

3-1-1988

Supreme Court Voting Behavior: 1986 Term

Robert E. Riggs

Follow this and additional works at: <https://digitalcommons.law.byu.edu/jpl>



Part of the [Courts Commons](#)

Recommended Citation

Robert E. Riggs, *Supreme Court Voting Behavior: 1986 Term*, 2 BYU J. Pub. L. 15 (1988).

Available at: <https://digitalcommons.law.byu.edu/jpl/vol2/iss1/3>

This Article is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Journal of Public Law by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Supreme Court Voting Behavior: 1986 Term

*Robert E. Riggs**

I. INTRODUCTION

This article examines the positions taken by individual justices of the United States Supreme Court on selected categories of cases decided during the 1986 term. It is the first of what is intended to be an annual survey of Supreme Court voting behavior. Since 1949 the Harvard Law Review has included several statistical tables with an annual analysis of the Supreme Court term, but tables dealing with actions of individual justices are currently limited to figures for opinions written, dissenting votes, voting alignments with other members of the court, and participation with the majority in 5-4 decisions.¹ The Journal of Public Law believes that additional voting data supplied on an annual basis would be of interest to students of the Supreme Court, and this article is a first step toward meeting that need.

For this initial survey, the analysis has been limited to eight categories of issues that occur each term with some frequency and which may provide indicators of the justices' views on important issues of constitutional interpretation and individual rights. The eight categories are as follows:

- 1) Civil cases in which a state, or one of its political subdivisions, is opposed by a private party.
- 2) Civil cases in which the federal government, or one of its agencies, is opposed by a private party.
- 3) State criminal cases.
- 4) Federal criminal cases.
- 5) Cases raising a first amendment issue of speech or association.
- 6) Cases raising an equal protection issue.
- 7) Cases raising a statutory civil rights claim.

* 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. The author wishes to acknowledge the research assistance of Michael R. Moss, Jeffrey Peatross, Douglas Short, and Paul W. VanDerwerken.

1. See *The Supreme Court, 1985 Term*, 100 HARV. L. REV. 1, 304-07 (1986). The Harvard survey in its present form was instituted in 1949. See *The Supreme Court, 1948 Term*, 63 HARV. L. REV. 121 (1949).

8) Cases raising an issue of federal court jurisdiction, standing, justiciability, or similar matters.

Voting data for each of the eight categories are presented in Tables 1-8.

Each of the categories in some way 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 state 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 giving great weight to the framers' intent (when ascertainable) in construing constitutional text.

Judicial restraint and concern for individual rights are not opposite poles of a single attitudinal dimension. Respect for precedent, avoidance of constitutional questions and unnecessary decisions, and even searching 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 framers' intent can mean reluctance to read new individual rights into the Constitution. Avoiding decisions by federal courts leaves 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 that support an inference of judicial restraint, or lack of it, will also be consistent, respectively, with a narrow or a broad view of individual rights.

II. THE VOTING RECORD

TABLE 1
CIVIL CASES: STATE/LOCAL GOVERNMENT
VERSUS A PRIVATE PARTY

Justice	Votes Favoring Government	Votes Favoring Private Party	Not Voting
Rehnquist	28 (71.8%)	11 (28.2%)	0
O'Connor	25 (64.1%)	14 (35.9%)	0
Scalia	25 (64.1%)	14 (35.9%)	0
Powell	19 (51.4%)	18 (48.7%)	2
Stevens	18 (46.2%)	21 (53.9%)	0
White	17 (43.6%)	22 (56.4%)	0
Blackmun	14 (36.8%)	24 (63.2%)	1
Brennan	13 (33.3%)	26 (66.7%)	0
Marshall	12 (30.8%)	27 (69.2%)	0
Majority	21 (53.9%)	18 (46.2%)	—

TABLE 2
CIVIL CASES: FEDERAL GOVERNMENT
VERSUS A PRIVATE PARTY

Justice	Votes Favoring Government	Votes Favoring Private Party	Not Voting
Rehnquist	29 (90.6%)	3 (9.4%)	0
White	27 (87.1%)	4 (12.9%)	1
Scalia	24 (82.8%)	5 (17.2%)	3
O'Connor	24 (75.0%)	8 (25.0%)	0
Powell	23 (71.9%)	9 (28.1%)	0
Blackmun	17 (53.1%)	15 (46.9%)	0
Stevens	16 (50.0%)	16 (50.0%)	0
Marshall	15 (46.9%)	17 (53.1%)	0
Brennan	14 (43.8%)	18 (56.3%)	0
Majority	22 (68.8%)	10 (31.3%)	—

