Brigham Young University Journal of Public Law

Volume 6 | Issue 1 Article 2

3-1-1992

Supreme Court Voting Behavior: 1990 Term

Robert E. Riggs

Guy L. Black

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

Part of the Courts Commons

Recommended Citation

Robert E. Riggs and Guy L. Black, *Supreme Court Voting Behavior: 1990 Term*, 6 BYU J. Pub. L. 1 (1992).
Available at: https://digitalcommons.law.byu.edu/jpl/vol6/iss1/2

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: 1990 Term

Robert E. Riggs[*]
Guy L. Black[**]

I. INTRODUCTION

This article is the fifth annual survey of Supreme Court voting behavior presented by the BYU JOURNAL OF PUBLIC LAW.[1] As in previous years, it examines the positions taken by each member of the Supreme Court on selected categories of cases decided during the immediately preceding term. The classification scheme is designed to provide indicators of the justices' views on important dimensions of constitutional interpretation and individual rights.

Nine of the categories are based on the nature of the issues or the character of the parties. A tenth category tabulates the number of times each justice voted with the majority in cases decided by a single vote. The issue and party categories are:

1) Civil controversies in which a state, or one of its officials or political subdivisions, 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, press, association, and free exercise of religion.

6) Equal protection issues.

7) Statutory civil rights claims.

8) Issues of federal court jurisdiction, standing,

---

* 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.

** Guy L. Black received his B.S., 1989, Brigham Young University, and is a candidate for graduation, J. Reuben Clark Law School, Brigham Young University, 1992.

The authors acknowledge the research assistance of Robert G. Fisher.

1. Previous articles in this series began with Robert E. Riggs, *Supreme Court Voting Behavior: 1986 Term*, 2 BYU J. PUB. L. 15 (1988).

justiciability and related matters.

9) Federalism issues.

Tables 1-9 present voting data for these nine issue-related categories. Table 10 deals with cases decided by a single vote.

Each of the first nine categories is intended to reveal attitudes of the justices toward two broad issues underlying most Supreme Court decision-making—individual rights and judicial restraint. The tables relating to criminal prosecutions, first amendment issues, the equal protection clause and civil rights statutes speak directly to individual rights. Civil suits between governmental and private parties, reported in the first two tables, also raise issues of individual rights because such suits necessarily place government in opposition to claims of private rights. Decisions in the federalism category have less obvious relevance for individual rights because such decisions focus on the proper balance of federal and state authority. Nevertheless, the usual practical effect of a vote for the state in such cases is to disappoint a party seeking federal relief from alleged state encroachment upon his or her rights.

Judicial restraint, the second broad underlying issue, 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 exist, avoidance of unnecessary decisions, and respect for the framers' intent (when ascertainable) in construing constitutional text.[2] Decisions on jurisdictional questions capture one aspect of judicial restraint—the relative propensity of the justices to avoid unnecessary decisions. Decisions on individual rights also have implications for judicial restraint. As a hands-off policy, judicial restraint commonly favors the government rather than the individual who claims rights against the government. This is so because the individual's attempt to obtain new rights usually requires the Court to overturn precedent or declare an existing statute unconstitutional. Judicial restraint is also likely to be identified with respect for the role of states within the federal system.

---

2. For a discussion of judicial restraint, see Charles M. Lamb, *Judicial Restraint on the Supreme Court*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 7 (Stephen C. Halpern & Charles M. Lamb eds., 1982) and DAVID F. FORTE, THE SUPREME COURT IN AMERICAN POLITICS: JUDICIAL ACTIVISM V. JUDICIAL RESTRAINT (1972).

Despite these common relationships, judicial restraint and concern for individual rights are not necessarily opposite poles of a single attitudinal dimension. In certain instances, judicial restraint may be consistent with, and even reinforce individual rights. For example, if existing precedent grants extensive protection to individual rights, a judge who resists efforts to undermine the precedent is exercising restraint and also acting to preserve individual rights.[3] Thus, respect for precedent, avoidance of constitutional questions and unnecessary decisions, deference to states, and allegiance to the framers' intent can cut either way with respect to individual rights, depending on the facts.[4]

More often than not, however, there is tension between individual rights and judicial restraint. 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 is often associated with unwillingness to read new individual rights into the Constitution. Refusal to exercise federal jurisdiction leaves the matter to state courts with their possible bias in favor of actions by state government claims, and is a clear rebuff to the claimant seeking federal vindication of his or her rights. 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.

---

3. At least one author feels that the distinction between activism and restraint is neutral as to issues of liberal or conservative politics. Perhaps he even implies that concern for individual rights, traditionally viewed as a characteristic of liberal judges, is not always inconsistent with judicial restraint. JOHN BRIGHAM, THE CULT OF THE COURT 69 (1987).

> Like independence at the more general level, restraint is neither liberal nor conservative, but unlike independence, the political implication of activism and restraint depend on what has come before, the body of law whether judge-made or statutory from which the judicial stance acquires its politics. A restrained judge operating from a received body of law that is "liberal," like the legacy of the Warren Court, will give the polity liberal decisions.

Id.

4. Judicial activism, rather than judicial restraint, could be a barrier to individual rights claims if a conservative court takes the place of a liberal court and begins to limit previously established rights.

II. The Voting Record

TABLE 1

CIVIL CASES: STATE GOVERNMENT VERSUS A PRIVATE PARTY

Justice	1990 Term Votes			% Votes for Government			
	For Gov't	Against Gov't	1990 Term	1989 Term	1988 Term	1987 Term	1986 Term
Rehnquist	21	4	84.0	70.3	66.7	67.9	71.8
Kennedy	19	6	76.0	61.1	57.1	50.0	—
O'Connor	17	8	68.0	67.6	57.4	50.0	64.1
Scalia	16	9	64.0	64.9	59.2	51.7	64.1
White	16	9	64.0	59.5	55.1	53.6	43.6
Souter	14	8	63.6	—	—	—	—
Stevens	9	16	36.0	40.5	35.4	37.9	46.2
Marshall	7	18	28.0	27.0	21.3	34.5	30.8
Blackmun	6	19	24.0	43.2	30.6	44.8	36.8
Majority							
All Cases	16	9	64.0	51.4	51.0	51.7	53.9
Split Decisions	11	5	68.8	52.4	64.0	58.8	—
Unanimous	5	4	55.6	50.0	50.0	37.5	41.7

TABLE 2

CIVIL CASES: FEDERAL GOVERNMENT VERSUS A PRIVATE PARTY

Justice	1990 Term Votes			% Votes for Government			
	For Gov't	Against Gov't	1990 Term	1989 Term	1988 Term	1987 Term	1986 Term
Rehnquist	14	6	70.0	78.6	71.4	61.8	90.6
White	14	6	70.0	75.0	71.4	72.7	87.1
Blackmun	12	8	60.0	64.3	60.7	50.0	53.1
O'Connor	12	8	60.0	60.7	60.7	76.5	75.0
Scalia	11	8	57.9	60.7	59.3	62.5	82.8
Kennedy	10	8	55.6	60.7	66.7	58.3	—
Souter	10	8	55.6	—	—	—	—
Marshall	11	9	55.0	50.0	39.3	44.1	46.9
Stevens	8	12	40.0	57.1	42.9	55.9	50.0
Majority							
All Cases	12	8	60.0	71.4	64.3	61.8	68.8
Split Decisions	6	4	60.0	66.7	66.7	55.6	—
Unanimous	6	4	60.0	76.9	61.5	68.8	—

TABLE 3

STATE CRIMINAL CASES

Justice	1990 Term Votes			% Votes for Government			
	For Gov't	Against Gov't	1990 Term	1989 Term	1988 Term	1987 Term	1986 Term
Rehnquist	22	5	81.5	85.3	85.2	73.7	87.9
Scalia	20	7	74.1	73.5	77.8	47.4	81.8
Souter	17	8	68.0	—	—	—	—
O'Connor	18	9	66.7	76.5	77.8	61.1	75.8
Kennedy	16	11	57.7	73.5	81.5	70.0	—
White	13	14	48.1	73.5	77.8	47.4	81.8
Blackmun	4	23	14.8	35.3	37.0	26.3	30.3
Marshall	0	27	0.0	8.8	14.8	5.3	3.0
Stevens	0	27	0.0	20.6	37.0	21.1	21.2
Majority							
All Cases	15	12	55.6	64.7	70.4	47.4	60.6
Split Decisions	15	7	68.2	70.0	72.7	53.8	—
Unanimous	0	5	0	25.0	60.0	16.7	—

