

The Upcoming 2004–2005 Term

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I. Introduction

As of the publication of this volume, the Supreme Court has selected roughly half of the cases it will decide in the 2004–2005 term. The justices now consistently hear around eighty cases a term, and they have accepted forty to date.¹ Those cases will fill the monthly argument calendars for October, November, and December 2004, leaving a handful left over for January 2005. Assuming recent practice holds, the remainder will be selected between late September (when the justices return from their summer recess) and late January—the latest date by which cases can be briefed in time for the final argument sitting in April.

None of the pending cases will have the timeless significance of this year's executive detention rulings, or of the affirmative action rulings described by Roger Pilon in last year's *Cato Supreme Court Review*. But that is an almost impossibly high bar to meet, and the docket is of course not yet full. There are several interesting, high profile petitions for certiorari now pending or on their way to the Court and, for several years, the most notable cases have coincidentally been selected and argued late in the term.

This article describes the leading cases of the 2004–2005 term, both the cases already selected for review and the most interesting candidates for certiorari. The article focuses on the cases that directly implicate Madisonian principles—that is, the cases that test the extent to which the Supreme Court is committed to the principle that ours is a government of limited, enumerated powers.

¹See Richard Cordray, *The Calendar of the Justices: How the Supreme Court's Timing Affects its Decisionmaking*, 36 *Ariz. St. L.J.* 183 n.110 and accompanying text (2004) (showing that since the mid-90s the Court's docket has now stabilized at approximately eighty cases per term).

II. The 2004–2005 Term’s Leading Cases

Six cases to be decided in the 2004–2005 term are particularly noteworthy, and three have already attracted a great deal of attention. Each of these three asks the Court to resolve unresolved questions about constitutional limits on government’s regulatory power: whether the First Amendment allows the government to compel farmers to finance advertising for their products, whether the Twenty-First Amendment permits a state to prohibit the importation of wine from another state, and whether the Commerce Clause permits the federal government to prohibit the intrastate growing and distribution of marijuana for medicinal use.

*Veneman v. Livestock Marketing Association*² involves the constitutionality of a compelled advertising program enacted by Congress in the Beef Promotion and Research Act. The statute requires beef producers and importers to pay an assessment on each head of cattle to fund generic advertising of beef.³ In *United States v. United Foods, Inc.*,⁴ the Supreme Court held that a similar program for the promotion of mushrooms violated the First Amendment by compelling producers to fund speech with which they disagreed.⁵ The Eighth Circuit held in *Livestock Marketing Association v. U.S. Department of Agriculture*⁶ that the same result followed under the beef program.⁷

The government contends that the beef program should be sustained on two theories that the Supreme Court did not address in *United Foods*. Principally, it argues that the advertisements are immune from First Amendment scrutiny because they are “government speech.”⁸ The board that selects and purchases the advertisements, the government notes, is selected and overseen by the Secretary of Agriculture.⁹ The court of appeals rejected this argument

²*Livestock Marketing Association v. U.S. Department of Agriculture*, 335 F.3d 711 (8th Cir. 2003), cert. granted sub nom. *Veneman v. Livestock Marketing Association*, 124 S. Ct. 2389 (May, 24, 2004) (No. 03-1164).

³7 U.S.C. § 2904 (2004).

⁴533 U.S. 405 (2001).

⁵*Id.* at 410–11. The author was counsel to the producer in *United Foods* and is counsel to the producer in *Livestock Marketing Association*.

⁶*Livestock Marketing Association v. U.S. Department of Agriculture*, 335 F.3d 711 (8th Cir. 2003).

⁷*Id.* at 725–26.

⁸Reply Brief for the Petitioners at 1, *Veneman v. Livestock Marketing Association*, 124 S. Ct. 2389 (2004) (No. 03-1164), available at 2004 WL 1081115.

⁹7 U.S.C. § 2904 (2004).

principally on the ground that “the government speech doctrine clearly does not provide immunity for all types of First Amendment claims.”¹⁰ The court emphasized that the producers’ objection is to the *assessment* rather than the *advertisements*.¹¹ They do not contend that the government cannot itself promote beef; rather, they argue (and the court of appeals held) that the First Amendment prevents the government from requiring particular individuals to engage in speech or associate together for the purpose of promoting speech through the assessments.

