Tulsa Law Review

Volume 37
Number 1 *2000-2001 Supreme Court Review*

Volume 37 | Number 1

Fall 2001

2000-2001 Supreme Court Review: Introduction

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SYMPOSIUM: 2000-2001 SUPREME COURT REVIEW

INTRODUCTION

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I would like to welcome you this morning and to congratulate the University of Tulsa for its continued sponsorship of this symposium. This marks the seventh year in which the College of Law has presented this important event.

The 2000 Term of the United States Supreme Court will forever be remembered as the Term in which the Supreme Court again entered the field of politics by declaring the winner of the Presidential election between Governor George W Bush and Vice-President Al Gore.

We could, of course, spend this entire symposium analyzing *Bush v. Gore*.[1] I will leave it to others, however, to address whether there was standing to assert a claim under the United States Constitution; whether the facts presented a political question; whether there was an equal protection violation; whether the case was ripe for adjudication; or whether federalism, as the Rehnquist Court has defined it, required that the Supreme Court respect the construction of state law by the Florida Supreme Court.

Instead, I will confine my comment here to the observation that history will be the judge of whether the most fundamental responsibility of the Supreme Court—to promote confidence in the rule of law—was helped or harmed by this decision.

I.

During the 2000 Term, the United States Supreme Court decided 79 cases, compared to 73 last year and 75 the year before.[2] In the

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1. 531 U.S. 98 (2000).

2. Marcia Coyle, *An Activist Court Rules on Speech, Immigration and One Big Election*, 23 Natl. L.J. C1 (Aug. 26, 2001).

1990's, the average number of opinions per term was just over 80 cases.[3] This compares to the decade of the 1980's, when the average number of opinions per term was nearly twice that number.[4]

Some have argued that there are splits in the circuits, or other areas of statutory or constitutional construction, that have been left unattended as a result of the Court's reduced docket. In my judgment, there is simply no evidence that any such cases have been ignored. The reduced caseload does not appear to have affected in any way the capacity of the Court to decide those issues which are both significant and pressing.

This Term, more than ever before, the Court decided cases by a 5-4 margin. Of the 79 opinions, 26 were by a 5-4 vote[5]—compared to 20 such splits during the 1999 Term.[6] Moreover, the language in the opinions suggests that the sharp division on the Court will continue well into the future.

Consider for example, the following exchange in *Board of Trustees of the University of Alabama v. Garrett*:[7]

For the five justice majority: "[a]lthough Justice Breyer would infer from Congress' general conclusions regarding societal discrimination against the disabled that the States had likewise participated in such action, . . . the House and Senate committee reports on the ADA flatly contradict this assertion."[8]

And for Justice Breyer in dissent: "[t]he Court, through its evidentiary demands, its non-deferential review, and its failure to distinguish between judicial and legislative constitutional competencies, improperly invades a power that the Constitution assigns to Congress."[9]

One consequence of so many 5-4 decisions is that a single justice can wield considerable power. That power is now incontrovertibly held by Justice Sandra Day O'Connor. In fact, at times, this Court has been described as the O'Connor Court. This Term, Justice O'Connor was in the majority 72 times.[10] More importantly, she was in the majority in 20 of the Court's 26 opinions decided by a 5-4 vote.[11] By comparison, in the 1999 Term, of the 73 cases decided, Justice O'Connor was in the majority 69 times.[12]

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3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. 121 S. Ct. 955 (2001).
8. *Id.* at 966.
9. *Id.* at 975-76.
10. Coyle, *supra* n. 2.
11. *Id.*
12. *Id.*

II.

The cases decided this Term reflect two distinct trends that merit attention.

A.

First, the Rehnquist Court's signature jurisprudence has now evolved into its second generation. For the last six years, the Supreme Court has engaged in a systematic effort to implement Chief Justice Rehnquist's vision of the role of the United States Congress and the role of the states in our federal system. These cases form the legacy of the Rehnquist Court. Relying upon an expressed view of the intent of the framers, the Court declared new principles of constitutional law. As a result, the power of Congress to legislate under both the Commerce Clause and Section 5 of the Fourteenth Amendment has been severely restricted.[13]

This Term, the Court relied, not on the framers, but on its own opinions. The cases of *City of Boerne v. Flores*,[14] *Kimel v. Florida Board of Regents*,[15] and *United States v. Lopez*,[16] in particular, were cited as controlling authority. In dealing with issues of federalism and Congressional power, the Court now emphasizes the importance of following "firmly established precedent"—recognizing that such precedents were only recently " firmly established."[17] I observe, without comment, that the same fidelity to stare decisis has not yet found its way into the Court's opinions involving *Roe v. Wade*.[18]

B.

