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A PRESIDENTIAL STRIKEOUT, FEDERALISM, RFRA, STANDING, AND A STEALTH COURT*

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Just after the 1994 Term ended, James Simon published a book on the Rehnquist Court entitled *The Center Holds.*[1] After the 1996 Term, no one would use such a title for the Supreme Court. The 1996 Term decisions confirmed, indeed accelerated, the swing to the right that began in 1995. Today, more than ever, the wag's comment after the Simon book appeared—"[the] title is just one letter off. 'It should be, The Center Folds'"[2]—more accurately characterizes the present Court.

THE PRESIDENT STRIKES OUT

Clinton v. Jones[3] was the most spectacular case decided during the term, for it presented the rare scenario of a sitting President as defendant. In addition, the Presidency, which had batted 1.000 in the Rehnquist Court, finally struck out when the Court held that the President has no immunity from a suit for civil damages for acts committed before he took office.[4]

"The King can do no wrong" has long been a basic maxim of English public law. That principle means that the Queen herself may not be sued. It is tolerable today only because the Crown's power is now exercised in practice by Cabinet Ministers and the legality of their acts may be challenged in the courts. Indeed, as the classic statement by A.V. Dicey tells us, "[w]ith us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen."[5] This, says Dicey, is an essential aspect of the rule of law.[6]

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* Based on remarks delivered at the Conference, *Practitioner's Guide to the October 1996 Supreme Court Term*, at the University of Tulsa College of Law, October 31, 1997.

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

2. Tony Mauro, *Tug of War; In the 1994-1995 Term; Can the Center Hold?*, LEGAL TIMES, July 31, 1995, at S23.

3. 117 S. Ct. 1636 (1997).

4. *See id.* at 1639.

5. A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 193 (10th ed.

If there was one thing the Framers sought to avoid, it was creating their Executive in the image of George III. Despite this, the Supreme Court had for years insulated the President from judicial jurisdiction, much as its English predecessors had done for the Crown. The leading case over a century ago refused to allow an action to enjoin the President from enforcing an unconstitutional statute; such an action, the Court ruled, would violate the separation of powers.[7]

The Presidential immunity thus recognized does not mean that Presidential action is *unreviewable*. Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive.[8]

Thus, the legality of Presidential orders can normally be reviewed. The Rehnquist Court has, however, taken a broad approach to Presidential immunity. In 1992, the Court stated that the President's acts, unlike all other executive and administrative acts, are "not reviewable for abuse of discretion."[9] Though the Court indicated that Presidential acts may be challenged on constitutional grounds,[10] there is still broad Presidential immunity, unique in our public law, permitting a violation of the law which does not raise any constitutional issue.[11]

Even where a constitutional claim is presented, how is review to be secured? The Court has reaffirmed the holding that "this [C]ourt has no jurisdiction of a bill to enjoin the President in the performance of his official duties."[12] Additionally, Justice Scalia went out of his way, in a concurrence, to assert that the same rule applied to a declaratory judgment against the President.[13] The President was thus rendered immune from suits for injunctive or declaratory relief that challenged his performance of executive functions, even in cases raising constitutional claims.[14] *United States v. Nixon*[15] is thus relegated from its position as a constitutional cause célèbre to one of legal landmark passé, which has no effect on general Presidential immunity in other cases.

In them, no court has jurisdiction to order injunctive or declaratory relief against the President. The potential implications are far-reaching. Suppose a case where a valid constitutional claim is presented. The courts would still not

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1987).

6. *See id.*

7. *See* Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1866).

8. *See* Franklin v. Massachusetts, 505 U.S. 788, 828 (1992) (Scalia, J., concurring in part and concurring in the judgment).

9. *Id.* at 801.

10. *See id.*

11. *See id.*

12. *Franklin*, 505 U.S. at 802-803 (plurality opinion) (quoting Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1866)); *Franklin*, 505 U.S. at 827 (Scalia, J., concurring in part and concurring in the judgment) (quoting Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1866)).

13. *See Franklin*, 505 U.S. at 827 (Scalia, J., concurring in part and concurring in the judgment).

14. *See id.*

15. 418 U.S. 683 (1974).

be able to grant any remedy against the President. As the Court stated in 1994, "Where a statute . . . commits decisionmaking [sic] to the discretion of the President, judicial review of the President's decision is not available."[16] Since there is normally no other effective relief, the result would be unconstitutional executive action immune from judicial review—ordinarily the very negation of what we mean by the rule of law.

The upshot is effective immunization of the President from judicial review. Also, the President has been ruled immune from civil suits for damages caused by his official acts.[17] Now *Clinton v. Jones* holds that this immunity does not apply to suits for damages arising out of events that occurred before the President took office.[18] The same would be true, the Court states, of damage suits based upon Presidential action not "taken in an official capacity"[19]—i.e., "acts outside official duties."[20] There is, the *Jones* opinion declares, no "immunity from suit for his unofficial acts."[21]

One might wish that the *Jones* opinion had been written more in the grand manner of a Marshall or a Holmes; the Stevens opinion has all the pedestrian flair of a traffic-court case. But the holding is clear: For the first time, a sitting President is subjected to the same civil liability as any other American.[22] The separation of powers is ruled no bar to this exercise of jurisdiction over the President.[23] As one commentator writes, the decision is a "symbolic reaffirmation of the rule of law that . . . reminds the chief executive . . . that for all his pomp and power, he is just '[the] individual who happens to be president.'"[24]

