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FEDERALISM, ADMINISTRATIVE LAW, AND THE REHNQUIST COURT IN ACTION*

Bernard Schwartz†

One of the broad themes in the Warren Court was nationalism. The Court under Chief Justice Warren preferred national solutions to what it considered national problems and, to secure such solutions, was willing to countenance substantial growth in federal power. The Burger Court's approach to federalism was more ambivalent. Its first important decision on the matter virtually revived the state-rights doctrine, drastically restricting federal power in the process.¹ That decision was, however, overruled toward the end of the Burger tenure, with the Court pendulum swinging again in favor of federal authority.²

SEMINOLE TRIBE AND FEDERALISM

The Rehnquist Court has displayed no such ambivalence. Its first decision on the subject struck down a federal law because it "commandeered" states into enforcement of federal regulatory provisions.³ Then, in 1995, *United States v. Lopez*⁴ ruled for the first time in over half a century that a federal statute went beyond the limits of the Commerce Clause. The Rehnquist trend continued this past term with the decision in *Seminole Tribe of Florida v. Florida*,⁵ which gives new scope to the state immunity from suit provided by the Eleventh Amendment. In the case, a federal statute provided that an Indian tribe may conduct certain gaming activities only under a compact between the tribe and the state where gaming activities are located. The law, passed under the Indian Commerce Clause,⁶ imposes upon the states a duty to negotiate in good faith with an Indian tribe toward the formation of a compact and authorizes a tribe to

* Based on remarks delivered at the Conference, *Practitioner's Guide to the October 1995 Supreme Court Term*, at The University of Tulsa College of Law, December 6, 1996.

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1. See *National League of Cities v. Usery*, 426 U.S. 833 (1976).

2. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

3. See *New York v. United States*, 505 U.S. 144 (1992).

4. 115 S. Ct. 1624 (1995).

5. 116 S. Ct. 1114 (1996).

6. "The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

bring suit in federal court against a state in order to compel performance of that duty. The Court held that, "notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power," and consequently the statute "cannot grant jurisdiction over a state that does not consent to be sued."⁷ Therefore, the Seminole Tribe's suit against Florida to compel it to negotiate in good faith for a tribal-state compact had to be dismissed. Under *Seminole Tribe*, state Eleventh Amendment immunity from suit may be abrogated by Congress only under its power to enforce the Fourteenth Amendment.⁸

The 1989 *Union Gas* case⁹ had held that the Commerce Clause also gave Congress the power to abrogate state immunity from suit; but *Seminole Tribe* expressly overruled *Union Gas*.¹⁰ The Eleventh Amendment stands for the constitutional principle that state sovereign immunity limits the federal courts' Article III jurisdiction. The bounds of Article III may not be expanded by Congress under any constitutional provision other than the Fourteenth Amendment. Congress may do so under the Fourteenth Amendment because it was adopted well after the Eleventh Amendment and the Constitution operated to alter the pre-existing balance between state and federal power under both Article III and the Eleventh Amendment. Except for the Fourteenth Amendment, Eleventh Amendment immunity from suit does not give way when the suit involves an area, like regulation of Indian commerce, that is under exclusive federal control. "The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."¹¹

Decisions in the lower federal courts indicate that *Seminole Tribe* may have far-reaching impact upon suits brought against the States. Since *Seminole Tribe*, it has been held, for example, that a suit alleging violation of the federal prohibition against age discrimination may not be brought against a State.¹² And, even more striking, lower court cases hold that States may not be sued for violations of the Federal Fair Labor Standards Act.¹³ If those cases are correct, it may well be that *Seminole Tribe*, without expressly doing so, in practice overrules the last important federalism decision of the Burger Court in the 1985 *Garcia* case,¹⁴ which held that the States could be subjected as employers to the wage and hour requirements imposed by the Federal Fair Labor Standards Act.

However, *Seminole Tribe* has even broader, and more disturbing, implications. The Seminole Tribe sought an injunction not only against the State of

7. *Seminole Tribe*, 116 S. Ct. at 1119.

8. See *Seminole Tribe*, 116 S. Ct. at 1125 (citing *Fitzpatrick v. Blitzer*, 427 U.S. 445 (1976)).

9. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

10. See *Seminole Tribe*, 116 S. Ct. at 1128.

11. *Id.* at 1131-32.