TABLE 4

FEDERAL CRIMINAL CASES

Justice	1990 Term Votes			% Votes for Government			
	For Gov't	Against Gov't	1990 Term	1989 Term	1988 Term	1987 Term	1986 Term
Souter	6	2	75.0	—	—	—	—
Blackman	7	3	70.0	44.4	55.6	78.6	30.0
O'Connor	7	3	70.0	77.8	77.8	71.4	90.0
Rehnquist	7	3	70.0	77.8	88.9	85.7	80.0
Stevens	6	4	60.0	33.3	66.7	64.3	40.0
White	6	4	60.0	77.8	88.9	85.7	90.0
Kennedy	5	5	50.0	66.7	88.9	71.4	—
Marshall	5	5	50.0	11.1	33.3	28.6	0.0
Scalia	4	6	40.0	66.7	66.7	64.3	70.0
Majority							
All Cases	6	4	60.0	66.7	88.9	78.6	60.0
Split Decisions	3	3	50.0	83.3	100.0	75.0	—
Unanimous	3	1	75.0	33.3	66.7	100.0	—

TABLE 5

FIRST AMENDMENT RIGHTS OF EXPRESSION, ASSOCIATION, AND FREE EXERCISE OF RELIGION

Justice	1990 Term Votes			% Votes for Rights Claim			
	For Claim	Against Claim	1990 Term	1989 Term	1988 Term	1987 Term	1986 Term
Blackmun	9	4	69.2	60.0	41.2	69.2	72.7
Marshall	8	5	61.5	73.3	76.5	84.6	91.7
O'Connor	6	5	54.5	26.7	25.0	23.1	45.5
Stevens	6	6	50.0	46.7	64.7	50.0	50.0
Kennedy	5	7	41.7	40.0	37.5	66.7	—
Souter	5	7	41.7	—	—	—	—
Scalia	3	9	25.0	26.7	35.3	38.5	36.4
Rehnquist	2	10	16.7	13.3	18.8	16.7	16.7
White	2	11	15.4	20.0	23.5	30.8	41.7
Majority							
All Cases	3	9	25.0	40.0	35.3	50.0	58.3
Split Decisions	3	7	30.0	40.0	22.2	50.0	—
Unanimous	0	2	0.0	40.0	50.0	50.0	—

TABLE 6

EQUAL PROTECTION CLAIMS

Justice	1990 Term Votes			% Votes for Rights Claim			
	For Claim	Against Claim	1990 Term	1989 Term	1988 Term	1987 Term	1986 Term
Marshall	5	0	100.0	0.0	50.0	37.5	71.4
Blackmun	5	1	83.3	0.0	60.0	50.0	57.1
Stevens	5	1	83.3	0.0	66.7	28.6	33.3
Souter	3	3	50.0	—	—	—	—
Kennedy	3	4	42.9	25.0	57.1	33.3	—
White	3	4	42.9	0.0	66.7	12.5	28.6
O'Connor	2	5	28.6	25.0	66.7	12.5	42.9
Rehnquist	1	6	14.3	20.0	57.1	12.5	14.3
Scalia	1	6	14.3	25.0	57.1	12.5	14.3
Majority							
All Cases	3	4	42.9	0.0	57.1	12.5	14.3
Split Decisions	2	2	50.0	0.0	100.0	0.0	—
Unanimous	1	2	33.3	0.0	50.0	20.0	—

TABLE 7

STATUTORY CIVIL RIGHTS CLAIMS

Justice	1990 Term Votes			% Votes for Rights Claim			
	For Claim	Against Claim	1990 Term	1989 Term	1988 Term	1987 Term	1986 Term
Marshall	13	2	86.7	100.0	94.4	87.5	84.6
Blackmun	12	3	80.0	88.9	80.0	87.5	84.6
Stevens	12	3	80.0	77.8	73.7	87.5	61.5
Souter	8	6	57.1	—	—	—	—
O'Connor	8	7	53.3	55.6	52.6	42.9	30.8
White	8	7	53.3	88.9	55.0	62.5	61.5
Scalia	7	8	46.7	55.6	40.0	57.1	38.5
Rehnquist	5	10	33.3	44.4	35.0	37.5	38.5
Kennedy	5	10	33.3	62.5	45.0	66.7	—
Majority							
All Cases	8	7	53.3	88.9	50.0	75.0	53.9
Split Decisions	3	6	33.3	83.3	25.0	60.0	—
Unanimous	5	1	83.3	100.0	87.5	100.0	—

TABLE 8

CASES RAISING A CHALLENGE TO THE EXERCISE OF JURISDICTION

Justice	1990 Term Votes			% Votes for Jurisdiction			
	For Juris	Against Juris	1990 Term	1989 Term	1988 Term	1987 Term	1986 Term
Stevens	32	3	91.4	68.0	73.0	57.1	71.4
Marshall	30	5	85.7	87.5	75.0	57.1	57.1
Blackmun	28	7	80.0	79.2	64.9	58.1	64.3
White	23	13	63.9	68.0	62.2	51.2	71.4
Kennedy	21	15	58.3	64.0	51.4	56.3	—
Souter	19	14	57.6	—	—	—	—
O'Connor	19	16	54.3	68.0	51.4	42.9	64.3
Rehnquist	19	16	54.3	60.0	51.4	47.6	67.9
Scalia	16	17	48.5	60.0	50.0	36.6	61.5
Majority							
All Cases	23	13	63.9	64.0	62.2	55.8	60.7
Split Decisions	6	10	38.9	33.0	62.5	71.4	—
Unanimous	17	3	88.9	81.3	61.9	48.3	—

TABLE 9

FEDERALISM CASES

Justice	1990 Term Votes			% Votes for State Claim			
	For State	For Fed	1990 Term	1989 Term	1988 Term	1987 Term	1986 Term
Souter	5	1	83.3	—	—	—	—
Kennedy	5	2	71.4	56.3	72.7	33.3	—
O'Connor	5	2	71.4	56.3	73.7	33.3	—
Rehnquist	5	2	71.4	56.3	81.0	46.2	—
Scalia	5	2	71.4	56.3	76.2	30.8	—
White	4	3	57.1	43.8	63.6	30.8	—
Stevens	2	5	28.6	43.8	57.1	46.2	—
Blackmun	1	6	14.3	43.8	40.9	46.2	—
Marshall	1	6	14.3	37.5	33.3	53.8	—
Majority							
All Cases	5	2	71.4	43.8	59.1	38.5	—
Split Decisions	4	1	80.0	25.0	50.0	33.3	—
Unanimous	1	1	50.0	50.0	70.0	42.9	—

TABLE 10

SWING-VOTE ANLAYSIS: WHO VOTES MOST OFTEN WITH THE MAJORITY IN CLOSE CASES

Justice	1990 Term Votes			% Votes with Majority			
	For Maj.	Against Maj.	1990 Term	1989 Term	1988 Term	1987 Term	1986 Term
O'Connor	16	1	69.6	69.0	76.5	64.5	—
Rehnquist	16	2	69.6	66.7	76.5	70.0	—
White	14	2	60.9	78.6	76.5	77.4	—
Souter	13.	2	59.1	—	—	—	—
Kennedy	12	2	52.2	71.4	82.4	71.4	—
Scalia	12	3	52.2	66.7	73.5	66.7	—
Blackmun	11	5	47.8	33.3	38.2	45.2	—
Stevens	11	6	47.8	42.9	26.5	61.3	—
Marshall	10	6	43.5	35.7	23.5	38.7	—
Conservative Coalition	12	10	54.5	64.3	76.5	64.5	—
Liberal Coalition	12	10	45.5	35.7	23.5	35.5	—

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 were discussed in order to achieve consensus on the appropriate classification. The result undoubtedly falls 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, some classification problems of judgment remain. One example is *Burns v. Reed*,[5] in which a state prosecutor claimed absolute immunity from civil liability for giving advice to police officers that led to a violation of the plaintiff's rights. All members of the Court agreed that the prosecutor was only entitled to qualified immunity in his role as advice-giver, and in that sense all voted against the government. But three justices would have denied the prosecutor absolute immunity for initiating a search-warrant proceeding as well. Since three justices were relatively less favorable to the prosecutor, we classified them as voting "against the government" in contrast to the six who were "for the government." Most of the cases fit with little distortion into a dichotomous classification of "for" or "against," but a few, like *Burns*, leave room for differences of opinion regarding how a particular justice's vote should be coded.[6]

With that caveat, a brief discussion of the statistical tables may be helpful. The first four tables represent categories which are, for the most part, mutually exclusive. A case coded in one of the categories will not ordinarily be 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 appeal involve a simultaneous federal and state prosecution.[7] However, a civil

---

5. 111 S. Ct. 1934 (1991).

