

12-15-1972

12-15-1972 Preliminary Memorandum

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Recommended Citation

Miller, R.I. Preliminary Memorandum, Gomez v. Perez, 409 U.S. 535 (1973). Box 367, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C.

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No. 71-55

Gomez v. Perez

Justice White's dissent; 1st Draft; Dec 15

Summary:

Justice White takes the approach that, once the state undertakes to enforce a support obligation, it cannot violate EP. [He seems to obfuscate the statutory and common law obligations and treat the Texas law as a mass.]

Comment:

One of Justice White's clerks indicated that this opinion favored a simple reversal. It would be sent back to the Texas courts for them to worry about the remedy. No statute is declared unconstitutional. No obligation of support is imposed. Just reversed.

Recommendation:

This is an approach that I did not present in my bench memo. I feel it is sloppy craftsmanship, but it does solve the problems of remedy and federalism. I continue to think a deferred mandate would work.

The White approach has one great strength. If a duty of support is to be judicially created, it is created by the state court. If the statutes are to be declared unconstitutional, they will be so declared (unless the case comes back on remand for cert -- then it can be denied) by the state court. This reduces the federalism friction.

I would recommend the approach of Justice White for your consideration.

RIM
Dec 15, 1972