12. See *MacPherson v. University of Montevallo*, 938 F. Supp. 785 (N.D. Ala. 1996).

13. See *Wilson-Jones v. Caviness*, 99 F.3d 203 (6th Cir. 1996); *Adams v. Kansas*, 934 F. Supp. 371 (D. Kan. 1996).

14. See *supra* note 2 and accompanying text.

Florida, but also its governor. In *Ex parte Young*,¹⁵ one of its seminal constitutional law decisions, the Court had held that an action against a state official to enjoin official actions violating federal law was not a suit against the state barred by the Eleventh Amendment. Under *Young*, the state may be "free to carry out its functions without judicial interference directed at the sovereign or its agents, but this immunity from federal jurisdiction does not extend to individuals who act as officers"¹⁶ in violation of law. Under *Young*, the individual has, in almost every case, a ready means of bringing an action against what is actually the State, but formally only against the State official who is carrying out the State law that is alleged to violate the Federal Constitution or provision of federal law.

Seminole Tribe rejected the argument that, under *Young*, suit to enforce the federal statute might be brought against the governor notwithstanding the Eleventh Amendment's jurisdictional bar. *Young* did not apply here because the statute that imposed the duty to negotiate was passed in conjunction with a carefully crafted and intricate remedial scheme:¹⁷ "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*."¹⁸ This reasoning is difficult to support logically since the detailed remedial scheme provided by Congress here was completely ineffective because the Court held there could not be any action against the State. Nevertheless, the Ninth Circuit has followed that limitation of the *Young* exception, saying that *Young* applied unless Congress has, in the given statute, provided a detailed remedial scheme for would be plaintiffs.¹⁹

It is to be hoped, nevertheless, that *Seminole Tribe*'s refusal to apply *Young* will be limited to duties under statutes prescribing similar detailed remedial schemes. If, instead, it is meant to cast doubt upon the *Young* doctrine itself, that could have most baneful consequences. The *Young* doctrine may be only a "fiction,"²⁰ but it is "nothing short of 'indispensable to the establishment of constitutional government and the rule of law,'"²¹ since, without it, all illegal state action would be immune from judicial review.

15. 209 U.S. 123 (1908).

16. *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 305-06 (1952).

17. The statute provided that if the court found that the state had failed to negotiate in good faith, it could order the state and the tribe to conclude a compact within 60 days. See 25 U.S.C. § 2710(d)(7)(B)(iii) (1994). If the parties failed to conclude a compact within that period, each party then had to submit a proposed compact to a mediator, who selects one of the compacts which was then to be enforced by regulations of the Secretary of the Interior. See *id.* §§ 2710(d)(7)(B)(iv) to (vii).

18. *Seminole Tribe*, 116 S. Ct. at 1132.

19. *NRDC v. California Dept. of Transp.*, 96 F.3d 420 (9th Cir. 1996).

20. *Seminole Tribe*, 116 S. Ct. at 1180 (Souter, J., dissenting).

21. *Id.* (quoting C. WRIGHT, *LAW OF FEDERAL COURTS* 292 (4th ed. 1983)).

ADMINISTRATIVE LAW: *LOVING* AND *SMILEY*

The Rehnquist Court has been the most pro-executive and administrative agency Court in over half a century. The two decisions now to be discussed — *Loving v. United States*²² and *Smiley v. Citibank (South Dakota), N.A.*²³ — definitely continue that trend.

At issue in *Loving* was the delegation of authority to the President to prescribe aggravating factors that permit a court-martial to impose the death penalty upon a member of the armed forces convicted of murder. Under *Furman v. Georgia*,²⁴ which concededly applied to the military capital punishment scheme, court-martial members were required to “specifically identify the aggravating factors upon which they have relied in choosing to impose the death penalty.”²⁵ The President had issued an Executive Order providing that, before a military death sentence may be imposed, at least one aggravating factor must be present; it then enumerates 11 categories of aggravating factors sufficient for imposition of the death penalty.²⁶ The Court held that Congress had delegated to the President the authority to prescribe the aggravating factors in military murder cases.²⁷ But petitioner claimed that the separation of powers requires that Congress, not the President, make the “fundamental policy determination” on the factors that warrant capital punishment.²⁸ In effect, the argument was that Congress cannot delegate authority to prescribe aggravating factors: that was a “core function” that Congress had to perform itself. Only Congress was given the power “To make Rules for the Government and Regulation of the land and naval forces,”²⁹ and the determination of aggravating factors governing military capital cases was a “quintessential policy judgment” for the legislature.