It is, however, important to realize that, though the rule of law may have triumphed in *Jones*, it is all too likely that it will prove only "a famous victory."[25] True, the President may now be subject to suit for personal peccadilloes. But that scarcely affects the broad Presidential immunity otherwise recognized by the Rehnquist Court. The bottom line is that the President still may not be sued in all other cases (except in the unique circumstances of the *Watergate Tapes* case[26]). Even if, in theory, the bar does not apply where the complaint raises a constitutional claim, the Rehnquist Court decisions effectively bar any remedy against the President in such a case. President Clinton may have struck out in *Jones*, but the decision there does not really dent the wholesale Presidential immunity recognized by the Rehnquist Court.

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16. Dalton v. Specter, 511 U.S. 462, 477 (1994).
17. *See* Nixon v. Fitzgerald, 457 U.S. 731, 754 (1982).
18. *See Jones*, 117 S. Ct. at 1639.
19. *Id.* at 1644.
20. *Id.* (quoting Nixon v. Fitzgerald, 457 U.S. 731, 759 (1982) (Burger, C.J. concurring)).
21. *Id.*
22. *See id.* at 1636.
23. *See id.* at 1648-49.
24. Stuart Taylor Jr., *The Facts of the Matter*, NEWSWEEK, June 9, 1997, at 39.
25. 'But what good come of it at last?'
Quoth little Peterkin.
'Why that I cannot tell,' said he,
'But 't was a famous victory.'
ROBERT SOUTHEY, *The Battle of Blenheim*, *in* A CHOICE OF SOUTHEY'S VERSE 39 (1970).
26. United States v. Nixon, 418 U.S. 683 (1974).

STATE VERSUS FEDERAL POWER

As stated in last year's Symposium, the Rehnquist Court jurisprudence has been marked by its decisions on federalism.[27] These decisions have made for a renaissance of state versus federal power, reviving notions of federalism dormant for over half a century. The first important Rehnquist decision on the subject, *New York v. United States*,[28] struck down a federal law because it "commandeered" states into enforcement of federal regulatory provisions.[29] In one of its most noted 1996 Term decisions, *Printz v. United States*,[30] the Court applied the holding in *New York v. United States* to strike down a key portion of the Brady Act,[31] a law passed by Congress commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks.[32] Such a law, like that in *New York*, directed state officers to participate in the administration of a federal regulatory scheme.[33] In effect, state officers were pressed into federal service; such Congressional action, compelling state officers to execute federal laws, was ruled unconstitutional.[34] The Constitution rejects the concept of a central government that may act through the states; instead, it designs a system in which both governments exercise concurrent authority. Nor is the result changed by the Necessary and Proper Clause. It gives Congress power to require or prohibit certain acts, but not the power directly to compel the states or its officers to require or prohibit those acts.

Until the Rehnquist Court decisions, the dominant theme had been that of *cooperative federalism*,[35] which made it possible for either government to act on behalf of the other. The Federal Government has frequently availed itself of the services of state officers in exercising its own powers. The first Congress authorized state justices of the peace to issue warrants for the arrest of offenders against federal laws and to admit them to bail. The Fugitive Slave Act of 1793, the Naturalization Act of 1795, and the Alien Enemy Act of 1798 made use of state courts to enforce their provisions. More recently, state officials have been employed by the Federal Government in the exercise of its power of eminent domain and in enforcement of the selective service and prohibition laws.

This has, of course, raised the *Printz* question of the obligation of the states to lend their officials to execution of federal statutes. In the absence of state consent, can the National Government impose upon state officials any duty to enforce federal laws?

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27. *See* Bernard Schwartz, *Federalism, Administrative Law, and the Rehnquist Court in Action*, 32 TULSA L.J. 477 (1997).
28. 505 U.S. 144 (1992).
29. *Id.* at 176.
30. 117 S. Ct. 2365 (1997).
31. 18 U.S.C. § 922 (s)(2) (1994).
32. *See id.* at 2368-69.
33. *See id.* at 2369.
34. *See id.* at 2383-84.
35. *See* NORMAN REDLICH ET AL., UNDERSTANDING CONSTITUTIONAL LAW § 2.09 at 57-59 (1995).

Until the *New York* and *Printz* cases, the Court had held that the Supremacy Clause compels a general affirmative answer. The leading case used to be *Testa v. Katt*.[36] Under the Federal Emergency Price Control Act, a person charged more than ceiling prices could bring suit for treble damages in "any court of competent jurisdiction"[37]—federal, state, or territorial. The *Testa* suit was brought in a state court, but the highest state court held that state courts could not be required to enforce the federal statute.[38] The Supreme Court reversed, holding that the decision below disregarded the Supremacy Clause.[39] Congress could constitutionally require state courts to hear and decide cases involving the enforcement of federal laws, including penal laws.[40]

According to *Printz* however, the *Testa* holding is limited to state *courts*. The Scalia opinion of the Court states that "*Testa* stands for the proposition that state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause ('the Judges in every State shall be bound [by federal law]')."[41] According to Justice Scalia, "that says nothing about whether state executive officers must administer federal law."[42] Does this imply the constitutional heresy that the Supremacy Clause is not applicable to the states except for the state courts? At any rate, whether the Court's attempt to distinguish *Testa* is valid or not, it is clear from the Scalia opinion that, even if *Testa* is not specifically overruled, its holding now applies only to state courts. They may still be required to apply federal law. But state legislative and executive officers may no longer be compelled to carry out federal statutes.