6. Sometimes a classification must be based on inference. For example, in Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, 111 S. Ct. 2298 (1991), six members of the Court addressed the issue of plaintiff's standing, but the dissent made no reference to it. Because the dissent addressed the merits of the case, and would have decided the issue against the plaintiff, we assumed that the dissent accepted the majority's judgment on the standing question.

7. Both federal and state court action are involved in a federal habeas corpus review of a state prosecution, but such cases are classified as state rather than

suit having a private party on one side and both a state and a federal agency or official on the other is possible. Two cases of that nature were decided during the 1990[8] term and were included in both Tables 1 and 2.

Tables 5-9, the issue categories, do not comprise mutually exclusive categories either among themselves or with the party categories. A case raising more than one relevant issue is included in each relevant category. An action by a private party against a state, for example, might raise issues pertaining to the first amendment, equal protection and jurisdiction. If so, it would be included in all three issue tables, as well as in Table 1 (State v. Private party). The voting alignment would not necessarily be the same for each issue.[9] A single case may also be included more than once in the same category. This occurs when the facts raise two or more distinct issues affecting the disposition of the case and the issues are decided by different voting alignments.[10]

A brief look at the behavior of the Court as a whole may be helpful before turning to the voting of the individual justices within each of the ten categories. In particular, the data can provide a basis for appraising the extent of the Court's shift toward greater conservatism in recent terms. As decisions are

---

federal criminal cases. *See, e.g.*, Lozada v. Deeds, 111 S. Ct. 860 (1991).

8. In Arcadia v. Ohio Power Co., 111 S. Ct. 415 (1991), the city and the Federal Energy Regulatory Commission were on the same side of the dispute. In Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, 111 S. Ct. 2298 (1991), the local governmental agency was petitioner and the United States a respondent, but the United States argued in support of the petitioner (Airport Authority) and thus was classified as being on the same side.

9. To illustrate, in Renne v. Geary, 111 S. Ct. 2331 (1991), the Court dismissed a challenge to California's ban on political party endorsement of candidates for non-partisan office, holding by a 6-3 margin that the issue was not ripe for resolution. The alignment in the jurisdiction category thus was 6-3, but in Table 1 (civil, state) the alignment was 7-2 because Justice White supported the government's position on first amendment grounds. The case is also included in the first amendment table, with two justices supporting and one (White) opposing the claim. The other six justices took no position on the first amendment issue.

10. To cite an extreme example, Lehnert v. Ferris Faculty Association, 111 S. Ct. 1950 (1991), raised first amendment issues that resulted in four different voting alignments. The broad question was whether the Ferris Faculty Association, in effect the faculty union, could require non-members of the Association to pay union dues. The Court canvassed the Association's activities one by one to determine whether non-members, consistent with the first amendment, could be required to support those activities against their will. The various sub-issues derived from this canvassing were decided by votes of 9-0, 8-1, 6-3 and 5-4.

analyzed in our tables, a conservative position would ordinarily be inferred from a vote favoring the government, a vote against a claim of constitutional or statutory rights, a vote against the exercise of jurisdiction, or a vote in favor of state (rather than federal) authority on federalism questions.

There are, however, exceptions to this general rule. Approximately one-third of the decisions were unanimous, indicating that the law or the facts of the case, or both, pointed so clearly one way that there was little room for liberal or conservative ideologies. In a few other cases, the peculiar nature of the facts created a reverse of the expected relationship, with liberals opposing a civil rights claim and conservatives supporting the claim. A good illustration of the latter phenomenon is *Lehnert v. Ferris Faculty Association*,[11] in which non-union faculty members at a state college raised first amendment objections to paying union dues. Support of a first amendment claim is ordinarily a liberal position, but traditionally liberal Justices Marshall, Blackmun and Stevens voted against the claim in most of its applications, while the more conservative Justices Kennedy, O'Connor, Scalia and Souter took the opposite position. The role of the union, apparently, was the dominating issue for these justices and their votes reflected attitudes toward labor unions rather than the first amendment.[12] Despite such exceptional cases, the expected general correlation between ideology and voting is apparent in the tables.

With the replacement of Justice Brennan by Justice Souter, we might have expected pronounced movement by the Court in a conservative direction this year.[13] In fact, only a

11. *Id.*

12. Justice White and Chief Justice Rehnquist were not re-oriented by the context of this case. Both assumed their usual posture of opposition to first amendment claims.

13. One must use caution in interpreting the data because the percentages are affected not only by the behavior of individual justices but also by the nature of the cases decided each year. A vote to uphold a higher percentage of criminal convictions in a given year may mean that an individual justice or the Court has become tougher on criminal defendants. Alternatively, it may only mean that this year the facts or the law (or both) of a number of individual cases were less favorable to defendants than in previous years. Comparable variables affect other categories of cases. Hence, one cannot be confident that percentage changes from one year to the next reflect a change in ideological orientation of an individual justice, or of the Court majority. Similar directional changes across a number of tables, however, would strengthen the hypothesis that a genuine shift in attitude has occurred. There is, of course, the possibility that a change in the priorities or

very modest shift occurred. Change over time in the decisions of the Court as a whole is indicated by the percentage figures in the bottom two rows of each table. For Tables 1-9, the first of these two rows gives figures for all decisions, whatever the voting alignment, while the second row is limited to decisions with one or more dissenting votes. For all cases, as compared with the 1989 term, a more conservative result appears in Tables 1, 5, 7 and 9 (state civil cases, first amendment issues, statutory civil rights and federalism issues). On the other hand, Tables 2, 3, 4 and 6 (federal civil cases, state criminal cases, federal criminal cases and equal protection cases) point in a less conservative direction as compared with the previous year. For Table 8 (jurisdiction) the percentage figure is virtually identical (63.9%, 64%). While these indicators show that the Court voted more often for a conservative result (pro-government, anti-rights) than for a liberal one, the figures for all cases show no pronounced movement in either direction when compared with the 1989 term.

In some respects a better measure is found in the bottom row of the tables, which includes only decisions marked by at least one dissenting vote.[14] Counting only split decisions creates a smaller universe of cases, but it has the advantage of including only those in which ideological differences might have affected the voting. The split decision voting produces percentages somewhat different from the figures for all cases, but the overall result seems to differ very little. Tables 1, 5, 7, and 9 show more conservative voting than last year. Tables 2, 4, 6, and 8 record a more liberal outcome. The percentage difference in Table 3 is too small (1.8 percentage points) to be meaningful. On its face, the split decision data, like the data for all decisions, shows no consistent directional change—four

---

attitudes of members of the Court could introduce some hidden bias into the process by which cases are selected for review, resulting in the selection of cases in which the government's (or the individual's) position is particularly strong. However, bias in the case selection process is beyond the scope of this analysis. For persons interested in the method by which the Court grants certiorari, see BRIGHAM, *supra* note 3, at 178-82.

14. This refers mainly to unanimous decisions, but includes a few in which one or more justices did not participate or did not address the issue.

tables point in one direction and four in the other, with one showing no significant change.[15]

On closer examination of the relevant cases, however, the figures in Table 6 (equal protection) are misleading as an indicator of ideological direction. During the 1990 term two of four split votes on equal protection issues were decided in favor of the claimant (50%), compared with a single split vote the preceding year which went against the claimant (0% for the claimant). Apart from the problem of generalizing from so few cases, even the facial direction is wrong because the one case decided the previous term had a liberal, not a conservative, outcome. Ordinarily a vote for individual rights under the Constitution has a liberal connotation, but in *Metro Broadcasting v. Federal Communication Commission* the claimants were attempting to invalidate a Federal Communications Commission regulation giving preference to minority applicants for broadcasting licenses.[16] Under the circumstances, the majority vote for the preference and against the equal protection claim, was a liberal vote. Thus, in reality, the equal protection figures for the 1990 term represent a conservative shift from the previous term. That would leave five tables for the 1990 term pointing in a more conservative direction, three in a more liberal direction, and one with little change from the previous year. This may suggest a slight tilt in a conservative direction, but no more.