TABLE 3
STATE CRIMINAL CASES

Justice	Votes Favoring Government	Votes Favoring Defendant	Not Voting
Rehnquist	29 (87.9%)	4 (12.1%)	0
White	27 (81.8%)	6 (18.2%)	0
O'Connor	25 (75.8%)	8 (24.2%)	0
Scalia	25 (75.8%)	8 (24.2%)	0
Powell	21 (63.6%)	12 (36.4%)	0
Blackmun	10 (30.3%)	23 (69.7%)	0
Stevens	7 (21.2%)	26 (78.8%)	0
Brennan	1 (3.0%)	32 (97.0%)	0
Marshall	1 (3.0%)	32 (97.0%)	0
Majority	20 (60.6%)	13 (39.4%)	—

TABLE 4
FEDERAL CRIMINAL CASES

Justice	Votes Favoring Government	Votes Favoring Defendant	Not Voting
O'Connor	9 (90.0%)	1 (10.0%)	0
White	9 (90.0%)	1 (10.0%)	0
Rehnquist	9 (80.0%)	2 (20.0%)	0
Scalia	7 (70.0%)	3 (30.0%)	0
Powell	6 (60.0%)	4 (40.0%)	0
Stevens	4 (40.0%)	6 (60.0%)	0
Blackmun	3 (30.0%)	7 (70.0%)	0
Brennan	0 (0.0%)	10 (100.0%)	0
Marshall	0 (0.0%)	10 (100.0%)	0
Majority	6 (60.0%)	4 (40.0%)	—

TABLE 5
 CASES INVOKING FIRST AMENDMENT RIGHTS
 OF EXPRESSION AND ASSOCIATION

Justice	Votes Favoring First Amendment Claims	Votes Opposing First Amendment Claims	Not Voting
Brennan	11 (91.7%)	1 (8.3%)	0
Marshall	11 (91.7%)	1 (8.3%)	0
Blackmun	8 (72.7%)	3 (27.3%)	1
Powell	7 (58.3%)	5 (41.7%)	0
Stevens	6 (50.0%)	6 (50.0%)	0
O'Connor	5 (45.5%)	6 (54.6%)	1
White	5 (41.7%)	7 (58.3%)	0
Scalia	4 (36.4%)	7 (63.6%)	1
Rehnquist	2 (16.7%)	10 (83.3%)	0
Majority	7 (58.3%)	5 (41.7%)	—

TABLE 6
 EQUAL PROTECTION CASES

Justice	Votes Favoring Equal Protection Claim	Votes Opposing Equal Protection Claim	Not Voting
Brennan	5 (71.4%)	2 (28.6%)	0
Marshall	5 (71.4%)	2 (28.6%)	0
Blackmun	4 (57.1%)	3 (42.9%)	0
O'Connor	3 (42.9%)	4 (57.1%)	0
Stevens	2 (33.3%)	4 (66.7%)	1
White	2 (28.6%)	5 (71.4%)	0
Powell	1 (14.3%)	6 (85.7%)	0
Rehnquist	1 (14.3%)	6 (85.7%)	0
Scalia	1 (14.3%)	6 (85.7%)	0
Majority	1 (14.3%)	6 (85.7%)	—

TABLE 7
 CASES INVOLVING STATUTORY
 CIVIL RIGHTS CLAIMS

Justice	Votes Favoring Civil Rights Claim	Votes Opposing Civil Rights Claim	Not Voting
Blackmun	11 (84.6%)	2 (15.4%)	0
Brennan	11 (84.6%)	2 (15.4%)	0
Marshall	11 (84.6%)	2 (15.4%)	0
Stevens	8 (61.5%)	5 (38.5%)	0
White	8 (61.5%)	5 (38.5%)	0
Rehnquist	5 (38.5%)	8 (61.5%)	0
Scalia	5 (38.5%)	8 (61.5%)	0
O'Connor	4 (30.8%)	9 (69.2%)	0
Powell	4 (30.8%)	9 (69.2%)	0
Majority	7 (53.9%)	6 (46.2%)	—

TABLE 8
 CASES RAISING A CHALLENGE TO THE
 EXERCISE OF JURISDICTION

Justice	Votes Favoring Exercise	Votes Opposing Exercise	Not Voting
Stevens	20 (71.4%)	8 (28.6%)	0
White	20 (71.4%)	8 (28.6%)	0
Powell	19 (67.9%)	9 (32.1%)	0
Rehnquist	19 (67.9%)	9 (32.1%)	0
Blackmun	18 (64.3%)	10 (35.7%)	0
O'Connor	18 (64.3%)	10 (35.7%)	0
Scalia	16 (61.5%)	10 (38.5%)	2
Brennan	17 (60.7%)	11 (39.3%)	0
Marshall	16 (57.1%)	12 (42.9%)	0
Majority	17 (60.7%)	11 (39.3%)	—

III. ANALYSIS

A list of cases included in each of the eight categories, and the criteria governing their selection, are presented in an appendix to this article. Each case was read and coded by at least three readers, and differences in classification were discussed in order to arrive at 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 a few cases, justices are listed as voting the same way even though some joined a majority opinion and others dissented. In *Pope v. Illinois*,² for example, all members of the Court agreed that the trial court had committed error in its jury instruction. The majority remanded for a determination whether the error was harmless; dissenters believed the error was not harmless and justified outright reversal. The remand was considered as a vote against the State (and in favor of the defendant) even though the dissenters would have reached a decision much more favorable to the defendant. Since the voting classification is dichotomous, with no allowance for positions in between, all justices were treated as voting against the State. The necessity of reading and interpreting several opinions in a single case, including some that dissent or concur in part, obviously leaves 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 mutually exclusive categories: 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, nor would a case on review by the Supreme Court involve a simultaneous federal and state prosecution. A civil suit involving 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 1986 term.³ In contrast, the last four tables do not involve mutually exclusive categories. 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 ex-

2. 107 S. Ct. 1918 (1987).

