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Robert E. Riggs

Michael R. Moss

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I. INTRODUCTION

This article is the second annual survey of Supreme Court voting behavior presented by the BYU JOURNAL OF PUBLIC LAW.[1] Like its predecessor, it examines the positions taken by individual justices of the United States Supreme Court on selected issues and categories of cases decided during the immediately preceding term. This survey of the 1987 term examines several categories of issues that occur each term with some frequency and which may provide indicators of the justices' views on important questions of constitutional interpretation and individual rights. A federalism category, added this year, increases the number of issues tables from eight to nine. A tenth table, also new this year, tabulates "swing voting" on the Court. This table counts the number of times each member of the Court voted with the majority in some thirty-one decisions that could have been reversed had any member of the majority coalition voted instead with the minority. The issue categories are as follows:

1) Civil controversies in which a state, one of its officials, or a political subdivision is opposed by a private party.

2) Civil controversies in which the federal government, or one of its agencies or officials, is opposed by a private party.

3) State criminal cases.

4) Federal criminal cases.

5) First amendment issues of speech, association, and free exercise of religion.

6) Equal protection issues.

7) Statutory civil rights claims.

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* Robert E. Riggs is a Professor of Law, Brigham Young University, B.A., 1952, M.A., 1953, University of Arizona; Ph.D., 1955, University of Illinois; LL.B, 1963, University of Arizona.

** Michael R. Moss received his B.A., 1986, Brigham Young University, and is a candidate for graduation, J. Reuben Clark Law School, Brigham Young University, 1989.

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1. For the initial survey see Riggs, *Supreme Court Voting Behavior: 1986 Term*, 2 BYU J. PUB. L. 15 (1988).

8) Issues of federal court jurisdiction, standing, justiciability and similar matters.

9) Federalism issues.

Tables 1-9 present voting data for these nine issue categories. Table 10 deals with the swing-vote cases.

Each of the nine issue categories, in theory at least, taps attitudes of the justices toward two super-issues having relevance for most Supreme Court decision-making—individual rights and judicial restraint. A claim of individual rights, whether based on statute or a constitutional guarantee, usually finds the claimant opposed by the government or by a relatively powerful social group or organization. Judicial restraint is normally identified with deference to legislatures as the policy-making branch of government, respect for precedent, avoidance of constitutional questions when narrower grounds for decision are available, avoidance of unnecessary decisions, and respect for the framers' intent (when ascertainable) in construing constitutional text.[2] Respect for the role of states within the federal system might also be associated with judicial restraint, for example, when deciding whether to strike down a state law under the preemption doctrine.

Judicial restraint and concern for individual rights are not opposite poles of a single attitudinal dimension. Concern for precedent, avoidance of constitutional questions and unnecessary decisions, deference to states, and even search for the framers' intent could cut either way with respect to individual rights. Nevertheless, there is a good deal of tension between the two. Deference to legislatures frequently means rejection of an individual's claim, especially one predicated upon the impropriety of governmental action. Emphasis upon the framers' intent can mean unwillingness to read new individual rights into the Constitution. Reluctance to exercise federal court jurisdiction may leave the decision to state courts, with their possible bias in favor of actions by state governments. In the voting tabulations that follow, most of the data supporting an inference of judicial restraint, or the lack of it, will also be consistent, respectively, with a narrow or a broad view of individual rights.

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2. For an extensive discussion of judicial restraint, see Lamb, *Judicial Restraint on the Supreme Court*, in SUPREME COURT ACTIVISM AND RESTRAINT 7 (S. Halpern & C. Lamb eds. 1982).

II. The Voting Record

TABLE 1

CIVIL CASES: STATE GOVERNMENT VERSUS A PRIVATE PARTY

Justice	Number of Votes, 1987 Term		% Votes for Government	
	For Gov't	Against Gov't	1987 Term	1986 Term
Rehnquist	19	9	67.9	71.8
White	15	13	53.6	43.6
Scalia	15	14	51.7	64.1
Kennedy	7	7	50.0	--
O'Connor	14	14	50.0	64.1
Blackmun	13	16	44.8	36.8
Stevens	11	18	37.9	46.2
Brennan	10	19	34.5	33.3
Marshall	10	19	34.5	30.8
Majority	15	14	51.7	53.9

TABLE 2

CIVIL CASES: FEDERAL GOVERNMENT VERSUS A PRIVATE PARTY

Justice	Number of Votes, 1987 Term		% Votes for Government	
	For Gov't	Against Gov't	1987 Term	1986 Term
O'Connor	26	8	76.5	75.0
White	24	9	72.7	87.1
Scalia	20	12	62.5	82.8
Rehnquist	21	13	61.8	90.6
Kennedy	7	5	58.3	--
Stevens	19	15	55.9	50.0
Blackmun	17	17	50.0	53.1
Brennan	15	18	45.5	43.8
Marshall	15	19	44.1	46.9
Majority	21	13	61.8	68.8

TABLE 3

STATE CRIMINAL CASES

Justice	Number of Votes, 1987 Term		% Votes for Government	
	For Gov't	Against Gov't	1987 Term	1986 Term
Rehnquist	14	5	73.7	87.9
Kennedy	7	3	70.0	--
Scalia	12	7	63.2	75.8
O'Connor	11	7	61.1	75.8
White	9	10	47.4	81.8
Blackmun	5	14	26.3	30.3
Stevens	4	15	21.1	21.2
Brennan	1	18	5.3	3.0
Marshall	1	18	5.3	3.0
Majority	8	11	47.4	60.6

TABLE 4

FEDERAL CRIMINAL CASES

Justice	Number of Votes, 1987 Term		% Votes for Government	
	For Gov't	Against Gov't	1987 Term	1986 Term
Rehnquist	12	2	85.7	80.0
White	12	2	85.7	90.0
Blackmun	11	3	78.6	30.0
Kennedy	5	2	71.4	--
O'Connor	10	4	71.4	90.0
Scalia	9	5	64.3	70.0
Stevens	9	5	64.3	40.0
Brennan	5	8	38.5	0.0
Marshall	4	10	28.6	0.0
Majority	11	3	78.6	60.0

TABLE 5

FIRST AMENDMENT RIGHTS OF EXPRESSION, ASSOCIATION, AND FREE EXERCISE

Justice	Number of Votes, 1987 Term		% Votes for Rights Claim	
	For Claim	Against Claim	1987 Term	1986 Term
Brennan	11	2	84.6	91.7
Marshall	11	2	84.6	91.7
Blackmun	9	4	69.2	72.7
Kennedy	4	2	66.7	--
Stevens	7	7	50.0	50.0
Scalia	5	8	38.5	36.4
White	4	9	30.8	41.7
O'Connor	3	10	23.1	45.5
Rehnquist	2	10	16.7	16.7
Majority	7	7	50.0	58.3

TABLE 6

EQUAL PROTECTION CLAIMS

Justice	Number of Votes, 1987 Term		% Votes for Rights Claim	
	For Claim	Against Claim	1987 Term	1986 Term
Blackmun	4	4	50.0	57.1
Brennan	3	5	37.5	71.4
Marshall	3	5	37.5	71.4
Kennedy	1	2	33.3	--
Stevens	2	5	28.6	33.3
O'Connor	1	7	12.5	42.9
Rehnquist	1	7	12.5	14.3
Scalia	1	7	12.5	14.3
White	1	7	12.5	28.6
Majority	1	7	12.5	14.3

TABLE 7

STATUTORY CIVIL RIGHTS CLAIMS

Justice	Number of Votes, 1987 Term		% Votes for Rights Claim	
	For Claim	Against Claim	1987 Term	1986 Term
Blackmun	7	1	87.5	84.6
Brennan	7	1	87.5	84.6
Marshall	7	1	87.5	84.6
Stevens	7	1	87.5	61.5
Kennedy	2	1	66.7	--
White	5	3	62.5	61.5
Scalia	4	3	57.1	38.5
O'Connor	3	4	42.9	30.8
Rehnquist	3	5	37.5	38.5
Majority	6	2	75.0	53.9

TABLE 8

CASES RAISING A CHALLENGE TO THE EXERCISE OF JURISDICTION

Justice	Number of Votes, 1987 Term		% Votes for Rights Claim	
	For Claim	Against Claim	1987 Term	1986 Term
Brennan	27	16	62.8	60.7
Blackmun	25	18	58.1	64.3
Marshall	24	18	57.1	57.1
Stevens	24	18	57.1	71.4
Kennedy	9	7	56.3	--
White	22	21	51.2	71.4
Rehnquist	20	22	47.6	67.9
O'Connor	18	24	42.9	64.3
Scalia	15	26	36.6	61.5
Majority	24	19	55.8	60.7

