

# Tulsa Law Review

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Volume 35  
Issue 3 *Practitioner's Guide to the 1998-1999  
Supreme Court Term*

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Spring 2000

## Practitioner's Guide to the 1998-1999 Supreme Court Term: Introduction

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### Recommended Citation

Sven E. Holmes, *Practitioner's Guide to the 1998-1999 Supreme Court Term: Introduction*, 35 *Tulsa L. J.* 467 (2013).

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## **SYMPOSIUM: PRACTITIONER'S GUIDE TO THE 1998 - 1999 SUPREME COURT TERM**

### **INTRODUCTION**

The Honorable Sven Erik Holmes<sup>†</sup>

Today marks the fifth year that the University of Tulsa College of Law has sponsored this annual review of the most recent Term of the Supreme Court – and also the fifth year that I have had the privilege of giving this Introduction. Whenever anything reaches the five-year point, it can legitimately be considered a tradition – and so it is with this event.

#### I

As with any tradition, this symposium deserves a pause for reflection. As most of you know, this program was first developed under the auspices of Professor Bernard Schwartz, who each year until his death in 1998 would captivate the audience with his knowledge and insight into the most recent decisions of the Supreme Court.

Despite Professor Schwartz's untimely death last year, the tradition of this symposium has continued. Indeed, today I salute Professor Gary Allison for his work in maintaining this important contribution to Constitutional law. You will hear a presentation later from Professor Allison on the federalism cases decided this term by the Court, which scholars, jurists, and practitioners all agree were the most significant opinions issued during the 1998 Term.

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<sup>†</sup>. United States District Judge for the Northern District of Oklahoma.

## II

A tradition of five years merits more than congratulations. Five years is a sufficient period of time from which to recognize specific trends. These trends in turn should tell us what to expect from the Supreme Court in the future. Permit me, then, to introduce the 1998 Term through the prism of the trends that we have identified in this forum during the last five years.

1. The Supreme Court has become extremely comfortable deciding only a limited number of cases each year. In the 1998 Term, the Court issued 75 rulings; in 1997, 91; in 1996, 80; and in 1995, 75. Indeed, over the last ten years, the Court has averaged fewer than 100 cases per year. In my judgment, this is a positive – not a negative – trend. Indeed, there is no empirical evidence that the Court has failed to address an important constitutional question, or has left unattended any significant legal split in the circuit courts of appeals. To the contrary, as will become abundantly clear by the program today, the Court again this Term has given clear statements of legal principles in critical areas of law. As a result, criticism that the number of cases decided in some way indicates a deficiency in the Court's work has abated.

2. While opinions issued by a divided Court receive a preponderance of the attention, as well they should, there has actually been a great deal of agreement on the Rehnquist Court. In fact, this last term, 32 of the 75 decisions were unanimous. Over the last five years, the percentage of unanimous decisions has ranged between 35% and 48%.

3. The Supreme Court is, and will continue to be, most deeply divided over the issue of federalism. During the last five years, at this symposium, we have analyzed such cases as *United States v. Lopez*,<sup>1</sup> *Seminole Tribe v. Florida*,<sup>2</sup> and *City of Boerne v. Flores*.<sup>3</sup> The jurisprudence articulated in these opinions was further refined this Term in *Alden v. Maine*,<sup>4</sup> *Florida Prepaid Postsecondary Education Expense v. College Savings Bank*,<sup>5</sup> and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense*.<sup>6</sup>

In *Alden*, the Court considered a suit originally brought in federal court by Maine public employees seeking damages from the state under the Fair Labor Standards Act.<sup>7</sup> The employees' federal case was dismissed.<sup>8</sup> Thereafter, the employees filed their action in state court.<sup>9</sup> The Supreme Court ruled that the

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1. 514 U.S. 549 (1995).

2. 517 U.S. 44 (1996).

3. 521 U.S. 507 (1997).

4. 119 S. Ct. 2240 (1999).

5. 119 S. Ct. 2199 (1999).

6. 119 S. Ct. 2219 (1999).