3. In a class action brought by welfare recipients against the North Carolina Department of Human Resources, *Flaherty v. Gilliard*, 107 S. Ct. 3008 (1987), the State impleaded the Secretary of the U.S. Department of Health and Human Services. The lawsuit against the United States was docketed as a separate action, *Bowen v. Gilliard*, 107 S. Ct. 3008 (1987), although both cases were decided in a single opinion.

ample, an action by a private party against a state might conceivably raise issues pertaining to the first amendment, equal protection, statutory civil rights, and jurisdiction. 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 on each of the issues would not necessarily be the same, however. The Court might be unanimous on the jurisdictional issue but divided, perhaps different ways, on the other issues.

Table 1 lists the number of times (with percentages) 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 a clear reason for deciding otherwise) and a narrow view of the scope of individual rights. Inspection of the judicial rankings on this scale tends to confirm that presumption, based on what is generally known or believed about individual members of the Court, with Chief Justice Rehnquist the most supportive of government and Justice Marshall and Brennan the least.

Such a conclusion obviously cannot be drawn from the voting on every individual case, however. In *Johnson v. Transportation Agency*,⁴ for example, a vote for the state was a vote for a policy of affirmative action giving preference to women in state employment. The underlying correlate of the vote might variously be characterized as a strong commitment to eliminating gender discrimination, a narrow view of the rights of men, or judicial restraint in upholding state policy. Likewise, in *California Federal Savings and Loan Association v. Guerra*,⁵ a vote for the state (Guerra, Director of California's Department of Fair Employment and Housing) was a vote to uphold a California statute designed to protect the jobs of women requiring pregnancy leave. Significantly, in these cases the justices at the extremes of the table departed from their normal positions—the Chief Justice voting for the private party and Justices Brennan and Marshall voting for the state. *Keystone Coal Association v. DeBenedictis*,⁶ upholding a Pennsylvania law prohibiting coal mining that causes subsidence of pre-existing buildings, illustrates another exception to the pattern. Justices Marshall and Brennan voted for the state while the Chief Justice voted for the coal mining companies. These departures from the general pattern

4. 107 S. Ct. 1442 (1987).

5. 107 S. Ct. 683 (1987).

6. 107 S. Ct. 1232 (1987).

reflected in the table support the widely-held belief that Justices Brennan and Marshall are predisposed to take the side of the underdog when rights are in conflict, while the Chief Justice is more inclined to safeguard established relationships, including vested property rights.

Table 2 (federal cases), like Table 1 (state cases), shows Rehnquist, Brennan and Marshall at the extremes. Of the fourteen cases in which Justice Brennan voted for the federal government, ten were decided without an opposing vote, indicating, apparently, a case for the government too strong to controvert. Of his other four pro-federal government votes, two upheld the tax liability of corporate taxpayers (clearly not underdogs),⁷ and two had the effect of favoring worker rights as against employer.⁸ Chief Justice Rehnquist's three votes against the federal government are found in two unanimous decisions and a labor-management dispute in which a vote against government was a vote in favor of the employer.⁹ With respect to other members of the Court, Justices Scalia and O'Connor are near the pro-government end of both tables, while Justices Stevens and Blackmun are closer to the opposite end. All members of the court showed a greater preference for federal than for state government causes, a fact reflected in majority votes for the federal government in 71.9% of all cases as compared with 54.1% for state government cases. Justice White showed a marked preference for federal as compared with state government parties, while Justices Powell and Stevens supported both state and federal parties in slightly less than half of the relevant cases.

The two criminal case tables (3 and 4) appear to reflect the same attitudes toward judicial restraint and individual rights as do the tables for civil cases, except that voting by justices at the extremes of the scales is even more one-sided. Brennan and Marshall voted in favor of the prosecution only once in 34 state cases and not at all in ten federal prosecutions. Justice Brennan's single pro-prosecution vote was a concurrence in the judgment only and was accompanied by an opinion dissociating himself from portions of the majority opinion.¹⁰ Justice Marshall's odd vote was cast in an extradition case.¹¹

The heightened polarization in criminal cases is also evident at the pro-government end of the rankings. Justice O'Connor voted only once against the prosecution in a federal case, and that came by way of a

7. *United States v. General Dynamics Corp.*, 107 S. Ct. 1732 (1987); *Commissioner v. Fink*, 107 S. Ct. 2729 (1987).