Alternatively, the government contends that the assessment is constitutional under the intermediate scrutiny reserved for regulation of commercial speech.¹² The court of appeals concluded that the Beef Act does not sufficiently advance an important government interest to be sustained.¹³ “[S]urely the interest in making one entrepreneur finance advertising for the benefit of his [or her] competitors, including some who are not required to contribute, is insufficient.”¹⁴ Here too, the government’s argument seems directed at justifying the Beef Board’s advertising, as opposed to answering the objectors’ argument that *they* cannot be compelled to fund that advertising and be associated with it.

The *Livestock Marketing Association* case presents the Court with the opportunity to bring further clarity to the unresolved status of “commercial speech” under the First Amendment. The case also arises in a context that calls on the justices to account for both the First Amendment right against compelled speech and association (as reaffirmed in *United Foods*), and also the government’s ability to adopt user fees that place the burden of government programs on those who benefit the most. Those competing concerns each evoke important interests. On the one hand, the government’s argument suggests the possibility of a system of targeted fees that theoretically would have the benefit of reducing tax burdens on the general citizenry. But compelled advertising programs, at bottom, represent

¹⁰ *Livestock Marketing Association*, 335 F.3d at 720.

¹¹ *Id.* at 721.

¹² Reply Brief for the Petitioners at 12, *Veneman v. Livestock Marketing Association*, No. 03-1164 (U.S. May 24, 2004).

¹³ *Livestock Marketing Association*, 335 F.3d at 722.

¹⁴ *Id.* at 725 (quoting *United States v. United Foods, Inc.*, 533 U.S. 405, 418 (Stevens, J., concurring)).

a troubling intrusion into free markets, including the vital free market of ideas.

*Granholm v. Heald*¹⁵ (which is consolidated with another case, *Swedenburg v. Kelly*¹⁶) involves the constitutionality of state statutes that permit in-state, but not out-of-state, wineries to ship directly to in-state consumers. Approximately half the states now have such laws. In the internet era, “[s]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine.”¹⁷ The statutes impede the interstate transportation of wine, which leads wineries to contend that they are invalid under the so-called “dormant Commerce Clause.” According to that doctrine, the congressional power to “regulate Commerce . . . among the several States” forbids states from discriminating against interstate commerce.¹⁸

The states, by contrast, contend that the statutes are authorized by the Twenty-First Amendment, which authorizes states to regulate the “transportation or importation . . . of intoxicating liquors.”¹⁹ They specifically defend the statutes as reasonable measures to ensure that out-of-state wineries (which are not subject to direct regulation by the recipient state) do not ship their products to minors.²⁰ Also, the statutes are defended on the ground that, by requiring out-of-state wineries to use in-state distributors, they ensure that states receive the applicable taxes from wineries.²¹

Granholm presents another test of the Supreme Court’s commitment to freedom of interstate commerce, albeit in the difficult context of the Constitution’s seeming commitment to the states of a broad power to regulate the importation of a particular type of product. The statutes are, at bottom, protectionist measures intended to benefit in-state wineries. These categorical bans on direct importation might

¹⁵342 F.3d 517 (6th Cir. 2003), cert. granted, 124 S. Ct. 2389 (May 24, 2004) (No. 03-1116).

¹⁶358 F.3d 223 (2d Cir. 2003), cert. granted, 124 S. Ct. 2391 (May 24, 2004) (No. 03-1274).

¹⁷Federal Trade Commission, Possible Anticompetitive Barriers to E-Commerce: Wine 3, 14 (2003), available at <http://www.ftc.gov/os/2003/07/winereport2.pdf>.

¹⁸U.S. Const. art. I, § 8, cl. 3.

¹⁹U.S. Const. amend. XXI, § 2.

²⁰Petition for Certiorari at 3–4, *Granholm v. Heald*, No. 03-1116 (U.S. May 24, 2004), available at 2004 WL 226297.

²¹*Id.*

not survive a Commerce Clause challenge given that states could satisfy their legitimate objectives through more limited licensing requirements. On the other hand, it does not seem possible to say that the statutes further *no* legitimate interest relating to the states' regulation of alcohol consumption. It is true that *Bacchus Imports v. Diaz*,²² invalidated Hawaii's tax exemptions for locally produced liquor, but it did so only on the ground that the exemptions were "mere economic protectionism" not intended "to carry out any other purpose of the Twenty-First Amendment."²³ Under that precedent, among others, it seems likely that the states will prevail unless the justices are willing to give greater weight to the fact that these statutes are a direct affront to the national interests that the Commerce Clause was intended to further.