In rejecting this claim, the Court conducted an extensive excursus into the history of military capital punishment in England.³⁰ The excursus, though learned, was irrelevant.³¹ If there was one thing the Framers sought to avoid, it was to create their Executive in the image of the English King. What is clear, however, is the Court’s reaffirmation of the principle that there are no inherently nondelegable functions. The Court had so ruled with regard to the taxing power;³² *Loving* holds the same for the power to govern the military, including rules for capital punishment. “This power,” says the Court, “is no less plenary

22. 116 S. Ct. 1737 (1996).

23. 116 S. Ct. 1730 (1996).

24. 408 U.S. 238 (1972).

25. *Loving*, 116 S. Ct. at 1741-42.

26. *See id.* at 1742.

27. *See id.* at 1750.

28. *See id.* at 1742.

29. U.S. CONST. art. I, § 8, cl. 14.

30. *See Loving*, 116 S. Ct. at 1744-47.

31. This point was stressed in the concurring opinions of Justices Scalia and Thomas. *See id.* at 1752 (Scalia, J., concurring); *id.* at 1753 (Thomas, J., concurring).

32. *See Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989).

than other Article I powers . . . and we discern no reasons why Congress should have less capacity to make measured and appropriate delegations of this power than of any other. . . ."³³

Loving pushes the Court's post-1935 abnegation on delegation to the edge. The Court holds that, despite the "intelligible principle" requirement,³⁴ the *Loving* delegation was valid even though Congress provided no principle (intelligible or otherwise) telling the President how to select aggravating factors. In fact, *Loving* indicates, no such guidance was needed, given the nature of the delegation and the officer who exercises the delegated authority.³⁵ The implication is that no standard — not even an "intelligible principle" — is needed for a delegation to the President, particularly when it involves his duties as Commander in Chief. Indeed, the Court goes so far as to assert, "It is hard to deem lawless a delegation giving the President broad discretion to prescribe rules on this subject."³⁶

Administrative law heresy perhaps — but it fits in with the dominant theme of the Rehnquist Court jurisprudence vis-à-vis Presidential power.³⁷

In the other administrative law decision to be discussed, *Smiley v. Citibank (South Dakota), N.A.*,³⁸ the Court carried the *Chevron* doctrine of deference to statutory interpretations by administrative agencies³⁹ to an almost ridiculous extreme. Under *Smiley*, *Chevron* deference even applies where the agency gives a statutory term a meaning different from that in any dictionary. An 1864 federal statute provided that a national bank may charge its loan customers "interest at the rate allowed by the laws of the State . . . where the bank is located."⁴⁰ The Comptroller of the Currency issued a regulation that included flat late fees that banks charged credit card holders in the definition of "interest."⁴¹ This is contrary to the meaning of the word in all dictionaries, which uniformly define "interest" as "Money paid for the use of money lent (1) (the *principal*), or for forbearance of a debt, according to a fixed ratio (*rate per cent*),"⁴² — a meaning that it has had since a 1545 statute, which prohibited "interest . . . above the sum of tenne pounds in the hundred."⁴³

Despite this, *Smiley* held that *Chevron* deference required the Comptroller's interpretation to be upheld as a reasonable one. According to *Smiley*, "the question before us is not whether it represents the best interpreta-

33. *Loving*, 116 S. Ct. at 1748.

34. See *Mistretta v. United States*, 488 U.S. 361 (1989).

35. See *Loving*, 116 S. Ct. at 1748.

36. *Id.* at 1751.

37. See, e.g., Bernard Schwartz, *Administrative Law Cases During 1994*, 47 ADMIN. L. REV. 355, 364 (1995).

38. 116 S. Ct. 1730 (1996).

39. See *Chevron USA Inc. v. NRDC*, 467 U.S. 837 (1984).

40. 12 U.S.C. § 85 (1994).

41. See *Smiley*, 116 S. Ct. at 1732.

42. 5 OXFORD ENGLISH DICTIONARY 394 (1970). See also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1178 (1981); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 993 (1987).