Ironically, the swing-vote table (Table 10) indicates movement toward greater liberalism. During the 1989 term, 64.3% of forty-two cases decided by a single vote went in favor of a conservative coalition of justices (not the same five justices in every case, but predominantly conservative). For the 1990 term, based on twenty-three decisions (including one 5-3 reversal), the comparable figure was 56.5%.

This table, suggesting a move toward liberalism, is also misleading. The basic ideological cleavage on the Court was a 6-3 division—Justices Rehnquist, Scalia, O'Connor, Kennedy, Souter and White evidencing various shades of conservatism,

15. "Significant change" as used here does not refer to statistical significance, a measurement that we have not undertaken here. For our purposes, we use a rule-of-thumb that any change of five percentage points or less is probably not very significant, as that term is used in common parlance.

16. Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 1467 (1990).

with Marshall, Blackmun and Stevens constituting a more or less liberal bloc. Hence many decisions having significant ideological content were characterized by a 6-3 or a 5-3 split rather than a 5-4 division. These cases are excluded from the swing vote table because they were not decided by a single vote. By our count there were twenty-five such decisions,[17] and as a group they have a considerably more conservative cast (68% conservative, 32% liberal) than the 5-4 cases.[18]

Not all of the majorities comprising a "conservative coalition" involved the same six justices, but eleven of the eighteen did include Kennedy, O'Connor, Rehnquist, Scalia, Souter and White; and two of the 5-3 affirmances in the group included all but one of those six. This contrasts with the 5-4 cases in which no coalition of the same five justices formed the majority more than four times.

We turn now to a more detailed examination of individual voting behavior.

A. *Civil Cases with Government Opposing a Private Party*

Table 1 lists summary percentages and the number of times each justice voted for 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. The rankings are generally as expected, with conservative justices at the top of the scale (pro-government) and liberal justices at the bottom.

Chief Justice Rehnquist occupies his customary spot at the top of both lists, but Justice Marshall relinquished his usual place at the bottom of Table 1 to Justice Blackmun and on Table 2 to Justice Stevens. Justice White continues to hold his customary position in the middle of the state government table (but closer to the conservative than the liberal pole in percent

17. One 5-3 decision is included with the 5-4 decisions in Table 10, rather than with the 6-3 decisions, because it was a *reversal* of a lower court decision rather than an *affirmance*. The swing-vote table is comprised of all cases whose outcome would have been changed with the shift of a single vote from the majority coalition to the minority. A 5-3 reversal falls in this category because the shift of one vote from the majority to the minority position results in affirmance by an equally divided court. A 5-3 affirmance is not included in the swing-vote table, however, because a shift of one vote would still result in affirmance.

18. For further data on 6-3 decisions, see *infra* Table 13 and text accompanying note 40.

age support of government) and near the top of the federal government table. Justice Blackmun again scores relatively high in support of the federal government (60%, third ranked) but much lower (24%, last in rank) for state government. Justice Kennedy climbed almost to the top of the state government table but remained lower middle in his support of federal government parties. The new justice, Souter, ranks sixth (or tied for sixth) in both tables. In the state table, he appears to be the least conservative of the conservatives, but he is still nearly 28 points higher than any of the three liberal members of the Court. In the federal table, the differences between liberal and conservative justices are less pronounced this year, and Souter is closer to the liberal end.

As compared with the preceding term, the voting in the state government table is somewhat more polarized, with conservatives generally supporting the government more frequently than the liberals. Majority support for the states is at a high for the five year period. By contrast, every member of the Court scored lower in percentage support of the federal government (Table 2), except for Justice Marshall and Justice Souter (no previous record). Majority support for the federal government was, by a small margin, at a five-year low. For the first time in five years, the state governments prevailed in a larger percentage of cases than did the federal government.

Examination of the state cases in which justices at ideological extremes voted contrary to their anticipated pro- or anti-government leanings shows that the discrepancy is largely accounted for by the unanimous decisions. In those cases, we assume, the argument for one side or the other was strong enough to transcend ideological differences. Chief Justice Rehnquist, at the top of the scale, never voted against the state when the Court was divided.[19] At the other extreme, Justice Blackmun voted only once for a state government when the decision was not unanimous. This occurred in *Columbia v.*

19. Justice Kennedy voted against the state just twice in a divided Court—once to reverse the censure of a Nevada attorney for making allegedly prejudicial pretrial statements to the press, Gentile v. State Bar of Nevada, 111 S. Ct. 2720 (1991); and a second time in Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, 111 S. Ct. 2298 (1991), where he voted to void the relevant statute as a separation of powers violation.

Omni Outdoor Advertising, Inc.[20] when he joined a 6-3 majority to hold the city immune from antitrust liability for actions taken under its zoning power to limit the construction of billboards.

Justice Marshall deviated twice from his expected voting behavior in *Trinova Corp. v. Michigan Deptartment of Treasury*[21] and *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise.*[22] *Trivona* involved state taxation of business, thereby leaving the private party without the benefit of the underdog's appeal to the liberal conscience. *Airports* raised a separation of powers question and appears to have had little discernible ideological content since it grouped Justices Marshall, White and Rehnquist in support of the government, with all of the others favoring the private party.

In Table 2 (civil cases involving the federal government as a party), as in Table 1, most of the unexpected votes at the extremes of the ideological scale occurred in unanimous decisions. Chief Justice Rehnquist and Justice White supported the federal government most frequently, while only two of their six votes against the government involved split decisions. In one of the two, *EEOC v. Arabian American Oil Co.*,[23] both justices joined a 6-3 majority to reject the Equal Employment Opportunity Commission's claim that U.S. employment discrimination laws should apply to the overseas operations of American firms. In that case a vote against the government was a conservative rather than a liberal position, which makes the vote consistent with expectations. The other anti-government vote for each justice was cast, respectively, in cases having little obvious ideological content.[24]

At the other extreme, Justice Stevens had only two nonunanimous pro-government votes. One occurred in *EEOC*

---

20. 111 S. Ct. 1334 (1991).
21. 111 S. Ct. 818 (1991).
22. 111 S. Ct. 2298 (1991).
23. 111 S. Ct. 1227 (1991).
24. The Chief Justice voted with the anti-government majority in Cottage Savings Association v. Commissioner, 111 S. Ct. 1503 (1991), a tax case; and Justice White joined the majority in McNary v. Haitian Refugee Center, Inc., 111 S. Ct. 888 (1991), holding that a federal district court had jurisdiction to adjudicate a challenge to procedures of the Immigration and Naturalization Service. Both were 7-2 decisions, and both majorities embraced liberal and conservative members of the Court.

where, as we have noted, the government position was the liberal position. The other such vote, *Pauley v. Bethenergy Mines, Inc.*,[25] did not reflect a liberal position since it upheld Department of Labor regulations making benefits under the Black Lung Benefits Act more difficult to obtain. Justice Scalia was the only dissenter in that case. Justice Marshall voted with Justice Stevens in both instances and, in addition, supported the government in three other decisions where the ideological lines were not clearly drawn.[26]

B. *Criminal Cases*

Table 3, state criminal cases, reflects the same ideological divisions as the civil case tables with still greater polarization at the extremes. At the conservative pole, the Chief Justice supported the prosecution in 81.5% of the decisions, with Justice Scalia in second place at 74.1%. Justices Marshall and Stevens at the liberal extreme never voted for the government, while Justice Blackmun voted against the defendant only four times. All five of the Chief Justice's votes in favor of the defendant were unanimous decisions. Justice Souter, in his first term on the Court, generally upheld the prosecution, although not so frequently as the Chief Justice and Justice Scalia. Justice White supported the prosecution much less often this term (1990) than last term (1989) (48.1%, 73.5%), and the Court as a whole was also less favorable to the prosecution this term (55.6%, 64.7%).