Second, again this Term the Court will be accused of judicial activism because certain opinions appear to advance a political philosophy. These opinions are separate and apart from *Bush v. Gore*, which was inherently political because it decided a presidential election and was limited to the facts of the case.

In prior years, the Supreme Court exercised judicial activism through a narrow interpretation of the constitutional limits on the power of Congress to legislate. This Term, the Court expanded its activist approach to strict interpretations of federal statutes and legislative history.

Specifically, in *Garrett* and *Solid Waste Agency of Northern Cook*

13. *See e.g. U.S. v. Morrison*, 529 U.S. 598 (2000).
14. 521 U.S. 507 (1997).
15. 528 U.S. 62 (2000).
16. 514 U.S. 549 (1995).
17. *See e.g. Garrett*, 121 S. Ct. at 962 (citing *Kimel*, 528 U.S. 62).
18. 410 U.S. 113 (1973) (establishing the fundamental right of privacy).

County v. United States Army Corps of Engineers,[19] the Court declared its own view of the legislative history to reach a result. In *Garrett*, the Court rejected a determination by Congress that the Americans with Disabilities Act ("ADA") was necessary to address prior acts of discrimination by the states.[20] More importantly, the Court opined that the judiciary's assessment of the facts, not the assessment of the legislature, should control any determination of whether legislation is proper under the Fourteenth Amendment.[21] Accordingly, the Court held that the Eleventh Amendment's grant of immunity to the states barred state employees from suing their employer for ADA violations.[22]

In *Solid Waste Agency*, the Court held that provisions of the Clean Water Act should be narrowly interpreted—notwithstanding a broad interpretation of the Act previously expressed by Congress.[23] The Court justified imposing its own view of the law as necessary to avoid ruling on whether the statute violated the Commerce Clause under *Lopez*.[24] The Court had followed a similar approach the previous Term in *Jones v. United States*.[25] The effect was for the Court to posit a possible constitutional problem as the basis for rejecting Congress' interpretation of the law and to substitute its own.[26] Of course, if Congress exceeded its authority under the Commerce Clause by enacting the Clean Water Act, the statute should be overturned. However, to modify the provisions of the law to avoid reaching a theoretical constitutional issue is in effect to displace the view of Congress with the view of the five-justice majority. The case legitimizes the argument that, notwithstanding a contrary interpretation by the legislative branch, many federal statutes may be construed *ab initio* by the judicial branch in order to insure that they do not run afoul of the Supreme Court's Commerce Clause jurisprudence.

Over the years, the Rehnquist Court has been criticized for judicial activism. The 2000 Term will exacerbate this concern. Our system was founded on the principle that courts are responsible for interpreting the law and not making the law. Restraint requires that the judicial branch 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.[27] In recent

19. 531 U.S. 159 (2001).
20. *Garrett*, 121 S. Ct. at 964-65.
21. *Id.* at 963.
22. *Id.* at 967-68.
23. *Solid Waste Agency*, 531 U.S. at 167-68.
24. *Id.* at 173-74.
25. 529 U.S. 848 (2000).
26. *Solid Waste Agency*, 531 U.S. at 174-75; *Jones*, 529 U.S. at 857-58.
27. Judge Learned Hand once wrote: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians [i.e. judges]. . . . If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Learned Hand, *The Bill of Rights* 75 (Harv. U. Press 1958).

years, despite mounting criticism, the Rehnquist Court appears to have actually increased its level of judicial activism.

III.

It has been said that the closeness of the 2000 Presidential election demonstrated to the American people that every individual vote counts. I would add that the judicial activism of the Supreme Court in recent years similarly demonstrates that every individual vote counts. Presidential elections are about very important issues—among the most important of which is the future make-up of the Supreme Court. When the Supreme Court engages in judicial activism to implement a philosophical point of view, it is clear that any presidential election will have political repercussions for many years to come.