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INTRODUCTION

The Honorable Sven Erik Holmes*

Welcome to the sixth annual review of the most recent term of the Supreme Court here at the University of Tulsa College of Law. This is also my sixth introduction.

As most of you know, this program was initially developed by the late Professor Bernard Schwartz.[1] Professor Schwartz established the standard of excellence by which our work in the area of constitutional law will be measured.

I

The 1999 Term of the Supreme Court addressed a wide spectrum of social, political, and legal issues. The opinions will forever define the contours of Chief Justice Rehnquist's legacy. In case after case, the majority solidified and extended the distinctively conservative jurisprudence that is the signature of the Rehnquist Court.

The centerpiece of the Rehnquist Court's work has been in the area of federalism—limiting the authority of Congress, narrowly construing the power delegated to the federal government, and expanding states' sovereign immunity. As part of its effort to restrict the scope of the power of Congress, the Court has struck down all or part of twenty-four federal statutes since 1994. This trend

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1. Bernard Schwartz was the Chapman Distinguished Professor of Law at the University of Tulsa College of Law from 1992 until his untimely death in 1998. He was a member of the New York University Law School faculty from 1947-1992. Professor Schwartz authored over 60 books and was recognized throughout the world as a preeminent constitutional scholar.

continued in the 1999 Term, as the Court invalidated laws that held states liable for age discrimination, *Kimel v. Florida Board of Regents*,[2] allowed women to sue their abusers in federal court, *United States v. Morrison*,[3] and altered the requirement that criminal suspects be given *Miranda*[4] warnings, *United States v. Dickerson*.[5]

II

Before turning to specific cases, a brief review of the statistics is instructive:

1. In the 1999 Term, the Court issued seventy-four rulings. This is the lowest number of cases decided in nearly five decades. As a result, the five-year average has dropped to approximately seventy-nine cases per term. In the future, we can anticipate that the Court will decide approximately this number of cases each year. By now, however, it should be clear that the number of cases does not in any way reflect the significance of the rulings or the sweeping reach of the Court's work.

2. A majority of the cases decided this term, 58%, reversed the decision of a lower court. This fact, however, has no substantive significance. In the event of a split in the circuits, the Supreme Court generally prefers to decide the case that will reverse the court of appeals because, in so doing, there can be no future argument that circuit court dicta also was affirmed. Simply, the Court speaks with greater clarity for the future when it rejects, rather than affirms, the reasoning and conclusion of a lower court opinion.

3. The philosophical divisions on the Court were more evident during the 1999 Term. The Court split 5-4 in twenty cases, up from sixteen during the 1998 Term. These 5-4 splits included some of the Term's most high-profile decisions: *FDA v. Brown & Williamson*,[6] holding that the Food and Drug Administration did not have the legal authority to regulate tobacco; *Boy Scouts of America v. Dale*,[7] holding that the Boy Scouts may exclude a gay scoutmaster; *United States v. Morrison*,[8] holding the Violence Against Women Act to be unconstitutional as beyond the legal authority of Congress to enact; and *Stenberg v. Carhart*,[9] overturning Nebraska's prohibition of so-called "partial birth abortions." Notably, the number of unanimous decisions has steadily declined over the past three years, from 48% in the 1997 Term, to 44% in 1998, to just 39% in 1999.

Moreover, in the close cases, the conservative wing of the Court was clearly dominant. A review of the 5-4 splits reflects that in 13 such cases, the majority included Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas. The Court's so-called "liberal" wing—Justices Stevens, Souter,

2. 120 S. Ct. 631 (2000).
3. 120 S. Ct. 1740 (2000) (Souter, Breyer, J.J., dissenting).
4. Miranda v. Arizona, 384 U.S. 436 (1966) (Harlan, Stewart, White, J.J., dissenting).
5. 120 S. Ct. 2326 (2000) (Scalia, J., dissenting).
6. 120 S. Ct. 1291 (2000) (Breyer, J., dissenting).
7. 120 S. Ct. 2446 (2000) (Stevens, Souter, J.J., dissenting).
8. 120 S. Ct. 1740 (2000).
9. 120 S. Ct. 2597 (2000) (Rehnquist, Scalia, Thomas, J.J., dissenting).