8. *Citicorp Indus. Credit Inc. v. Brock*, 107 S. Ct. 2694 (1987); *Fall River Dyeing & Finishing Corp. v. NLRB*, 107 S. Ct. 2225 (1987).

9. *Fall River Dyeing & Finishing Corp. v. NLRB*, 107 S. Ct. 2225 (1987).

10. *Connecticut v. Barrett*, 107 S. Ct. 828 (1987).

11. *California v. Superior Court of California*, 107 S. Ct. 2433 (1987).

concurrence suggesting that the lower court error may have been harmless.¹² Justice White wrote the majority opinion in his one disagreement with the federal prosecutors, where he concluded that the federal mail fraud statute, 18 U.S.C. § 1341, did not reach the defendant's conduct.¹³ The Chief Justice supported the defendant in the same two cases, but no others. The four cases in which Justice Rehnquist favored the defendant in a state prosecution were all decided by unanimous votes.

Tables 5, 6, and 7, dealing with claims of constitutional and statutory rights, show the same broad voting patterns as the tabulations based on governmental versus private parties. Brennan and Marshall are at one extreme, with Rehnquist usually at the other. In Table 5 (First Amendment) the two liberal justices voted for the claimant in eleven of twelve cases. The single exception was *Board of Directors of Rotary International v. Rotary Club of Duarte*,¹⁴ in which a vote against the first amendment associational rights of Rotary International was a vote against its policy of excluding women from membership. The Chief Justice twice voted with all other members of the Court in finding a constitutional violation,¹⁵ although in one of them, *Pope v. Illinois*,¹⁶ he joined the court in remanding the cause, over vigorous dissent, for determination whether the error was harmless.

The rankings in Table 6 (equal protection) are quite similar to Table 5, except that Justice Powell, who ranked above middle in support of first amendment claims, joins Rehnquist and Scalia as least supportive of equal protection claims. Rehnquist and Scalia found a violation of equal protection only once, the claimants being white state police officers who objected to Alabama's affirmative action program giving promotion preference to blacks.¹⁷ Not surprisingly, that same case raised the only equal protection claim to which Brennan and Marshall objected. Justice Powell cast his lone vote for the claimant in a decision that struck down an Arkansas tax bearing unequally on different types of publications. The principal issue in the case,¹⁸ however, was not equal protection but first amendment, an area where Justice Powell, as shown in Table 5, was much more sympathetic to the claimant.

12. *Young v. United States*, 107 S. Ct. 2124 (1987).

13. *McNally v. United States*, 107 S. Ct. 2875 (1987).

14. 107 S. Ct. 1940 (1987).

15. *Pope v. Illinois*, 107 S. Ct. 1918 (1987); *Board of Airport v. Jews for Jesus, Inc.*, 107 S. Ct. 2568 (1987).

16. 107 S. Ct. 1918 (1987).

17. *United States v. Paradise*, 107 S. Ct. 1053 (1987).

18. *Arkansas Writers' Project, Inc. v. Ragland*, 107 S. Ct. 1722 (1987).

Table 7, dealing with civil rights based on federal statutory rather than constitutional grounds, shows somewhat more support for the claimed right among justices at the bottom of the scale, but otherwise the patterns are similar to Table 5 and 6. Justice Powell again appears among the least sympathetic to the claimant, as he did in the equal protection cases. Two of his pro-civil rights votes came in unanimous decisions that Arabs and Jews, respectively, could state a claim under civil rights statutes barring racial discrimination.¹⁹ Another “pro-civil rights” vote by conservative members of the court was recorded in *Johnson v. Transportation Agency*²⁰ where Rehnquist, Scalia, and White supported a male governmental employee in his Title VII claim of sex discrimination. The *Johnson* case, predictably, accounted for one of the two votes cast by Justices Brennan and Marshall against statutory claims. Their other negative vote occurred in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,²¹ which unanimously rejected an employee’s claim of religious discrimination under Title VII. The employee had been dismissed from his job in a church-owned gymnasium for religious reasons, but the Court upheld as constitutional a statutory exemption expressly permitting religious organizations to use religious criteria in hiring.

Table 8 (Jurisdiction) is the only table not conforming in broad outline to our initial assumptions about judicial restraint and individual rights. The marked variations in the voting of conservative and liberal members of the Court, which are apparent in each of the preceding tables, do not show up here. The most activist on the jurisdiction scale, Justices Stevens and White, favored the exercise of federal court jurisdiction in 20 of 28 cases. The least activist by this criterion, Justice Marshall, favored federal court jurisdiction 16 of 28 times—not a very significant variation. Moreover, Justice Marshall’s position on the scale is the reverse of what might have been expected if a vote against federal court jurisdiction indicates judicial restraint. He is among the most activist on all of the other scales; here he is at the bottom. Justice Rehnquist is also out of position: usually at the judicial restraint pole, he is nearer the activist end of the jurisdiction scale.