43. 5 OXFORD, *supra* note 42, at 394 (quoting 37 Henry VIII, C.9, § 3).

tion of the statute, but whether it represents a reasonable one. The answer is obviously yes."⁴⁴

To the contrary, what the agency did here calls to mind a statement some years ago by the Chief Justice: "Congress did not empower the Administrator [to act] after the manner of Humpty Dumpty in Through the Looking Glass."⁴⁵ It is hard to support an interpretation of *Chevron* that would require the courts to uphold an agency that followed the Lewis Carroll method.

I don't usually nit-pick Supreme Court opinions, but I was intrigued by *Smiley's* citation of contemporary law dictionaries and a Supreme Court opinion to support the Comptroller's definition. The authorities cited by *Smiley* do not really support the decision there. It quotes the definition in *Brown v. Hiatts*,⁴⁶—"Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money or as damages for its detention."—but neglects to point out that this statement was made with reference to a loan that called for "interest at the rate of twenty per cent a year."⁴⁷ Similarly, the law dictionaries cited do not support the decision. Thus, the *Smiley* quote from *Bouvier*,⁴⁸ the standard American law dictionary of its day, is similar to that in *Brown v. Hiatts*, but again the Court's opinion does not mention that, in its discussion of how interest is computed, *Bouvier* makes reference only to interest as a percentage of principal. In particular, it lists the rate of interest allowed in the different states, all stated in percentage terms. *Burrill's Law Dictionary* and the *Encyclopedia of Law* cited by the Court⁴⁹ contain general definitions similar to that in *Bouvier*; but that alone scarcely endorses the *Smiley* definition—especially since the *Encyclopedia* also later lists the rate allowed in the different states as only a percentage of principal.⁵⁰ Equally important is the fact that the leading English law dictionary of the day defined "interest" as "the rate per cent."⁵¹ In addition, the leading American dictionary when the 1864 federal statute was passed defined "interest" as "Premium paid for the use of money; the profit per cent derived from money lent."⁵²

It is hard to see how the Comptroller of the Currency's definition is reasonable when it is contrary as it is to all the dictionary meanings of the word. After all, as a famous Lincoln remark put it, "If you call a tail a leg, that don't make it a leg."⁵³ Under *Smiley*, however, if an agency calls a tail a leg, the tail apparently *does* become a leg. Of course, the broader question in our public law

44. *Smiley*, 116 S. Ct. at 1735.

45. *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 283 (1978).

46. 82 U.S. (15 Wall.) 177 (1873).

47. *Id.* at 185.

48. JOHN BOUVIER, LAW DICTIONARY 652, 656-658 (6th ed. 1856).

49. See *Smiley*, 116 S. Ct. at 1735.

50. 11 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 411-13 (1890).

51. WHARTON, LAW LEXICON OR DICTIONARY OF JURISPRUDENCE 391 (1860) (cited as "But see" in *Smiley*, 116 S. Ct. at 1735).

52. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 615 (1856 ed.).

53. BARTLETT'S FAMILIAR QUOTATIONS 458 (Morley ed. 1951).

is another Humpty Dumpty query: "The question is . . . which is to be master—that's all"⁵⁴—the administrative agency or the law?

THE REHNQUIST COURT IN ACTION

Looking at the 1995 Term more broadly, we can say that there was no great surprise comparable to that which met Court aficionados on the first Monday of October, 1996, when the Justices assembled for the 1996 Term. The big question then was whether Justice Scalia, who had grown a beard during the Summer recess, would still have it on when the new term began.⁵⁵ He did and so became the first Justice to wear a beard on the bench in over half a century. However, anyone who has seen the portraits realizes that there is all the difference in the world between Justice Scalia's scruffy beard and the elegant one worn by Chief Justice Hughes, the last Justice to wear one.