Ginsburg, and Breyer—prevailed as a group in only one of the 20 splits, *Stenberg*[10] (which was written by Justice O'Connor).

4. The numbers also tell a story about where the Court has been and where it is going. In 1999-2000, Chief Justice Rehnquist agreed most often with Justice O'Connor (93% of the time) and agreed least often with Justice Stevens (54% of the time). This reflects the alliances and conflicts of the last generation. Looking to the future, it is noteworthy that Justice Breyer agreed most often with Justice Souter (84% of the time) and agreed least often with Justice Thomas (58% of the time); Justice Ginsburg agreed most often with Justice Souter (91% of the time) and agreed least often with Justice Scalia (46% of the time); and Justice Thomas agreed most often with Justice Scalia (90% of the time) and agreed least often with Justice Ginsburg (53% of the time). This indicates who may be the primary combatants in the debates of the next generation.

III

Following the Supreme Court's adjournment in June, many commentators reported that the 1999 Term was a "mixed bag," that is, that there were a number of so-called "liberal" results to counterbalance its "conservative" opinions, and therefore no ideological stamp could be placed on the Court's work. A close reading of the cases, however, does not support this conclusion. The claim of moderation is based primarily on four highly-publicized decisions: *United States v. Dickerson*,[11] upholding *Miranda*;[12] *Hill v. Colorado*,[13] upholding state regulation of abortion clinic protests; *Stenberg v. Carhart*,[14] overturning a state ban on partial birth abortions; and *Santa Fe Independent School District v. Doe*,[15] prohibiting student-led prayer before Texas high school football games. A careful analysis of these opinions reveals that the law was not changed in any way with respect to the Fifth Amendment, abortion, or school prayer. In fact, it can be argued that these either solidified the previously announced Rehnquist Court doctrine or simply maintained the status quo.

A

In *United States v. Dickerson*,[16] the Court held that the U.S. Congress could not statutorily modify *Miranda v. Arizona*.[17] Two years after *Miranda*, Congress had enacted 18 U.S.C. § 3501, which effectively makes the admissibility of statements by suspects during interrogation turn solely on whether such

10. *Id.*
11. 120 S.Ct. 2326 (2000).
12. Miranda v. Arizona, 384 U.S. 436 (1966).
13. 120 S. Ct. 2480 (2000).
14. 120 S. Ct. 2597 (2000).
15. 120 S. Ct. 2266 (2000).
16. 120 S. Ct. 2326, 2328 (2000).
17. 384 U.S. 436 (1966).

statements were made "voluntarily."[18] Thus, under the statute, a defendant may not defend solely on the basis of having not received his "Miranda warnings." The statute lay dormant for some thirty years, until the Fourth Circuit invoked its terms to reject a *Miranda* claim in 1999, holding that the federal law, not *Miranda*, was controlling authority.[19]

By a 7-2 vote, the *Dickerson* Court rejected § 3501. In so doing, the Court followed the unremarkable principle that Congress by statute may not overturn a "constitutional rule."[20] The opinion expressly relies on *City of Boerne v. Flores*,[21] which established the Rehnquist Court framework for determining whether Congress had exceeded its authority in enacting legislation.

Notably, the "constitutional rule" announced in *Miranda* was the result of a painstaking analysis by Chief Justice Warren, balancing society's need for effective law enforcement with its need to protect individual rights. By contrast, *Dickerson* belittles the constitutional element of *Miranda*, summarily stating, without analysis, that "experience suggests that the totality of the circumstances test which § 3501 seeks to revive is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner."[22] Moreover, the opinion ignores altogether the exhaustive effort of the Warren Court to address the competing policy concerns at issue. Rather, the Court intimates that the substantive holding of *Miranda* is questionable, stating that "[w]hether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now."[23]

B

Likewise, the two abortion cases decided this Term had virtually no effect on the substantive law. In *Hill v. Colorado*,[24] a 6-3 majority upheld a statute that regulated speech-related conduct within 100 feet of the entrance of a health care facility, by prohibiting anyone from "knowingly" approaching within eight feet of another person without consent and engaging in advocacy. This opinion, however, provided nothing new to either abortion or First Amendment jurisprudence. The time, place, and manner restrictions at issue were analyzed entirely under established principles previously applied to such public advocacy, specifically *Ward v. Rock Against Racism*, [25] *Schenk v. Pro-Choice Network of Western New York*,[26] and *Madsen v. Women's Health Center*.[27]