A closer examination of the cases affords at least a plausible explanation. Eighteen of the twenty-eight cases in which we found an issue of jurisdiction (broadly construed to include questions of standing, mootness, etc.), were resolved without any apparent dissent. In those

19. *Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022 (1987); *Shaare Tefila Congregation v. Cobb*, 107 S. Ct. 2019 (1987).

20. 107 S. Ct. 1442 (1987).

21. 107 S. Ct. 2862 (1987).

instances the challenge was raised by one of the parties, but it was not substantial enough to persuade a single member of the Court. Of the remaining ten cases, two were resolved by the predicted voting pattern—Brennan and Marshall voting in favor of jurisdiction, Rehnquist, Scalia and O'Connor voting against. A third case, *Pennzoil Company v. Texaco, Inc.*,²² was a slightly looser fit: Justices Brennan and Stevens favored federal court jurisdiction, while the other seven agreed that the district court should have abstained from interfering with the state court proceeding.

The other seven cases are still farther removed from the expected pattern. Four of the seven were criminal appeals, in which a vote against jurisdiction had the effect of favoring the defendant.²³ In all four, the voting was precisely the opposite of the expected: Brennan and Marshall opposed federal court jurisdiction while Rehnquist, Scalia and O'Connor were in favor. Here one may speculate that decisions on the jurisdictional issue were affected by the underlying predispositions of the justices, so strongly attested in Tables 3 and 4, to favor, respectively, the criminal defendant, or the prosecution. In a fifth case, *Iowa Mutual Insurance Co. v. LaPlante*,²⁴ all members of the court except Justice Stevens voted against jurisdiction. This is consistent with the predicted position of restraint by conservative justices but not with the greater activism of their more liberal colleagues. In this case, however, a vote against federal court jurisdiction had the effect of returning the dispute to Indian tribal courts where, presumably, the Indian plaintiff might fare better against the insurance company defendant. In such circumstances, the "underdog" issue may have spelled the difference for Justices Marshall and Brennan. In the sixth case, *Burke v. Barnes*,²⁵ several members of the House of Representatives challenged President Reagan's pocket veto of a bill (which by its own terms expired in 1984) conditioning aid to El Salvador upon the President's certification of continued progress in protecting human rights. Six members of the Court concluded that the cause was moot; Justices Stevens and White disagreed, and Justice Scalia did not participate. The vote of Justices Brennan and Marshall to hold the question moot cannot be explained by any of the theories previously suggested.

The preceding discussion has highlighted some of the relationships apparent in the patterns of voting by Supreme Court justices during the

22. 107 S. Ct. 1519 (1987).

23. *Solorio v. United States*, 107 S. Ct. 2924 (1987); *California v. Rooney*, 107 S. Ct. 2852 (1987); *United States v. Salerno*, 107 S. Ct. 2095 (1987); and *Pennsylvania v. Finley*, 107 S. Ct. 1990 (1987).

24. 107 S. Ct. 971 (1987).

25. 107 S. Ct. 734 (1987).

1986 term and has used the information to assess their attitudes toward individual rights and judicial restraint. It has not exhausted all credible interpretations of the data. Readers may, and hopefully will, discover other significant relationships and interpretations that the data will sustain. As new data become available each year, the search for trends will become an important part of the analysis. For continuity and comparison, the *Journal of Public Law* intends to use essentially the same categories from year to year. This does not, however, preclude the addition of other categories in the future. The author and staff of the *Journal* hope this annual feature will be a useful service to those interested in the work of the United States Supreme Court, and we invite suggestions for the augmentation and improvement of subsequent surveys of Supreme Court voting.

IV. APPENDIX

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

1. *The universe of cases*

Only cases decided during the 1986 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 4-4 tie vote, and 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 eight 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 which require no restatement here, although two extradition cases posed a difficult problem of interpretation. One, *California v. Superior Court of California*, 107 S. Ct. 2433 (1987), was treated as a criminal case because the real parties in interest were resisting the issuance of an extradition warrant by California to compel them to face charges in Louisiana. The second extradition case, *Puerto Rico v. Branstad*, 107 S. Ct. 2802 (1987), was classified as a civil suit because Puerto Rico was seeking writ of mandamus to compel the governor of Iowa to extradite a fugitive.

3. *Classification by nature of the parties*

Cases are included in Tables 1-4 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. In instances of multiple parties, a civil case is excluded if governmental entities appear on both sides of the controversy.

4. *Classification by nature of the issue*

A case is included in each category, Tables 5-8, for which the relevant issue is raised and addressed in the written opinion(s). A case is not included for any issue which, though raised by one of the litigants, is not addressed in the opinions. Identification of first amendment and equal protection issues posed no special problem; in each instance the nature of the claim was 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 Title 42 U.S.C. §§ 1981 through 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 federal statute or common law; § 1983 actions are excluded if the substantive right asserted is based on the United States Constitution. 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.

