US Supreme Court completes term with rulings attacking democratic rights

John Andrews
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The 2000-2001 term of the United States Supreme Court, which ended two weeks ago, will be remembered above all for its infamous, unsigned 5-4 decision in *Bush v. Gore*, halting the Florida vote count and allowing George W. Bush and the Republican right wing to steal the presidential election. In subsequent decisions the high court deepened its attack on democratic rights, siding repeatedly with the government and big business against the rights of individuals.

There were 77 opinions in all. No objective person could review this output without reaching the conclusion that respect for precedent and even-handed application of legal doctrine counted for very little. The Court based decisions with far-reaching implications on sophistry rather than consideration of public policy. Even the purported judicial guideposts trumpeted by the right wing—"strict constructionism," "states' rights," and "judicial restraint"—were frequently ignored to achieve predetermined, politically-motivated results.

Four cases decided during the last month of the term exemplify the Supreme Court's ongoing assault on democratic rights. These include decisions making it more difficult for people to sue police for excessive force and undermining the ability of public interest lawyers to get paid for litigating cases against government bodies and corporate entities. Other rulings opened up elementary schools for proselytizing by Christian fundamentalists and protected the tobacco industry from state regulations.

The excessive force decision arose from a dispute over the meaning of the Federal Civil Rights Act, Section 1983 of Title 42 of the United States Code, which Congress enacted during Reconstruction (the period immediately following the US Civil War) to provide emancipated former slaves with the legal basis to file suit in federal court against local government officials who violated their constitutional rights. As part of the political settlement ending Reconstruction, the Supreme Court interpreted the Civil Rights Act in a manner that essentially made it a dead letter.

The Civil Rights Act came back to life with decisions during the Supreme Court's more liberal period under Chief Justice Earl Warren. Over the past 40 years, in particular, the Civil Rights Act has been used to sue police for brutality, exposing police violence and providing some compensation for certain victims. In deciding *Saucier v. Katz*, however, the current Court ruled that police have "qualified immunity" from suit, meaning that even if their conduct violates constitutional rights, they cannot be sued unless it is proved that they should have known that their conduct was illegal.

The *Saucier* decision illustrates how far the Supreme Court will go to block the clear intent of a federal law. Section 1983, the Federal Civil Rights Act, provides simply that one person may sue another who, while acting under governmental authority, causes the deprivation of a constitutional right. An officer who uses "unreasonably" excessive force when making an arrest violates the Fourth Amendment's prohibition against "unreasonable searches and seizures." Basic rules of legal construction and logic dictate that a person who proves that an officer's use of force was "unreasonable" or "excessive" should recover money damages under the Civil Rights Act.

The supposed "strict constructionists" of the Supreme Court saw things differently, however. Associate Justice Anthony Kennedy, writing for the same right-wing five-judge majority that decided *Bush v. Gore*, "acknowledged there was some 'surface appeal' to the argument that, because the Fourth Amendment's guarantee was a right to be free from 'unreasonable' searches and seizures, it would be inconsistent to conclude that an officer who acted unreasonably under the constitutional standard nevertheless was entitled to immunity because he 'reasonably' acted 'unreasonably.' This superficial similarity, however, could not overcome either our history of applying qualified immunity analysis to Fourth Amendment claims against officers or the justifications for applying the doctrine in an area where officers perform their duties with considerable uncertainty as to 'whether particular searches or seizures comport with the Fourth Amendment.'"

In other words, to win an excessive force claim a civil rights plaintiff must now show not only that the force used was "excessive"—that is, that the Constitution was violated—but that the officer should have known the conduct was illegal. This holding ignores the general rule that ignorance of the law is no excuse. In no other area of the law are defendants who violate people's rights given such protection. This decision will allow police violence to escalate across the United States.

In a second decision, the Supreme Court limited a series of acts of Congress which provide that plaintiffs who prevail in certain kinds of cases can recover attorneys' fees. These "fee shifting" laws have made feasible a wide variety of lawsuits to expand the rights of workers, protect the environment and stop illegal practices by the government and big business. Not infrequently, a defendant will stop the alleged illegal behavior during a lawsuit

because of the challenge. The rule has long been settled that under such circumstances, the plaintiff is the "prevailing party" so long as the evidence establishes that the lawsuit was the "catalytic factor" in bringing about the change.

