup>No. 04-1329.

<sup>130</sup>“A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product . . .” *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451, 461 (1992) (internal quotation omitted).

<sup>131</sup>*Independent Ink, Inc. v. Illinois Tool Works, Inc.*, 396 F.3d 1342, 1344–45 (Fed. Cir. 2005) (summarizing facts).

For over four decades, an antitrust defendant who holds a patent or copyright to a product has been presumed to have market power, making the tying arrangement illegal under section 1 of the Sherman Act.<sup>132</sup> In *United States v. Loew's, Inc.*,<sup>133</sup> the Supreme Court adopted a virtual per se rule against tying arrangements involving patented or copyrighted products. Such arrangements are subject to antitrust scrutiny where the seller has “market power”—the power to charge prices above competitive levels or otherwise force purchasers to do something they would not do in a competitive market. In *Loew's* the Court held that “[t]he requisite economic power is presumed when the tying product is patented or copyrighted.”<sup>134</sup> The Court’s assumption in *Loew's* was that the existence of a patent or copyright was itself evidence of market power, owing to the “uniqueness” or “distinctiveness” necessary to patent or copyright the product in question.<sup>135</sup> Antitrust jurisprudence at the time was highly suspicious of *any* tying arrangements whatsoever, and the law and economics scholarship on the potential efficiency gains from tying was still undeveloped.

The district court disagreed with *Independent*, observing that the *Loew's* presumption dated from “a time when genuine proof of power in the market for the tying product was not required.”<sup>136</sup> Today, however, market power must be proven when alleging that a given tying arrangement is illegal. Not even the antitrust enforcers at the Federal Trade Commission or the Department of Justice presume that patents and copyrights necessarily confer market power.<sup>137</sup> While appreciating the district court’s critique of the *Loew's* presumption, the three judge panel of the U.S. Court of Appeals for the Federal Circuit felt bound by existing precedent.<sup>138</sup>

While never overruled, the *Loew's* rationale has been subject to extensive criticism. The academic commentary is nearly unanimous

<sup>132</sup> 15 U.S.C. § 1.

<sup>133</sup> 371 U.S. 38 (1962).

<sup>134</sup> *Id.* at 45.

<sup>135</sup> *Id.* at 45, 46.

<sup>136</sup> *Independent Ink, Inc. v. Trident, Inc.*, 210 F. Supp. 2d 1155, 1165 n.10 (C.D. Cal. 2002).

<sup>137</sup> United States Department of Justice and Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property*, §§ 2.2, 5.3 (1995).

<sup>138</sup> 396 F.3d 1342, 1348–49, 1351 (Fed. Cir. 2005).



in its condemnation of the *Loew's* rule. As Judge Richard Posner observed, “most patents confer too little monopoly power to be a proper object of antitrust concern. Some patents confer no monopoly power at all.”<sup>139</sup> Several justices have echoed this view, most notably in Justice O'Connor's noted plurality in *Jefferson Parish Hospital District No. 2 v. Hyde*.<sup>140</sup> The American Bar Association, among others, filed briefs supporting Illinois Tool Works' petition for certiorari so that *Loew's* could be overruled.<sup>141</sup> A decision overturning *Loew's* seems likely. The question is whether the existence of a patent will be entitled to any weight at all in a market power determination.

*Texaco v. Dagher* (consolidated with *Shell Oil Company v. Dagher*)<sup>142</sup> presents the question whether it is per se illegal under section 1 of the Sherman Act for a joint venture to set the prices at which it sells its own products. In 1998, Texaco and Shell Oil formed two wholly-owned joint ventures—one for the eastern United States (Motiva), the other for the West (Equilon)—encompassing the entirety of their respective refining and marketing operations in the United States. Although the joint ventures would continue to sell gasoline under both the Shell and Texaco brands, each in their respective geographic region, neither company would retain a financial stake in the gasoline bearing its name, as profits from the ventures were to be distributed based upon each company's investment. Pursuant to the joint venture agreement, gasoline under each label would sell for the same price.<sup>143</sup>

The case arose with the filing of a class-action lawsuit on behalf of service station owners alleging that the joint venture's common pricing scheme was an illegal “restraint of trade” under the Sherman

<sup>139</sup>Richard Posner, *Antitrust Law* 197–98 (2d ed. 2001).

<sup>140</sup>466 U.S. 2, 37 n.7 (1984) (O'Connor, J., concurring in the judgment) (noting the “common misconception . . . that a patent or copyright . . . suffices to demonstrate market power” and that “a patent holder has no market power in any relevant sense if there are close substitutes for the patented product”).