B. Cases Included in Statistical Tables

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

Kelly v. Robinson, 107 S. Ct. 353 (1986).

North Carolina Dept. of Transp. v. Crest Street Community Council, Inc. 107 S. Ct. 336 (1986).

Ansonia Bd. of Educ. v. Philbrook, 107 S. Ct. 367 (1986).

R.J. Reynolds Tobacco Co. v. Durham County, 107 S. Ct. 499 (1986).

Munro v. Socialist Workers Party, 107 S. Ct. 533 (1986).

- Tashjian v. Republican Party, 107 S. Ct. 544 (1986).
California Federal Sav. and Loan Ass'n v. Guerra, 107 S. Ct. 683 (1987).
324 Liquor Corp. v. Duffy, 107 S. Ct. 720 (1987).
Wright v. City of Roanoke Redevelopment and Housing Authority, 107 S. Ct. 766 (1987).
I.C.C. v. Texas, 107 S. Ct. 787 (1987).
Wimberly v. Labor and Indus. Relations Comm'n of Missouri, 107 S. Ct. 821 (1987).
Western Air Lines, Inc. v. Board of Equalization, 107 S. Ct. 1038 (1987).
Hobbie v. Unemployment Appeals Comm'n, 107 S. Ct. 1046 (1987).
California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083 (1987).
City of Springfield, Mass. v. Kibbe, 107 S. Ct. 1114 (1987).
School Bd. of Nassau County v. Arline, 107 S. Ct. 1123 (1987).
Town of Newton v. Rumery, 107 S. Ct. 1187 (1987).
Keystone Bituminous Coal Ass'n v. DeBenedicts, 107 S. Ct. 1232 (1987).
California Coastal Comm'n v. Granite Rock Co., 107 S. Ct. 1419 (1987).
Johnson v. Transportation Agency, Santa Clara County, 107 S. Ct. 1442 (1987).
O'Connor v. Ortega, 107 S. Ct. 1492 (1987).
Indiana v. Dynamics Corp. of America, 107 S. Ct. 1637 (1987).
Arkansas Writers' Project, Inc. v. Ragland, 107 S. Ct. 1722 (1987).
Lukhard v. Reed, 107 S. Ct. 1807 (1987).
Burlington Northern Ry. Co. v. Oklahoma Tax Comm'n, 107 S. Ct. 1855 (1987).
Fort Halifax Packing Co., Inc. v. Coyne, 107 S. Ct. 2211 (1987).
Turner v. Safley, 107 S. Ct. 2254 (1987).
Rockford Life Ins. Co. v. Illinois Dept. of Revenue, 107 S. Ct. 2312 (1987).
First English Evangelical Lutheran Church v. Los Angeles County, 107 S. Ct. 2378 (1987).
City of Houston v. Hill, 107 S. Ct. 2502 (1987).
Board of Airport Comm'rs v. Jews for Jesus, Inc., 107 S. Ct. 2568 (1987).
Edwards v. Aguillard, 107 S. Ct. 2573 (1987).
Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue, 107 S. Ct. 2810 (1987).
National Can Corp. v. Washington State Dept. of Revenue, 107 S. Ct. 2810 (1987).

American Trucking Associations, Inc. v. Scheiner, 107 S. Ct. 2829 (1987).
 Welch v. Texas Dept. of Highways and Public Transp., 107 S. Ct. 2941 (1987).
 Flaherty v. Gilliard, 107 S. Ct. 3008 (1987).
 Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 107 S. Ct. 3078 (1987).
 Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987).

2. Table 2: Civil Cases: Federal Government versus Private Party

O'Connor v. United States, 107 S. Ct. 347 (1986).
 Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 107 S. Ct. 616 (1986).
 Clarke v. Securities Industry Ass'n, 107 S. Ct. 750 (1987).
 Jersey Shore State Bank v. United States, 107 S. Ct. 782 (1987).
 C.I.R. v. Groetzinger, 107 S. Ct. 980 (1987).
 United States v. Paradise, 107 S. Ct. 1053 (1987).
 F.C.C. v. Florida Power Corp., 107 S. Ct. 1107 (1987).
 I.N.S. v. Cardozo-Fonseca, 107 S. Ct. 1207 (1987).
 Amoco Production Co. v. Village of Gambell, 107 S. Ct. 1396 (1987).
 Alaska Airlines, Inc. v. Brock, 107 S. Ct. 1476 (1987).
 United States v. Cherokee Nation, 107 S. Ct. 1487 (1987).
 United States v. John Doe, Inc., 107 S. Ct. 1656 (1987).
 United States v. General Dynamics Corp., 107 S. Ct. 1732 (1987).
 Brock v. Roadway Exp., Inc., 107 S. Ct. 1740 (1987).
 Tull v. United States, 107 S. Ct. 1831 (1987).
 Meese v. Keene, 107 S. Ct. 1862 (1987).
 N.L.R.B. v. International Broth. of Elec. Workers, Local 340, 107 S. Ct. 2002 (1987).
 United States v. Johnson, 107 S. Ct. 2063 (1987).
 Hodel v. Irving, 107 S. Ct. 2076 (1987).
 Fall River Dyeing & Fishing Corp. v. N.L.R.B., 107 S. Ct. 2225 (1987).
 United States v. Hohri, 107 S. Ct. 2246 (1987).
 Bowen v. Yuckert, 107 S. Ct. 2287 (1987).
 I.C.C. v. Brotherhood of Locomotive Engineers, 107 S. Ct. 2360 (1987).
 O'Lone v. Estate of Shabazz, 107 S. Ct. 2400 (1987).
 Frazier v. Heebe, 107 S. Ct. 2607 (1987).
 Hewitt v. Helms, 107 S. Ct. 2672 (1987).
 Citicorp Indus. Credit Inc. v. Brock, 107 S. Ct. 2694 (1987).
 C.I.R. v. Fink, 107 S. Ct. 2729 (1987).