In fact, the Scalia stubble brings to mind one of the greatest judges in our history, Charles Doe, Chief Justice of New Hampshire (1876-1896) — an eccentric who looked like anything but a Chief Justice or even any respectable person. Doe wore the clothes of a country farmer.⁵⁶ He never shined his shoes and wore the same Prince Albert coat for over twenty years.⁵⁷ Once, while he was sitting in the lobby of Boston's leading hotel, he was taken for a tramp and thrown out.⁵⁸ If you have seen Justice Scalia's picture with a beard, you may fear that that is going to happen again. (Lest it be thought I am being uncharitable to the Scalia hirsute appendage, I quote Tony Mauro's comment: "The debate over his beard seems to fall into two camps: one side preferring to compare Scalia with Luciano Pavarotti, the other detecting more of a Dom DeLuise look."⁵⁹)

Nothing like the Scalia beard, of course, happened to enliven the pre-beard 1995 Term. On the other hand, we can state certain things about the Court's work during the term. The statistics prepared by Thomas C. Goldstein,⁶⁰ which appear after this article,⁶¹ are of great help in this respect. What we see from these statistics confirms what we know from reading about the Rehnquist Court and, above all, from reading its opinions.

First of all, we know that this is a Court that, compared to its predecessors, is doing relatively little work. During the 1995 Term, the Court disposed of only 85 cases. Even a century ago, the Court disposed of far more cases. It will be said to this that the Court caseload was much lighter in those days. That

54. BARTLETT'S FAMILIAR QUOTATIONS 519 (16th ed. 1992).

55. See Tony Mauro, *High Court Highs and Lows*, LEGAL TIMES, Dec. 23, 1996, at 11.

56. See Note, *Doe of New Hampshire: Reflections on a Nineteenth Century Judge*, 63 HARV. L. REV. 513, 519 (1950).

57. G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 123 (1988).

58. JOHN PHILLIP REID, *CHIEF JUSTICE: THE JUDICIAL WORLD OF CHARLES DOE* 167 (1967).

59. Mauro, *supra* note 55, at 11.

60. See Tony Mauro, *The Man With the Stats*, LEGAL TIMES, Oct. 28, 1996, at 9.

61. See *infra* pp. 487-91.

may be true as far as the docket was concerned; but it was not true of the opinions issued by the Justices. In fact, as then-Justice Rehnquist informed us in a 1973 article:

The number of signed opinions handed down by the 1889 Court compares favorably with most later courts. With virtually no assistance from law clerks, its justices managed to turn out 265 signed opinions during this term. Now, with three law clerks for each associate justice and four for the chief justice, the Court turns out in the neighborhood of one hundred twenty-five or one hundred thirty signed opinions each year. I am willing to treat this as being pure coincidence, rather than any reflection on law clerks.⁶²

It is, of course, a reflection not on law clerks, but on the Justices themselves.

One of the main reasons for the decreased case-load is the fact that the Rehnquist Court is a more conservative Court and one of the essential principles on which Justices like the Chief Justice and those who tend toward his view, and even the middle Justices such as Justices O'Connor and Kennedy, operate is: do not disturb the operation of the system unless you have to. The conservative judge feels that it is not the role of the Court to decide every issue. That is why if you go through the cases where certiorari has been denied in recent years, you will find some very important cases. Indeed, Ernest Gellhorn wrote an article in 1994, in the *National Law Journal* analyzing some of the cases the Court had turned down.⁶³ Earlier Courts, particularly the Warren Court, would have jumped at the opportunity to decide some of those cases.

Justice Brandeis used to say that what the Supreme Court did not do was often more important than what it did do.⁶⁴ One of the more important things about the Rehnquist Court is that it is doing less in terms of cases actually decided than any Court in a long time.

In the Court itself today, we, of course, see a severe fragmentation. There are two wings: a so-called conservative wing composed of the Chief Justice and Justices Scalia and Thomas, and a liberal wing composed of Justices Stevens, Souter, Ginsburg, and Breyer. Then there is the middle—the swing vote—wing. The key question about the Rehnquist Court is still that posed last year, based upon James Simon's book on the Rehnquist Court, *The Center Holds*.⁶⁵ The book came out just after the Supreme Court made its great switch in cases like the *Lopez* case limiting federal power⁶⁶ and a commentator wrote, "the title is just one letter off. 'It should be, *The Center Folds*.'"⁶⁷

62. BERNARD SCHWARTZ, *DECISION: HOW THE SUPREME COURT DECIDES CASES* 260 (1996).

63. See Ernest Gellhorn, *Supreme Court Docket Skirts Critical Issues*, NAT'L L.J., Dec. 5, 1994, at A21.

64. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 71 (1986).