There are even broader implications to *Printz*. Before 1937, the division of power between states and nation was dominated by what has been termed the doctrine of *dual federalism*,[43] based upon "two mutually exclusive, reciprocally limiting fields of power, the governmental occupants of which confront each other as equals."[44] The "constitutional revolution,"[45] that began in 1937 removed the limitations that the dual federalism concept had placed upon federal power. However, *Printz* tells us again "that the Constitution established a system of 'dual sovereignty,'"[46] under which "the States . . . retained 'a residuary and inviolable sovereignty.'"[47] Are we now to go back to John C. Calhoun's conception of the division between state and federal powers?

In one provision of the Constitution, the Eleventh Amendment[48] expressly

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36. 330 U.S. 386 (1942).
37. Id. at 387 (quoting Emergency Price Control Act of 1942, § 205(e), ch. 26, 56 Stat. 23 (1942)).
38. *See* Testa v. Katt, 47 A.2d. 312 (R.I. 1946), *rev'd* 330 U.S. at 386 (1942).
39. *See* Testa v. Katt, 330 U.S. at 389.
40. *See id.* at 390-92.
41. *Printz*, 117 S. Ct. at 2381.
42. *Id.*
43. *See* BERNARD SCHWARTZ, AMERICAN CONSTITUTIONAL LAW 42 (1955); EDWARD S. CORWIN, THE COMMERCE POWER VERSUS STATES RIGHTS 141 (1962).
44. CORWIN, *supra* note 43, at 135.
45. EDWARD S. CORWIN, CONSTITUTIONAL REVOLUTION, LTD. (1941).
46. *Printz*, 117 S. Ct. at 2376.
47. *Id.* (quoting THE FEDERALIST No. 39, at 245 (J. Madison)).
48. U.S. CONST. amend. XI. The Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the

confirms state immunity from federal power. In its 1996 *Seminole Tribe* decision,[49] the Court gave new scope to the state immunity from suit provided by the Eleventh Amendment. *Seminole Tribe* was followed this past Term in *Idaho v. Coeur d'Alene Tribe*,[50] which held that an action by the Tribe for a declaratory judgment establishing its entitlement to certain submerged lands in Idaho was barred by the Eleventh Amendment.[51] This was true not only of the suit against the state but also of an action against state officials to prohibit them from taking any action in violation of the Tribe's rights in the lands.[52] Here, too, *Ex parte Young*[53] did not trump Eleventh Amendment immunity.

Why not? *Coeur d'Alene* indicated that *Ex parte Young* generally applied in two instances: 1) "where there is no state forum available to vindicate federal interests";[54] and 2) "when the case calls for the interpretation of federal law."[55] In both instances, however, there is need for a case-by-case "careful balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case."[56] Here, the suit is "the functional equivalent of a quiet title action which implicates special sovereignty interests."[57] Since the Tribe could not maintain a quiet title action against the state, it cannot achieve "the functional equivalent"[58] by the suit against state officers. The relief sought "would divest the State of its sovereign control over submerged lands."[59]

According to Justice O'Connor, concurring, *Coeur d' Alene* "is unlike a typical *Young* action."[60]

> The *Young* doctrine rests on the premise that a suit against a state official to enjoin an ongoing violation of federal law is not a suit against the State. Where a plaintiff seeks to divest the State of all regulatory power over submerged lands—in effect, to invoke a federal court's jurisdiction to quiet title to sovereign lands—it simply cannot be said that the suit is not a suit against the State. I would not narrow our *Young* doctrine, but I would not extend it to reach this case.[61]

Despite the O'Connor disclaimer, one may wonder whether *Coeur d'Alene* does not "narrow our *Young* doctrine."[62]

United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.*

49. Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996).
50. 117 S. Ct. 2028 (1997).
51. *See id.* at 2043.
52. *See id.* at 2047.
53. 209 U.S. 123 (1908).
54. *Coeur d'Alene*, 117 S. Ct. at 2035.
55. *Id.* at 2036.
56. *Id.* at 2038.
57. *Id.* at 2040.
58. *Id.*
59. *Id.* at 2041.
60. Id. at 2043 (O'Connor, J., concurring in part and concurring in the judgment).
61. *Id.* at 2047 (O'Connor, J., concurring in part and concurring in the judgment).
62. *Id.*

RFRA AND CONGRESSIONAL POWER

One of Justice Brennan's legacies was his opinion in *Katzenbach v. Morgan*,[63] which pushed Congressional power to enforce the Fourteenth Amendment to its outer limit. More specifically, *Morgan* recognized Congress' power to define the *substantive* scope of the amendment, by upholding a statute prohibiting voter literacy tests, even though the Court had held that, absent Congressional action, such a literacy test did not violate the Fourteenth Amendment.[64]