<sup>141</sup>See, e.g., Motion to File Brief Amicus Curiae and Brief of the American Bar Association as Amicus Curiae in Support of Petitioners, *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, No. 04-1329 (U.S. filed May 5, 2005).

<sup>142</sup>Nos. 04-805 and 04-814.

<sup>143</sup>*Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108, 1111–13 (9th Cir. 2004) (summarizing facts).

Act.<sup>144</sup> After the oil companies won a summary judgment in the district court, a divided panel of the U.S. Court of Appeals for the Ninth Circuit held that the decision to set a single gasoline price within the joint venture could be per se illegal price fixing under the Sherman Act if the setting of a single price is not “reasonably necessary to further the legitimate aims of the joint venture.”<sup>145</sup>

The solicitor general’s office filed an amicus brief in support of Texaco and Shell, arguing that the Ninth Circuit “plainly erred” in concluding that the joint venture’s pricing of its own products “could result in a per se violation of Section 1 of the Sherman Act.”<sup>146</sup> Antitrust doctrine has long recognized that when “partners set the price of their goods or services they are literally ‘price fixing,’ but they are not per se in violation of the Sherman Act.”<sup>147</sup> Rather, where the setting of prices, or other potentially anti-competitive conduct, is “ancillary” to a legitimate joint venture, it should be subject to rule of reason analysis, if subject to antitrust scrutiny at all.

A joint venture’s ability to set the prices for its own products would seem quite integral to the success of the joint venture. Indeed, it is hard to imagine how the Texaco-Shell joint venture could operate at all if it were not able to set the prices for its own products. As a single firm, whether it chose to set the prices for Shell and Texaco gasoline at the same or varying levels is immaterial in terms of its competitive impact. As Judge Ferdinand Fernandez noted in his dissent:

In this case, nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products.<sup>148</sup>

The decision to create the joint venture in the first place is subject to antitrust scrutiny under the Sherman Act, but once the joint venture is created, it is hard to see what legitimate purpose is served by subjecting internal pricing decisions to further scrutiny. In the

<sup>144</sup>The only claims at issue in this case concern the western joint venture, Equilon.

<sup>145</sup>369 F.3d at 1121.

<sup>146</sup>Brief for the United States as Amicus Curiae at 8, *Texaco, Inc. v. Dagher*, Nos. 04-805 and 04-814 (U.S. filed May 2005).

<sup>147</sup>*Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979).

<sup>148</sup>*Dagher*, 369 F.3d at 1127 (Fernandez, J., concurring in part and dissenting in part).

unlikely event it is upheld, the Ninth Circuit's opinion could have a chilling effect on the creation of joint ventures among potentially competing firms, even though such ventures can have tremendous economic benefits.<sup>149</sup>

The third antitrust case before the Court next term, *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*<sup>150</sup> arises under the Robinson-Patman Act (RPA) rather than the Sherman Act. Under the RPA, sellers may not "discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition . . ."<sup>151</sup> The RPA is traditionally enforced in the context of sales of fungible goods and was intended to prevent a seller from favoring one purchaser over another. *Volvo Trucks*, however, raises the price discrimination concern in the context of competitive bidding. Specifically, the question is how to apply the RPA's prohibition in the context of special order products that are made for and sold to individual, pre-identified customers after competitive bidding through resellers that are not directly competing against one another.

Volvo argues that the RPA should not apply to its conduct as it is not engaging in price discrimination between dealers competing to sell its products to the same customers. If Volvo provides greater price concessions to some dealers over others, it is not doing so in an anti-competitive fashion. Reeder-Simco GMC, a truck dealership, argued that any practice of giving some dealers greater price concessions than others was illegal price discrimination under the RPA.<sup>152</sup>

Again the solicitor general's office supported the petition for certiorari, counseling a more modest interpretation of federal antitrust law so as to give private firms a wider berth. Specifically, the solicitor general argued that the RPA only bans price discrimination between competing purchasers. Applying the RPA here, the solicitor general's brief argued, "could severely restrict a manufacturer's ability to

<sup>149</sup>See, e.g., *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) ("combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively").

<sup>150</sup>No. 04-905.

<sup>151</sup>15 U.S.C. § 13(a).