TABLE 9

FEDERALISM CASES

Justice	Number of Votes, 1987 Term		% Votes for State
	For State Claim	For Federal Claim	1987
Brennan	7	6	53.8
Marshall	7	6	53.8
Blackmun	6	7	46.2
Stevens	6	7	46.2
Rehnquist	6	7	46.2
O'Connor	4	8	33.3
Kennedy	3	6	33.3
White	4	9	30.8
Scalia	4	9	30.8
Majority	5	8	38.5

TABLE 10

SWING-VOTE ANALYSIS: WHO VOTES MOST OFTEN WITH THE MAJORITY IN CLOSE CASES 1987 TERM

Justice	Number of Votes with Majority				Total Votes Cast In Close Cases	% Votes With Majority
	5-4 Votes	5-3 Votes	4-3 Votes	Total		
White	12	10	2	24	31	77.4
Kennedy	10	0	0	10	14	71.4
Rehnquist	10	9	2	21	30	70.0
Scalia	8	10	2	20	30	66.7
O'Connor	9	10	1	20	31	64.5
Stevens	6	11	2	19	31	61.3
Blackmun	5	8	1	14	31	45.2
Brennan	5	6	1	12	30	40.0
Marshall	5	6	1	12	31	38.7
Majority	14	14	3	31	31	

III. ANALYSIS

A list of cases included in each of the ten tables, and the criteria governing their selection, are presented in an appendix to this article. Each case was read and coded by three readers, and differences in classification were discussed in order to achieve consensus on the appropriate classification. The result undoubtedly falls somewhat short of perfect validity and reliability, but we believe that other readers using the same coding criteria would arrive at substantially the same results. Still, not all difficult problems of judgment are eliminated by the criteria. In *Hicks v. Feiock,*[3] for example, five justices voted to remand for a state court determination whether a contempt proceeding for nonpayment of child support was civil or criminal. Three justices in dissent were convinced the proceeding was civil and would have reversed outright. Since the state was petitioner, all eight in some sense voted in favor of the state. The case nevertheless was coded three votes for the state and five for the defendant in order to reflect the substantial difference in viewpoint between the majority and minority positions. Most of the decisions fit with little distortion into a dichotomous classification of "for" or "against," but some, like *Hicks,* leave room for legitimate difference of opinion how a particular justice's "vote" should be coded.

With that caveat, a brief discussion of the statistical tables may be helpful. The first four tables deal with categories which are for the most part mutually exclusive: no case coded in one of the categories is included in any of the other three. By definition, a case would not be categorized as both civil and criminal,[4] nor would a case on appeal involve a simultaneous federal and state prosecution. A civil suit having a private party on one side and both a state and a federal agency on the other is not inconceivable, but no case of that nature was decided by full opinion during the 1987 term.[5] In contrast, the last five tables do

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3. 108 S. Ct. 1423 (1988) (Kennedy, J. not participating).

4. In *Hicks,* 108 S. Ct. at 1423, the issue, as noted above, was whether to treat the contempt proceeding as civil or criminal. The case is coded as criminal because it was decided in the lower courts on that assumption, although the state attorney argued to the contrary and the Supreme Court remanded for the state court to address that issue directly.

5. In Schweiker v. Chilicky, 108 S. Ct. 2460 (1988), an Arizona official was a named defendant along with federal officials in a suit by recipients of disability payments. The action was predicated upon Bivens v. Six Unknown Fed. Bureau of Narcotics Agents, 403 U.S. 388 (1971), which creates liability only for federal officials. Although rejecting the claim, the Court was willing to assume, *arguendo,* that the Arizona official was in some sense an agent of the Secretary of Health and Human Services. The officials were defended by the Solicitor General of the United States, with no participation of record by the Arizona Attorney General's office. The case is included only in Table 2.

F.E.R.C. v. Martin Exploration Management Co., 108 S. Ct. 1765 (1988), and Public Serv. Comm'n v. Martin Exploration Management Co., 108 S. Ct. 1765 (1988), are companion cases

not comprise mutually exclusive categories of cases. The categories are based on issues rather than parties, which means that a case raising more than one relevant issue will be included in more than one category. For example, an action by a private party against a state might conceivably raise issues pertaining to the first amendment, equal protection, statutory civil rights, jurisdiction, and federalism. If so, it would be included in each of the last four tables, as well as in Table 1 (state/private civil controversies). The voting alignment would not necessarily be the same for each issue.[6] In a few instances a case is coded more than once in the same issue category. This occurs when the case raises two or more distinct issues in a single category and the issues are decided by differing voting alignments.[7]

Civil Cases with Government Opposing a Private Party

Table 1 lists summary percentages and the number of times each justice voted for and against the state government in a civil dispute with a private litigant. Table 2 gives the same kind of data for civil disputes between the federal government and private parties. While the variety of cases included in these tables defies any neat summary, a consistent record of voting for the government position might be presumed to indicate a posture of judicial restraint (leaving decisions of the political branches in place unless there is a clear reason for deciding otherwise) and a narrow view of the scope of individual rights. Inspection of the judicial rankings in Table 1 tends to confirm that presumption, based on what is generally known or believed about individual members of the Court, with Chief Justice Rehnquist and Justices O'Connor and Scalia usually the most supportive of the government party and Justices Marshall and Brennan the least supportive. On the federal scale for the 1987 term, the Chief Justice moved toward the middle of the ranking, a matter which is discussed below.[8] The Kennedy vote during his first term on the High Court is of some interest also. He participated in less

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decided in a single opinion. A federal agency is a party in one case, a state agency in the other. They are listed as separate cases in the reports and are so treated in this analysis with one included in Table 1, the other in Table 2.

6. *E.g.,* New York State Club Ass'n v. City of New York, 108 S. Ct. 2225 (1988) (raised first amendment, equal protection, and jurisdiction issues; the voting was unanimous on each issue); Boos v. Barry, 108 S. Ct. 1157 (1988) (rejected an equal protection claim unanimously, but struck down a District of Columbia embassy picketing ordinance on first amendment grounds by a divided vote).

7. For example, in Boos v. Barry, 108 S. Ct. 1157 (1988), the Court rejected one of petitioners' first amendment claims but upheld another. Thus the case accounts for two issues in Table 5. If both issues had been decided in the same way by an identical vote, the case would have been treated as raising a single first amendment issue.

8. *See infra* page 76.

than half of the Court's decisions, but his score for those cases placed him precisely at the midpoint of both scales—close to the position occupied the previous term by his predecessor Justice Powell.

Comparison of the percentage figures in the two right hand columns indicates that the rankings at the extremes have remained fairly constant from the 1986 to the 1987 terms, except for Chief Justice Rehnquist's move toward the middle on Table 2. The percentages likewise show only modest differences between the two terms for the state table, especially at the extremes. The federal government table, however, shows a marked decline in percentage support for the government among justices at the upper end of the scale. The support score dropped fifteen percentage points for Justice White, twenty-one points for Justice Scalia, and twenty-nine points for the Chief Justice.

Examination of the state cases in which the justices at the extremes voted contrary to their expected pro- or anti-government leanings tends to confirm prevailing assumptions about their conservative or liberal orientations. Seven of the nine Rehnquist votes against government were unanimous, or at least without any opposing vote, which suggests a case against the government strong enough to transcend ideological bias. An eighth case, *Honig v. Doe,*[9] probably should be included in that category as well since the two dissenters, Scalia and O'Connor, objected on mootness grounds and expressly did not address the merits of the case. The one remaining Rehnquist vote against the state came in *Mississippi Power & Light Co. v. Mississippi,*[10] in which the financial survival of a large public utility company was at stake in a rate dispute with the state of Mississippi. The Chief Justice found the state's action was preempted, which, apart from the legal merits, had the effect of preferring vested interests of shareholders to the interests of consumer ratepayers.

The Brennan and Marshall votes in favor of the state are similarly explicable in terms consistent with the underlying assumptions. Five of their ten "unexpected" votes occurred in unanimous decisions, and all five votes were reasonably consistent with a liberal social philosophy. Two of the votes had the effect of remedying alleged discrimination against minorities[11] and women;[12] two upheld state regulation in the interest of consumers;[13] and one validated a state tax on the mail order

9. 108 S. Ct. 592 (1988).