*Ashcroft v. Raich*²⁴ also involves the distribution of power between the state and federal governments to regulate commerce. The federal Controlled Substances Act (CSA) makes it illegal to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" any controlled substance, subject to certain exceptions.²⁵ So-called "Schedule 1" narcotics, including marijuana, may not be dispensed for medical uses under the CSA.²⁶ California law, by contrast, permits the medicinal use of marijuana. California residents brought this suit, alleging that the application of the CSA to the purely intrastate growing and noncommercial distribution of marijuana for medicinal purposes exceeds Congress's power under the Commerce Clause. The Ninth Circuit held that the plaintiffs were entitled to a preliminary injunction because they had a strong likelihood of success on their Commerce Clause claim.²⁷

The Supreme Court seems almost certain to reverse. The merits of the nation's war on drugs have been hotly debated.²⁸ Also, the view that federal drug laws are unwarranted could draw support

²²468 U.S. 263 (1984).

²³*Id.* at 276.

²⁴352 F.3d 1222 (9th Cir. 2003), cert. granted, 124 S. Ct. 2909 (June 28, 2004) (No. 03-1454).

²⁵21 U.S.C. § 841(a) (2004).

²⁶*United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 490 (2001).

²⁷*Raich v. Ashcroft*, 352 F.3d 1222,1227 (9th Cir. 2003).

²⁸See, e.g., Gene Healy and Robert A. Levy, *The War on Drugs*, in *Cato Handbook for Congress*, 108th Congress, 171–91 (2002).

in this case from those that favor a shift in the balance of regulatory power from the federal government to the states. But the modern Supreme Court does not embrace either of those views. Instead, the justices have held firmly to the view that Congress's commerce power is extensive. Under current doctrine, it seems implausible to say that the effect of medicinal marijuana production and use on interstate commerce is so small as to forbid federal regulation.

Three other leading cases of the 2004–2005 term, which have received somewhat less attention, are nonetheless equally important. First, in October the Court will consider two cases (*United States v. Booker*²⁹ and *United States v. Fanfan*³⁰) that ask whether and to what extent the Federal Sentencing Guidelines are consistent with the Fifth and Sixth Amendments.³¹ *Apprendi v. New Jersey*³² held that the right to a jury trial on proof beyond a reasonable doubt (along with the right to a grand jury indictment in federal courts) requires that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury.”³³ This past term, in *Blakely v. Washington*,³⁴ the same majority held that *Apprendi* invalidated a sentencing scheme in which a judicial “finding . . . neither admitted by [the defendant] nor found by a jury” resulted in a heightened sentence.³⁵

The *Blakely* dissenters predicted that the Court's holding would essentially invalidate the Federal Sentencing Guidelines, which rely heavily on judicial fact-finding.³⁶ The Guidelines (together with Federal Rule of Criminal Procedure 32(i)) regularly require judges to find facts that determine each of the core elements of a defendant's sentence: the base offense level, any sentencing enhancement, and

²⁹375 F.3d 508, (7th Cir. 2004), cert. granted, 2004 WL 1713654 (U.S. Aug. 2, 2004) (No. 04-104).

³⁰2004 WL 1723114 (D. Me.), cert. granted, 2004 WL 1713655 (U.S. Aug. 2, 2004) (No. 04-105).

³¹The author is counsel to the National Association of Criminal Defense Lawyers and National Association of Federal Defenders in these cases.

³²530 U.S. 466 (2000).

³³*Id.* at 490.

³⁴124 S. Ct. 2531 (2004).

³⁵*Id.* at 2537.

³⁶See, e.g., *id.* at 2543 (O'Connor, J., joined by Breyer, J., and Rehnquist, C.J., dissenting); *id.* at 2550 (Kennedy, J., joined by Breyer, J., dissenting).

any upward departure. As Justice O'Connor noted in dissent, "If the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would."³⁷

Blakely immediately generated an enormous amount of litigation over the constitutionality of the Sentencing Guidelines. The Supreme Court subsequently stepped in, agreeing to hear *Booker* and *Fanfan* on an expedited basis to decide two questions: whether *Apprendi* bars increases in a defendant's sentence under the Guidelines pursuant to judicial fact-finding, and the extent to which the Guidelines are consistent with the Fifth and Sixth Amendments.³⁸ Both cases will be argued in October.