65. JAMES F. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT* (1995).

66. See *supra* note 4 and accompanying text.

67. Tony Mauro, *Tug of War In the 1994-1995 Term; Can the Center Hold*, LEGAL TIMES, July 31, 1995, at A23.

These are still the big questions this year.⁶⁸ Did the center hold? Did the center fold? Were the decisions of the court liberal? Were the decisions of the court conservative?

The answer to all of the above is, "Yes." Depending on what cases you look at, the reason the answer is "Yes" is because the key votes are now those of the two center Justices. In the Court, "the critical battle continues to be for the minds and votes of the two pivotal Justices, Justices Anthony Kennedy and Sandra Day O'Connor."⁶⁹ We can see from the Goldstein statistics that, in the close cases, Justices Kennedy and O'Connor were with the majority most of the time. In the 16 cases decided by 5-4 votes, Justice Kennedy was in the majority in 13 of those cases, and Justice O'Connor in 12.⁷⁰ How the two have voted has been the key to a working majority. If one wing or another gets the votes of Justices O'Connor and/or Kennedy, that is usually enough to give them a majority and the two swing back and forth. It reminds one of the early days of the Warren Court just after Justice Potter Stewart was appointed. The Court was then often divided 4-4 and Stewart's votes decided many important cases for four years, until Justices Frankfurter and Whittaker retired and Chief Justice Warren obtained a working majority.⁷¹

That is apparently the way it is going to be in the Rehnquist Court until new appointments are made. Those appointments will undoubtedly be determinative, but it is all but impossible to predict them now. There are three Justices who would probably like to retire, but whether they will do so in the second Clinton term is something we really do not know. The Chief Justice would like to retire; he wants to devote himself, it is said, to his writing. Justice Stevens, the oldest member of the Court and the longest serving is, it is rumored, also ready to retire and at least one other Justice may want to retire. But they are all fearful of who their successors will be. If the President in the next few years has the opportunity to appoint new Justices, particularly to replace the Chief Justice, that will, as Robert Frost once said "make all the difference." But we are clearly in a transitional stage. In the Warren Court we had a flood-tide in our constitutional law. The Burger Court saw a period that most people consider a receding one. In fact, the Burger Court, according to the statistics, was at least as activist as the Warren Court. Indeed, if that is the criterion of activism, the Burger Court struck down far more federal and state laws than did the Warren Court — 31 federal and 288 state statutes under Chief Justice Burger compared to 21 federal and 150 state laws under Chief Justice Warren.⁷²

68. See the Dialogue on the Simon book's theme in 40 N.Y. L. SCH. L. REV. 855 (1996).

69. James F. Simon, *Politics and the Rehnquist Court*, 40 N.Y. L. SCH. L. REV. 863, 864 (1996).

70. See *infra* p. 491. See also David G. Savage, *Opinions on Rehnquist: Views on the Chief Justice's Impact are Still Mixed*, A.B.A. J., Oct. 1996, at 42, 43.

71. See BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT — A JUDICIAL BIOGRAPHY* chs. 8-10. (1983).

72. See BERNARD SCHWARTZ, *THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION* 408 (1990).

Under Chief Justice Rehnquist, there has definitely been a turn to the right. We should bear in mind, however, that though we call Justices O'Connor and Kennedy centrist, compared to the Justices on the right toward the end of the Warren tenure, they are more conservative and more willing to act on their conservatism. What is going to happen in the Rehnquist Court depends on whether its present trends, particularly the trend in favor of federalism (to me the key development in the Rehnquist Court) will continue and/or intensify. That will depend on the future composition of the Court. Unfortunately, we know no way to make us privy to what is going to happen in the future.

Few authors are as rash as those who venture into print with attempts to forecast coming Supreme Court developments. As a newspaper once put it, with regard to the present writer's effort to predict future Court tendencies, "He would be on much safer ground trying to forecast the winner of the 1958 Kentucky Derby, for which nominations have not even been made as yet."⁷³ Perhaps all we can say with assurance is to repeat, with Albert Camus, "the wheel turns, history changes."⁷⁴ The Court's public law will continue to evolve, as it has until the present, to meet the changing needs of the society it serves.