10. 108 S. Ct. 2428 (1988).

11. Marino v. Ortiz, 108 S. Ct. 586 (1988) and Costello v. New York City Police Dept., 108 S. Ct. 586 (1988) (companion cases).

12. New York State Club Ass'n v. City of New York, 108 S. Ct. 2225 (1988).

13. Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 108 S. Ct. 1350 (1988); Public Serv. Comm'n v. Martin Exploration & Mining Co., 108 S. Ct. 1765 (1988).

catalog business.[14] The "unexpected" pro-government votes by Justices Brennan and Marshall in the five cases decided by a divided court are for the most part similarly explicable in terms of a liberal orientation or a "favor-the-underdog" philosophy. The pro-Mississippi position in *Mississippi Power and Light Co.*[15] preferred consumer interests over shareholder interests. A vote for the state in *Goodyear Atomic Corp. v. Miller*[16] was a vote for a workmen's compensation claim. In *Pennell v. City of San Jose,*[17] the city's cause was rent control. *Phillips Petroleum Co. v. Mississippi*[18] involved a suit by a large oil company to establish its claim to certain tidelands subject to the jurisdiction of the state. Only one vote by Justices Brennan and Marshall in this category was out of character in the sense of supporting the government against a claim of individual rights violation. In *City of St. Louis v. Praprotnik,*[19] both justices agreed that the city was not liable because no municipal policy had led to the retaliation alleged by plaintiff, a former city employee. Only Justice Stevens dissented from that decision. Although concurring in the judgment, Justice Brennan (joined by Justices Marshall and Blackmun) argued that the Court had set too high a constitutional threshold for finding municipal liability.

In Table 2, civil cases involving a federal government party, both the rankings and the percentages for justices at the low end of the scale show only modest change from the 1986 term. As expected, Justices Brennan and Marshall voted most often against the government, and most of their votes in favor of the federal government are readily explained. Ten of Justice Brennan's votes[20] and eleven of Justice Marshall's pro-government votes[21] occurred in decisions without dissent. In two of the remaining pro-government decisions a vote for the government was a vote for worker rights.[22] In two other such decisions, both

14. D.H. Holmes Co. v. McNamara, 108 S. Ct. 1619 (1988).

15. 108 S. Ct. 2428 (1988).

16. 108 S. Ct. 1704 (1988).

17. 108 S. Ct. 849 (1988).

18. 108 S. Ct. 791 (1988).

19. 108 S. Ct. 915 (1988).

20. I.N.S. v. Pangilinan, 108 S. Ct. 2210 (1988); Huffman v. Western Nuclear Inc., 108 S. Ct. 2087 (1988); F.D.I.C. v. Mallen, 108 S. Ct. 1780 (1988); F.E.R.C. v. Martin Exploration Management Co., 108 S. Ct. 1765 (1988); United States v. Wells Fargo Bank, 108 S. Ct. 1179 (1988); N.L.R.B. v. United Food & Commercial Workers' Union, 108 S. Ct. 413 (1987); Arkansas Best Corp. v. Commissioner, 108 S. Ct. 971 (1988); I.N.S. v. Abudu, 108 S. Ct. 904 (1988); Bowen v. Galbreath, 108 S. Ct. 892 (1988); Langley v. Federal Deposit Ins. Corp., 108 S. Ct. 396 (1987).

Justice Brennan did not participate in Church of Scientology v. I.R.S., 108 S. Ct. 271 (1987).

21. *See* cases cited *supra* note 20, and Church of Scientology of California v. I.R.S., 108 S. Ct. 271 (1987).

22. E.E.O.C. v. Commercial Office Prod. Co., 108 S. Ct. 1666 (1988) (upholding jurisdiction

justices cast their votes for consumers in upholding United States customs regulations that permitted the importation of foreign goods bearing American trademarks without the consent of the American trademark holders.[23] Justices Brennan and Marshall cast votes on opposing sides in only one case included in Table 2.[24]

For the justices at the top of the scale in Table 2, the contrast with the 1986 term probably reflects something more than mere differences in the types of fact situations litigated. At least Justice Rehnquist's shift toward the center seems more than the random variation one might expect from term to term.[25] Some of his voting behavior may be explicable in terms of an underlying conservative philosophy that dictates, on particular facts, a vote against the government even though a pro-government vote is his normal leaning. Of his eight votes[26] against the government in non-unanimous decisions, four were in some respect "pro-business" positions, conservative in the sense of protecting vested interests.[27] Of the other four, however, three of his positions were clearly on the individual rights side of the ledger,[28] and one was at least

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of E.E.O.C. because filing of sex discrimination charge was timely); McLaughlin v. Richland Shoe Co., 108 S. Ct. 1677 (1988) (Brennan, J., Marshall, J. and Blackmun, J. dissenting from majority decision more favorable to employers than to employees in civil action to enforce the Fair Labor Standards Act).

23. K-Mart Corp. v. Cartier, Inc., 108 S. Ct. 1811 (1988). The Court upheld two government regulations and invalidated one. The voting on the issues is tabulated as two decisions in Table 2. Business organizations were ranged on both sides of the issue, but one effect of the Brennan/Marshall vote was to allow American consumers greater access to foreign imports—a position consistent with their "under-dog" philosophies.

24. United States Catholic Conference v. Abortion Rights Mobilization, Inc., 108 S. Ct. 2268 (1988). All but Justice Marshall agreed that the U.S. Catholic Conference had the right to challenge the district court's subject matter jurisdiction as a defense to a civil contempt citation issued for failure to comply with a discovery order in a suit to which the Conference was not a party. In the instant case, the United States, though a respondent, supported the petitioners' position. The underlying suit by Abortion Rights Mobilization, Inc. (ARM) sought revocation of petitioners' tax exempt status because of the Conference's alleged electoral support of anti-abortion candidates. Given the nature of the suit, liberal justices were undoubtedly cross-pressured. Support for the Conference was a vote for the rights of litigants; support for ARM was a vote for abortion rights.

25. The Chief Justice's votes favoring the federal entity moved from 90.1 percent in the 1986 term to 61.8 percent in the 1987 term.

26. Pierce v. Underwood, 108 S. Ct. 2541 (1988); Webster v. Doe, 108 S. Ct. 2047 (1988); K-Mart Corp. v. Cartier, Inc., 108 S. Ct. 1811 (1988); McLaughlin v. Richland Shoe Co., 108 S. Ct. 1677 (1988); E.E.O.C. v. Commercial Office Prod. Co., 108 S. Ct. 1666 (1988); United States Dep't of Justice v. Julian, 108 S. Ct. 1606 (1988); Kungys v. United States, 108 S. Ct. 1537 (1988).

27. K-Mart Corp. v. Cartier, Inc., 108 S. Ct. 1811 (1988) (accounting for two of the votes, see *supra* note 23 and accompanying text for further explanation); E.E.O.C. v. Commercial Office Prod., 108 S. Ct. 1666 (1988) (opposing an employment discrimination claim); McLaughlin v. Richland Shoe Co., 108 S. Ct. 1677 (1988) (opposing civil enforcement of the Fair Labor Standards Act).

28. Kungys v. United States, 108 S. Ct. 1537 (1988) (reversing a deportation order); United States Dept. of Justice v. Julian, 108 S. Ct. 1606 (1988) (ordering disclosure under the Freedom

ambiguously so.[29] This performance suggests a genuine if modest attitudinal shift in favor of individual rights on the part of the Chief Justice during the 1987 term.

Criminal Cases

The two criminal case tables (3 and 4), as in the previous term, appear to reflect the same attitudes toward judicial restraint and individual rights as do the tables for civil cases, but with voting somewhat more polarized at the extremes. Justices Brennan and Marshall voted only once to support a state criminal conviction,[30] while Justice White[31] and Chief Justice Rehnquist[32] only twice supported the plea of a federal criminal defendant. In the state table all of the "unexpected" votes at the extremes occurred in unanimous (or non-dissenting) decisions[33] where, one may suppose, the law and the facts pointed overwhelmingly in one direction.[34] In the federal criminal case table no decision favoring the criminal defendant was unanimous (or without dissent),[35] and, indeed, all members of the Court but Justices Brennan and Marshall voted against the defendant in the large majority of cases. The Chief Justice favored the defendant only in a white collar bribe-

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Of Information Act); and Webster v. Doe, 1008 S. Ct. 2047, (1988) (holding that the dismissal of a C.I.A. employee on grounds of homosexuality was reviewable).