United States v. Amos, 107 S. Ct. 2862 (1987).
Rankin v. McPherson, 107 S. Ct. 2891 (1987).
Bowen v. Gilliard, 107 S. Ct. 3008 (1987).
United States v. Stanley, 107 S. Ct. 3054 (1987).

3. Table 3: State Criminal Cases

Griffith v. Kentucky, 107 S. Ct. 708 (1987).
Colorado v. Bertine, 107 S. Ct. 738 (1987).
Connecticut v. Barrett, 107 S. Ct. 828 (1987).
California v. Brown, 107 S. Ct. 837 (1987).
Colorado v. Spring, 107 S. Ct. 851 (1987).
Martin v. Ohio, 107 S. Ct. 1098 (1987).
Arizona v. Hicks, 107 S. Ct. 1149 (1987).
Illinois v. Krull, 107 S. Ct. 1160 (1987).
Granberry v. Greer, 107 S. Ct. 1671 (1987).
Tison v. Arizona, 107 S. Ct. 1676 (1987).
Cruz v. New York, 107 S. Ct. 1714 (1987).
Richardson v. Marsh, 107 S. Ct. 1702 (1987).
McCleskey v. Kemp, 107 S. Ct. 1756 (1987).
Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).
Pope v. Illinois, 107 S. Ct. 1918 (1987).
Arizona v. Mauro, 107 S. Ct. 1931 (1987).
Pennsylvania v. Finley, 107 S. Ct. 1990 (1987).
Gray v. Mississippi, 107 S. Ct. 2045 (1987).
Hilton v. Braunskill, 107 S. Ct. 2113 (1987).
Board of Pardons v. Allen, 107 S. Ct. 2415 (1987).
California v. Superior Court of California, 107 S. Ct. 2433 (1987).
Miller v. Florida, 107 S. Ct. 2446 (1987).
Booth v. Maryland,, 107 S. Ct. 2529 (1987).
New York v. Burger, 107 S. Ct. 2636 (1987).
Kentucky v. Stincer, 107 S. Ct. 2658 (1987).
Ricketts v. Adamson, 107 S. Ct. 2680 (1987).
Rock v. Arkansas, 107 S. Ct. 2704 (1987).
Sumner v. Shuman, 107 S. Ct. 2716 (1987).
California v. Rooney, 107 S. Ct. 2852 (1987).
Buchanan v. Kentucky, 107 S. Ct. 2906 (1987).
Greer v. Miller, 107 S. Ct. 3102 (1987).
Burger v. Kemp, 107 S. Ct. 3114 (1987).
Griffin v. Wisconsin, 107 S. Ct. 3164 (1987).

4. *Table 4: Federal Criminal Cases*

- Colorado v. Connelly, 107 S. Ct. 515 (1986).
 Griffith v. Kentucky, 107 S. Ct. 708 (1987).
 United States v. Dunn, 107 S. Ct. 1134 (1987).
 United States v. Salerno, 107 S. Ct. 2095 (1987).
 Young v. United States ex rel. Vuitton Et Fils S.A., 107 S. Ct. 2124 (1987).
 United States v. Mendoza-Lopez, 107 S. Ct. 2148 (1987).
 Tanner v. United States, 107 S. Ct. 2739 (1987).
 Bourjaily v. United States, 107 S. Ct. 2775 (1987).
 McNally v. United States, 107 S. Ct. 2875 (1987).
 Solorio v. United States, 107 S. Ct. 2924 (1987).

