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INTRODUCTION: THE OCTOBER 1994 SUPREME COURT TERM*

The Honorable Sven Erik Holmes†

I would like to welcome you here this morning and congratulate the University of Tulsa on this symposium. I am very excited about the program today, which is a continuation of the important work being done by the University of Tulsa Law School in the area of constitutional law.

I would like to offer for your consideration a few brief introductory comments about the 1994-1995 term of the United States Supreme Court. In my judgment, this was a very important term of Court. As this symposium will make clear, this term was remarkable because of the significance of the various cases decided. The more narrow focus of my comments, however, will be on those cases dealing with federalism and race, which will be addressed in greater detail later in the conference.

In the area of federalism, the Supreme Court has now embarked on what promises to be a prolonged struggle to define the authority and role of the national government. The Court decided two significant cases in this area this term: *United States v. Lopez*,[1] which held that Congress had limited power under the Commerce Clause to ban possession of firearms near schools, and *U.S. Term Limits, Inc. v. Thornton*,[2] which held that a state acting by initiative petition could

* Based on remarks delivered at the Conference, *Practitioner's Guide to the October 1994 Supreme Court Term*, at The University of Tulsa College of Law, November 17, 1995.

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1. 115 S. Ct. 1624 (1995).
2. 115 S. Ct. 1842 (1995).

not add qualifications to serve in the United States Congress to those expressly set forth in the Constitution. These two opinions, taken together, reflect enormous uncertainty as to the authority of government and the extent to which that authority is limited by the Constitution.

Moreover, the *Lopez* decision marks the end of an era which began in 1937 with *NLRB v. Jones & Laughlin Steel Corp.*,[3] in which the Supreme Court effectively granted the Congress almost unlimited authority under the Commerce Clause. The legacy of *Lopez* undoubtedly will be a virtual flood of federal court claims that Congress has overstepped its power under the Commerce Clause by enacting certain statutes. In this regard, I would note that I recently received my first claim under *Lopez* in the form of a challenge to the Child Support Recovery Act of 1992,[4] which imposes criminal liability for the failure to pay child support by a non-custodial parent residing in another state.

In the area of race, I would direct your attention to three cases decided this term: *Adarand Constructors, Inc. v. Pena*,[5] which subjected federal affirmative action programs that draw racial classifications to strict scrutiny; *Miller v. Johnson*,[6] which held that the Equal Protection Clause is violated when race constitutes the dominate reason for drawing a legislative district; and *Missouri v. Jenkins*,[7] which held that a federal court's school desegregation remedy may not require that a school district create a "magnet school" to attract white students from outside the district, since such an inter-district remedy is inappropriate for an intra-district Constitutional violation.

In my judgment, race is the most difficult social issue facing America today. Nevertheless, the Supreme Court appears to be moving toward a judicial declaration that the government lacks the authority under the Constitution to deal with race-related problems. In *Adarand*, *Miller*, and *Jenkins*, the Court in effect stated that race-related remedies, imposed by the United States Congress in *Adarand*,[8] by a state legislature in *Miller*,[9] and by a federal district court in *Jenkins*,[10] were all inappropriate.

3. 301 U.S. 1 (1937).
4. 18 U.S.C. § 228 (Supp. V 1993).
5. 115 S. Ct. 2097 (1995).
6. 115 S. Ct. 2475 (1995).
7. 115 S. Ct. 2038 (1995).
8. 115 S. Ct. at 2102-03.
9. 115 S. Ct. at 2483-84.
10. 115 S. Ct. at 2042-45.

This limitation on the role of government is directly related, in my view, to the federalism decisions of the Court in *Term Limits* and *Lopez*. Indeed, the Court arguably may be moving toward the view that government is not a legitimate vehicle at all for solving a number of social and political problems.

With this in mind, I ask you to consider two issues during the course of today's program: governmental authority under the Constitution and judicial restraint.

Analytically, the issue of governmental authority involves three questions: (i) does any governmental entity have the power to impose a solution to the problem at hand, whether the problem is affirmative action, legislative districts, school desegregation, or school safety; (ii) if so, which governmental entity has such power; and (iii) what is the scope of that power. These questions permeate both the federalism and race cases. As you consider these questions, I ask you to consider a more fundamental question: if government, acting by and through its elected officials, cannot undertake to solve certain problems, how indeed are such problems to be solved in a democratic society?

The issue of judicial restraint is closely linked to the issue of governmental authority. Since footnote four of *United States v. Carolene Products Co.*[11] in 1938, a principal responsibility of the courts has been to protect "discrete and insular minorities" from the actions of the majority.[12] These actions generally manifested themselves through legislative enactments. Since that time, judicial restraint typically has been defined as permitting the legislature to enact laws without interference from the courts — and judicial activism has been defined as identifying individual rights in the Constitution which operate as a shield against certain legislative action.

That formulation is now being turned on its head. In the two federalism cases and the three race cases, the Supreme Court determined that, in fact, the governmental entities involved did not have the authority to act. This clearly presents the question — is this another form of judicial activism? This form of judicial activism, however, identifies constitutional limits on the government, which has the effect of prohibiting certain legislative action, rather than identifying individual rights, which has the same effect of prohibiting legislative action.

11. 304 U.S. 144 (1938).
12. *Id.* at 152 n.4.

In my judgment, our system was founded on the principle that the courts are responsible for interpreting the law and not making the law. Judicial restraint requires that the courts show great deference to the acts of the legislative branch. Courts which fail to exercise judicial restraint in effect are substituting the views of the appointed judiciary for the views of elected officials.

I ask you to consider the proposition that judicial activism is judicial activism — whether practiced by conservatives in the name of limiting the power of government or practiced by liberals in the name of expanding individual rights. In either case, the principles of judicial restraint are clearly compromised, and to the extent one believes, as I do, that judicial restraint should be practiced by liberals and conservatives alike, this is an unsettling trend in the recent term of the Supreme Court.

In conclusion, this is an excellent program today; I want to thank you again for being here and to congratulate the University of Tulsa Law School for this important event.