29. Pierce v. Underwood, 108 S. Ct. 2541, (1988). The Chief Justice voted with the majority in granting attorney fees under the Equal Access to Justice Act but agreed that the district court's trebling of the $75.00 hourly rate was unjustified. Since two justices, White and O'Connor, see *id.* at 2559, were opposed to any attorney fee, the other six justices were treated as voting against the government. Justice Kennedy did not participate.

30. Michigan v. Chesternut, 108 S. Ct. 1975 (1988).

31. United States v. Kozminski, 108 S. Ct. 2751 (1988); United States v. Providence Journal Co., 108 S. Ct. 1502 (1988).

32. United States v. Kozminski, 108 S. Ct. 2751 (1988); Mathews v. United States, 108 S. Ct. 883 (1988).

33. Johnson v. Mississippi, 108 S. Ct. 1981 (1988); Michigan v. Chesternut, 108 S. Ct. 1975 (1988); Maynard v. Cartwright, 108 S. Ct. 1853 (1988); Satterwhite v. Texas, 108 S. Ct. 1792 (1988); Amadeo v. Zant, 108 S. Ct. 1771; Yates v. Aiken, 108 S. Ct. 534 (1988).

34. *E.g.*, Michigan v. Chesternut, 108 S. Ct. 1975 (1988). This is the one state case in which Justices Marshall and Brennan voted to uphold conviction. The sole issue was whether police pursuit of a person who fled at the sight of an approaching patrol car constituted an impermissible fourth amendment seizure so as to preclude admission in evidence of packets containing drugs the suspect was observed to discard while in flight. All Justices agreed that the initial pursuit was not a "seizure." *Id.*

35. The conviction in United States v. Kozminski, 108 S. Ct. 2751 (1988), had been reversed by the Court of Appeals, United States v. Kozminski, 821 F.2d 1186 (6th Cir. 1987), and this was affirmed by the Supreme Court. Justices Stevens and Blackmun concurred in the judgment but are coded as voting for the government because they disagreed with the majority on the only disputed issue, i.e., whether the lower court instructions on "involuntary servitude" were adequate. They concurred in the remand because of the need to rectify a trial court error not challenged on appeal by the government.

taking case[36] and in an unusual case prosecuted for violation of a little used federal statute proscribing "involuntary servitude".[37] At the bottom end of the scale, Justice Marshall was on the side of the prosecution in just four cases. Two were unanimous decisions,[38] one involved a white collar (non-underdog) defendant,[39] and the fourth was a landmark separation of powers case in which the Court upheld the constitutionality of the independent counsel provisions of the 1978 Ethics in Government Act, in the context of the prosecution of a former Reagan Administration official.[40] Justice Brennan supported the government in the same four cases, as well as in one additional case of white collar crime.[41] Compared with the previous term, the ranking of the Justices is much the same in the criminal case tables. However, the polarization between the Justices is not quite as pronounced, primarily because the pro-government percentages are lower at the conservative end of the state scale and higher at the liberal end of the federal scale. If unanimity means easier cases, a portion of this diminished polarization may be explained by the greater number of cases decided without dissent during the 1987 term. The most notable change in voting behavior is Justice Blackmun's in the federal criminal cases table. He moved from seventh to third in support of the prosecution, which is an increase of 48.6 percentage points. Justice Kennedy is somewhat more prosecution-oriented on both tables than Justice Powell, whom he replaced.

Individual Rights

Tables 5, 6, and 7 deal with claims of constitutional and statutory rights. These show the same broad voting patterns as the tabulations based on governmental versus private parties. There are slight variations in the rankings, but Justices Brennan, Marshall and Blackmun are in each instance at one extreme, with the Chief Justice, usually joined or closely followed by Justices White, O'Connor and Scalia, at the other. Justice Kennedy occupies a place in the rankings similar to that of Justice Powell in the preceding term and, except for equal protection (Table 6), has comparable voting percentages. With so few cases from which to draw any conclusions, Justice Kennedy's scores should

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36. Mathews v. United States, 108 S. Ct. 883 (1988).

37. United States v. Kozminski, 108 S. Ct. 2751 (1988).

38. Carpenter v. United States, 108 S. Ct. 316 (1987); Huddleston v. United States, 108 S. Ct. 1496 (1988).

39. Doe v. United States, 108 S. Ct. 2341 (1988).

40. Morrison v. Olson, 108 S. Ct. 2597 (1988).

41. Bank of Nova Scotia v. United States, 108 S. Ct. 2369 (1988).

be regarded as only a rough indication of his views on individual rights and judicial restraint.

Table 5 best illustrates the wide spectrum of views on the Court, ranging from the 84.6% support of first amendment rights by Justices Brennan and Marshall to a mere 16.7% by the Chief Justice. As the figures in the right-hand column show, this pattern is consistent with the Court's voting behavior of the prior year. In the current term Justices Brennan and Marshall failed to support the first amendment claim in only two of fourteen decisions, both of which were unanimous. In one of them, a claim of first amendment associational rights was rejected because it clashed with a New York City ordinance barring gender discrimination in club membership.[42] This was a matter of preferring one set of individual rights over another. The remaining instance of failure to support a first amendment claim was a unanimous decision to uphold one provision of a District of Columbia ordinance designed to prevent picketing of foreign embassies.[43] However, the two justices joined the Court majority in striking down another provision of the same ordinance restricting the display of certain signs.[44] At the other extreme, Justice Rehnquist's two votes in support of first amendment claims also came in decisions without dissent.[45] Justice O'Connor, joining the Chief Justice at the low end of the scale, endorsed one additional claim: the challenge to the embassy picketing ordinance.[46]

The rankings in Table 6 (equal protection) are much the same as in Table 5, although the percentages of votes in favor of these claims are uniformly lower. Blackmun, the highest ranked, supported only four[47] of eight, and Justices Rehnquist, White, O'Connor, and Scalia found only one meriting their support—a mother's attack on a Pennsylvania statute placing a six year limitation upon the filing of a paternity action.[48] That decision was unanimous. The Court was also unanimous in rejecting four of the eight equal protection claims,[49] while rejecting

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42. New York State Club Ass'n v. City of New York, 108 S. Ct. 2225 (1988).

43. Boos v. Barry, 108 S. Ct. 1157 (1988).

44. *Id.* The case is included twice in Table 5 because two distinct issues were decided by differing voting alignments. The case as a whole is classified in Table 1 as a decision against the government.

45. Hustler Magazine v. Falwell, 108 S. Ct. 876 (1988) ("actual malice" required for public figure to recover for emotional distress); Meyer v. Grant, 108 S. Ct. 1886 (1988) (statute prohibiting use of paid petition circulators invalidated).

46. Boos v. Barry, 108 S. Ct. at 1157.

47. New York State Club Ass'n v. City of New York, 108 S. Ct. 2225 (1988); I.N.S. v. Pangilinan, 108 S. Ct. 2210 (1988); Boos v. Barry, 108 S. Ct. at 1157; Pennell v. City of San Jose, 108 S. Ct. 849 (1988).

48. Clark v. Jeter, 108 S. Ct. 1910 (1988).

49. New York State Club Ass'n v. City of New York, 108 S. Ct. 2225 (1988); I.N.S. v. Pangilinan, 108 S. Ct. 2210 (1988); Boos v. Barry, 108 S. Ct. at 1157; Pennell v. City of San

three others by a divided vote. As indicated in the right-hand column, individual justices were somewhat more supportive of equal protection claims than during the previous term, but the Court as a whole rejected all but one of the claims in each term.