The great majority of lower courts that have considered the Guidelines in light of *Blakely* have concluded that the Guidelines are subject to the rule of *Apprendi*, and the Supreme Court is likely to agree. As Justice O'Connor's dissent makes clear, the justices were well aware of *Blakely*'s implications for the Guidelines.

But it is much harder to predict exactly what the Court will hold regarding the ongoing role of the Guidelines. The lower courts have adopted a variety of inconsistent approaches, from use of juries to determine the facts that control a defendant's sentence under the Guidelines to invalidation of the Guidelines under *Apprendi*.³⁹ For its part, the government argues that in cases that require judicial fact-finding, if "the Guidelines as a whole cannot be implemented as intended, [then] the [district] court should therefore sentence the defendant in its discretion within the maximum and minimum provided by statute for the offense of conviction."⁴⁰ In the government's view, however, the Guidelines would be unaffected in cases that do not call for judicial fact-finding. Of note, the Court faces the

³⁷*Id.* at 2550 (O'Connor, J., dissenting).

³⁸See Petition for a Writ of Certiorari at 2, *United States v. Booker*, No. 04-104 (U.S. Aug. 2, 2004); Petition for a Writ of Certiorari at 2, *United States v. Fanfan*, No. 04-105 (U.S. Aug. 2, 2004).

³⁹Compare *United States v. Landgarten*, No. 04-CR-70 (JBW), 2004 U.S. Dist. LEXIS 13172, at *1–*2 (E.D.N.Y. July 15, 2004) (ordering a sentencing jury trial to determine "whether the enhancement factors are proved beyond a reasonable doubt"), with *United States v. Jaamar*, No. 6:04-cr-35-Orl-31KRS, 2004 U.S. Dist. LEXIS 13496, at *22 (M.D. Fla. July 19, 2004) (finding that "the determinate scheme set up by the Guidelines violates the Constitution and can no longer be used in any case").

⁴⁰Petition for Certiorari at 16, *United States v. Booker*, No. 04-104 (U.S. Aug. 2, 2004), available at <http://www.usdoj.gov/osg/briefs/2004/2pet/7pet/2004-0104.pet.aa.pdf>.

dilemma that it may not be able to muster a majority for any particular result if the four justices who dissented in *Apprendi* and *Blakely* adhere to their view that those cases were wrongly decided and that the Sentencing Guidelines are completely consistent with the Fifth and Sixth Amendments.

In October, the Court will also hear argument in *Roper v. Simmons*,⁴¹ which presents the question whether the Eighth Amendment permits the execution of persons for crimes they committed between the ages of sixteen and eighteen. The Court previously held in *Thompson v. Oklahoma*⁴² that the Constitution forbids capital punishment for crimes committed by persons younger than sixteen. The Missouri Supreme Court in this case extended that rule to all minors.

The question presented by *Roper* is significant given the ongoing national debate over the death penalty. The case is also noteworthy because it involves two other controversial, and related, areas of the Court's recent jurisprudence. First, current Eighth Amendment doctrine determines whether a punishment is "cruel and unusual" by reference to "evolving standards of decency."⁴³ That standard is heavily criticized by those who embrace an originalist understanding of the Constitution's meaning.⁴⁴ Second, in identifying relevant standards of decency, a majority of the Court has looked increasingly to international norms, not merely domestic conceptions. For example, in *Atkins v. Virginia*,⁴⁵ the Court overruled its prior precedent to hold that the Eighth Amendment prohibits the execution of the mentally retarded. The six-justice majority explained its rejection of precedent by reasoning that such executions "ha[ve] become truly unusual, and it is fair to say that a national consensus has developed against [them]."⁴⁶ Further, the Court noted that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."⁴⁷

⁴¹ 112 S.W.3d 397 (Mo. 2003), cert. granted, 124 S. Ct. 1171 (Jan. 26, 2004) (No. 03-633).

⁴² 487 U.S. 815 (1988).

⁴³ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

⁴⁴ See, e.g., Antonin Scalia, *A Matter of Interpretation* 40–49 (1998).

⁴⁵ 536 U.S. 304 (2002).

⁴⁶ *Id.* at 316.

⁴⁷ *Id.* at 316 n.21.

