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Sven Erik Holmes

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INTRODUCTION: THE OCTOBER 1995 SUPREME COURT TERM*

The Honorable Sven Erik Holmes†

One year ago, I had the privilege of introducing this program on the 1994 Term of the Supreme Court. My remarks at that time emphasized the cases dealing with federalism and race.¹ Today, because the emerging trends of the 1994 Term became more pronounced in 1995, I intend to focus primarily on the same two areas.

In 1994, the Supreme Court in *United States v. Lopez*² limited the power of Congress to enact legislation under the Commerce Clause for the first time since its 1937 decision in *NLRB v. Jones & Laughlin Steel Corp.*³ In 1995, the Court's efforts to circumscribe the authority of the national legislature intensified in *Seminole Tribe of Florida v. Florida*.⁴ In *Seminole Tribe*, the Supreme Court struck down a federal statute that subjected states to the jurisdiction of the federal courts for purposes of adjudicating disputes with Indian tribes under the Indian Gaming Regulatory Act (IGRA).⁵ The Court held that Congress lacked Constitutional authority to abrogate states' sovereign immunity under the Eleventh Amendment, thus rendering the IGRA unconstitutional. The opinion in *Seminole Tribe*, authored by Chief Justice Rehnquist, concluded that Congress

* Based on remarks delivered at the Conference, *Practitioner's Guide to the October 1995 Supreme Court Term*, at The University of Tulsa College of Law, December 6, 1996.

† United States District Judge for the Northern District of Oklahoma.

1. See Sven Erik Holmes, *Introduction: The October 1994 Supreme Court Term*, 31 TULSA L.J. 421 (1996).

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

3. 301 U.S. 1 (1937).

4. 116 S. Ct. 1114 (1996).

5. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2486 (codified at 25 U.S.C. § 2701-2721 (1994)).

lacks the authority to legislate in this area not only under the general provisions of the Commerce Clause, but also under the very specific provisions of the Indian Commerce Clause.

The significance of this opinion cannot be understated. Already, states have brought cases in federal courts challenging the applicability of copyright, patent, bankruptcy, and environmental laws to the states—all designed to test the outer reaches of *Seminole Tribe* and the Commerce Clause itself. More importantly for future federalism jurisprudence, the Court now appears very comfortable questioning the power of Congress to act. The Supreme Court is presently dominated by conservative appointees, and its decisions in both *Lopez* and *Seminole Tribe* are certainly consistent with the declared goal of political conservatives to reduce the role of the federal government in everyday life by reducing the authority of Congress to put it there. If the Court's purpose is to curtail the reach of the national legislature, that purpose will surely become clear in at least three cases the Court will decide in the 1996 Term: *Mack v. United States*,⁶ which challenges the authority of Congress to require state officials to carry out certain gun registration procedures; *Freestone v. Cowan*,⁷ a class action under 42 U.S.C. §1983 based upon Arizona's failure to comply with federal requirements to identify and to seek support from "deadbeat dads" which could ultimately challenge Congress' ability to require states to pursue child support payments; and *Flores v. City of Boerne*,⁸ which challenges congressional authority to legislate the applicable standards that a court must apply in determining whether a state action violates the Religious Freedom Restoration Act of 1993.⁹

The 1995 Term also clarified the trends of the 1994 Term in the area of race. In 1994, the Court overturned government action involving race in three cases: *Adarand Constructors, Inc. v. Peña*,¹⁰ in which the Court subjected to strict scrutiny federal affirmative action programs that draw racial classifications; *Miller v. Johnson*,¹¹ which held that the use of race as the dominant reason for drawing a legislative district violates the Equal Protection Clause; and *Missouri v. Jenkins*,¹² which held that a federal court's school desegregation remedy may not require a school district to create a magnet school to attract white students from outside the district. The government actors in these cases were the United States Congress in *Adarand*, a state legislature in *Miller*, and a federal district court in *Jenkins*. These decisions suggested that the Supreme Court was moving toward a judicial declaration that government at all levels simply lacks the authority under the Constitution to deal with race-related problems.

6. 66 F.3d 1025 (9th Cir. 1995), cert. granted sub nom. *Printz v. United States*, 116 S. Ct. 2521 (1996).

7. 68 F.3d 1141 (9th Cir. 1995), cert. granted sub nom. *Blessing v. Freestone*, 116 S. Ct. 1671 (1996).

8. 73 F.3d 1352 (5th Cir. 1995), cert. granted sub nom. *City of Boerne v. Flores*, 117 S. Ct. 293 (1996).

9. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (1994)).

10. 115 S. Ct. 2097 (1995).

11. 115 S. Ct. 2475 (1995).

12. 115 S. Ct. 2038 (1995).