In *City of Boerne v. Flores*,[65] the Court refused to follow the *Morgan* lead and ruled instead that Congressional power to enforce the Fourteenth Amendment does not give it authority to expand the substantive scope of the amendment.[66] After the decision in *Employment Division v. Smith*,[67] Congress passed the Religious Freedom Restoration Act of 1993 (RFRA),[68] overruling *Smith* and requiring the "compelling interest" test to be met in free-exercise cases.[69] *Boerne* held that RFRA was not authorized by the Fourteenth Amendment's Enforcement Clause.[70] Congressional enforcement power, the Court stated, was remedial and preventive, rather than substantive, in nature.[71] RFRA, in effect, changed the substantive scope of the Fourteenth Amendment by overriding the Supreme Court's interpretation of the reach of the Free Exercise Clause: State action that would be valid under *Smith* would have to be stricken down under RFRA.

Its enforcement power did not authorize Congress to make such a substantive change in the governing law: "Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported."[72] Instead, Congress has been given only "the power to enforce the provisions of this article,"[73] which means the amendment as interpreted by the Court in a case such as *Smith*. The enforcement power does not include authority to overrule the amendment's meaning as construed by the Court in *Smith*, which is exactly what RFRA attempted to do.

And what of *Katzenbach v. Morgan*? The *Boerne* opinion recognized that there is language in *Morgan* "which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment."[74] According to *Boerne*, however, "[t]his is not

63. 384 U.S. 641 (1966).
64. *See* Lassiter v. Northampton County Board of Elections, 360 U.S. 45, 51 (1959).
65. 117 S. Ct. 2157 (1997).
66. *See id.* at 2172.
67. 494 U.S. 872 (1990).
68. 42 U.S.C. §§ 2000bb-1 to 2000bb-4 (1994).
69. *See* City of Boerne v. Flores, 117 S. Ct. at 2162.
70. *See id.* at 2172.
71. *See id.* at 2167-68.
72. *Id.* at 2167.
73. *Id.* at 2163.
74. *Id.* at 2168.

a necessary interpretation, however, or even the best one."[75]

Morgan was different, states *Boerne*, because it involved what Congress could have concluded was "invidious discrimination in violation of the Equal Protection Clause"[76]—something not present in *Boerne*. Of course, the two cases are different in their facts. However, the *Boerne* rationale is essentially inconsistent with that of *Morgan*. Instead, without acknowledging it, *Boerne* adopts the approach urged by Justice Harlan in his *Morgan* dissent. It would have been better if *Boerne* acknowledged this, instead of trying to mask its refusal to follow *Morgan* by its distinction without a true difference.

STANDING AND A CONUNDRUM

The eyes of law students and even practitioners tend to glaze over when the subject of justiciability and its different aspects (such as standing) are discussed. Yet the question of justiciability determines whether even the most important constitutional issues will be decided by the courts. If, for example, the review action is brought by a plaintiff who does not have standing, it must be dismissed, no matter how significant the issues raised or the country's interest in having them decided.

During the Term surveyed, the Court decided two standing cases worthy of comment. Though the first to be discussed is the one that made headlines, the second is perhaps of greater interest to Supreme Court technicians. *Raines v. Byrd*[77] arose out of an action by members of Congress challenging the constitutionality of the landmark Line Item Veto Act,[78] giving the President, for the first time, power to disapprove portions of bills signed by him. The Court decided that Members of Congress who voted against the Line Item Veto Act did not have standing to file suit challenging the Act's constitutionality because it diluted their Article I voting power.[79] The claim of dilution of institutional legislative power was not enough to show injury to plaintiffs as individuals because it was "wholly abstract and widely dispersed."[80]

The difficulty with the holding is that the Court had ruled the other way in *Coleman v. Miller*[81]—a case that had been assumed to settle the law in favor of legislators' standing. The opinion of the Chief Justice in *Raines v. Byrd* states that the Members of Congress' instant "claim does not fall within our holding in *Coleman*."[82] That is true, the opinion asserts, because "[t]hey have not alleged that they voted for a specific bill, that there were sufficient votes to

75. *Id.*
76. *Id.*
77. 117 S. Ct. 2312 (1997).
78. Pub. L. No. 104-130, 110 Stat. 1200 (1996) (codified as amended in scattered sections of 2 U.S.C.A.).
79. *See* Raines v. Byrd, 117 S. Ct. at 2322.
80. *Id.*
81. 307 U.S. 433 (1939).
82. Raines v. Byrd, 117 S. Ct. at 2319-20.

pass the bill, and that the bill was nonetheless deemed defeated."[83] Here, too, this seems to be a matter of what Coleridge once termed the quality of "sameness, with [a] difference"[84]—the difference in facts that characterizes all cases, but a difference not great enough to justify a different rule.

Once again, we do not know whether the case is distinguished, or whether the general rule stated in *Coleman* has been virtually overruled sub silentio. It would, however, in this commentator's view, now be safer, after *Raines*, to conclude that legislators who have voted against a law no longer possess standing to challenge the constitutionality of that law.