Suprisingly, voting on federal criminal cases this term, as shown in Table 4, does not follow the expected ideological lines. Justice Souter, presumed to be one of the Court's conservatives, appears most prosecution-oriented; but Justice Scalia—also conservative—voted least often for the prosecution. Justices Marshall and Kennedy have identical voting records at the bottom of the table, while Justice Blackmun near the top has the same score as Justice O'Connor and the Chief Justice. All of the conservative justices, except Souter (not on the Court previously), supported the prosecution less frequently this year,

25. 111 S. Ct. 2524 (1991).

26. In Irwin v. Veterans Adminstration, 111 S. Ct. 453 (1991), and United States v. Smith, 111 S. Ct. 1180 (1991), only Justice Stevens dissented. The third case was Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, 111 S. Ct. 2298 (1991), a 6-3 decision that cut across the normal ideological divisions on the Court.

while the three liberals favored the prosecution in a substantially higher percentage of the cases.

Unanimous decisions explain only part of the anomaly. The rest is probably attributable to the nature of the crimes before the Court. For example, if the voting on three cases involving white collar crimes were exactly reversed,[27] and the votes on the other seven cases remained the same, the rank ordering of justices would be as follows:

TABLE 11

Federal Criminal Cases Excluding White Collar Crimes

Justice	*With majority*	*Against*	*% with majority*
Souter	7	1	87.5
Kennedy	8	2	80.0
O'Connor	8	2	80.0
Rehnquist	8	2	80.0
Scalia	7	3	70.0
White	7	3	70.0
Stevens	5	5	50.0
Blackmun	4	6	40.0
Marshall	4	6	40.0
Majority	7	3	70.0

27. McCormick v. United States, 111 S. Ct. 1807 (1991) (Hobbs Act conviction of a state legislator for accepting a bribe); Cheek v. United States, 111 S. Ct. 604 (1991) (tax evasion prosecution); Moskal v. United States, 111 S. Ct. 461 (1990) (automobile "title washing").

This rearrangement is much closer to expected rankings, and the individual percentages are also more comparable to last term. Apparently the nature of the crime has ideological significance to justices across the spectrum.

C. Individual Rights

Tables 5, 6 and 7, dealing with claims of constitutional and statutory civil rights, show the same general voting patterns as Tables 1-3 and the adjusted version of Table 4. Liberals occupy one end of the scale with conservatives grouped at the other. Justice Souter is near the midpoint of each table. Although his rank and voting scores clearly mark him as conservative, his percentages are in each case closer to the nearest liberal than to the most extreme conservative position in the table. Justice Marshall is by a small margin the most supportive of individual rights claims, and Chief Justice Rehnquist the least. Justice Kennedy appears at the median of the two constitutional rights tables, but in adjudicating statutory rights he is at the conservative extreme with the Chief Justice.

Table 5 (first amendment claims) exhibits the expected liberal-conservative voting pattern, except for the relative rankings of Justice O'Connor and Justice Stevens. Although Justice Stevens has supported first amendment claims less often than Justices Marshall or Blackmun in previous terms, he has had a higher support percentage than Justice O'Connor. This term the figures are skewed by the inclusion of four separate decisions from a single case, *Lehnert v. Ferris Faculty Association*,[28] in which the claim of first amendment rights was overshadowed by the asserted right of a union to assess dues against faculty choosing not to join the union. With the issue framed as union rights, liberal members tended to favor the union's claim and conservatives tended to oppose it.

The *Lehnert* case had a substantial impact on the table because it was recorded as four separate decisions, each decided by a different voting alignment. Thus, Justice Stevens, uncharacteristically voted against the first amendment claim on three of four issues; and Justice O'Connor, uncharacteristically, voted for the first amendment claim on three of four issues.

---

28. 111 S. Ct. 1950 (1991).

With these decisions excluded from the table, Justice Stevens (at 62.5%) and Justice O'Connor (42.9%) would be ranked in the order anticipated. The *Lehnert* case also accounts for all of the votes by Justices Blackmun and Marshall against first amendment claims in non-unanimous decisions, and for one of the two pro-first amendment votes by Justice White and Chief Justice Rehnquist. The Chief Justice's other vote for a first amendment claim came in support of a publisher in a libel suit;[29] Justice White's other first amendment vote was a dissent from the Court's decision upholding an Indiana ban on non-obscene nude dancing.[30]

Table 6 indicates that equal protection decisions this term almost precisely followed the anticipated pattern, in contrast to some recent terms in which equal protection arguments have been invoked to invalidate preferences for minorities or women in situations of alleged reverse discrimination.[31] When affirmative action is mandated by law, conservatives commonly support the equal protection claim and liberals oppose it. This year, the equal protection clause was invoked in the more traditional mold. No cases involved legally mandated preferences for disadvantaged groups. As expected, liberal members of the Court generally supported the equal protection claim, and conservatives generally opposed it. The fit was so close that all of the votes falling outside this pattern, among five justices at the extremes (Marshall, Blackmun, Stevens, Rehnquist, Scalia), occurred in unanimous decisions.[32] As a further indication of the liberal-conservative split on this issue, the largest percentage difference from one rank to the next (33 percentage points) occurs between Souter and Stevens.

The figures in Table 7 (statutory civil rights) also fall within the expected pattern. Justices Marshall, Blackmun and Stevens voted most frequently for the claimant, while Justice Kennedy and the Chief Justice were willing to support such

---

29. Masson v. New Yorker Magazine, 111 S. Ct. 2419 (1991).

30. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991).

31. *See, e.g.*, Robert E. Riggs & Mark T. Urban, *Supreme Court Voting Behavior: 1989 Term*, 5 B.Y.U. J. PUB. L. 1 (1991).

32. The table shows two of four decisions against equal protection claims to be split votes, leaving two without dissent. It also shows Justice Blackmun and Stevens with only one vote each against such a claim, and Justice Marshall with none. The apparent discrepancy is explained by the failure of these justices to address the equal protection issues. The decisions were without dissent, in the sense that no negative vote was cast.

claims only when the Court was unanimous. Justice Marshall at the other extreme rejected a statutory civil rights claim in just two cases—one unanimous and the other a 7-1 decision (Stevens the dissenter), which held that the petitioner had missed the statutory deadline for appeal of his job discrimination claim.[33] The Court as a whole ruled in favor of the claimant in just over half of the cases, a significant decline from the previous term, but more in keeping with its decisions in earlier terms. As with equal protection questions, the largest percentage gap in individual rankings falls between Souter and Stevens.

D. Jurisdiction and Justiciability Questions

Table 8 (jurisdiction claims) conforms to our initial assumptions about judicial restraint—the liberal justices appearing more inclined to exercise jurisdiction and the conservative justices less so. Indeed, the difference between the three liberal and the six conservative is quite marked. Justices Marshall, Stevens and Blackmun all fall within a percentage spread of 12 points, and all six conservative justices are within a 16 percentage point range. However, a 16 point gap separates the two groups. The gap becomes even larger when unanimous decisions are eliminated from the calculation. Counting only decisions from which one or more justices dissented, the voting on jurisdictional questions is as follows:

33. Irwin v. Veterans Admin., 111 S. Ct. 453 (1991).

TABLE 12

Jurisdictional Decisions with One or More Dissenting Vote

Justice	*For Jurisdiction*	*Against*	*% For*
Stevens	15	1	98.3
Marshall	13	3	81.3
Blackmun	11	5	68.8
White	6	10	37.5
Souter	4	11	26.7
Kennedy	4	12	25.0
O'Connor	3	13	18.8
Rehnquist	3	13	18.8
Scalia	1	15	6.3

Using these numbers the total spread is 87.5 percentage points (compared with 42.9 in Table 8), and a gap of more than 31 points emerges between Justice White and Justice Blackmun. Whichever scale is used, Justice Scalia—for the fifth consecutive year—has the distinction of voting against the exercise of jurisdiction more frequently than any other member of the Court. Justice White, for the fourth term in the past five, was the conservative most receptive to the exercise of jurisdiction. Justice Souter, in his first year, carved out a middle position in the conservative group.