A final major case of the 2004–2005 term will be *Tenet v. Doe*,⁴⁸ which presents the question whether individuals who claim that the CIA had employed them at one time may bring a suit alleging that the government broke a promise to provide them with financial assistance. In *Totten v. United States*,⁴⁹ the Supreme Court held that the president could not be sued under a contract for the provision of confidential intelligence. The Ninth Circuit in *Tenet v. Doe* held, however, that “*Totten* does not require immediate dismissal as to the [plaintiffs’] case because their claims . . . do not arise out of an implied or express contract.”⁵⁰ The Supreme Court granted the government’s petition for certiorari, which alleges that the court of appeals’ decision is precluded by *Totten*.⁵¹ Although the Supreme Court has hesitated to find implied repeals of rights to sue, it is likely that the justices will find that this suit represents too great a risk of exposing classified information to be allowed to go forward. Still more interesting will be how the justices resolve the government’s attempt to extend the political question doctrine to preclude any suit that “arises out of, and depends upon, a classified fact.”⁵²

III. Other Important Cases of the 2004–2005 Term

Several other cases in the upcoming term have a lower profile, but nonetheless raise particularly important questions or present the Court with the opportunity to bring clarity to important areas of the law.

*Johnson v. California*⁵³ involves a Fourteenth Amendment challenge to racial discrimination. The State of California initially houses newly arrived prison inmates in two-person cells principally according to race. According to the state, “the chances of an inmate being assigned a cell mate of another race [are] ‘pretty close’ to zero percent.”⁵⁴ A district court dismissed an African American prisoner’s civil rights

⁴⁸329 F.3d 1135 (9th Cir. 2003), cert. granted, 124 S. Ct. 2908 (June 28, 2004) (No. 03-1395).

⁴⁹92 U.S. 105 (1875).

⁵⁰319 F.3d 1135, 1146 (9th Cir. 2003).

⁵¹Petition for Writ of Certiorari at 11–12, *Tenet v. Doe*, No. 03-1395 (U.S. June 28, 2004).

⁵²See *id.* at 11, 13.

⁵³321 F.3d 791 (9th Cir. 2003), cert. granted, 124 S. Ct. 1505 (Mar. 1, 2004) (No. 03-636).

⁵⁴*Johnson v. California*, 321 F.3d 791 (9th Cir. 2003).

suit challenging the policy as unconstitutional, and the Ninth Circuit affirmed. The court of appeals held that the racial segregation was subject not to strict scrutiny but instead to the deferential standard of review applicable to the government's decisions regarding prison administration. Because the plaintiff was unable to rebut the state's claim that the policy reduced the risks of prison violence, the court of appeals deemed it constitutional.⁵⁵

The Supreme Court is likely to reverse. Although the Court's recent decisions in the affirmative action cases demonstrate that the justices have sharply different conceptions of the anti-discrimination principle of the Fourteenth Amendment, there is common ground that racial distinctions generally should be avoided.⁵⁶ The Ninth Circuit applied lower constitutional scrutiny on the ground that the case arose in the prison context. But the Supreme Court is unlikely to hold that the deference usually afforded prison officials extends to permitting routine racial segregation given the importance of the constitutional right at stake. Instead, if the state can demonstrate that a particular racial classification is truly necessary to advance a compelling interest, it will be sustained under the strict scrutiny standard. Of note, the federal government, which operates the nation's most extensive prison system, has filed a brief arguing that the court of appeals should have applied a more rigorous constitutional standard and invalidated the program.

In *Ballard v. Commissioner of Internal Revenue*⁵⁷ (consolidated with *Estate of Kanter v. Commissioner of Internal Revenue*⁵⁸), the Court will consider the legality of a novel system used by the Tax Court for deciding certain cases. So-called "special trial judges" conduct extensive proceedings and produce nonpublic opinions for tax court judges. Although the point is disputed, it appears that the Tax Court gives the special trial judges deference as finders of fact. Through this process, the Tax Court found that two individuals owed very considerable unpaid taxes. They appealed on the ground that the use

⁵⁵ *Id.* at 794.

⁵⁶ See *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁵⁷ 321 F.3d 1037 (11th Cir. 2003), cert. granted, 124 S. Ct. 2065 (Apr. 26, 2004) (No. 03-184).