73. Editorial, *The Court Confuses a Noted Professor*, SHREVEPORT TIMES, July 13, 1957.

74. ALBERT CAMUS, *RESISTANCE, REBELLION, AND DEATH* 71 (Justin O'Brien trans., 1st Amer. ed. 1960).

APPENDIX

STATISTICS FOR THE OCTOBER 1995 SUPREME COURT TERM⁷⁵

by Thomas C. Goldstein⁷⁶

INTRODUCTION

The following tables set out a series of statistics for the October 1995 Supreme Court Term. They are intended to give the reader a summary view of how the Court disposed of cases, as well as the degree to which the Justices agreed with each other. To be sure, the data is just a snapshot view, and cannot replace serious study of the Court's individual decisions. In addition, there were times when it was necessary to make judgment calls about whether the Justices in fact agreed with each other, notwithstanding the labels (e.g., concurring in the judgment) that accompanied their opinions.

GENERAL STATISTICS FOR OCTOBER TERM 1995

Dispositions

Cases disposed of after argument and by signed opinion	75
Cases disposed of after argument but without signed opinion	2
Cases disposed of by substantial opinion but without oral argument, i.e., cases decided on the briefs	8
Total number of cases	85

75. Copyright © 1996, 1997, by Thomas C. Goldstein. These statistics appeared previously as Thomas C. Goldstein, *Statistics for the Supreme Court's October Term 1995*, 65 U.S.L.W. 3029 (1996).

76. Adjunct Lecturer, Program on Law & Government, Washington College of Law.

Unanimity

Unanimous decisions	28
9-0 decisions, i.e., full agreement on the judgment but more than one opinion	10
8-1 or 7-1 decisions	9
7-2 or 6-2 decisions	17
6-3 decisions	4
5-4 decisions	13
4-4 decisions	1
Other arrangements	3

Judgments

Lower court opinions reversed or vacated	50
Lower court opinions affirmed	29
Lower court opinions reversed or vacated in part and affirmed in part	4
Original jurisdiction or habeas dismissed	2

Treatment of the United States

Record of the United States as a party or amicus curiae in cases disposed of after argument and by signed opinion: Won 37; Lost 16; and Won in Part 1.

Voting Relationships

KEY: The following chart sets forth how often the individual Justices voted together or apart. Each "cell" shows the relationship between two Justices, and includes certain information. The first line shows the number of cases that the two Justices decided together. The second line shows three numbers: the first number is the number of cases the two Justices were in full agreement; the second number is the number of cases the two Justices were in partial agreement; and the third number is the number of cases the two Justices were in total disagreement. The third line shows the percentage of cases in which the two Justices were in total agreement. Finally, the fourth line shows the percentage of cases in which the two Justices were in both total and partial agreement. Thus, for example, in the "cell" for Justices Rehnquist and Stevens, they decided 81 cases together, in which they agreed in full 38 times, in part 13 times, and not at all 30 times. Their full agreement in 38 of 81 cases is 46.91%. Their full or partial agreement in 51 of 81 cases is 62.96%.