E. Federalism Issues

Table 9 (federalism issues) deals with questions raised by

conflict between federal and state governmental authority.[34] In examining issues of federalism we assume that the more conservative justices—Rehnquist, O'Connor, Scalia, Kennedy, Souter and White—will tend to favor state authority, while Justices Blackmun, Marshall and Stevens will tend to support federal authority. That has in fact been the pattern for the past three terms, including the most recent (1990) term.[35] Justice Souter, by virtue of not having participated in one of the decisions, emerged with the highest percentage support for the state. His only vote for the United States was with a unanimous Court. At the other extreme, Justices Blackmun and Marshall supported the state only once, and that case was decided without dissent.

F. Swing-Vote Analysis

Table 10 shows the number of times each justice voted with the majority in cases close enough to be decided by a single vote. For the 1990 term we identified twenty-two cases decided by 5-4 votes. These, and one 5-3 decision, are included in the table.[36] In these 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 it identifies members of the Court who most frequently shift or "swing" from one voting coalition to another in order to form majorities. Because each vote is crucial to the outcome, frequency of voting with the majority in such cases may be regarded as one index of influence on Court decision-making.

The archetypical swing voter on the Court is a person not staunchly committed to a liberal or a conservative position who votes sometimes with one group and sometimes with the other,

34. See Appendix A for a more detailed statement of the criteria for inclusion in this category.

35. In 1987 the pattern was not followed. The specific subject matter of the federalism cases during that term led liberals to support the state position on the six split decisions more frequently than the conservatives. *See* Robert E. Riggs & Michael R. Moss, *Supreme Court Voting Behavior: 1987 Term*, 3 BYU J. PUB. L. 59, 65, 75-76 (1989).

36. The usual "close case" is a 5-4 decision, but a 5-3 decision is included if it reverses or sets aside the lower court decision because, in such a situation, a shift of one vote from the majority to the minority would change the outcome to affirmance by an equally divided Court. A 5-3 *affirmance* is *not* included because the lower court decision would be affirmed without opinion by a 4-4 vote.

making the crucial difference on close cases. Justice White has to some extent filled this role in recent years, as did Justice Powell before his retirement.[37] During the 1987 term, the first year we included swing voting in this survey, Justice White voted most frequently with the majority in cases decided by a single vote. Justice Kennedy had that honor during the 1988 term, but Justice White regained the top spot in 1989. This year, the 1990 term, the Chief Justice and Justice O'Connor came in ahead of Justice White, with Justice Kennedy at midpoint in the rankings. In these twenty-three decisions Justice White behaved as the typical swing-voter is supposed to do—he voted eleven times with a liberal coalition and twelve times with the conservatives. This normally is a recipe for a high majority agreement score, but in this instance he joined a number of losing coalitions and agreed with the majority on only thirteen of twenty-two decisions, or 59.1%. Justice Souter, in his first year, is near the middle of the table. No liberal justice voted as much as half the time with the majority.

The most noticeable and in some respects surprising, aspect of Table 10 is the relatively even distribution of outcomes between conservative and liberal majorities for the Court as a whole (see bottom two rows of the table).[38] Thirteen of the close decisions had a conservative outcome and ten were liberal. For a Court supposedly dominated by six conservative justices, the 56.5% figure represents a very slim margin of dominance. It is especially anomalous when compared with the

---

37. For discussion of Justice Powell as a swing-voter, see Janet L. Blasecki, *Justice Lewis F. Powell: Swing Voter or Staunch Conservative*, 52 J. POLS. 530 (1990). Blasecki argues that Justice Powell was not a swing voter (by her definition) because he took mainly conservative positions rather than dividing his "deciding votes roughly evenly between" the liberal and conservative blocs. *Id.* at 533. However, her figures for the 1981 through 1986 terms show that Justice Powell voted with the majority more often than any other justice in decisions determined by one vote margins. *Id.* at 542. During this same period her figures show Justice White running a close second to Justice Powell.

38. An outcome was classified as liberal if 1) Justices Blackmun, Marshall and Stevens were in the majority; 2) the decision went against the government (first four tables) or in favor of individual rights, the exercise of jurisdiction or the federal as opposed to state claims in federalism questions; and 3) the decision otherwise favored the underdog, disadvantaged party, or a labor union. Generally all three coincided. If the first and third criteria were satisfied, a contrary reading on the second factor was disregarded. An outcome was classified as conservative if it had the support of at least four of the conservative justices (ten of the thirteen decisions so classified included five of the six conservatives) and, substantively, favored the government or more powerful party (the reverse of the second and third criteria above).

64.3% score of the previous term (or 76.5% for the 1988 term) when the Court had four liberal members rather than three. Moreover, the gap between individual conservative and liberal majority agreement percentages was totally obliterated this year. During the 1989 term the difference between the conservative with the lowest majority agreement and the liberal with the highest was 23.8 percentage points. For 1990 a mere 4.4% (a difference of one decision) separated Justices Blackmun and Stevens from Justices Kennedy and Scalia. The spread between the very highest percentage (Rehnquist and O'Connor, 69.6%) and the very lowest (Marshall, 43.5%) was only 26.1 points, compared with the 45.3 point spread between the Chief Justice and Justice Blackmun during the 1989 term.

These surprising figures do not mean that the Court, against all odds, turned in a liberal direction this year even though purported conservatives on the Court had increased in number from five to six. Rather, it suggests that cases with strong ideological content tended to be decided by 6-3 rather than 5-4 majorities. To obtain a 5-4 voting alignment at least one conservative justice had to join the liberal cause, and the three-justice liberal wing could not prevail without enlisting support from two of the six conservatives. Such hybrid alignments indicate some degree of ideological ambiguity in the issues being resolved.[39] This interpretation gains support from the following tabulation of individual and majority voting in cases decided by a 6-3 margin.[40]

39. Of course no two justices have the same intellectual and emotional make-up. Classifying six as conservative and three as liberal should not be taken to imply perfect homogeneity within classifications. The tables amply demonstrate individual differences even with respect to the decision characteristics we use to distinguish liberals from conservatives. Nevertheless, the labels do distinguish tendencies deduced from observed voting behavior that are shared in varying degrees by members of the group.

40. The tabulation includes three 5-3 affirmances of lower court rulings, as well as all 6-3 decisions. See *supra* note 17, for reasons why 5-3 reversals are included in table 10.

TABLE 13

6-3 Decisions for 1990 Term

Justice	*With Majority*	*Against*	*% with Majority*
Souter	22	1	95.7
Kennedy	21	4	84.0
White	21	4	84.0
Rehnquist	19	6	76.0
O'Connor	18	6	75.0
Scalia	18	7	72.0
Blackmun	10	15	40.0
Stevens	10	15	40.0
Marshall	8	17	32.0
Conservative Majority	17		68.0
Liberal Majority	8		32.0

This tabulation looks much like the 5-4 voting of previous years—conservatives with high majority agreement rates and liberals with much lower agreement scores, with a large percentage gap between the lowest conservative and the highest liberal.

A conservative majority prevailed in 68% of these cases as compared with the bare conservative majority of 54.2% in the 5-4 decisions. This more polarized result suggests that the issues in this group of cases had more recognizable ideological overtones than the 5-4 cases. If this term's 6-3 decisions are compared with last term's 5-4 decisions, a small movement in the conservative direction appears. That seems more congruent with what we know about the Court, than the alternate hypothesis of a liberal shift based on a comparison of 5-4 decisions for the two terms.

One interesting aspect of Table 13 is Justice Souter's position at the very top. He achieved this rank by joining a majority favoring a liberal outcome in five cases and a conservative result in seventeen others. He voted only once on the losing side in a 6-3 decision.[41] Justice White voted more frequently for a liberal result in this group of cases (ten times, as compared with five for Souter), but three of his liberal votes were in a losing cause.