⁵⁸ 337 F.3d 833 (7th Cir. 2003), cert. granted, 124 S. Ct. 2066 (Apr. 26, 2004) (No. 03-1034).

of a secret opinion was unlawful and violated their Fifth Amendment rights to due process of law.⁵⁹ The Seventh and Eleventh Circuits rejected their argument,⁶⁰ and the Supreme Court subsequently granted certiorari and consolidated the two cases.

The fact that the Supreme Court has agreed to hear the cases despite the absence of any circuit conflict is a strong signal that the justices intend to reverse. The petitioners have a substantial argument that it is impossible for a litigant to assess (and challenge if necessary) the Tax Court's ruling without access to the secret opinion of the special trial judge on which it is based. And the very fact that the system is so unusual—it apparently is not employed in any other U.S. court system—is an indication that it does not comport with due process. As Judge Cudahy explained, dissenting in the Seventh Circuit case: “Transparency is the universal practice of agencies and courts employing these decisional practices. The question then becomes, if there are policy reasons that dictate transparency for everyone else, why do these reasons not apply to the Tax Court?”⁶¹

The Court also has before it in the 2004–2005 term two interesting employment discrimination cases—one involving age discrimination, the other sex discrimination—that touch on the power of federal regulatory agencies. In *Smith v. City of Jackson*,⁶² the Court will decide whether “disparate impact claims”—those that rely on an employment policy's adverse effect on a protected group, not an assertion of personal discrimination—are cognizable under the Age Discrimination in Employment Act (ADEA).⁶³ The plaintiffs in this case challenge a police department pay plan that gave larger raises to younger workers. They contend that the statute reaches disparate impact claims, although the employer will prevail so long as it can establish that the challenged policy pursues some reasonable objective.

The case is too close to call. A majority of the Court is openly hostile to disparate impact claims, regarding it as unreasonable to

⁵⁹ See, e.g., Kanter, 337 F.3d at 840; Ballard, 321 F.3d at 1038.

⁶⁰ Kanter, 337 F.3d at 841; Ballard, 321 F.3d at 1043.

⁶¹ Kanter, 337 F.3d at 874 (Cudahy, J., dissenting).

⁶² 351 F.3d 183 (5th Cir. 2003), cert. granted, 124 S. Ct. 1724 (Mar. 29, 2004) (No. 03-1160). The author is counsel to the petitioners in *Smith*.

⁶³ Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2004).

hold employers liable for innocent policies that have unintended negative effects on employees. But in 1971, the Court held that disparate impact claims are cognizable under Title VII of the Civil Rights Act of 1964,⁶⁴ which uses identical language to that in the ADEA.⁶⁵ And the Equal Employment Opportunity Commission, which has the authority to implement the ADEA, has provided by regulation that the statute reaches disparate impact claims⁶⁶; there is a strong argument that the Court is obliged to defer to that administrative interpretation.

*Jackson v. Birmingham Board of Education*⁶⁷ involves the scope of Title IX of the Education Amendments of 1972. The statute provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁶⁸ The case arises from the claim of a girls’ basketball coach that the Birmingham Board of Education retaliated against him for complaining that the team was receiving unequal funding. The Eleventh Circuit held that Title IX does not create an implied private right of action to remedy retaliation.⁶⁹

As with *Smith*, it is very difficult to predict how the Supreme Court will rule in *Jackson*. In recent years, a five-justice majority of the Court has repeatedly rejected claims that various federal statutes create implied rights of action, avowedly rejecting prior precedent that more liberally recognized such claims. The Court has also specifically provided that federal agencies do not have the power to authorize implied rights of action not otherwise provided for by statute.⁷⁰ On the other hand, the Court has already held that Title IX does create a private right of action.⁷¹ The court of appeals simply declined

⁶⁴42 U.S.C. § 2000(e) (2000).

⁶⁵*Griggs v. Duke Power Co.*, 401 U.S. 424, 430–32 (1971).

⁶⁶See 46 Fed. Reg. 47,274, 47,275 (Sept. 29, 1981) (amending 29 C.F.R. § 1625.7(d)).

⁶⁷309 F.3d 1333 (11th Cir. 2002), cert. granted, 124 S. Ct. 2834 (June 14, 2004) (No. 02-1672)

⁶⁸20 U.S.C. § 1681(a).

⁶⁹*Jackson v. Birmingham Bd. of Education*, 309 F.3d 1333, 1347 (11th Cir. 2002).

⁷⁰*Alexander v. Sandoval*, 532 U.S. 275 (2001).