	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer
Rehnquist		81	83	83	83	83	82	83	83
		38 13 30	65 7 11	63 10 10	62 7 14	54 11 18	64 9 9	53 11 19	47 14 22
		46.91%	78.31%	75.90%	74.70%	65.06%	78.05%	63.86%	56.63%
		62.96%	86.75%	87.95%	83.13%	78.31%	89.02%	77.11%	73.49%
Stevens	81		81	81	81	81	80	81	81
	38 13 30		44 14 23	33 15 33	49 13 19	52 17 12	34 14 32	56 12 13	53 19 9
	46.91%		54.32%	40.74%	60.49%	64.20%	42.50%	69.14%	65.43%
	62.96%		71.60%	59.26%	76.54%	85.19%	60.00%	83.95%	88.89%
O'Connor	83	81		83	83	83	82	83	83
	65 7 11	44 14 23		57 11 15	62 11 10	61 11 11	57 11 14	55 11 17	59 11 13
	78.31%	54.32%		68.67%	74.70%	73.49%	69.51%	66.27%	71.08%
	86.75%	71.60%		81.93%	87.95%	86.75%	82.93%	79.52%	84.34%
Scalia	83	81	83		83	83	82	83	83
	63 10 10	33 15 33	57 11 15		54 11 18	46 15 22	68 8 6	44 14 25	41 16 26
	75.90%	40.74%	68.67%		65.06%	55.42%	82.93%	53.01%	49.40%
	87.95%	59.26%	81.93%		78.31%	73.49%	92.68%	69.88%	68.67%
Kennedy	83	81	83	83		83	82	83	83
	62 7 14	49 13 19	62 11 10	54 11 18		58 14 11	53 10 19	61 9 13	52 18 13
	74.70%	60.49%	74.70%	65.06%		69.88%	64.63%	73.49%	62.65%
	83.13%	76.54%	87.95%	78.31%		86.75%	76.83%	84.34%	84.34%
Souter	83	81	83	83	83		82	83	83
	54 11 18	52 17 12	61 11 11	46 15 22	58 14 11		46 13 23	65 10 8	67 12 4
	65.06%	64.20%	73.49%	55.42%	69.88%		56.10%	78.31%	80.72%
	78.31%	85.19%	86.75%	73.49%	86.75%		71.95%	90.36%	95.18%
Thomas	82	80	82	82	82	82		82	82
	64 9 9	34 14 32	57 11 14	68 8 6	53 10 19	46 13 23		44 12 26	38 17 27
	78.05%	42.50%	69.51%	82.93%	64.63%	56.10%		53.66%	46.34%
	89.02%	60.00%	82.93%	92.68%	76.83%	71.95%		68.29%	67.07%
Ginsburg	83	81	83	83	83	83	82		83
	53 11 19	56 12 13	55 11 17	44 14 25	61 9 13	65 10 8	44 12 26		58 15 10
	63.86%	69.14%	66.27%	53.01%	73.49%	78.31%	53.66%		69.88%
	77.11%	83.95%	79.52%	69.88%	84.34%	90.36%	68.29%		87.95%
Breyer	83	81	83	83	83	83	82	83	
	47 14 22	53 19 9	59 11 13	41 16 26	52 18 13	67 12 4	38 17 27	58 15 10	
	56.63%	65.43%	71.08%	49.40%	62.65%	80.72%	46.34%	69.88%	
	73.49%	88.89%	84.34%	68.67%	84.34%	95.18%	67.07%	87.95%	

JUSTICE-BY-JUSTICE STATISTICS

Opinion Authorship

	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer
Majority	10	6	8	8	8	7	8	8	5
Plurality or Plurality-like	0	1	1	1	0	1	0	0	3
Dissent (full or partial)	1	22	3	8	5	6	9	3	6
Concurrence	4	7	3	9	5	6	5	7	4
Total opinions authored	15	36	15	26	18	20	22	18	18
Unanimous Majority	1	3	2	5	4	5	2	1	2

Per Curiam or other unsigned disposition: 10

Dissenting Votes

Number of times each Justice dissented in full or in part:

Rehnquist:	14
Stevens:	23
O'Connor:	8
Scalia:	17
Kennedy:	6
Souter:	11
Thomas:	19
Ginsburg:	17
Breyer:	16

Number of times a Justice was the sole dissenter in a case:

Stevens:	5
Scalia:	2
Thomas:	2
All others:	0

5-4 Decisions

5-4 decisions: 16 (this includes both the 13 cases in which the Justices split 5-4 in the judgment and 3 others in which they split 5-4 over a key issue in the case)

Number of times each Justice was a member of a 5-4 majority:

Rehnquist:	10
Stevens	5
O'Connor:	12
Scalia:	10
Kennedy:	13
Souter:	7
Thomas:	10
Ginsburg:	7
Breyer:	6

Number of times particular 5-4 voting arrangements occurred:

Rehnquist, O'Connor, Scalia, Kennedy, Thomas:	7
Rehnquist, O'Connor, Scalia, Thomas, Ginsburg:	1
Rehnquist, O'Connor, Scalia, Souter, Thomas:	1
Rehnquist, Scalia, Kennedy, Thomas, Ginsburg:	1
O'Connor, Kennedy, Souter, Ginsburg, Breyer:	1
Stevens, O'Connor, Kennedy, Souter, Breyer:	1
Stevens, O'Connor, Souter, Ginsburg, Breyer:	1
Stevens, Kennedy, Souter, Ginsburg, Breyer:	3