Table 7 shows the Court to be more receptive to statutory civil rights claims than in the preceding term. Table 7 also shows that Court majorities were much more inclined to uphold claims based on federal statutes than claims based on constitutional guarantees of speech, religion and equal protection (Tables 5 and 6). The figures for statutory claims show more support for individual rights among all members of the Court, and particularly those at the bottom (conservative) end of the table. Two of the decisions favoring the claimant were unanimous,[50] and another was decided without dissent on the merits, although Justices Scalia and O'Connor objected on jurisdictional grounds without reaching the merits.[51] Justices Brennan, Marshall, and Blackmun voted against the statutory claim only once in a case raising an issue of municipal liability for an alleged retaliatory personnel decision. Although they agreed with the Court that the acts complained of did not result from municipal policy, they joined a separate concurrence attributing broader liability to cities generally than might be inferred from the plurality opinion.[52]

Jurisdiction and Justiciability Questions

Table 8 also conforms in broad outline to our initial assumptions about judicial restraint and individual rights, with Justices Brennan, Marshall, Blackmun and Stevens most favorable to the exercise of jurisdiction and Justices Scalia, O'Connor and the Chief Justice least likely to proceed to the merits in a challenge to jurisdiction or justiciability. This stands in contrast to the 1986 term where the rankings were contrary to expectations. More jurisdictional issues appeared in the voting count this year (43 as compared with 28); but more issues were decided without dissent (29 as compared with 18). The differences in rankings are attributable to the 15 issues on which members of the Court differed, compared with 10 in 1986. Last year we explained the unexpected rankings by suggesting that the desire to achieve a particu-

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Jose, 108 S. Ct. 849 (1988).

50. West v. Atkins, 108 S. Ct. 2250 (1988) (prison doctor acted "under color of state law"); Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777 (1988) (disparate impact analysis applied to subjective employment criteria under Title VII).

51. Honig v. Doe, 108 S. Ct. 592 (1988) (upholding the statutory claims of handicapped student).

52. City of St. Louis v. Praprotnik, 108 S. Ct. 915, 928 (1988) (Brennan, J., concurring).

lar substantive outcome may have affected the Justices' attitudes toward jurisdictional questions in several of the split decisions.[53] This year the effect of substance upon the jurisdictional decisions is not as readily apparent. Justice Brennan voted against exercise of jurisdiction only once when any member of the Court dissented;[54] and Justice Scalia voted only twice to exercise jurisdiction when the decision was less than unanimous.[55] If consistency on jurisdictional questions (when the issue is truly debatable) is a good criterion of judicial activism or restraint, Justice Scalia seems clearly to be the least activist Justice.

Cases Raising Federalism Issues

Table 9 presents a new category, not used in the summary of the 1986 term, based on cases which raise an issue of conflict between state and federal government authority. We have labeled it "federalism." This category includes only those issues raised by conflict between national and state governmental instrumentalities, such as preemption, intergovernmental taxation, application of the tenth amendment, or federal court interference with state court activities. It does not include cases in which the only conflict is alleged incompatibility of the state action with the United States Constitution. Nor does it include issues of interstate or "horizontal" federalism, as raised by the dormant commerce clause or the privileges and immunities clause. The federalism scale is intended to measure preference for federal government authority, as opposed to state and local government authority. It excludes cases dealing with state-erected barriers to intercourse with other states, which appear to tap a different attitudinal dimension.

In theory, the more conservative Justices—Rehnquist, O'Connor, Scalia—would tend to favor state authority, while Justices Brennan, Marshall and Blackmun presumably would tend to support federal authority. On its face Table 9 shows almost the opposite. Justices Brennan and Marshall vote most often for state authority; Justices White, O'Connor, Scalia and Kennedy the least often; and Justices Rehnquist, Stevens and Blackman fall in the middle. We know, from their own announced positions on tenth amendment issues,[56] that Table 9 does

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53. Riggs, *supra* note 1, at 25-26.

54. United States v. Providence Journal Co., 108 S. Ct. 1502 (1988) (Stevens, J. and Rehnquist, C.J., dissenting).

55. United States Catholic Conference v. Abortion Rights Mobilization, Inc., 108 S. Ct. 2268 (1988) (Marshall, J., dissenting from an otherwise unanimous vote for jurisdiction); City of St. Louis v. Praprotnik, 108 S. Ct. 915 (1988) (Stevens, J., dissenting from the otherwise unanimous vote for jurisdiction).

56. *See, e.g.*, Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), in which Justice Blackmun, joined by Justices Brennan, Marshall, Stevens and White, wrote an

not accurately reflect their views on the appropriate position of states within the federal system.

The probable explanation of this anomaly lies in the specific subject matter of the disputes. Seven of the thirteen issues raised no questions close enough to call forth a dissent.[57] Justices Brennan and Marshall cast "unexpected" votes (for the state) in four[58] of the six[59] split decisions, but three of the four are explicable by the "underdog" hypothesis. A vote for the state was a vote, respectively, for utility ratepayers against utility shareholders,[60] for a workmen's compensation claim,[61] and for liability of military suppliers to persons injured as a result of design defects in military equipment.[62] Justices Brennan and Marshall both abandoned the underdog in *Mackey v. Lanier Collections Agency & Service, Inc.*[63] by concluding that the Employee Retirement Income Security Act (ERISA) did not preempt a Georgia general garnishment statute. The practical effect was to permit judgment creditor garnishment of employee vacation and holiday benefits. Justice Blackmun parted company with his two liberal brethren on this question,[64] but voted with them on every other federalism issue.

The votes of the most conservative members (Rehnquist, O'Connor, Scalia) are less easily explained by apparent predispositions transcending the peculiar facts of a particular case, although their votes

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opinion overturning National League of Cities v. Usery, 426 U.S. 833 (1976), thus eliminating the tenth amendment as a limitation upon the capacity of Congress acting under the commerce power to regulate state governmental activities. Justices Rehnquist and O'Connor wrote vigorous dissents. Justice Scalia has also indicated concern for preserving the role of the states. *See, e.g.,* South Carolina v. Baker, 108 S. Ct. 1355, 1369 (1988) (Scalia, J., concurring in part).

57. Ten of the thirteen dealt with preemption; six of these were without dissent, including Mackey v. Lanier Collections Agency, Inc., 108 S. Ct. 2182 (*Mackey* raised two preemption issues, one decided unanimously, one by a divided Court); Lingle v. Norge Div. of Magic Chef, Inc., 108 S. Ct. 1877 (1988); City of New York v. F.C.C., 108 S. Ct. 1637 (1988); Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum, 108 S. Ct. 1350 (1988); Bennett v. Arkansas, 108 S. Ct. 1204 (1988); Schneidewind v. ANR Pipeline Co., 108 S. Ct. 1145 (1988). Non-unanimous preemption decisions included Boyle v. United Technologies Corp. 108 S. Ct. 2510 (1988); Mississippi Power & Light Co. v. Mississippi, 108 S. Ct. 2428 (1988); Felder v. Casey, 108 S. Ct. 2302 (1988); and Mackey v. Lanier Collections Agency and Service, Inc., 108 S. Ct. 2182 (1988). The seventh unanimous decision, Chick Kam Choo v. Exxon Corp, 108 S. Ct. 1684 (1988), did not involve preemption.

58. Boyle v. United Technologies Corp., 108 S. Ct. 2510 (1988); Mississippi Power & Light Co. v. Mississippi, 108 S. Ct. 2428 (1988); Mackey v. Lanier Collections Agency, Inc., 108 S. Ct. 2182 (1988); Goodyear Atomic Corp. v. Miller, 108 s. Ct. 1704 (1988).

59. *See* cases cited *supra* note 58, and Felder v. Casey, 108 S. Ct. 2302 (1988); South Carolina v. Baker, 108 S. Ct. 1355 (1988).

60. Mississippi Power & Light Co. v. Mississippi, 108 S. Ct. 2428 (1988).

61. Goodyear Atomic Corp. v. Miller, 108 S. Ct. 1704 (1988).

62. Boyle v. United Technologies Corp., 108 S. Ct. 2510 (1988).

63. 108 S. Ct. 2182 (1988).

64. *Id.* at 2191 (Kennedy, J. dissenting, joined by Justices Blackmun, O'Connor and Scalia).

for preemption in heeding the pleas of Mississippi Power and Light Company and the military contractor[65] might be interpreted as a pro-business or vested-interests bias. In *South Carolina v. Baker,*[66] only Justice O'Connor found federal taxation of interest on state and local bonds unconstitutional.[67] The Chief Justice and Justice Scalia agreed with Justice O'Connor that the tenth amendment was not a dead letter,[68] but they nevertheless voted to uphold the tax. The justices' remaining departures from the expected voting behavior must be explained by other factors, perhaps those peculiar to the facts and circumstances of a given case.

Swing-Vote Analysis

Table 10, also new this year, gives the number of times each justice voted with the majority in cases close enough to be decided by a single vote. In such cases, a shift of any one justice from the majority to the minority coalition would create a new majority and a different result. We call this "swing-vote" analysis because each member of the majority is in a position to swing the decision one way or the other (assuming, of course, that other votes remain constant), depending on how his or her vote is cast. Because each majority vote is crucial to the outcome, frequency of swing voting may be regarded as one index of influence on Court decision-making.