5. *Table 5: Cases Invoking First Amendment Rights of Expression and Association*

- Munro v. Socialist Workers Party, 107 S. Ct. 533 (1986).
 Tashjian v. Republican Party of Connecticut, 107 S. Ct. 544 (1986).
 Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 107 S. Ct. 616 (1986).
 Arkansas Writers' Project, Inc. v. Ragland, 107 S. Ct. 1722 (1987).
 Meese v. Keene, 107 S. Ct. 1862 (1987).
 Pope v. Illinois, 107 S. Ct. 1918 (1987).
 Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 107 S. Ct. 1940 (1987).
 Turner v. Safley, 107 S. Ct. 2254 (1987).
 Board of Airport Comm'rs v. Jews for Jesus, 107 S. Ct. 2568 (1987).
 Rankin v. McPherson, 107 S. Ct. 2891 (1987).
 San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 107 S. Ct. 2971 (1987).
 City of Houston v. Hill, 107 S. Ct. 3222 (1987).

6. *Table 6: Equal Protection Cases*

- Burlington Northern Ry. Co. v. Woods, 107 S. Ct. 967 (1987).
 United States v. Paradise, 107 S. Ct. 1053 (1987).
 Arkansas Writers' Project, Inc. v. Ragland, 107 S. Ct. 1722 (1987).
 McCleskey v. Kemp, 107 S. Ct. 1756 (1987).
 Pennsylvania v. Finley, 107 S. Ct. 1990 (1987).
 San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 107 S. Ct. 2971 (1987).
 Bowen v. Gilliard, 107 S. Ct. 3008 (1987).

7. *Table 7: Cases Involving Statutory Civil Rights Claims*

North Carolina Dept. of Transp. v. Crest Street Community Council, 107 S. Ct. 336 (1986).
Ansonia Bd. of Educ. v. Philbrook, 107 S. Ct. 367 (1986).
Wright v. City of Roanoke Redevelopment and Housing Authority, 107 S. Ct. 766 (1987).
City of Pleasant Grove v. United States, 107 S. Ct. 794 (1987).
School Bd. of Nassau County v. Arline, 107 S. Ct. 1123 (1987).
Town of Newton v. Rumery, 107 S. Ct. 1187 (1987).
Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987).
O'Connor v. Ortega (2), 107 S. Ct. 1492 (1987).
Shaare Tefila Congregation v. Cobb, 107 S. Ct. 2019 (1987).
Saint Francis College v. Al-Khazraji, 107 S. Ct. 2022 (1987).
Hewitt v. Helms, 107 S. Ct. 2672 (1987).
Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 107 S. Ct. 2862 (1987).
Rankin v. McPherson, 107 S. Ct. 2891 (1987).

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

R.J. Reynolds Tobacco Co. v. Durham County, 107 S. Ct. 499 (1986).
Burke v. Barnes, 107 S. Ct. 734 (1987).
Clarke v. Securities Industry Ass'n, 107 S. Ct. 750 (1987).
International Paper Co. v. Ouellette, 107 S. Ct. 805 (1987).
Iowa Mut. Ins. Co. v. LaPlante, 107 S. Ct. 971 (1987).
City of Springfield, Mass. v. Kibbe, 107 S. Ct. 1114 (1987).
Stringfellow v. Concerned Neighbors in Action, 107 S. Ct. 1177 (1987).
Atchison, Topeka and Santa Fe Ry. Co. v. Buell, 107 S. Ct. 1410 (1987).
California Coastal Comm'n v. Granite Rock Co., 107 S. Ct. 1419 (1987).
Pennzoil Co. v. Texaco, Inc., 107 S. Ct. 1519 (1987).
Metropolitan Life Ins. Co. v. Taylor, 107 S. Ct. 1542 (1987).
Granberry v. Greer (2), 107 S. Ct. 1671 (1987).
Arkansas Writer' Project, Inc. v. Ragland, 107 S. Ct. 1722 (1987).
Brock v. Roadway Exp., Inc. 107 S. Ct. 1740 (1987).
Burlington Northern Ry. Co. v. Brotherhood of Maintenance of Way Employees, 107 S. Ct. 1841 (1987).
Burlington Northern Ry. Co. v. Oklahoma Tax Comm'n, 107 S. Ct. 1855 (1987).
Meese v. Keene, 107 S. Ct. 1862 (1987).
Pennsylvania v. Finley, 107 S. Ct. 1990 (1987).
Hodel v. Irving, 107 S. Ct. 2076 (1987).

United States v. Salerno, 107 S. Ct. 2095 (1987).

International Bhd. of Elec. Workers, AFL-CIO v. Hechler, 107 S. Ct. 2161 (1987).

I.C.C. v. Brotherhood of Locomotive Engineers, 107 S. Ct. 2360 (1987).

Caterpillar, Inc. v. Williams, 107 S. Ct. 2425 (1987).

City of Houston v. Hill, 107 S. Ct. 2502 (1987).

California v. Rooney, 107 S. Ct. 2852 (1987).

Solorio v. United States, 107 S. Ct. 2924 (1987).

Welch v. Texas Dept. of Highways and Public Transp., 107 S. Ct. 2941 (1987).

United States v. Stanley, 107 S. Ct. 3054 (1987).