7. See *Alden*, 119 S.Ct. 2240, 2246.

8. See *id.*

9. See *id.*

sovereign immunity from such federal claims described in *Seminole Tribe* extends to state courts, and thus the decision of the state court dismissing the case was sustained.<sup>10</sup>

The other two federalism cases, referred to collectively as *College Savings Bank*, involved a bank's patented college investment plan.<sup>11</sup> The bank claimed a violation of the federal patent and trademark law.<sup>12</sup> The Court rejected both claims based on sovereign immunity, ruling that Congress exceeded its constitutional authority under Section 5 of the 14th Amendment when it authorized private suits against states for patent infringement and Lanham Act violations.<sup>13</sup> The Court reasoned that Section 5 power permits Congress to enforce a constitutional right, not to define what constitutes a constitutional violation, and that deprivation of property without due process was not established under the facts presented.<sup>14</sup>

The significance of these cases can best be understood in the context of the other federalism cases that we have addressed in this symposium during the last five years. In *Seminole Tribe*, the Court held that Congress cannot abrogate state immunity under its Article I powers, but noted that abrogation is permitted under Section 5 of the 14th Amendment.<sup>15</sup> After *Alden*, *Seminole Tribe* clearly applies to federal claims in both state and federal courts.

With the Article I route to abrogation of state immunity foreclosed by *Seminole Tribe*, and the state court alternative foreclosed by *Alden*, in the future remedial federal legislation must find support in the Enforcement Clause to survive. Accordingly, such enactments must satisfy *City of Boerne*, which restricted the ability of Congress to legislate under Section 5 by requiring congruence and proportionality between the 14th Amendment violation by the states and Congress's chosen remedy.<sup>16</sup>

In the *College Savings Bank* cases, the Court emphasized that Congress cannot simply recite its Enforcement Clause authority to abrogate state sovereignty and concluded that the congruence and proportionality requirements of *City of Boerne* had not been met.<sup>17</sup>

These applications of *Seminole Tribe* and *City of Boerne* make clear that the Court views sovereign immunity as a significant restraint on federal power. Accordingly, the viability of private claims against states under a variety of federal statutes – including the Age Discrimination in Employment Act, the Family and Medical Leave Act and the Americans with Disabilities Act – may be subject to question.

The federalism cases are crucial, not only because a state employee may not bring a claim for relief otherwise cognizable under federal law, but also because of

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10. *See id.*

11. *Florida Prepaid Postsecondary Education Expense v. College Savings Bank*, 119 S.Ct. 2199, 2202-03.

12. *See id.* at 2204.

13. *See id.* at 2206-08.

14. *See id.* at 2208.

15. *See Seminole Tribe*, 517 U.S. 44, 47.

16. *See City of Boerne*, 521 U.S. 507, 512.

17. *See College Savings Bank*, 119 S.Ct. 2199.

the dramatic redistribution of political power occasioned by this jurisprudence. Many scholars believe that the federalism cases are more an expression of political philosophy than an objective legal analysis. With each passing Term of the Supreme Court, this view appears to gain support.

Moreover, this conclusion is buttressed by other public pronouncements by Chief Justice Rehnquist. During this past year, the Chief Justice joined forces with representatives from all points on the political spectrum to assail the efforts of Congress to federalize state crimes. In his Report on the Judiciary last year, the Chief Justice stated:

The trend to federalize crimes that traditionally have been handled in state courts not only is taxing the [federal] judiciary's resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system. The pressure in Congress to appear responsive to every highly publicized societal ill or sensational crime needs to be balanced with an inquiry into whether states are doing an adequate job in these particular areas and, ultimately, whether we want most of our legal relationships decided at the national rather than local level.<sup>18</sup>

An impartial assessment of these comments, coupled with the federalism jurisprudence painstakingly carved out over the last five years in a series of divided Court decisions, suggests that the Chief Justice may not stop until the powers of the U.S. Congress have been severely curtailed.

To many, such a systematic effort to undermine the legitimacy of Congressional action appears to be far more politics than law – that is, judicial activism in furtherance of a political philosophy – and not strict Constitutional construction. Any time a desired outcome takes precedence over legal analysis, the fairness and impartiality of our system can reasonably be questioned.

### III

There are other five-year trends reflected in the cases this Term that also merit our attention.

First, the Court continues to provide important guidance in the area of employment law. These types of cases have constituted in excess of 10% of my total docket, and 25% of all my trials, since I took the federal bench in 1995. This year, two of the most important cases were *Sutton v. United Air Lines, Inc.*,<sup>19</sup> and *Kolstad v. American Dental Ass'n.*<sup>20</sup>

In *Sutton*, the Court held that the determination of whether an individual is disabled for purposes of the ADA must be made with reference to any corrective

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18. 1998 Year-End Report on the Federal Judiciary.

19. 119 S. Ct. 2139 (1999).