18. *See* 18 U.S.C. § 3501.
19. *See Dickerson*, 120 S. Ct. at 2328.
20. *Id.* at 2337.
21. 521 U.S. 507 (1997).
22. 120 S. Ct. at 2337.
23. *Id.* at 2336 (emphasis in original).
24. 120 S. Ct. 2480 (2000).
25. 491 U.S. 781 (1989).
26. 519 U.S. 357 (1997).
27. 512 U.S. 753 (1994).

Invoking these precedents, the Court upheld the conclusions of various Colorado appellate courts, all of which had relied on the same authorities. In so doing, the Court reaffirmed the declaration in *Ward* that "[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[28] The Court further cited *Madsen* for the proposition that "[t]he First Amendment does not demand that patients of a medical facility undertake Herculean efforts to escape the cacophony of political protests."[29] Thus, the opinion did little more than recite existing law.

In *Stenberg v. Carhart*, a 5-4 majority ruled that Nebraska could not ban a "partial birth abortion."[30] The reasoning on all sides of the issue, however, did not change from previous decisions.

These cases suggest that, notwithstanding the results, the pro-choice forces may have actually lost ground in the 1999 Term. First, there was nothing in either *Hill* or *Stenberg* that established any new basis, or strengthened any existing basis, for a woman's constitutional right to choose. Second, the pro-choice side in both cases lost the support of Justice Kennedy, who co-authored the majority opinion in the last abortion case decided by the Supreme Court, *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[31] In *Hill*, by contrast, Justice Kennedy voiced agreement with Justice Scalia's conclusion that the regulation should be overturned[32] and filed his own dissent, stating in part that "[i]n addition to undermining established First Amendment principles, the Court's decision conflicts with the essence of the joint opinion in *Casey* . . . ."[33] Furthermore, in *Stenberg*,[34] Justice Kennedy accused the majority of "misunderstanding" *Casey* by not giving States sufficient latitude to fashion abortion regulations. Justice Kennedy wrote in part that:

> [w]hen the Court reaffirmed the essential holding of *Roe*, a central premise was that the States retain a critical and legitimate role in legislating on the subject of

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28. 491 U.S. at 791.

29. 512 U.S. at 772-73.

30. 120 S. Ct. at 2609.

31. 505 U.S. 833 (1992). In the 1992 5-4 decision, Justices O'Connor, Kennedy, and Souter were joined by Justices Stevens and Blackmun, while in 1999, Justices O'Connor and Souter were joined by Justices Stevens, Breyer and Ginsburg.

32. Justice Scalia's dissent in *Hill* stated in part:

> What is before us . . . is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the "ad hoc nullification machine" that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice. Having deprived abortion opponents of the political right to persuade the electorate that abortion should be restricted by law, the Court today continues and expands its assault upon their individual right to persuade women contemplating abortion that what they are doing is wrong. Because, like the rest of our abortion jurisprudence, today's decision is in stark contradiction of the constitutional principles we apply in all other contexts, I dissent.

120 S. Ct. at 2503 (Scalia, J., dissenting) (quoting *Madsen*, 512 U.S. at 785).

33. *Id.* at 2516 (Kennedy, J., dissenting) (citing *Casey* 505 U.S. 833 (1992)).

34. 120 S. Ct. at 2623 (Kennedy, J., dissenting).

> abortion, as limited by the woman's right the Court restated and again guaranteed... The Court's decision today, in my submission, repudiates this understanding by invalidating a statute advancing critical state interests, even though the law denies no woman the right to choose an abortion and places no undue burden upon the right.[35]

This indicates that Justice Kennedy may not support any future application of *Casey* beyond the specific facts of that case.

Finally, more related to style than substance, Justice Scalia delivered from the bench a stinging rebuke of the majority opinion, likening *Stenberg* to *Korematsu*[36] and *Dred Scott*,[37] two previous Supreme Court decisions.[38] Surely, such open hostility cannot be viewed as evidence of moderation.