<sup>152</sup>Petition for a Writ of Certiorari at 11–13, *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, No. 04-905 (U.S. filed May 2005) (describing arguments).

compete effectively with other manufacturers. It would sacrifice vibrant interbrand competition, the primary concern of antitrust law, for an illusory gain in intrabrand competition."<sup>153</sup>

### III. More to Come

If recent practice is any guide, the Court has filled only half of its docket for the year. In addition to the cases noted above, there are quite a few high-profile issues that could wind up on the Court's plate. For instance, the Court may consider the extent to which the dormant Commerce Clause limits the ability of state governments to encourage in-state economic development through the use of tax credits and other fiscal instruments. In *Cuno v. Daimler Chrysler*,<sup>154</sup> the U.S. Court of Appeals for the Sixth Circuit held that Ohio's franchise tax credit for additional manufacturing investment made by in-state firms was unconstitutional.<sup>155</sup> The court rejected Daimler's argument that the policy benefited in-state investment instead of penalizing out-of-state investment.<sup>156</sup> A Supreme Court decision in *Cuno* could have a substantial effect on states' use of tax credits and other investment incentives to attract, or maintain, business investment within the state.

On the environmental front, the Court may be asked to consider whether the Clean Air Act requires the Environmental Protection Agency (EPA) to regulate greenhouse gases,<sup>157</sup> as maintained by several states and environmentalist groups, as well as the extent of the EPA's authority to force decades-old coal-fired power plants to adopt newer pollution control equipment in the course of routine maintenance and repairs.<sup>158</sup> The Court may also seek to resolve the brewing circuit split on the scope of the EPA's authority under the Clean Water Act. While most circuits have interpreted the Court's 2001 decision in *Solid Waste Agency of Northern Cook County v. U.S.*

<sup>153</sup>Brief for the United States as Amicus Curiae Supporting Petitioner at 10, *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, No. 04-905 (U.S. filed May 2005) (internal citations omitted).

<sup>154</sup>386 F.3d 738 (6th Cir. 2004), petition for cert. filed, 73 U.S.L.W. 3650 (U.S. April 18, 2005) (No. 04-1407).

<sup>155</sup>*Id.* at 746.

<sup>156</sup>*Id.* at 745.

<sup>157</sup>*Massachusetts v. EPA*, No. 03-1361, 2005 WL 1653055 (D.C. Cir. July 15, 2005).

<sup>158</sup>See generally *United States v. Duke Energy*, 411 F.3d 539 (4th Cir. 2005).

*Army Corps of Engineers*<sup>159</sup> quite broadly, the Fifth Circuit has held the decision places substantial limits on EPA regulatory authority.<sup>160</sup> Therefore, one or more petitions for certiorari on this issue are possible.

Much of the above may be overshadowed should the Court, as expected, agree to hear one or more cases relating to the “war on terror” this term. In July, the U.S. Court of Appeals for the D.C. Circuit upheld the executive’s decision to try Salim Ahmed Hamdan by military commission.<sup>161</sup> Hamdan was captured in Afghanistan and is reported to have been a bodyguard and personal driver for Osama bin Laden. The D.C. Circuit held that the use of military commissions was authorized by Congress<sup>162</sup> and rejected Hamdan’s claims that such a trial would violate the 1949 Geneva Convention governing the treatment of prisoners.<sup>163</sup>

In addition to the *Hamdan* case, the Court could also agree to hear the Guantanamo detainee cases, consolidated and currently pending before the D.C. Circuit.<sup>164</sup> A petition of certiorari is also expected, once again, in the case of Jose Padilla, currently pending before the U.S. Court of Appeals for the Fourth Circuit.<sup>165</sup> While the Supreme Court’s decision in *Hamdi v. Rumsfeld* upheld the detention and trial of an “enemy combatant” captured on foreign soil,<sup>166</sup> the *Padilla* case would force the Court to consider whether an American citizen, apprehended on *American* soil, can also be held and tried as an “enemy combatant.” Any single one of these cases could have a significant effect on civil liberties and the federal government’s anti-terrorism efforts, and there is a reasonable chance the Court could end up hearing all three.

<sup>159</sup>531 U.S. 159 (2001).

<sup>160</sup>See *In re Needham*, 354 F.3d 340, 344–45 (5th Cir. 2003); see generally *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001). Although *Needham* and *Rice* specifically address the scope of federal regulation over “waters of the United States” under the Oil Pollution Act (OPA), both decisions note that federal jurisdiction under the OPA was intended to be coextensive with that under the Clean Water Act. *Needham*, 354 F.3d at 344; *Rice*, 250 F.3d at 267.

<sup>161</sup>*Hamdan v. Rumsfeld*, No. 04-5393, 2005 WL 1653046 (D.C. Cir. July 15, 2005).

<sup>162</sup>*Id.* at \*4.

<sup>163</sup>*Id.* at \*6.

<sup>164</sup>*In re Guantanamo Detainee Cases*, Nos. 05-8003 and 05-5064 (D.C. Cir. consolidated on March 10, 2005).

<sup>165</sup>*Padilla v. Hanft*, No. 05-6396 (4th Cir. oral argument held July 19, 2005).

<sup>166</sup>542 U.S. 507 (2004).