⁷¹*Cannon v. University of Chicago*, 441 U.S. 677, 683 (1979).

to apply that ruling to a claim for retaliation. And the relevant federal agency—the Department of Education—has adopted a regulation indicating that retaliation claims are cognizable.⁷²

The Court also has before it three important search and seizure cases with a single unifying theme. In each, the Court will address a circumstance in which an individual was initially detained for one reason, but was subjected to a further search or detention that arguably violates the Fourth Amendment. And in each, the Court seems likely to rule in favor of the government.

*Illinois v. Caballes*⁷³ will address the extent to which the Fourth Amendment applies to drug-sniffing dog searches, which are an increasingly prevalent police practice. The specific question presented is whether officers conducting a legitimate traffic stop may, without probable cause, bring a drug detection dog to the car to see if it alerts the police.⁷⁴ In this case, Illinois police stopped a car for a minor speeding violation and, while writing a ticket, walked a dog around the car, where it detected marijuana in the trunk. The Illinois Supreme Court (divided four-to-three) ordered the marijuana suppressed as the fruits of an unconstitutional search.⁷⁵

The U.S. Supreme Court granted the state's petition for certiorari and is likely to reverse. The justices have held that the Fourth Amendment prohibits the use of high technology devices (such as a thermal sensor) to search within a dwelling without probable cause.⁷⁶ But a dog that detects scent is a far more common and accepted investigatory tool, and one that is unlikely to be deemed an unreasonable search given the lessened Fourth Amendment protections that are associated with automobiles.

*Devenpeck v. Alford*⁷⁷ will address the extent to which the police may justify a detention based on reasons they did not express at the time. The police in this case suspected that Jerome Alford had been impersonating a police officer and pulled over his car. During

⁷²34 C.F.R. §§ 100.7(e), 106.71.

⁷³802 N.E.2d 202 (Ill. 2003), cert. granted, 124 S. Ct. 1875 (Apr. 5, 2004) (No. 03-923).

⁷⁴Brief for the Petitioner at (i), *Illinois v. Caballes*, No. 03-923 (U.S. Apr. 5, 2004).

⁷⁵*People v. Caballes*, 802 N.E.2d 202, 205 (Ill. 2003).

⁷⁶*Kyllo v. United States*, 533 U.S. 27 (2001).

⁷⁷333 F.3d 972 (9th Cir. 2003), cert. granted, 124 S. Ct. 2014 (Apr. 19, 2004) (No. 03-710).

questioning, the officers discovered that Alford had recorded their conversation and arrested him for making an illegal recording in violation of the Washington Privacy Act.⁷⁸ A state court judge threw out the charge.⁷⁹

Alford then filed a civil rights suit. In response, the officers argued that, even if Alford had not violated the Privacy Act, they had probable cause to arrest him for impersonating an officer. The Ninth Circuit held that the alternative justification for the arrest was irrelevant because it was not “closely related” to the basis for the arrest articulated by the officers at the time.⁸⁰ The court of appeals also held that the officers were not entitled to qualified immunity, reasoning that it was well established at the time that Alford’s conduct could not be deemed a violation of the Privacy Act.⁸¹ The Supreme Court seems likely to reverse based on the principle that the authority to seize or arrest an individual is measured by an objective standard, not the officer’s subjective intent. Assuming that the police did have probable cause to arrest Alford for impersonating an officer, that will probably be sufficient to defeat his suit.

Finally, *Muehler v. Mena*⁸² presents the question whether the police may question an individual about criminal activity for which he was not lawfully detained, and whether the police may continue to detain the occupant of a dwelling during a lawful search of the premises. In this case, police entered a suspected gang safe house with a warrant to search it in the course of an investigation of a suspected gang shooting. Once in the house, they detained Iris Mena for two to three hours in handcuffs and questioned her about her immigration status without probable cause either that she was involved in gang activity or was an illegal immigrant. The Ninth Circuit held that the questioning and continued detention both violated the Fourth Amendment.⁸³ Rehearing en banc was denied over the dissent of seven judges.⁸⁴

⁷⁸ Washington Rev. Code Ann. § 9.73.010 (2004).

⁷⁹ See, e.g., *Alford v. Haner*, 335 F.3d 972, 975 (9th Cir. 2003).

⁸⁰ *Id.* at 976.

⁸¹ *Id.* at 977.