No longer. In *Buckhannon Board & Care Home, Inc., v. West Virginia Department of Health and Human Resources*, the Supreme Court broke with its own precedent as well as that of every Circuit Court of Appeals except the ultra-reactionary Fourth Circuit by eliminating the "catalytic factor" test. Chief Justice William Rehnquist, again writing for the same five judges who decided *Bush v. Gore*, relied almost entirely on a definition of "prevailing party" found in Black's Law Dictionary and ignored the extensive legislative history which establishes that Congress intended to incorporate the catalytic factor test in its fee statutes. The significant impact of this decision on public interest lawsuits will be felt for years.

The Supreme Court opened a gaping hole in what is supposed to be an "impenetrable wall between Church and State" in *Good News Club v. Milford Central School*. The defendant school district, acting pursuant to a state law, allowed certain community organizations to use its classrooms after hours, but religious meetings were prohibited because of the Establishment Clause of the First Amendment. In response to a suit by a fundamentalist Christian organization, the Supreme Court held 6-3 that prohibiting religious worship when other organizations are allowed to meet constituted illegal "viewpoint" discrimination, and that allowing such meetings after hours at an elementary school does not constitute a governmental endorsement of religion in violation of the Establishment Clause.

The majority opinion of Associate Justice Clarence Thomas shows how mired the Supreme Court has become in the ideology of the Christian right. "We disagree that something that is 'quintessentially religious' or 'decidedly religious in nature' cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint," Thomas wrote. "What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons. It is apparent that the unstated principle of the Court of Appeals' reasoning is its conclusion that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a 'pure' discussion of those issues. According to the Court of Appeals, reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not. We, however, have never reached such a conclusion."

Thomas ignores the fact that the First Amendment prohibits the state-sponsorship of religion. There are no similar constitutional provisions prohibiting government sponsorship of the "other foundations for thought" to which he refers. When considering the Establishment Clause, "strict constructionism" means drawing a distinction between governmental aid to religion as opposed to other forms of ideology.

Even more ominous is the text of the concurring opinion by Associate Justice Antonin Scalia, a devout Catholic, which explicitly argues that Christian doctrine is the foundation of morality: "The Boy Scouts could undoubtedly buttress their exhortations to keep 'morally straight' and live 'clean' lives ... by giving reasons why that is a good idea—because parents want and expect it, because it will make the scouts 'better' and 'more successful' people, because it will emulate such admired past Scouts as former President Gerald Ford. The Club, however, may only discuss morals and character, and cannot give its reasons why they should be fostered-because God wants and expects it, because it will make the Club members 'saintly' people, and because it emulates Jesus Christ. The Club may not, in other words, independently discuss the religious premise on which its views are based—that God exists and His assistance is necessary to morality. It may not defend the premise, and it absolutely must not seek to persuade the children that the premise is true. The children must, so to say, take it on faith. This is blatant viewpoint discrimination. Just as calls to character based on patriotism will go unanswered if the listeners do not believe their country is good and just, calls to moral behavior based on God's will are useless if the listeners do not believe that God exists. Effectiveness in presenting a viewpoint rests on the persuasiveness with which the speaker defends his premise—and in [the school district's] facilities every premise but a religious one may be defended."

Finally, the Supreme Court ended the term with *Lorillard Tobacco Co. v. Reilly*, unanimously striking down a Massachusetts law limiting the advertising of cigarettes and other tobacco products to young people. "States' rights," the reactionary doctrine that this Supreme Court has used over the past several years to strip millions of state employees of the protection of federal anti-discrimination laws, vanished in a puff of smoke when the profits of the tobacco industry were at stake.

Turning the Federal Cigarette Labeling and Advertising Act (FCLAA), which prescribes mandatory health warnings for cigarette packaging and advertising, into its opposite, the High Court held that states could not provide their young people with *more* protection from cigarette advertising, such as a ban on outdoor advertising within 1,000 feet of schools or indoor advertising at levels lower than five feet. Despite the established linkage between marketing and increased tobacco consumption among youth, the High Court held that the First Amendment prohibits the Massachusetts regulations, discarding the established right of the government to limit "commercial speech" where regulation is necessary to further a recognized governmental interest, such as public health and safety.

The Supreme Court is making clear that it will prevent any populist or reform measures, whether from Congress or the governments of the various states, from interfering with police power or the ability of big business to generate profit at the expense of the working class and the environment.