IV. Conclusion

The preceding discussion has highlighted some of the patterns and relationships in Supreme Court voting, without exhausting all credible interpretations of the data. The availability of information from earlier terms gives an important temporal dimension to the analysis. For the 1988 term, the voting patterns indicated a significant shift to the right when compared with the two previous terms, as well as a tendency for more polarized voting and a greater point spread between the extremes of the tables. In 1989, the polarization declined and conservative dominance moderated, although the membership of the Court remained the same as in 1988. The 1990 term, despite the retirement of Justice Brennan and the addition of Justice Souter, a sixth conservative member of the Court, has had only a very modest overall tilt in a conservative direction. As expected, Justice Souter generally voted with the conservatives, but he was more often in a moderate conservative position in the tables than at the extreme. In the federal criminal and federalism categories he occupied the extreme conservative position, but both categories had very few cases and his percentage margin over closely ranked fellow conservatives appears attributable to his non-participation in a few relevant decisions, rather than to more conservative voting in cases where all participated. For the 1991 term we may anticipate

new patterns and alignments with the replacement of Justice Marshall by the more conservative Justice Thomas.

41. Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950 (1991). On one of the four first amendment issues decided by different voting alignments in that case, Justice Souter voted with Justices Scalia and O'Connor, against the union's position.

V. APPENDIX

A. Explanation of Criteria for Selection and Classification of Cases

1. The universe of cases

Only cases decided during the 1990 term by a full opinion setting forth reasons for the decision are included in the data. Decisions on motions are excluded, even if accompanied by an opinion. Cases handled by summary disposition are included if accompanied by a full opinion of the Court, but not if the only opinion is a dissent. Cases decided by a four-to-four vote, hence resulting in affirmance without written opinion, are excluded. Both signed and per curiam opinions are considered full opinions if they set forth reasons in a more than perfunctory manner. Cases not fitting any of the ten categories are, of course, not included in the data base for any of the tables.

2. Cases classified as civil or criminal

The classification of cases as civil or criminal follows commonly accepted definitions; generally, the nature of the case is clearly identified in the opinion. Only occasionally does a case pose a problem of classification. No cases this year raised such a question.

3. Cases classified by nature of the parties— Tables 1 through 4

Cases are included in Tables 1 through 4 only if governmental and private entities appear as opposing parties. This is necessarily true of criminal cases. Civil cases are excluded from these tables 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 or her personal capacity is included if he or she is represented by government attorneys, or if the interests of the government are otherwise clearly implicated. In instances of multiple parties, a civil case is excluded if governmental entities appear on both sides of the controversy. If both a state and a federal entity are parties to the same suit on the same side with only private parties on the other, the case is included in Tables 1 and 2. A case is included more than once in the same table if it raises

two or more distinct issues affecting the outcome of the case, and the issues are resolved by differing voting alignments.

4. Classification by nature of the issue—Tables 5 through 9

A case is included in each category of Tables 5 through 9 for which 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 or more distinct issues in that category affecting the disposition of the case, and if the issues are resolved by different 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 poses no special problem. In each instance, the nature of the claim is expressly identified in the opinion. Issues of speech, press, association, and free exercise of religion are included. However, establishment clause cases are excluded because one party's claim of religious establishment is often aligned against another party's claim of free exercise or some other individual right, thus blurring the issue of individual rights.

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; and the civil rights 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 if the issue is the application of section 1983—that is, whether or how that section's protections apply in the case at hand. However, section 1983 actions are excluded if the substantive right asserted is based on the United States Constitution and the issue relates to the constitutional right. The purpose of the section 1983 exclusion is to preserve a 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. 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.

Table 9 (federalism cases) 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 and eleventh amendments as a limit on action by the federal government, and federal court interference with state court activities (other than review of state court decisions). 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.

5. The "swing-vote" cases

Table 10 includes all cases where the outcome turns on a single vote. This category is also intended to include four-to-three decisions, if any, as well as five-to-three and four-to-two decisions resulting in reversal of a lower court decision. Affirmances by a vote of five-to-three or four-to-two are not included because a shift of one vote from the majority to the minority position would still result in affirmance by a tie vote. A case is included more than once in the table if it raises two or more distinct issues affecting the disposition of the case and the issues are resolved by differing five-to-four (four-to-three, etc.) voting alignments.

B. Cases Included in Statistical Tables[42]

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

Arcadia v. Ohio Power Co., 111 S. Ct. 415 (1990).
Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991).
Blatchford v. Village of Noatak, 111 S. Ct. 2578 (1991).
Board of Educ. v. Dowell, 111 S. Ct. 630 (1991).
Burns v. Reed, 111 S. Ct. 1934 (1991).
Burns v. Reed, 111 S. Ct. 1934 (1991).
City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344 (1991).
Clark v. Roemer, 111 S. Ct. 2096 (1991).
Connecticut v. Doehr, 111 S. Ct. 2105 (1991).
County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991).
Dennis v. Higgins, 111 S. Ct. 865 (1991).
Gentile v. State Bar of Nev., 111 S. Ct. 2720 (1991).
Gregory v. Ashcroft, 111 S. Ct. 2395 (1991).
Houston Lawyers Ass'n v. Attorney Gen. of Tex., 111 S. Ct. 2376 (1991).
James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991).

---

42. Cases listed more than once in a table are those with more than one voting alignment within the category.

Kay v. Ehrler, 111 S. Ct. 1435 (1991).
Leathers v. Medlock, 111 S. Ct. 1438 (1991).
McCarthy v. Bronson, 111 S. Ct. 1737 (1991).
Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298 (1991).
Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 111 S. Ct. 905 (1991).
Renne v. Geary, 111 S. Ct. 2331 (1991).
Trinova Corp. v. Michigan Dep't of Treasury, 111 S. Ct. 818 (1991).
West Virginia Univ. Hosp's., Inc. v. Casey, 111 S. Ct. 1138 (1991).
Wilson v. Seiter, 111 S. Ct. 2321 (1991).
Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476 (1991).

Table 2: Civil Cases: Federal Government versus Private Party

Air Courier Conference v. American Postal Workers Union, 111 S. Ct. 913 (1991).
American Hosp. Ass'n v. NLRB, 111 S. Ct. 1539 (1991).
Arcadia v. Ohio Power Co., 111 S. Ct. 415 (1990).
Cottage Sav. Ass'n v. Commissioner, 111 S. Ct. 1503 (1991).
Demarest v. Manspeaker, 111 S. Ct. 599 (1991).
EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227 (1991).
Freytag v. Commissioner, 111 S. Ct. 2631 (1991).
International Primate Protection League v. Tulane Educ. Fund, 111 S. Ct. 1700 (1991).
Irwin v. Veterans Admin., 111 S. Ct. 453 (1990).
Litton Fin. Printing Div. v. NLRB, 111 S. Ct. 2215 (1991).
McNary v. Haitian Refugee Ctr., Inc., 111 S. Ct. 888 (1991).
Melkonyan v. Sullivan, 111 S. Ct. 2157 (1991).
Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298 (1991).
Mobil Oil Exploration v. United Distribution Co., 111 S. Ct. 615 (1991).
Norfolk & W. Ry. v. American Train Dispactchers Ass'n, 111 S. Ct. 1156 (1991).
Pauley v. Bethenergy Mines, Inc., 111 S. Ct. 2524 (1991).
Siegert v. Gilley, 111 S. Ct. 1789 (1991).
Stevens v. Department of Treasury, 111 S. Ct. 1562 (1991).
United States v. Gaubert, 111 S. Ct. 1267 (1991).
United States v. Smith, 111 S. Ct. 1180 (1991).

Table 3: State Criminal Cases

Arizona v. Fulminante, 111 S. Ct. 1246 (1991).
Arizona v. Fulminante, 111 S. Ct. 1246 (1991).
Arizona v. Fulminante, 111 S. Ct. 1246 (1991).
Burden v. Zant, 111 S. Ct. 862 (1991).
Cage v. Louisiana, 111 S. Ct. 328 (1990).
California v. Acevedo, 111 S. Ct. 1982 (1991).
California v. Hodari D., 111 S. Ct. 1547 (1991).
Coleman v. Thompson, 111 S. Ct. 2546 (1991).
Florida v. Bostick, 111 S. Ct. 2382 (1991).
Florida v. Jimeno, 111 S. Ct. 1801 (1991).
Ford v. Georgia, 111 S. Ct. 850 (1991).