The usual case of this type is the 5-4 decision, but other combinations are possible. During the 1987 term, three cases were decided by a 4-3 vote[69] and, because the Senate was slow in approving a replacement for Justice Powell, twenty-two decisions were made by a vote of 5-3. Not all of the five-three decisions are included in Table 10 because the outcome in seven of them would not have been changed by the shift of a single justice from the majority to minority. In those cases the Court merely affirmed a lower court decision, and a switch of one vote would still have resulted in affirmance by an equally divided court.[70] In all, a total of 31 decisions are included in Table 10.

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65. Mississippi Light & Power Co. v. Mississippi, 108 S. Ct. 2428 (1988).

66. 108 S. Ct. 1355 (1988).

67. *Id.* at 1370 (O'Connor, J. dissenting).

68. *Id.* at 1369 (Scalia, J., and Rehnquist, C.J., concurring).

69. Murray v. United States, 108 S. Ct. 2529 (1988); City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (1988); Traynor v. Turnage, 108 S. Ct. 1372 (1988).

70. The seven cases were Communications Workers of America v. Beck, 108 S. Ct. 2641 (1988); McCoy v. Court of Appeals, 108 S. Ct. 1895 (1988); United States Dep't. of Justice v. Julian, 108 S. Ct. 1606 (1988); Phillips Petroleum Co. v. Mississippi, 108 S. Ct. 791 (1988); Taylor v. Illinois, 108 S. Ct. 646 (1988); Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614 (1988); Lowenfield v. Phelps, 108 S. Ct. 546 (1988).

Not surprisingly, the high scorer is Justice White who voted with the majority in twenty-four of thirty-one close cases, which is 77.4% of the total. Justice White has perennially acted as a swing voter on the Court, not committed consistently to either a conservative or liberal course of action. In second place is Justice Kennedy who joined the majority in ten (71.4%) of the close cases in which he participated. Among other Justices the three conservatives (Rehnquist, O'Connor and Scalia) score higher than the three liberals (Brennan, Marshall and Blackmun), with Justice Stevens in a middle position. This pattern indicates that the swing vote of justices closer to the middle of the ideological spectrum is most often crucial, but overall the majorities come somewhat more from the right than from the left. This scale, of course, measures the voting of judges only in relation to each other; it provides no fixed or objective standard for determining how "conservative" or "liberal" the decisions of the Court may be. Tables 1 through 9 may shed some light on that subject.

IV. CONCLUSION

As we observed last year,[71] our discussion has highlighted some of the relationships appearing in patterns of Supreme Court voting, without exhausting all credible interpretations of the data. The availability of information covering two terms adds an additional temporal dimension to the analysis this year, although no startling changes are evident. Comparison of the two terms shows some variation of rankings in individual tables, as well as variation in percentages, but no large consistent shifts of any justice toward or away from judicial restraint or support of individual rights. Nor do the decisions of the Court as a whole indicate significant shifts in one direction across all of the tables, or even most of them. Justice Kennedy seems to have had little effect on the orientation of the Court during the 1987 term. To the extent of his participation, his voting behavior is quite comparable to that of his predecessor Justice Powell (except, perhaps, for a somewhat tougher attitude toward criminal defendants). One may identify important decisions in which Justice Kennedy's vote, or that of another Justice, made the critical difference; but no consistent trend away from last year's norm is evident for any member of the Court.

The authors and the BYU JOURNAL OF PUBLIC LAW hope that this analysis, and particularly the voting data, will be useful to those interested in the work of the United States Supreme Court. We again

71. Riggs, *supra* note 1, at 16, 21.

invite suggestions for the augmentation and improvement of subsequent surveys of Supreme Court voting.[72]

72. The authors thank Professor Rex E. Lee for his suggestions dealing with Table 10.

V. APPENDIX

A. *Explanation of Criteria Governing Selection and Classification of Cases*

1. *The Universe of cases*

Only cases decided during the 1987 Term by full opinion setting forth reasons for the decision are included in the data. Cases handled by summary disposition or denial of certiorari, though accompanied by written dissents in some instances, are excluded as not being decided by written opinion. Cases decided by a four-four tie vote, hence resulting in affirmance without written opinion, are also excluded. Both signed opinions and per curiam opinions are included, however, if they set forth reasons in a more than perfunctory way. All such cases were read, but cases not fitting any of the nine categories are of course not included in the data base for any of the tables.

2. *Cases classified as civil or criminal*

Classification of cases as civil or criminal follows commonly accepted definitions; generally the nature of the case is clearly identified in the opinion. One case, *Hicks v. Feiock,* 108 S. Ct. 1423 (1988), raised a difficult problem of classification because the outcome of the case hinged on whether the contempt citation was found to be civil or criminal. Three members of the Court thought it was civil; five were unsure and remanded for a lower court determination. We classified it as criminal because the lower courts had previously acted on that assumption without carefully addressing the issue.

3. *Classification by nature of the parties*

Cases are included in Tables 1 through 4 only if governmental and private entities appear as opposing parties. This is necessarily true of the criminal cases. Civil cases are excluded if they do not satisfy this criterion. The governmental entity might be the government itself, one of its agencies or officials, or, with respect to state government, one of its political subdivisions.

A suit against an official in his personal capacity is included if he is represented by government attorneys or the interests of the state are otherwise clearly implicated. In *Schweiker v. Chilicky,* 108 S. Ct. 2460 (1988), an Arizona official was named defendant along with several federal officials. The case was included in the federal-civil table but not the state-civil table because the Arizona official was treated as having liability only as an agent of the federal government and the suit was

defended by the United States Solicitor General, without participation of record by the Arizona Attorney General's office.

In instances of multiple parties, a civil case is excluded if governmental entities appear on both sides of the controversy. This rule was applied to exclude *ETSI Pipeline Project v. Missouri,* 108 S. Ct. 805 (1988), because a companion case, *Hodel v. Missouri,* 108 S. Ct. 805 (1988), litigating precisely the same issues, had federal and state government parties on opposite sides.

4. Classification by nature of the issue

A case is included in each category, Tables 5 through 9, if it raises a relevant issue that is addressed in the written opinion(s). One case may thus be included in two or more tables. A case is also included more than once in the same table if it raises two more distinct issues in that category and the issues are resolved by differing voting alignments. A case is not included for any issue which, though raised by one of the litigants, is not addressed in any opinion.

Identification of first amendment and equal protection issues posed no special problem. In each instance the nature of the claim is expressly identified in the opinions.

Cases included in Table 7, statutory civil rights claims, are limited to those invoking relevant sections of the Civil Rights Act of 1964, as amended; the Voting Rights Act of 1965; the civil rights statutes appearing in 42 U.S.C. §§ 1981-1988; and other federal statutes expressly barring discrimination on the basis of race, color, national origin, sex, religion, age, or physical handicap. Actions brought under 42 U.S.C. § 1983 are included if the substantive right asserted is based on a federal statute or on common law, or if the issue is the applicability of § 1983. Section 1983 actions are ***excluded*** if the substantive right asserted is based on the United States Constitution and the applicability of § 1983 is not at issue. The purpose of the § 1983 exclusion is to preserve the distinction between constitutional and non-constitutional claims.

For Table 8, jurisdictional questions are defined to include not only jurisdiction ***per se*** but also standing, mootness, ripeness, abstention, equitable discretion, and justiciability generally. Jurisdictional questions are excluded if neither party challenges jurisdiction and no member of the Court dissents on the question, even though the Court may comment on its jurisdiction.

The federalism table (Table 9) is limited to issues raised by conflicting actions of federal and state or local governments. Common examples are preemption, intergovernmental immunities, application of

the tenth amendment as a limit on federal regulation of state instrumentalities, and federal court interference with state court activities. Issues of "horizontal" federalism or interstate relationships, such as those raised by the dormant commerce clause or the privileges and immunities clause, are excluded from the table.