As stated, the second standing case, *Bennett v. Spear*,[85] should be of special interest to Court aficionados, for it answers the important question on citizen standing left open by the 1992 *Defenders of Wildlife* case.[86] In the absence of statute, a plaintiff does not have standing as a citizen to seek judicial review. However, Congress may provide for citizen standing in a given case. That poses a constitutional conundrum: If standing is an Article III requirement, how can Congress authorize a citizen qua citizen, "a person who [otherwise] shows no case or controversy to call on the courts to review?"[87]

In strict logic, it is difficult to answer this query. If there is an answer, it is the so-called *private attorney general* rationale. As Justice Harlan once stated: "[I]ndividual litigants, acting as private attorneys-general,[88] . . . have standing to represent the public interest, despite their lack of economic or other personal interests, if Congress has appropriately authorized such suits."[89] At any rate, it had been assumed that Congress can confer standing upon any citizen, even one who does not have the personal interest normally required.

This principle was called into doubt by *Defenders of Wildlife*, where the Court indicated for the first time that there may be limits upon statutory standing, since the "private attorney general" theory may itself be subject to Article III limitations.[90] What are those limitations?

Justice Scalia's *Defenders of Wildlife* opinion did not answer this question, but he has now given an answer in his *Bennett v. Spear* opinion of the Court. In that case, ranch operators and irrigation districts filed an action under the citizen-suit provision of the Endangered Species Act ("ESA"),[91] alleging violations of ESA concerning proposed use of reservoir water to protect certain species of fish.[92] The Fish and Wildlife Service had issued a "Biological Opinion" that an irrigation project might affect two endangered species of fish and identified as a reasonable alternative minimum water levels on certain reser-

83. *Id.* at 2320.
84. SAMUEL TAYLOR COLERIDGE, BIOGRAPHIA LITERARIA 197 (1926).
85. 117 S. Ct. 1154 (1997).
86. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
87. Scripps-Howard Radio v. FCC, 316 U.S. 4 at 21 (1942) (Douglas, J., dissenting).
88. Flast v. Cohen, 392 U.S. 83, 120 (1968) (Harlan, J., dissenting).
89. *Id.* at 131 (Harlan, J. dissenting).
90. *See Defenders of Wildlife*, 504 U.S. at 576-78.
91. 16 U.S.C. § 1540(g)(1) (1994).
92. *See* Bennett v. Spear, 117 S. Ct. at 1158.

voirs.[93] The Bureau of Reclamation then notified the Service that it would operate the project in compliance with the Biological Opinion.[94] The lower court held that petitioners, who alleged adverse effect because of substantially reduced available irrigation water, did not have standing because they asserted only "recreational, aesthetic, and commercial interests . . . [that did] not fall within the zone of interests sought to be protected by ESA,"[95] as required by *Association of Data Processing Service Organizations, Inc. v. Camp*.[96] The Court applied the *Data Processing* requirement to ESA's citizen-standing provision.[97]

Commentators have focused upon the Supreme Court's *Bennett* decision for the holding that review actions may be brought not only to enforce environmental laws, but also to prevent enforcement. As the *New York Times* 1996 Term survey puts it, ESA is "interpreted . . . to permit lawsuits not only by people who think the Government is doing too little to protect endangered species but also by those who think Federal regulation has gone too far."[98] More significant to students of standing, however, is what the Court tells us about Congressionally-conferred standing, such as that authorizing citizen suits under ESA. *Defenders of Wildlife* told us that statutory standing is subject to the "case" or "controversy" requirement of Article III.[99] Now *Bennett* explains more precisely just what this means.

According to the *Bennett* opinion, standing has two aspects: Article III standing and prudential standing.[100] The first is, of course, constitutionally based and must be met even when Congress has enacted a citizen-standing provision permitting virtually anyone to bring a review action.[101] The second—prudential requirements—may be negated by Congress at any time.[102]

What *Bennett* calls the "irreducible constitutional minimum" of standing under Article III contains three requirements.[103] As stated by *Bennett*, they are:

> (1) that the plaintiff have suffered an "injury in fact"—an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[104]

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93. *See id.* at 1159.
94. *See id.*
95. *Id.* at 1160 (quoting Bennett v. Plenert, Civ. No. 93-6076-HO, 1993 WL 669429, at *5 (D. Or. Nov. 18, 1993)).
96. 397 U.S. 150 (1970); *See* Bennett v. Spear, 117 S.Ct. at 1161.
97. *See* Bennett v. Spear, 117 S. Ct. at 1162.
98. Linda Greenhouse, *Benchmarks of Justice*, N.Y. TIMES, July 1, 1997, at A1.
99. *See Defenders of Wildlife*, 504 U.S. at 576-578.
100. *See* Bennett v. Spear, 117 S. Ct. at 1161.
101. *See id.*
102. *See id.*
103. *See id.* at 1163.
104. *Id.*

These requirements may not be negated by Congress. Hence, a citizen-standing suit must be dismissed if plaintiffs do not meet the requirements, even though a statute allows *any* citizen to sue. In *Bennett*, the Court held that the Article III standing requirements were satisfied.[105] In particular, plaintiffs had shown an "injury in fact" by alleging that the amount of available water would be reduced and they would be adversely affected thereby.[106]

The *Data Processing* "zone of interests" test, on the other hand, is not demanded by Article III. Instead, it is a prudential, not a constitutional, requirement—"reflections of prudential considerations defining and limiting . . . the propriety of judicial intervention."[107] According to *Bennett*, Congress has the power to negate the zone-of-interests prudential standing requirement and it did so in ESA's citizen-suit provision.[108] The ESA term "any person" is taken at face value; "the obvious purpose . . . is to encourage enforcement by so-called 'private attorneys general.'"[109] The result is expanded standing: "standing was expanded to the full extent permitted under Article III."[110]

Nor, as already noted, is the expanded standing limited to environmentalists alone. It applies to all suits under ESA, including those seeking to prevent application of environmental restrictions as well as those to implement them.