C

Finally, in *Santa Fe*, a 6-3 majority held that Santa Fe's policy of permitting student-initiated prayer at public high school football games violated the Establishment Clause of the First Amendment.[39] The Court concluded that the state sponsorship of the event and the coerced nature of the participation brought the facts squarely within established authorities,[40] specifically *Lee v. Weisman*,[41] and *Wallace v. Jaffree*.[42] The Court stated that "[i]n *Lee v. Weisman*, we held that a prayer delivered by a rabbi at a middle school graduation ceremony violated

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35. *Id.* Justice Kennedy concluded by stating:

> Ignoring substantial medical and ethical opinion, the Court substitutes its own judgment for the judgment of Nebraska and some 30 other States and sweeps the law away. The Court's holding stems from misunderstanding the record, misinterpretation of *Casey*, outright refusal to respect the law of a State, and statutory construction in conflict with settled rules. The decision nullifies a law expressing the will of the people of Nebraska that medical procedures must be governed by moral principles having their foundation in the intrinsic value of human life, including life of the unborn. Through their law the people of Nebraska were forthright in confronting an issue of immense moral consequence. The State chose to forbid a procedure many decent and civilized people find so abhorrent as to be among the most serious of crimes against human life, while the State still protected the woman's autonomous right of choice as reaffirmed in *Casey*. The Court closes its eyes to these profound concerns.

Id. at 2634-35 (Kennedy, J., dissenting).

36. Korematsu v. United States, 323 U.S. 214 (1944).

37. Dred Scott v. Sanford, 60 U.S. 393 (1856).

38. 120 S. Ct. at 2621. Justice Scalia went on to include:

> Today's decision, that the Constitution of the United States prevents the prohibition of a horrible mode of abortion, will be greeted by a firestorm of criticism—as well it should. I cannot understand why those who *acknowledge* that, in the opening words of Justice O'Connor's concurrence, "[t]he issue of abortion is one of the most contentious and controversial in contemporary American society," persist in the belief that this Court, armed with neither constitutional text nor accepted tradition, can resolve that contention and controversy rather than be consumed by it. If only for the sake of its own preservation, the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let *them* decide, State by State, whether this practice should be allowed. *Casey* must be overruled.

Id. at 2622-23 (Scalia, J., dissenting) (emphasis added).

39. 120 S. Ct. at 2275.

40. *See id.*

41. 505 U.S. 577 (1992).

42. 472 U.S. 38 (1985).

that Clause. Although this case involves student prayer at a different type of school function, our analysis is properly guided by the principles that we endorsed in *Lee*."[43]

By contrast, in *Mitchell v. Helms*,[44] announced one week later, a four-justice plurality moved the Court significantly closer to permitting state support for religious schools, announcing new principles of law and expressly overruling parts of two previous opinions, *Wolman v. Walter*,[45] and *Meek v. Pittenger*,[46] which had struck down similar parochial school assistance programs as impermissible government aid to religion.[47] The opinion of the Court stated that "[i]n distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion."[48] In her concurring opinion, Justice O'Connor concluded that a program allowing library and computer materials to be supplied to a parochial school does not have the effect of advancing religion and cannot "reasonably be viewed as an endorsement of religion."[49]

IV

Other cases decided this Term put the Rehnquist Court's distinctive mark on a number of significant social and political issues.

A

The Court decided two important federalism cases. In *United States v. Morrison*,[50] a 5-4 majority held that the portion of the Violence Against Women Act which creates a private right of action for victims of gender-motivated violence was not a valid exercise of Congressional power under either the Commerce Clause or the Equal Protection Clause of the 14th Amendment.[51] The Court concluded that gender-motivated crimes of violence are not economic activity,[52] and that the 14th Amendment applies only when states, not individuals,

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43. *Doe*, 120 S. Ct. at 2275 (citing *Lee*, 505 U.S. at 577) (citation omitted). The *Lee* Court held:

> The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so."

Id. (quoting *Lee*, 505 U.S. at 587).