*B. Cases Included in Statistical Tables**

Table 1: Civil Cases: State/Local Government versus Private Party

Riley v. National Fed'n of the Blind, 108 S. Ct. 2667 (1988).
Frisby v. Schultz, 108 S. Ct. 2495 (1988).
Kadrmas v. Dickinson Pub. Schools, 108 S. Ct. 2481 (1988).
Mississippi Power & Light Co. v. Mississippi *ex rel* Moore, 108 S. Ct. 2428 (1988).
Florida v. Long, 108 S. Ct. 2354 (1988).
Felder v. Casey, 108 S. Ct. 2302 (1988).
Supreme Court of Va. v. Friedman, 108 S. Ct. 2260 (1988).
West v. Atkins, 108 S. Ct. 2250 (1988).
New York State Club Ass'n v. City of New York, 108 S. Ct. 2225 (1988).
City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (1988).
Meyer v. Grant, 108 S. Ct. 1886 (1988).
New Energy Co. v. Limbach, 108 S. Ct. 1803 (1988).
Public Serv. Comm'n v. Martin Exploration & Mining Co., 108 S. Ct. 1765 (1988).
Goodyear Atomic Corp. v. Miller, 108 S. Ct. 1704 (1988).
D.H. Holmes Co. v. McNamara, 108 S. Ct. 1619 (1988).
Employment Div. Dep't of Human Resources v. Smith, 108 S. Ct. 1444 (1988).
Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 108 S. Ct. 1350 (1988).
Gardebring v. Jenkins, 108 S. Ct. 1306 (1988).
Bennett v. Arkansas, 108 S. Ct. 1204 (1988).
Boos v. Barry, 108 S. Ct. 1157 (1988).
Schneidewind v. ANR Pipeline Co., 108 S. Ct. 1145 (1988).
City of St. Louis v. Praprotnik, 108 S. Ct. 915 (1988).
Pennell v. City of San Jose, 108 S. Ct. 849 (1988).
Phillips Petroleum Co. v. Mississippi, 108 S. Ct. 791 (1988).
Honig v. Doe, 108 S. Ct. 592 (1988).
Marino v. Ortiz; Costello v. New York City Police Dep't, 108 S. Ct. 586 (1988) (companion cases).
Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562 (1988).
Forrester v. White, 108 S. Ct. 538 (1988).
Deakins v. Monaghan, 108 S. Ct. 523 (1988).

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* Cases listed twice are those with more than one voting alignment within the category.

Table 2: Civil Cases: Federal Government versus Private Party

Bowen v. Kendrick, 108 S. Ct. 2562 (1988).
Pierce v. Underwood, 108 S. Ct. 2541 (1988).
Schweiker v. Chilicky, 108 S. Ct. 2460 (1988).
Sheridan v. United States, 108 S. Ct. 2449 (1988).
United States Catholic Conference v. Abortion Rights Mobilization, Inc., 108 S. Ct. 2268 (1988).
I.N.S. v. Pangilinan, 108 S. Ct. 2210 (1988).
Huffman v. Western Nuclear Inc., 108 S. Ct. 2087 (1988).
Webster v. Doe, 108 S. Ct. 2047 (1988).
Loeffler v. Frank, 108 S. Ct. 1965 (1988).
Berkovitz v. United States, 108 S. Ct. 1954 (1988).
K-Mart Corp. v. Cartier, Inc., 108 S. Ct. 1811 (1988).
K-Mart Corp. v. Cartier, Inc., 108 S. Ct. 1811 (1988).
F.D.I.C. v. Mallen, 108 S. Ct. 1780 (1988).
F.E.R.C. v. Martin Exploration Management Co., 108 S. Ct. 1765 (1988).
McLaughlin v. Richland Shoe Co., 108 S. Ct. 1677 (1988).
E.E.O.C. v. Commercial Office Prods. Co., 108 S. Ct. 1666 (1988).
United States Dep't of Justice v. Julian, 108 S. Ct. 1606 (1988).
Kungys v. United States, 108 S. Ct. 1537 (1988).
DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 108 S. Ct. 1392 (1988).
Traynor v. Turnage, 108 S. Ct. 1372 (1988).
Bethesda Hosp. Ass'n v. Bowen, 108 S. Ct. 1255 (1988).
Lyng v. International Union, U.A.W., 108 S. Ct. 1184 (1988).
United States v. Wells Fargo Bank, 108 S. Ct. 1179 (1988).
Commissioner v. Bollinger, 108 S. Ct. 1173 (1988).
Arkansas Best Corp. v. Commissioner, 108 S. Ct. 971 (1988).
I.N.S. v. Abudu, 108 S. Ct. 904 (1988).
Bowen v. Galbreath, 108 S. Ct. 892 (1988).
Department of Navy v. Egan, 108 S. Ct. 818 (1988).
United States v. Fausto, 108 S. Ct. 668 (1988).
Westfall v. Erwin, 108 S. Ct. 580 (1988).
Mullins Coal Co. v. Director, U.S.D.L., 108 S. Ct. 427 (1987).
N.L.R.B. v. United Food & Commercial Workers' Union, Local 23, 108 S. Ct. 413 (1987).
Langley v. F.D.I.C., 108 S. Ct. 396 (1987).
Church of Scientology of Cal. v. I.R.S., 108 S. Ct. 271 (1987).

Table 3: State Criminal Cases

Coy v. Iowa, 108 S. Ct. 2798 (1988).
Thompson v. Oklahoma, 108 S. Ct. 2687 (1988).
Patterson v. Illinois, 108 S. Ct. 2389 (1988).
Houston v. Lack, 108 S. Ct. 2379 (1988).
Franklin v. Lynaugh, 108 S. Ct. 2320 (1988).
Ross v. Oklahoma, 108 S. Ct. 2273 (1988).
Arizona v. Roberson, 108 S. Ct. 2093 (1988).
Johnson v. Mississippi, 108 S. Ct. 1981 (1988).
Michigan v. Chesternut, 108 S. Ct. 1975 (1988).
McCoy v. Court of Appeals, 108 S. Ct. 1895 (1988).
Mills v. Maryland, 108 S. Ct. 1860 (1988).
Maynard v. Cartwright, 108 S. Ct. 1853 (1988).
Satterwhite v. Texas, 108 S. Ct. 1792 (1988).
Amadeo v. Zant, 108 S. Ct. 1771 (1988).
California v. Greenwood, 108 S. Ct. 1625 (1988).
Hicks v. Feiock, 108 S. Ct. 1423 (1988).
Taylor v. Illinois, 108 S. Ct. 646 (1988).
Lowenfield v. Phelps, 108 S. Ct. 546 (1988).
Yates v. Aiken, 108 S. Ct. 534 (1988).

Table 4: Federal Criminal Cases

United States v. Kozminski, 108 S. Ct. 2751 (1988).
Morrison v. Olson, 108 S. Ct. 2597 (1988).
Murray v. United States, 108 S. Ct. 2529 (1988).
United States v. Taylor, 108 S. Ct. 2413 (1988).
Bank of Nova Scotia v. United States, 108 S. Ct. 2369 (1988).
Doe v. United States, 108 S. Ct. 2341 (1988).
Braswell v. United States, 108 S. Ct. 2284 (1988).
Wheat v. United States, 108 S. Ct. 1692 (1988).
United States v. Providence Journal Co., 108 S. Ct. 1502 (1988).
Huddleston v. United States, 108 S. Ct. 1496 (1988).
Mathews v. United States, 108 S. Ct. 883 (1988).
United States v. Robinson, 108 S. Ct. 864 (1988).
United States v. Owens, 108 S. Ct. 838 (1988).
Carpenter v. United States, 108 S. Ct. 316 (1987).

Table 5: Cases Raising a Challenge to First Amendment Rights of Expression, Association, and Free Exercise

Riley v. National Fed'n of the Blind, 108 S. Ct. 2667 (1988).
Frisby v. Schultz, 108 S. Ct. 2495 (1988).

New York State Club Ass'n v. City of New York, 108 S. Ct. 2225 (1988).
City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (1988).
Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916 (1988).
Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916 (1988).
Meyer v. Grant, 108 S. Ct. 1886 (1988).
Employment Div. Dep't of Human Resources v. Smith, 108 S. Ct. 1444 (1988).
Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319 (1988).
Lyng v. International Union, U.A.W., 108 S. Ct. 1184 (1988).
Boos v. Barry, 108 S. Ct. 1157 (1988).
Boos v. Barry, 108 S. Ct. 1157 (1988).
City of St. Louis v. Praprotnik, 108 S. Ct. 915 (1988).
Hustler Magazine v. Falwell, 108 S. Ct. 876 (1988).
Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562 (1988).