A STEALTH COURT?

When David H. Souter's nomination to the Court was before the Senate Judiciary Committee, he was termed "the Stealth nominee"[111] because he had left virtually no "paper trail" showing his views on different constitutional issues. Can the Court during the 1996 Term be characterized as a "Stealth Court" because it drastically changed the law without acknowledging that it had done so?

Of course, the Rehnquist Court, like its predecessors, leaves a voluminous paper trail in the opinions published each Term. In fact, from the Court's first opinions in 1792,[112] the Justices have followed the practice of issuing opinions to explain their decisions—at first by the English custom of having the Justices deliver individual opinions seriatim, followed until John Marshall established the practice of opinions of the Court stating the rationale behind decisions.

Perhaps, as Chief Justice Hughes once said, an opinion only "supplies the reasons for supporting our predilections."[113] Still, for the public, the opinion

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105. *See id.* at 1169.
106. *See id.* at 1164.
107. Warth v. Seldin, 422 U.S. 490, 517-518 (1975).
108. *See Bennett*, 117 S. Ct. at 1162.
109. *Id.*
110. *Id.* at 1163.
111. Richard L. Berke, *Souter Anecdote: Off the Cuff or From the Script?*, N.Y. TIMES, Sept. 16, 1990, section 1 at 30.
112. *See* Georgia v. Braislford, 2 U.S. (2 Dall.) 402 (1792); *See* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 20 (1993).
113. WILLIAM O. DOUGLAS, THE COURT YEARS 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O.

of the Court is what Hughes called the "rational part"[114] of its decision. Nevertheless, if the opinion is the part of the decision process where "[p]ower should answer to reason,"[115] that purpose is defeated when the opinion does not explain, but instead conceals what it has done.

In three of the decisions discussed, the Court virtually overruled important precedents: If *Katzenbach v. Morgan*[116] had been followed, *Boerne v. Flores*[117] would have been decided differently; the same was true of *Raines v. Byrd*,[118] if *Coleman v. Miller*[119] had governed the decision, and *Printz v. United States*,[120] if *Testa v. Katt*[121] had been applied to the case. Additionally, *Idaho v. Coeur d'Alene*[122] continued the process of chipping away at the almost century-old landmark of our public law—*Ex Parte Young*,[123] which had begun in 1996. In none of these cases, however, did the Court admit the virtual overruling that had occurred. Instead, the opinions sought to mask what had been done by finding distinctions from the earlier cases where there were really no differences justifying departure from the prior precedents.

Perhaps a tribunal such as the Supreme Court must "live by correcting the errors of others and adhering to their own."[124] But when the Court decides to correct its own errors by relaxing the rule of adherence to precedent, it should acknowledge what it has done "in frank avowal and full abandonment."[125] This is precisely what the Court did not do in the important 1996 Term decisions discussed.

The virtual overruling of the Brennan landmark in *Katzenbach v. Morgan* and the other key precedents reveals the 1996 Term's swing to the right. Certainly, as stated above, no one would title a book on the Court today *The Center Holds*, after the way in which the center "folded" during the 1996 Term. After a decade, Chief Justice Rehnquist, whom *Newsweek* had once dubbed "The Court's Mr. Right,"[126] was finally able to point constitutional jurisprudence toward his own conservative image. From the Chief Justice's point of view, all the same, it was, as the Duke of Wellington once said of Waterloo, a "close-run thing." Most of the cases signaling the Court's turn to the right were decided by a bare majority.

In fact, as the Goldstein statistics which follow this paper show, of the 81 argued cases decided with opinion, 16 (20%) were decided by a 5-4 vote,[127]

DOUGLAS 8 (1980).

114. *Id.*

115. Jewell Ridge Corp. v. Local No. 6167, United Mine Workers of Am., 325 U.S. 161, 196 (1945) (Jackson, J., dissenting).

116. 384 U.S. 641 (1966).

117. 117 S. Ct. 2157 (1997).

118. 117 S. Ct. 2312 (1997).

119. 307 U.S. 433 (1939).

120. 117 S. Ct. 2365 (1997).

121. 330 U.S. 386 (1947).

122. 117 S. Ct. 2028 (1997).

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

124. Ellison v. Georgia R.R., 13 S.E. 809, 810 (Ga. 1891).

125. BENJAMIN N. CARDOZA, THE NATURE OF THE JUDICIAL PROCESS 150 (1921).

126. Diane Camper, *The Court's Mr. Right*, NEWSWEEK, July 23, 1979, at 68.

127. There was also one 5-4 case, where the minority concurred in part and dissented in part. *See* Schinck

and 12 by 6-3 (over 15%).[128] The Court continues in its tripartite split—with a conservative wing, (Rehnquist, Scalia, and Thomas), a liberal wing (Stevens, Souter, Ginsburg, and Breyer), and a center (O'Connor and Kennedy). The votes of the center Justices, particularly Justice Kennedy (who cast fewer dissenting votes[129] and was with the majority in all of the important cases discussed), were determinative.[130] The critical battle continued to be for their pivotal votes and the 1996 Term turn to the right was based on the fact that they joined the Chief Justice and Justices Scalia and Thomas in the key decisions of the term.