In the 1995 Term, the Court amplified its views on race in two redistricting cases: *Bush v. Vera*,¹³ which rejected a redistricting plan enacted by the Texas legislature, and *Shaw v. Hunt*,¹⁴ which overturned a North Carolina redistricting plan. In *Bush*, the Court articulated its view of equal protection and thus put the 1994 cases in perspective: "If the promise of the Reconstruction Amendments, that our Nation is to be free of state-sponsored discrimination, is to be upheld, we cannot pick and choose between the basic forms of political participation in our efforts to eliminate unjustified racial stereotyping by government actors."¹⁵ We must wait for future cases to determine whether the qualifier "unjustified" in fact applies to *all* government action involving racial classifications, regardless of the subject matter. Most certainly, if *all* racial classifications are found to be "unjustified," we can anticipate that the Court will strike down any government action dealing with race.

These race and federalism decisions present at least three questions. First, if we, as a democratic society, are unable to act by and through our elected representatives, how can we address the very serious problems of race facing our nation? Indeed, the Court appears to be moving toward a declaration that this critical social problem is off-limits to government actors—even if those government actors are members of the white majority seeking to craft programs and opportunities for minorities. Justice Stevens responded to this view in his dissent in *Shaw v. Hunt*, stating:

[I] am convinced that the Court's aggressive supervision of state action designed to accommodate the political concerns of historically disadvantaged minority groups is seriously misguided. A majority's attempt to enable the minority to participate more effectively in the process of democratic government should not be viewed with the same hostility that is appropriate for oppressive and exclusionary abuses of political power.¹⁶

The second question involves judicial restraint. Historically, "judicial restraint" has been defined as permitting the legislature to enact laws without interference from the courts; "judicial activism" has been defined as identifying individual rights in the Constitution which operate as a shield against certain legislative action. In both *Lopez* and *Seminole Tribe*, however, the Supreme Court determined that the legislative body involved did not have the authority to act at all. Arguably, this is another form of judicial activism. Rather than identifying individual rights, which has the effect of prohibiting legislation, this form of judicial activism identifies constitutional limits on the legislative branch, which has the same effect of prohibiting legislation.

The Constitution establishes clear and appropriate limits on judicial authority. A guiding principle in our system of justice is that courts are responsible for interpreting the law and not making the law. Judicial restraint properly re-

13. 116 S. Ct. 1941 (1996).

14. 116 S. Ct. 1894 (1996).

15. *Bush*, 116 S. Ct. at 1956.

16. *Shaw*, 116 S. Ct. at 1907 (Stevens, J., dissenting).

quires that judges show great deference to the acts of the legislative branch and not legislate from the bench. Courts that fail to exercise judicial restraint are in effect substituting their views for those of elected officials. Based on the 1994 and 1995 Terms, the question may fairly be asked whether the United States Supreme Court adheres to such principles of judicial restraint.

Finally, the role of the Supreme Court is to articulate fundamental principles of law. Its most important constitutional decisions are meant to provide guidance to government actors, including lower court judges; local, state, and federal legislators; and executives at all levels of government. These are the primary consumers of Supreme Court opinions. It merits consideration, however, whether in the 1995 Term the Supreme Court satisfactorily performed its function to establish generally applicable principles of law.

Consider the following examples. *Romer v. Evans*¹⁷ struck down a state-wide referendum in Colorado that was intended to disadvantage individuals on the basis of sexual orientation. However, sexual preference was not given constitutionally protected status as a result, and it is not clear that *Romer* would even apply to another case involving gay rights. *United States v. Virginia*¹⁸ required the Virginia Military Institute (VMI) to admit women, in effect outlawing same-sex education at VMI. It is not clear from that opinion, however, that state-sponsored same-sex education in other schools is unconstitutional as a result. *BMW North America, Inc. v. Gore*¹⁹ overturned a punitive damage award of \$2 million, holding that such an award violated the defendant's due process rights. The opinion, however, provides little useful guidance as to the appropriate constitutional framework for analyzing punitive damage awards in the future.²⁰ Finally, in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,²¹ Justice Breyer authored the judgment of the Court with the support of five other justices, but three portions of his opinion received only four supporting votes, and two other portions of the opinion garnered only three additional votes. As a result, this opinion cannot serve as controlling authority in any future case. In short, *Denver Telecommunications*, like *Romer*, *VMI*, and *BMW*, has limited precedential value.

These cases at least suggest the question whether the Supreme Court, by deciding disputes without articulating guiding principles or establishing useful precedent, is meeting its systemic responsibility to address and resolve the truly significant issues of constitutional and federal statutory law. I leave that question for you to consider as you listen to the excellent program here today.

17. 116 S. Ct. 1620 (1996).

18. 116 S. Ct. 2264 (1996).

19. 116 S. Ct. 1589 (1996).

20. Recently, in *Continental Trend Resources, Inc. v. Oxy USA Inc.*, 101 F.3d 634 (10th Cir. 1996), the Tenth Circuit meticulously applied *BMW* in reducing a punitive damage award from \$30 million to \$6 million. A close reading of the opinion, however, reveals that even such careful adherence to *BMW* does not result in a clearly principled basis for the majority's conclusion that \$6 million is the appropriate award—as opposed to \$8 million, \$10 million, or even, as suggested by the dissent, \$20 million.

21. 116 S. Ct. 2374 (1996).

I want to thank you again for being here and to congratulate the University of Tulsa College of Law for this important event.

