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The Supreme Court's Most Extraordinary Term - Introduction

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INTRODUCTION BY PROFESSOR DOUGLAS W. KMIEC*

In this symposium celebrating a presidential inaugural,¹ we present the scholarly work of some of the most exceptional constitutional scholars and commentators of our time regarding a truly extraordinary term of the U.S. Supreme Court. Present for the symposium were over 400 registrants, including distinguished federal and state court judges, law professors from around the nation, active constitutional litigators and students from numerous university law schools. Many who came study with us or in nearby universities; others traveled significant distances to join us. All found a magnificent university and campus that in slightly more than six decades, has grown in stature to be—by the ubiquitous measure of *U.S. News*—one of the top 50 universities in the United States.

Pepperdine now enrolls roughly 8,000 students under the instruction of more than 300 professors and scholars. Many in the past have come to know us by our rigorous great books program for undergraduates or because of our entrepreneurial graduate business program. Some associate Pepperdine with the noble experiment of moving the law from a wholly adversarial system to a healing one under the expert tutelage of the men and women who staff our top-ranked dispute resolution institute. Still others simply know us as that fortunate school in the beautiful Santa Monica Mountains with a spectacular ocean view.

We obviously do not hide what historian and philosopher Will Durant once referred to as “Pepperdine’s magnificent situation.” Virtually every Supreme Court justice or distinguished scholar who has visited the law school has said something similar. But we always admonish visitors to not let the natural beauty of the university’s campus mislead; what we are proudest of is the life of the mind that is cultivated within this beauty. In Durant’s words: “Oh to be young again and listen to Plato and Christ in these halls perched on these hills, under these skies!”

Well, under the skies of Pepperdine Law on September 23, 2000, we were honored to have some of the finest legal minds and analysts ever assembled at any university for any purpose. We are privileged now in this written record to share their insights, and our own, into the work of the Supreme Court in our time.

Unlike the past several terms of relatively quiet and unexceptional statutory interpretation, the Court in October Term 1999-2000 issued seventy-three opinions, re-examining some of the most sensitive and contentious issues in the land. Nineteen of those opinions were issued five-to-four, with alignments in those particular decisions largely, but not always, fitting the popular conception that the sitting Court is of moderate to conservative disposition.

However, the Court’s characters did not always play their assumed roles. For example, one of the most vocal opponents of *Miranda*,² Chief Justice William

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1. The symposium was conducted in honor of the inauguration of Andrew K. Benton, as the seventh President of the Pepperdine University.

2. *Miranda v. Ariz.*, 384 U.S. 436 (1966).

Rehnquist, wrote to reaffirm those warnings as a constitutional requirement.³ As USC's Professor Erwin Chemerinsky will illustrate, criminal defendants enjoyed one of their best terms since the Warren era, prevailing in the bulk of cases dealing with sentencing, the Fourth Amendment, as well as the Fifth Amendment privilege against self-incrimination.⁴

The Court took up legislative power in two guises during the term under review, and as my essay illustrates, an underlying consideration of both is political accountability.⁵ Of course, federalism remains synonymous with the Rehnquist Court, and the Justice's examination of the legislative commerce power reaffirms that there is a limit to Congress' authority, even if the locus of the limitation remains indeterminate. The Supreme Court reaffirmed the desire to disentangle the national and local in its invalidation of a section of the Violence Against Women Act.⁶ Separately, but also driven by concerns of constitutional accountability, was the Court's denial of regulatory authority to the FDA to regulate tobacco.⁷ Legislative history of subsequent legislation turns out to mean a great deal when the Court believes broadly worded agency power could not possibly mean what it says and the product involved is one of major significance. Both issues: the scope of the commerce power and deference to federal agencies have already returned to the Court's attention, and there are some speculations on these developments as well.

The modern progression of the judicial gloss upon the Eleventh Amendment continued to augment immunity to private suit under federal statute—this time, the Age Discrimination in Employment Act.⁸ Professor Akhil Amar of Yale will escort us down this fascinating journey.⁹ Along the way, he illustrates how long-embedded Court doctrine has come to mean more than constitutional document. Professor Amar describes the Court's decision in *Kimel*, for example, as “the precise negation of the Founder's root idea that the People are sovereign and that governments are not.” “There is,” he says, “no constitutional right for government to violate the Constitution and get away with it.”

Laurence Tribe, Harvard's Tyler Professor of Constitutional Law, draws on his knowledge of physics to explore unenumerated rights and their possible underlying symmetries.¹⁰ In exploring the Boy Scout's ability to expel a homosexual scout leader¹¹ and the Court's expulsion of school prayer from the

3. *Dickerson v. United States*, 530 U.S. 428 (2000).