Table 6: Cases Involving Equal Protection Claims

Kadrmas v. Dickinson Pub. Schools, 108 S. Ct. 2481 (1988).
New York State Club Ass'n v. City of New York, 108 S. Ct. 2225 (1988).
I.N.S. v. Pangilinan, 108 S. Ct. 2210 (1988).
Clark v. Jeter, 108 S. Ct. 1910 (1988).
Bankers Life and Casualty Co. v. Crenshaw, 108 S. Ct. 1645 (1988).
Lyng v. International Union, U.A.W., 108 S. Ct. 1184 (1988).
Boos v. Barry, 108 S. Ct. 1157 (1988).
Pennell v. City of San Jose, 108 S. Ct. 849 (1988).

Table 7: Cases Involving Statutory Civil Rights Claims

Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777 (1988).
Florida v. Long, 108 S. Ct. 2354 (1988).
Felder v. Casey, 108 S. Ct. 2302 (1988).
West v. Atkins, 108 S. Ct. 2250 (1988).
Loeffler v. Frank, 108 S. Ct. 1965 (1988).
E.E.O.C. v. Commercial Office Prods. Co., 108 S. Ct. 1666 (1988).
City of St. Louis v. Praprotnik, 108 S. Ct. 915 (1988).
Honig v. Doe, 108 S. Ct. 592 (1988).

Table 8: Cases Raising a Challenge to the Exercise of Jurisdiction

Bowen v. Massachusetts, 108 S. Ct. 2722 (1988).
Communications Workers of America v. Beck, 108 S. Ct. 2641 (1988).
Morrison v. Olson, 108 S. Ct. 2597 (1988).
Bowen v. Kendrick, 108 S. Ct. 2562 (1988).
Frisby v. Schultz, 108 S. Ct. 2495 (1988).
Kadrmas v. Dickinson Pub. Schools, 108 S. Ct. 2481 (1988).
Schweiker v. Chilicky, 108 S. Ct. 2460 (1988).
Torres v. Oakland Scavenger Co., 108 S. Ct. 2405 (1988).
Houston v. Lack, 108 S. Ct. 2379 (1988).
United States Catholic Conference v. Abortion Rights Mobilization, Inc., 108 S. Ct. 2268 (1988).
New York State Club Ass'n v. City of New York, 108 S. Ct. 2225 (1988).
Christianson v. Colt Indus. Operating Corp., 108 S. Ct. 2166 (1988).
Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 2104 (1988).
Webster v. Doe, 108 S. Ct. 2047 (1988).
Webster v. Doe, 108 S. Ct. 2047 (1988).
Van Cauwenberghe v. Biard, 108 S. Ct. 1945 (1988).
Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916 (1988).
Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916 (1988).
K-Mart Corp. v. Cartier, Inc., 108 S. Ct. 1811 (1988).
Budinich v. Becton Dickinson & Co., 108 S. Ct. 1717 (1988).
Bankers Life & Casualty Co. v. Crenshaw, 108 S. Ct. 1645 (1988).
United States v. Providence Journal Co., 108 S. Ct. 1502 (1988).
Traynor v. Turnage, 108 S. Ct. 1372 (1988).
Bowen v. Kizer, 108 S. Ct. 1200 (1988).
Gulfstream Aerospace Corp. v. Mayacamas Corp., 108 S. Ct. 1133 (1988).
Buchanan v. Stanships, Inc., 108 S. Ct. 1130 (1988).
City of St. Louis v. Praprotnik, 108 S. Ct. 915 (1988).
Pennell v. City of San Jose, 108 S. Ct. 849 (1988).
Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 108 S. Ct. 830 (1988).
United States v. Fausto, 108 S. Ct. 668 (1988).
Taylor v. Illinois, 108 S. Ct. 646 (1988).
Virginia v. American Booksellers Ass'n, 108 S. Ct. 636 (1988).
Carnegie-Mellon University v. Cohill, 108 S. Ct. 614 (1988).
Honig v. Doe, 108 S. Ct. 592 (1988).
Marino v. Ortiz; Costello v. New York City Police Dep't, 108 S. Ct. 586 (1988).
Deakins v. Monaghan, 108 S. Ct. 523 (1988).

Deakins v. Monaghan, 108 S. Ct. 523 (1988).
Thompson v. Thompson, 108 S. Ct. 513 (1988).
NLRB v. United Food & Commercial Workers' Union, Local 23, 108 S. Ct. 413 (1987).
Omni Capital Int'l v. Rudolf Wolff & Co., 108 S. Ct. 404 (1987).
Karcher v. May, 108 S. Ct. 388 (1987).
Gwaltney of Smithfield v. Chesapeake Bay Found., 108 S. Ct. 376 (1987).
Gwaltney of Smithfield v. Chesapeake Bay Found., 108 S. Ct. 376 (1987).

Table 9: Cases Raising a Federalism Issue

Boyle v. United Technologies Corp., 108 S. Ct. 2510 (1988).
Mississippi Power & Light Co. v. Mississippi *ex rel* Moore, 108 S. Ct. 2428 (1988).
Felder v. Casey, 108 S. Ct. 2302 (1988).
Mackey v. Lanier Collections Agency & Serv., Inc., 108 S. Ct. 2182 (1988).
Mackey v. Lanier Collections Agency & Serv., Inc., 108 S. Ct. 2182 (1988).
Lingle v. Norge Div. of Magic Chef, Inc., 108 S. Ct. 1877 (1988).
Goodyear Atomic Corp. v. Miller, 108 S. Ct. 1704 (1988).
Chick Kam Choo v. Exxon Corp., 108 S. Ct. 1684 (1988).
City of New York v. F.C.C., 108 S. Ct. 1637 (1988).
South Carolina v. Baker, 108 S. Ct. 1355 (1988).
Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 108 S. Ct. 1350 (1988).
Bennett v. Arkansas, 108 S. Ct. 1204 (1988).
Schneidewind v. ANR Pipeline Co., 108 S. Ct. 1145 (1988).

Table 10: Swing-vote cases

Thompson v. Oklahoma, 108 S. Ct. 2687 (1988) (5-3).
Bowen v. Kendrick, 108 S. Ct. 2562 (1988) (5-4).
Murray v. United States, 108 S. Ct. 2529 (1988) (4-3).
Boyle v. United Technologies Corp., 108 S. Ct. 2510 (1988) (5-4).
Kadrmas v. Dickinson Pub. Schools, 108 S. Ct. 2481 (1988) (5-4).
Patterson v. Illinois, 108 S. Ct. 2389 (1988) (5-4).
Houston v. Lack, 108 S. Ct. 2379 (1988) (5-4).
Florida v. Long, 108 S. Ct. 2354 (1988) (5-4).
Braswell v. United States, 108 S. Ct. 2284 (1988) (5-4).
Ross v. Oklahoma, 108 S. Ct. 2273 (1988) (5-4).
Liljeberg v. Health Servs. Acquisition Corp., 108 S. Ct. 2194 (1988)

(5-4).
Mackey v. Lanier Collections Agency & Serv., Inc., 108 S. Ct. 2182 (1988) (5-4).
City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (1988) (4-3).
Loeffler v. Frank, 108 S. Ct. 1965 (1988) (5-3).
Mills v. Maryland, 108 S. Ct. 1860 (1988) (5-4).
K-Mart Corp. v. Cartier, Inc., 108 S. Ct. 1811 (1988) (5-4).
K-Mart Corp. v. Cartier, Inc., 108 S. Ct. 1811 (1988) (5-4).
Wheat v. United States, 108 S. Ct. 1692 (1988) (5-4).
E.E.O.C. v. Commercial Office Prods. Co., 108 S. Ct. 1666 (1988) (5-3).
Employment Div. Dept. of Human Res. v. Smith, 108 S. Ct. 1444 (1988) (5-3).
Hicks v. Feiock, 108 S. Ct. 1423 (1988) (5-3).
Traynor v. Turnage, 108 S. Ct. 1372 (1988) (4-3).
Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319 (1988) (5-3).
Gardebring v. Jenkins, 108 S. Ct. 1306 (1988) (5-3).
Lyng v. International Union, U.A.W., 108 S. Ct. 1184 (1988) (5-3).
Boos v. Barry, 108 S. Ct. 1157 (1988) (5-3).
United States v. Robinson, 108 S. Ct. 864 (1988) (5-3).
Department of Navy v. Egan, 108 S. Ct. 818 (1988) (5-3).
United States v. Fausto, 108 S. Ct. 668 (1988) (5-3).
Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562 (1988) (5-3).
Gwaltney of Smithfield v. Chesapeake Bay Found., 108 S. Ct. 376 (1987) (5-3).