20. 119 S. Ct. 2118 (1999).

measures that mitigate her impairment.<sup>21</sup> Accordingly, two sisters who were able to correct their severe myopia to 20/20 vision were not regarded as disabled within the meaning of the statute.<sup>22</sup>

In *Kolstad*, the Court held that punitive damages can be awarded under Title VII if the plaintiff proves that the defendant acted with malice or reckless indifference to her civil rights.<sup>23</sup> The Court also held that an employer is not vicariously liable for punitive damages if it has made a good faith effort to comply with Title VII.<sup>24</sup> This aspect of the opinion reflects the Court's recent positive trend of creating incentives for employers to implement effective anti-discrimination policies in the workplace.

A second trend: the Court has now brought into focus a coherent Fourth Amendment jurisprudence applicable to automobiles. The vehicle search and seizure cases decided this year included *Wyoming v. Houghton*,<sup>25</sup> *Florida v. White*,<sup>26</sup> and *Knowles v. Iowa*.<sup>27</sup>

In *Wyoming v. Houghton*, the Court held that when a police officer has probable cause to search a car, he may inspect containers found therein, including those of passengers – in this case a purse.<sup>28</sup>

In *Florida v. White*, the Court held that the Fourth Amendment does not require the police to obtain a warrant before seizing an automobile from a public place when they have probable cause to believe that the car itself is forfeitable contraband.<sup>29</sup> Drugs found during the subsequent inventory search are not subject to suppression on Fourth Amendment grounds.<sup>30</sup>

In *Knowles v. Iowa*, the Court unanimously held that a police officer may not conduct a full-blown search of the automobile pursuant to a traffic citation.<sup>31</sup> Accordingly, there is no “search incident to a citation” exception to the requirements of the Fourth Amendment.<sup>32</sup>

These cases are important because, in conjunction with *Whren v. United States*,<sup>33</sup> the Court has put in place a clear framework by which trial courts may analyze Fourth Amendment challenges arising out of automobile searches, as follows:

- (a) Police may stop a motorist for even a pretextual violation of the motor vehicle code.

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21. *See Sutton*, 119 S.Ct. at 2143.

22. *See id.*

23. *See Kolstad*, 119 S.Ct. at 2121.

24. *See id.*

25. 526 U.S. 295 (1999).

26. 526 U.S. 559 (1999).

27. 525 U.S. 113 (1998).

28. *See Wyoming v. Houghton*, 526 U.S. 295, 307.

29. *See Florida v. White*, 526 U.S. 559, 561.

30. *See id.*

31. *See Knowles v. Iowa*, 525 U.S. 113, 118-19.

32. *Id.* at 119.

33. 517 U.S. 806 (1996).

- (b) If only a citation is issued, no additional search may be made.
- (c) If there is an additional violation (for example, an expired driver's license) or there is consent, the entire automobile may be searched incident thereto.
- (d) Attendant to that search, other passengers do not have any reasonable expectation of privacy in their own compartment or belongings.<sup>34</sup>

Whatever their merits, these principles are easily applied by trial courts – and this, after all, should be a fundamental goal of any Supreme Court decision.

A third trend involves race. Race continues to be a vexing issue for the Court and for the country. There was, however, a significant development this Term. After five years of categorical statements that race cannot be considered in any way in political redistricting, the Court for the first time recognized that race in fact may be a proxy for political preference, holding in *Hunt v. Cromartie*<sup>35</sup> that when there are correlations that may be explained by politics, not race, the mere existence of racial correlations do not end the inquiry.<sup>36</sup>

Finally, every year there have been one or more decisions that appear odd and can be applied by trial courts, if at all, only with some difficulty. This year, I would add to our five-year list *Kumho Tire Co. v. Carmichael*.<sup>37</sup>

In *Kumho Tire*, the Court held that the trial court, in its capacity as gatekeeper of the evidence, must apply the standard for scientific testimony established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>38</sup> to all expert witnesses.<sup>39</sup> In my judgment, this would effectively transfer from the jury to the judge a significant responsibility to determine, in advance of trial, the reliability of proffered expert testimony. This function historically has been performed by the jury, relying in large part on vigorous cross-examination. I anticipate that trial judges will be very reluctant to extend their authority into this area and instead will maintain the practice that such reliability determinations should be made by the finder of fact.

These are only a few of the trends of the last five years that were reflected in the cases decided during the 1998 Term of the Supreme Court. Again, I am proud to be a part of this University of Tulsa tradition and congratulate the College of Law on this important event.

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34. *See Whren*, 517 U.S. 806, 816-19.

35. 119 S. Ct. 1545 (1999).

36. *See id.* at 1552.

37. 536 U.S. 137 (1999)

38. 509 U.S. 579 (1993).

39. *See Kumho Tire Co.*, 536 U.S. at 147-49.