4. Erwin Chemerinsky, *Law Enforcement and Criminal Law Decisions*, 28 PEPP. L. REV. 509 (2001).

5. Douglas Kmiec, *Rediscovering a Principled Commerce Power*, 28 PEPP. L. REV. 539 (2001).

6. *United States v. Morrison*, 529 U.S. 598 (2000).

7. *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

8. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

9. Akhil Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 593 (2001).

10. Laurence Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 633 (2001).

11. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

Santa Fe football field,¹² among other cases, Professor Tribe attempts to illustrate a distinction between being forced to support or include *X* as part of a neutral, generally applicable obligation, and being forced to include *X* in order to change your identity or message. He will argue that *Boy Scouts* is the first exception to a neutral obligation. True to his remarkable ability to link even seemingly disparate thoughts, Professor Tribe examines the *Boy Scout* result in light of the reaffirmation of parental discretion in the grandparent/visitation dispute and wonders whether the breadth of the parental claim to direct upbringing is in the background of the *Boy Scout* decision. The partial birth case,¹³ too, is taken up by Professor Tribe, and he finds it illustrative of the proposition that the state cannot commandeer (borrowing from the law of federalism) the manner in which a woman decides to end her pregnancy. All of the cases preserve a sphere of private choice, but Tribe wonders, at what cost to state authority to pursue vital social ends?

Professor Michael McConnell outlines why a judicial rush to invalidate the Santa Fe school district policy leaves the nation without a prayer—at least over the loudspeaker at high school football games.¹⁴ His explanation of this case and that regarding the successful provision of aid to religious schools in *Mitchell v. Helms*¹⁵ is knit together by the unifying theme of the state action doctrine. It will come as no surprise that where there is state action, there can be no God, but what does and does not count as state action is the continuation of a long debate over the nature of the obligations imposed by the Establishment Clause.

Stanford Dean Kathleen Sullivan follows with a comprehensive look at all of the term's First Amendment speech cases.¹⁶ She reports that, unlike Professor Chemerinsky's criminal defendants, the advocates of free speech generally lost last term—maybe because they were all advocating unpopular things—unlimited campaign contributions,¹⁷ public nudity,¹⁸ and abortion protest.¹⁹ Only the Playboy Channel won,²⁰ which regrettably may tell us something about the denigrating popularity of sexually explicit television. The dean admirably unravels the campaign finance decision in *Nixon v. Shrink Missouri*, finding the Court stuck

12. *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

13. *Stenberg v. Calhart*, 530 U.S. 914 (2000).

14. Michael McConnell, *State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 673 (2001).

15. *Mitchell v. Helms*, 530 U.S. 793 (2000).

16. Kathleen Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 PEPP. L. REV. 715 (2001).

17. *Nixon v. Shrink Mo.*, 527 U.S. 1033 (1999).

18. *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

19. *Hill v. Colo.*, 530 U.S. 703 (2000).

20. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997).

in dead center, neither having the votes to invalidate contribution limits from the conservative side, nor from the liberal wing, the votes to impose limitations upon spending. The dean is no doubt correct about the divisions on the Court, though neither side seemed to like *Buckley v. Valeo*²¹—the judicial origin of the contribution/expenditure distinction—much anymore, so the area remains ripe for change of direction. In her review of the Colorado abortion protest limitation, Dean Sullivan notes that *Hill* is “unusual in permitting a kind of listener preclearance requirement in a public forum.”

Jon Varat, dean at nearby U.C.L.A., finds a reaffirmation of existing law in the dormant commerce area, but also undertakes a review of four preemption cases, which gives lie to the notion that states uniformly win before the Rehnquist Court.²² In each case, federal law trumped state provision, and in three of the four cases, the federal government was aided and abetted by large business interests. But Dean Varat says that doesn’t tell the tale, since preemption inevitably involves discerning congressional intent, and that says he, implicate a “multidimensional process . . . involving aids to interpretation of legislative text,” because that is so often “inconclusive.” Even though some of the decisions in this area last term were unanimous, Dean Varat illustrates that this is no topic for a novice and he very helpfully supplies a thoughtful list of factors that the Court employs in preemption cases.

Each presentation is followed by a response, based upon an edited transcript of the day, and those responses are followed with dialogue facilitated by Supreme Court interlocutors of the first-rank: Nina Totenberg of National Public Radio; Jan Crawford Greenburg of the *Chicago Tribune* and Jim Lehrer NewsHour; Marcia Coyle of the *National Law Journal*, and David Pike of the *Los Angeles* and *San Francisco Daily Journals*.

21. *Buckley v. Valeo*, 423 U.S. 820 (1975).

22. Jon Varat, *Federalism and Preemption in October Term 1999*, 28 PEPP. L. REV. 749 (2001).