Harmelin v. Michigan, 111 S. Ct. 2680 (1991).
Hernandez v. New York, 111 S. Ct. 1859 (1991).
Lankford v. Idaho, 111 S. Ct. 1723 (1991).
Lozada v. Deeds, 111 S. Ct. 860 (1991).
McClesky v. Zant, 111 S. Ct. 1454 (1991).
McNeil v. Wisconsin, 111 S. Ct. 2204 (1991).
Michigan v. Lucas, 111 S. Ct. 1743 (1991).
Minnick v. Mississippi, 111 S. Ct. 486 (1990).
Mu'Min v. Virginia, 111 S. Ct. 1899 (1991).
Parker v. Dugger, 111 S. Ct. 731 (1991).
Payne v. Tennessee, 111 S. Ct. 2597 (1991).
Powers v. Ohio, 111 S. Ct. 1364 (1991).
Schad v. Arizona, 111 S. Ct. 2491 (1991).
Shell v. Mississippi, 111 S. Ct. 313 (1990).
Yates v. Evatt, 111 S. Ct. 1884 (1991).
Ylst v. Nunnemaker, 111 S. Ct. 2590 (1991).

Table 4: Federal Criminal Cases

Braxton v. United States, 111 S. Ct. 1854 (1991).
Burns v. United States, 111 S. Ct. 2182 (1991).
Chapman v. United States, 111 S. Ct . 1919 (1991).
Cheek v. United States, 111 S. Ct. 604 (1991).
Gozlon-Peretz v. United States, 111 S. Ct. 840 (1991).
McCormick v. United States, 111 S. Ct. 1807 (1991).
Moskal v. United States, 111 S. Ct. 461 (1990).
Peretz v. United States, 111 S. Ct. 2661 (1991).
Touby v. United States, 111 S. Ct. 1752 (1991).
United States v. R. Enter., Inc., 111 S. Ct. 722 (1991).

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

Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991).
Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991).
Gentile v. State Bar of Nev., 111 S. Ct. 2720 (1991).
Gentile v. State Bar of Nev., 111 S. Ct. 2720 (1991).
Leathers v. Medlock, 111 S. Ct. 1438 (1991).
Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950 (1991).
Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950 (1991).
Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950 (1991).
Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950 (1991).
Masson v. New Yorker Magazine, 111 S. Ct. 2419 (1991).
Masson v. New Yorker Magazine, 111 S. Ct. 2419 (1991).
Renne v. Geary, 111 S. Ct. 2331 (1991).
Rust v. Sullivan, 111 S. Ct. 1759 (1991).

Table 6: Cases Involving Equal Protection Claims

Board of Educ. v. Dowell, 111 S. Ct. 630 (1991).
Chapman v. United States, 111 S. Ct. 1919 (1991).
Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991).
Ford v. Georgia, 111 S. Ct. 850 (1991).
Gregory v. Ashcroft, 111 S. Ct. 2395 (1991).
Hernandez v. New York, 111 S. Ct. 1859 (1991).
Powers v. Ohio, 111 S. Ct. 1364 (1991).

Table 7: Cases Involving Statutory Civil Rights Claims

Astoria Fed. Sav. & Loan Ass'n v. Solimino, 111 S. Ct. 2166 (1991).
Burns v. Reed, 111 S. Ct. 1934 (1991).
Burns v. Reed, 111 S. Ct. 1934 (1991).
Chisom v. Roemer, 111 S. Ct. 2354 (1991).
Clark v. Roemer, 111 S. Ct. 2096 (1991).
Dennis v. Higgins, 111 S. Ct. 865 (1991).
EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227 (1991).
Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991).
Gregory v. Ashcroft, 111 S. Ct. 2395 (1991).
Houston Lawyers Ass'n v. Attorney Gen. of Tex., 111 S. Ct. 2376 (1991).
International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991).
Irwin v. Veterans Admin., 111 S. Ct. 453 (1990).
Kay v. Ehrler, 111 S. Ct. 1435 (1991).
Stevens v. Department of Treasury, 111 S. Ct. 1562 (1991).
West Virginia Univ. Hosp's., Inc. v. Casey, 111 S. Ct. 1138 (1991).

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

Air Courier Conference v. American Postal Workers Union, 111 S. Ct. 913 (1991).
Astoria Fed. Sav. & Loan Ass'n v. Solimino, 111 S. Ct. 2166 (1991).
Blatchford v. Village of Noatak, 111 S. Ct. 2578 (1991).
Board of Educ. v. Dowell, 111 S. Ct. 630 (1991).
Carnival Cruise Lines, Inc. v. Shute, 111 S. Ct. 1522 (1991).
Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991).
Coleman v. Thompson, 111 S. Ct. 2546 (1991).
County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991).
Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991).
EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227 (1991).
Exxon Corp. v. Central Gulf Lines, Inc., 111 S. Ct. 2071 (1991).
FirsTier Mortgage Co. v. Investors Mortgage Ins. Co., 111 S. Ct. 648 (1991).
Ford v. Georgia, 111 S. Ct. 850 (1991).
Freeport-McMoRan, Inc. v. K N Energy, Inc., 111 S. Ct. 858 (1991).
Freytag v. Commissioner, 111 S. Ct. 2631 (1991).
Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991).
Gollust v. Mendell, 111 S. Ct. 2173 (1991).
Groves v. Ring Screw Works, 111 S. Ct. 498 (1990).
International Org. of Masters, Mates & Pilots v. Brown, 111 S. Ct. 880 (1991).
International Primate Protection League v. Tulane Educ. Fund, 111 S. Ct. 1700 (1991).

International Primate Protection League v. Tulane Educ. Fund, 111 S. Ct. 1700 (1991).
Irwin v. Veterans Admin., 111 S. Ct. 453 (1990).
Lozada v. Deeds, 111 S. Ct. 860 (1991).
McClesky v. Zant, 111 S. Ct. 1454 (1991).
McNary v. Haitian Refugee Center, Inc., 111 S. Ct. 888 (1991).
Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298 (1991).
Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 111 S. Ct. 905 (1991).
Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 111 S. Ct. 905 (1991).
Peretz v. United States, 111 S. Ct. 2661 (1991).
Powers v. Ohio, 111 S. Ct. 1364 (1991).
Renne v. Geary, 111 S. Ct. 2331 (1991).
Stevens v. Department of Treasury, 111 S. Ct. 1562 (1991).
Summit Health, Ltd. v. Pinhas, 111 S. Ct. 1842 (1991).
United States v. Smith, 111 S. Ct. 1180 (1991).
Virginia Bankshares, Inc. v. Sandberg, 111 S. Ct. 2749 (1991).
Ylst v. Nunnemaker, 111 S. Ct. 2590 (1991).

Table 9: Cases Raising a Federalism Issue

Blatchford v. Village of Noatak, 111 S. Ct. 2578 (1991).
Coleman v. Thompson, 111 S. Ct. 2546 (1991).
FMC Corp. v. Holliday, 111 S. Ct. 403 (1990).
Gregory v. Ashcroft, 111 S. Ct. 2395 (1991).
Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478 (1990).
Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476 (1991).
Ylst v. Nunnemaker, 111 S. Ct. 2590 (1991).

Table 10: Swing-Vote Cases

Arizona v. Fulminante, 111 S. Ct. 1246 (1991).
Arizona v. Fulminante, 111 S. Ct. 1246 (1991).
Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991).
Board of Educ. v. Dowell, 111 S. Ct. 630 (1991).
Burns v. United States, 111 S. Ct. 2182 (1991).
Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 111 S. Ct. 922 (1991).
Chambers v. NASCO, Inc., 111 S. Ct. 2123 (1991).
Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991).
County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991).
Gentile v. State Bar of Nev., 111 S. Ct. 2720 (1991).
Gentile v. State Bar of Nev., 111 S. Ct. 2720 (1991).
Harmelin v. Michigan, 111 S. Ct. 2680 (1991).
Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773 (1991).
Lankford v. Idaho, 111 S. Ct. 1723 (1991).
Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950 (1991).
Litton Fin. Printing Div. v. NLRB, 111 S. Ct. 2215 (1991).
Mu'Min v. Virginia, 111 S. Ct. 1899 (1991).

Oklahoma v. New Mexico, 111 S. Ct. 2281 (1991).
Parker v. Dugger, 111 S. Ct. 731 (1991).
Peretz v. United States, 111 S. Ct. 2661 (1991).
Schad v. Arizona, 111 S. Ct. 2491 (1991).
Summit Health, Ltd. v. Pinhas, 111 S. Ct. 1842 (1991).
Virginia Bankshares, Inc. v. Sandberg, 111 S. Ct. 2749 (1991).