Those decisions were not only conservative, they were also as activist as any decided by the Warren and Burger Courts. In fact, as the *New York Times* survey of the 1994 Term asserts, "judicial activism, a phrase that conservatives once hurled as an epithet, easily fits Chief Justice Rehnquist[]"[131] and his Court as well. To be sure, activism is all in the eye of the beholder. Conservatives used to criticize the "activism" of the Warren Court, as liberals now criticize that of the Rehnquist Court. To both, the "activist" decision was the decision with which they disagreed. Still, it cannot be denied that the 1996 Term decisions made for a significant shift in jurisprudence, particularly in the relations between state and federal power. But the Court, as indicated, has not acknowledged the extent of the shift, indicating instead that it has made only incremental modifications in the constitutional corpus.

I conclude, as I did last year, by stressing again the close-run nature of the apparent Rehnquist victory. The close vote in key cases means that the Court's future course will depend on the appointments made to the Court. That, in turn, will turn on the President who chooses new Justices, with emphasis on who will replace the Chief Justice when, as is inevitable, he does leave the Court. According to Mr. Dooley's now trite observation, the Supreme Court follows the election returns.[132] This will be even more true of the 2000 election for students of the Court. Its outcome may determine the future composition of a closely-divided Court and the course of its constitutional jurisprudence.

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v. Pro-Choice Network, 117 S. Ct. 855 (1997).

128. *See* Appendix.

129. He cast only 6 dissenting votes. *See* Appendix.

130. Next to Justice Kennedy, Justice O'Connor cast the fewest dissenting votes: 10. *See* Appendix.

131. Linda Greenhouse, *The Nation: Gavel Rousers; Farewell to the Old Order in the Court*, N.Y. TIMES, July 2, 1995, section 4 at 1.

132. FINLEY P. DUNNE, MR. DOOLEY'S OPINIONS 26 (1901).

APPENDIX

STATISTICS FOR THE OCTOBER 1996 SUPREME COURT TERM[133]

By Thomas C. Goldstein[134]

INTRODUCTION

This compilation of Supreme Court statistics provides a summary view of the recently completed Supreme Court term by reporting how the Court disposed of cases, as well as the degree to which the Justices agreed with each other. Readers are cautioned, however, that these statistics can give only the broadest overview of the term and cannot in any sense replace serious study of the Court's individual decisions.

STATISTICAL BREAKDOWN OF PUBLISHED OPINIONS

Argued Cases and Their Disposition	
Number of arguments	84
Decided by signed opinion	80
Dismissed with unsigned opinion	1
Dismissed without opinion	3

Decisions: Summary Dispositions (Not Including cases granted, vacated and remanded without opinion)			
Summary reversals and GVRs	10	Summary affirmances	4

Total Number of Decisions by Opinion			
From oral argument	81	From summary rulings	10

Splits in Decisions by Opinion (5-4 column does not reflect one decision that is *5-4 in part*)							
Unanimous	29	9-0	15	8-1	6	7-2 or 6-2	13
6-3	12	5-4	16	4-4	0	Other	0

Treatment of the Lower Court							
Reversed or vacated	65	Affirmed	23	Reversed or vacated in part and affirmed in part	1	Other	2

Treatment of the United States									
Did not participate	27	Won as a party	21	Won as an amicus	24	Lost as a party	10	Lost as an amicus	9

133. Copyright © 1997, by Thomas C. Goldstein. These statistics appeared previously as Thomas C. Goldstein, *Statistics for the Supreme Court's October Term 1996*, 66 U.S.L.W. 3068-71 (1997).

134. Attorney, Jones Day Reavis & Pogue, Washington, DC.

Opinion Authorship

Total Number of Opinions									
Rehnquist	15	Stevens	31	O'Connor	21	Scalia	28	Kennedy	11
Souter	19	Thomas	16	Ginsburg	16	Breyer	26		
Majority or Plurality Opinions									
Per Curiam	11	Rehnquist	11	Stevens	10	O'Connor	9	Scalia	9
Kennedy	8	Souter	8	Thomas	8	Ginsburg	9	Breyer	8
Concurring Opinions									
Rehnquist	0	Stevens	4	O'Connor	5	Scalia	9	Kennedy	1
Souter	4	Thomas	3	Ginsburg	4	Breyer	6		
Dissenting Opinions									
Rehnquist	4	Stevens	17	O'Connor	7	Scalia	10	Kennedy	2
Souter	7	Thomas	5	Ginsburg	3	Breyer	12		
Unanimous Majority Opinions									
Per Curiam	5	Rehnquist	2	Stevens	3	O'Connor	3	Scalia	5
Kennedy	1	Souter	1	Thomas	4	Ginsburg	3	Breyer	2