⁸² 332 F.3d 1255 (9th Cir. 2003), cert. granted, 124 S. Ct. 2842 (June 14, 2004) (No. 03-1423).

⁸³ *Mena v. Simi Valley*, 332 F.3d 1255, 1263–64 (9th Cir. 2003), reh’g denied, 354 F.3d 1015 (9th Cir. 2004).

⁸⁴ *Id.*

The Supreme Court seems likely to reverse, at least in part. The Ninth Circuit's holding that the questioning of Mena constitutes a search is, even if correct, an extension of existing law that would defeat qualified immunity. Nor is it likely that the Court will conclude that the facts of the physical detention—the period of two to three hours in particular—were so extreme as to be clearly unreasonable.

IV. Noteworthy Petitions for Certiorari

When the justices return from their summer recess, they will consider more than 1,500 pending petitions for certiorari. Petitions presenting three issues are particularly noteworthy.

*Bass v. Madison*⁸⁵ and *Cutter v. Wilkinson*⁸⁶ involve the constitutionality under the Establishment Clause of Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000.⁸⁷ The statute, in relevant part, forbids federal, state, and local governments from “impos[ing] a substantial burden on the religious exercise of a person residing in or confined to an institute,” except as the “least restrictive means” of furthering “a compelling government interest.”⁸⁸ The Sixth Circuit held in *Cutter* that the statute violates the Establishment Clause, a holding that conflicts with the ruling of the Fourth Circuit in *Bass*, as well as other rulings of the Seventh and Ninth Circuits. According to the Sixth Circuit, the statute impermissibly seeks “to advance religion generally by giving religious prisoners rights superior to those of nonreligious prisoners” and has the “inevitable effect” of “induc[ing] nonreligious inmates to adopt a religion.”⁸⁹ The Court is almost certain to grant review to decide the Establishment Clause issue in one or both cases. State officials have also sought certiorari on the question whether Congress had the constitutional authority to enact the statute in the first instance, but because there is no circuit conflict on that question, the justices are less likely to agree to decide it.

⁸⁵ *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003), petition for cert. filed, 2004 WL 763796 (U.S. Apr. 6, 2004) (No. 03-1404).

⁸⁶ 349 F.3d 257 (6th Cir. 2003), petition for cert. filed, Apr. 19, 2004 (No. 03-9877).

⁸⁷ 42 U.S.C. §§ 2000cc—2000cc-5.

⁸⁸ 42 U.S.C. § 2000cc-1(a) (2004).

⁸⁹ *Cutter v. Wilkinson*, 349 F.3d 257, 266 (6th Cir. 2003).

No fewer than four pending petitions for certiorari ask the Court to decide in what circumstances the government may display a monument of the Ten Commandments.⁹⁰ As the number of petitions suggests, there has been a torrent of litigation on the issue. But each case tends to reflect the unique factual circumstance of the particular monument at issue—in particular, its historical and physical context. Until a clear circuit conflict emerges on a question of law, the justices will likely avoid stepping into such a controversial issue.

Finally, the justices will have the opportunity to decide an important and recurring property rights question: whether a state may use its eminent domain authority to seize property for development by another private party. In *Kelo v. New London*,⁹¹ the Connecticut Supreme Court held that a municipality may condemn private homes to be redeveloped as part of a broad municipal development plan. The homeowners have sought certiorari, asserting that state supreme courts have adopted a variety of conflicting standards for determining when eminent domain can be used to further private redevelopment. Given the necessarily fact-bound nature of such takings challenges, the petition is far from sure to be granted, but the case is sufficiently important that it merits close attention.

⁹⁰ *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), petition for cert. filed, 2004 WL 972724 (U.S. Mar. 31, 2004) (No. 03-1500); *Baker v. Adams County / Ohio Valley School Bd.*, 86 Fed. Appx. 104 (6th Cir. Jan. 12, 2004), available at 2004 WL 68523, petition for cert. filed sub nom. *Johnson v. Baker*, 2004 WL 1378658 (U.S. June 14, 2004) (No. 03-1661); *American Civil Liberties Union of Kentucky v. McCreary County, Kentucky*, 354 F.3d 438 (6th Cir. 2003), petition for cert. filed, 2004 WL 1427470 (U.S. June 21, 2004) (No. 03-1963).

⁹¹ 843 A.2d 500 (Conn. 2004), petition for cert. filed, 2004 WL 1659558 (U.S. July 19, 2004) (No. 04-108).