44. 120 S. Ct. 2530 (2000) (plurality opinion).
45. 433 U.S. 229 (1977).
46. 421 U.S. 349 (1975).
47. 120 S. Ct. at 2535.
48. *Id.* at 2532.
49. *Id.* at 2562 (O'Connor, J., concurring) (quoting Agostini v. Felton, 521 U.S. 203, 235 (1992)).
50. 120 S. Ct. 1740 (2000).
51. *Id.* at 1759.
52. *See id.* at 1754.

take discriminatory action.[53]

In *Kimel v. Florida Board of Regents*,[54] a 5-4 majority held that the Age Discrimination in Employment Act (ADEA) did not effectively abrogate states' 11th Amendment immunity because, notwithstanding a clear statement of Congressional intent,[55] the abrogation in this case exceeded Congress's authority under the 14th Amendment.[56] The Court held that the14th Amendment does not grant Congress the power to apply the ADEA to the states because age is not a suspect classification. Further, the legislative history of the ADEA suggests that Congress never identified any pattern of age discrimination by the states.[57] The result in this case was anticipated, based on the Court's previous decisions in *Alden v. Maine*[58] and *College Savings Bank v. Florida Pre-Paid Post-Secondary Education Expenses*.[59] The effect will be to solidify *Seminole Tribe of Florida v. Florida*,[60] and *City of Boerne v. Flores*[61] as settled law.

B

The Court also issued important opinions in connection with freedom of association claims under the First Amendment. In *Boy Scouts of America v. Dale*,[62] a 5-4 majority held that a New Jersey law which prohibited discrimination on the basis of sexual orientation in places of public accommodation would not require the Boy Scouts to admit an avowed homosexual activist because to do so would violate the Boy Scouts' First Amendment right of expressive association. The Court reasoned that such required admission would adversely affect the mission of the Boy Scouts.[63]

In *California Democratic Party v. Jones*,[64] a 7-2 majority invalidated a California law mandating a primary election system in which all voters were permitted to vote for any candidate on the primary ballot, regardless of the voter's or the candidate's party affiliation. The Court held that the law burdened "a political party's First Amendment right of association" by forcing association with non-members and altering parties' candidates and messages.[65]

C

The Court also made a statement on family values. In *Troxel v. Granville*,[66]

53. *See id.* at 1758.
54. 120 S. Ct. 631 (2000).
55. *Id.* at 640.
56. *Id.* at 645.
57. *See id.* at 649.
58. 119 S. Ct. 2240 (1999).
59. 119 S. Ct. 2219 (1999).
60. 116 S. Ct. 1114 (1996).
61. 117 S. Ct. 2157 (1997).
62. 120 S. Ct. 2446 (2000).
63. *See id.* at 2454.
64. 120 S. Ct. 2402 (2000).
65. *Id.* at 2404 (2000).
66. 120 S. Ct. 2054 (2000).

by a 6-3 vote (Justices Souter and Thomas concurring in the judgment), the Court affirmed the judgment of the Washington Supreme Court invalidating a state statute that did not require the view of the parent to be given particular weight in a trial court's determination of the best interests of the child. The Court held that this statute infringed upon the mother's fundamental rights as a parent under the Due Process Clause of the 14th Amendment.[67]

V

Finally, I would like to mention one case, unrelated to ideology, that involves an issue of particular concern to federal trial court judges. Since I came on the federal bench in 1995, approximately one-third of all the civil trials that I have conducted involved claims under the federal employment laws, including Title VII of the Civil Rights Act, the Americans With Disabilities Act, the Age Discrimination in Employment Act, and the Family and Medical Leave Act. In the last two years, the Supreme Court has responded to the needs of trial courts by providing clear guidance for addressing various issues that arise under these statutes.

The Court decided a very significant case in this area in the 1999 term: *Reeves v. Sanderson Plumbing Product, Inc.*[68] In *Reeves*, the Court unanimously held that a prima facie case of discrimination plus sufficient evidence to reject the employer's proffered explanation for its employment action, without more, may permit a finding of liability. Specifically, the Court concluded that evidence which causes the finder of fact to believe that the stated reason for the employment action at issue is false, is sufficient for a rational jury to find that an employee was discharged for a reason prohibited by law.[69] This case will have a profound effect on the many employment cases coming before the federal courts.

These are just some of the important cases of the 1999 Term of the Supreme Court that you will hear about today. Again, I congratulate the University of Tulsa College of Law for its continued contribution to the study of constitutional law.

67. *See id.* at 2060.
68. 120 S. Ct. 2097 (2000).
69. *See id.* at 2109.