Dissenting Votes

Total Number									
Rehnquist	12	Stevens	26	O'Connor	10	Scalia	17	Kennedy	6
Souter	12	Thomas	16	Ginsburg	17	Breyer	20		
Number of Times a Justice Was the Only Dissenter in a Case									
Rehnquist	1	Stevens	5	O'Connor	0	Scalia	0	Kennedy	0
Souter	0	Thomas	0	Ginsburg	0	Breyer	0		

Five-To-Four Cases

Five-to-Four Cases (including one case that was 5-4 on a major issue)									
Number of cases					17				
Five-to-Four Cases: Alignments									
Rehnquist, O'Connor, Scalia, Kennedy, Thomas					8				
Stevens, O'Connor, Souter, Ginsburg, Breyer					2				
Rehnquist, Scalia, Kennedy, Souter, Thomas					1				
Stevens, O'Connor, Kennedy, Souter, Breyer					1				
Stevens, Kennedy, Souter, Ginsburg, Breyer					1				
Rehnquist, Stevens, Kennedy, Souter, Breyer					1				
Stevens, Scalia, Kennedy, Souter, Thomas					1				
Stevens, O'Connor, Kennedy, Ginsburg, Breyer					1				
Rehnquist, Stevens, Souter, Ginsburg, Breyer					1				
Authorship of the Opinion									
Rehnquist	1	Stevens	2	O'Connor	2	Scalia	2	Kennedy	4
Souter	3	Thomas	2	Ginsburg	0	Breyer	1		
Membership in the Majority									
Rehnquist	11	Stevens	8	O'Connor	12	Scalia	10	Kennedy	14
Souter	8	Thomas	10	Ginsburg	5	Breyer	7		

Justices' Voting Relationships

	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer
Rehnquist	91	90	91	91	91	91	91	91
	50 - 55%	66 - 73%	62 - 68%	77 - 85%	63 - 69%	67 - 74%	56 - 62%	53 - 58%
	8 - 64%	8 - 82%	18 - 88%	4 - 89%	6 - 76%	14 - 89%	10 - 73%	10 - 69%
	2 - 66%	2 - 84%	2 - 90%	0 - 89%	4 - 80%	2 - 91%	3 - 76%	3 - 73%
	31 - 34%	14 - 16%	9 - 10%	10 - 11%	18 - 20%	8 - 9%	22 - 24%	25 - 27%
Stevens		90	91	91	91	91	91	91
		50 - 56%	36 - 40%	58 - 64%	64 - 70%	40 - 44%	70 - 77%	67 - 74%
		7 - 63%	17 - 58%	7 - 71%	9 - 80%	13 - 58%	7 - 85%	9 - 84%
		4 - 68%	3 - 62%	3 - 75%	3 - 84%	3 - 62%	3 - 88%	4 - 88%
		29 - 32%	35 - 38%	23 - 25%	15 - 16%	35 - 38%	11 - 12%	11 - 12%
O'Connor			90	90	90	90	90	90
			63 - 70%	68 - 76%	62 - 69%	69 - 77%	55 - 61%	55 - 61%
			17 - 89%	9 - 86%	7 - 77%	12 - 90%	13 - 76%	11 - 73%
			1 - 90%	2 - 88%	4 - 81%	0 - 90%	3 - 79%	2 - 76%
			9 - 10%	11 - 12%	17 - 19%	9 - 10%	19 - 21%	22 - 24%
Scalia				91	91	91	91	91
				65 - 71%	48 - 53%	80 - 88%	43 - 47%	41 - 45%
				12 - 85%	17 - 71%	9 - 98%	22 - 71%	16 - 63%
				2 - 87%	4 - 76%	1 - 99%	2 - 74%	4 - 67%
				12 - 13%	22 - 24%	1 - 1%	24 - 26%	30 - 33%
Kennedy					91	91	91	91
					66 - 73%	68 - 75%	58 - 64%	57 - 63%
					5 - 78%	9 - 85%	10 - 75%	6 - 69%
					4 - 82%	2 - 87%	3 - 78%	3 - 73%
					16 - 18%	12 - 13%	20 - 22%	25 - 27%
Souter						91	91	91
						55 - 60%	68 - 75%	65 - 71%
						11 - 73%	11 - 87%	10 - 82%
						3 - 76%	4 - 91%	4 - 87%
						22 - 24%	8 - 9%	12 - 13%
Thomas							91	91
							46 - 51%	44 - 48%
							17 - 69%	11 - 60%
							4 - 74%	3 - 64%
							24 - 26%	33 - 36%
Ginsburg								91
								69 - 76%
								11 - 88%
								2 - 90%
								9 - 10%

KEY

Total No. of Cases Decided Together (e.g., for Rehnquist and Stevens: 91)
No. and % of Cases Agreed in Full (e.g., for Rehnquist and Stevens: 50 cases = 55%)
No. of Cases Agreed in Part & % of Cases Agreed in Full or in Part (e.g., for Rehnquist and Stevens: 58 cases (50 + 8) = 64%)
No. of Cases Agreed in the Judgment & % of Cases Agreed in Full, in Part, or in the Judgment (e.g., for Rehnquist and Stevens: 60 cases (50 + 8 + 2) = 66%)
No. and % of Cases Disagreed Completely (e.g., for Rehnquist and Stevens: 31 cases = 34%)