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Supreme Court Voting Behavior: 1988 Term

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I. INTRODUCTION

This article is the third 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 individual justices of the United States 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, added last year, tabulates the number of times each member of the Court joined with the majority during the past (1988) term in thirty-four decisions that could have been reversed had any member of the majority coalition voted instead with the minority. The issue and party categories are as follows:

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, justiciability and related matters.

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1. Riggs, *Supreme Court Voting Behavior: 1986 Term*, 2 BYU J. PUB. L. 15 (1988); Riggs and Moss, *Supreme Court Voting Behavior: 1987 Term*, 3 BYU J. PUB. L. 59 (1989).

9) Federalism issues.

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

Each of the first nine categories is intended to reveal attitudes of the justices toward two super-issues which are relevant to most Supreme Court decision-making—individual rights and judicial restraint. Criminal prosecutions, as well as claims arising under the first amendment, equal protection clause, and civil rights statutes, have an obvious relevance for individual rights. The relationship between individual rights and the two categories of civil cases, where governmental and private interests conflict, is perhaps less obvious because facts and circumstances of individual cases vary greatly. Nevertheless, a relationship exists because, even in civil cases, the preference for a governmental party is usually at the expense of persons claiming rights against the government. The same is true of the federalism category. A vote for the state is likely to be a vote against a person seeking federal relief from alleged state encroachment upon his rights.

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 exist, avoidance of unnecessary decisions, and respect for the framers' intent (when ascertainable) in construing constitutional text.[2] Judicial restraint, as a hands-off policy, is more likely to favor the government as constituted authority than the individual who claims rights against the government. When the issue is whether to strike down a state law under the preemption doctrine, judicial restraint would usually dictate respect for the role of states within the federal system.

Judicial restraint and concern for individual rights are not necessarily opposite poles of a single attitudinal dimension. Concern for precedent, avoidance of constitutional questions and unnecessary decisions, deference to states, and allegiance to the framers' intent could cut either way with respect to individual rights, depending on the facts. Still, there is a good deal of tension between the concerns. Deference to legislatures frequently means rejection of an individual's claim, especially one predicated upon the impropriety of governmental action. Emphasis upon the framers' intent can mean unwillingness to read new individual rights into the Constitution. Reluctance to exercise federal court jurisdiction may leave the decision to state courts, with their possible

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

bias in favor of actions by state governments, and the almost certain disappointment of the claimant seeking federal intervention. 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.

II. The Voting Record

TABLE 1

CIVIL CASES: STATE GOVERNMENT VERSUS A PRIVATE PARTY

Justice	Number of Votes, 1988 Term		% Votes for Government		
	For Gov't	Against Gov't	1988 Term	1987 Term	1986 Term
Rehnquist	32	16	66.7	67.9	71.8
Scalia	29	20	59.2	51.7	64.1
O'Connor	27	20	57.4	50.0	64.1
Kennedy	28	21	57.1	50.0	—
White	27	22	55.1	53.6	43.6
Stevens	17	31	35.4	37.9	46.2
Blackmun	15	34	30.6	44.8	36.8
Marshall	10	37	21.3	34.5	30.8
Brennan	10	39	20.4	34.5	33.3
Majority	25	24	51.0	51.7	53.9
Split Decisions	16	9	64.0	58.8	—
Unanimous	9	15	37.5	41.7	—

TABLE 2

CIVIL CASES: FEDERAL GOVERNMENT VERSUS A PRIVATE PARTY

Justice	Number of Votes, 1988 Term		% Votes for Government		
	For Gov't	Against Gov't	1988 Term	1987 Term	1986 Term
Rehnquist	20	8	71.4	61.8	90.6
White	20	8	71.4	72.7	87.1
Kennedy	18	9	66.7	58.3	—
O'Connor	17	11	60.7	76.5	75.0
Blackmun	17	11	60.7	50.0	53.1
Scalia	16	11	59.3	62.5	82.8
Stevens	12	16	42.9	55.9	50.0
Marshall	11	17	39.3	44.1	46.9
Brennan	10	17	37.0	45.5	43.8
Majority	18	10	64.3	61.8	68.8
Split Decisions	10	5	66.7	55.6	—
Unanimous	8	5	61.5	68.8	—

TABLE 3

STATE CRIMINAL CASES

Justice	Number of Votes, 1988 Term		% Votes for Government		
	For Gov't	Against Gov't	1988 Term	1987 Term	1986 Term
Rehnquist	23	4	85.2	73.7	87.9
Kennedy	22	5	81.5	70.0	—
O'Connor	21	6	77.8	61.1	75.8
White	21	6	77.8	47.4	81.8
Scalia	20	7	74.1	63.2	75.8
Blackmun	10	17	37.0	26.3	30.3
Stevens	10	17	37.0	21.1	21.2
Brennan	5	22	18.5	5.3	3.0
Marshall	4	23	14.8	5.3	3.0
Majority	19	8	70.4	47.4	60.6
Split Decisions	16	6	72.7	53.8	—
Unanimous	3	2	60.0	16.7	—

TABLE 4

FEDERAL CRIMINAL CASES

Justice	Number of Votes, 1988 Term		% Votes for Gov't		
	For Gov't	Against Gov't	1988 Term	1987 Term	1986 Term
Kennedy	8	1	88.9	71.4	—
Rehnquist	8	1	88.9	85.7	80.0
White	8	1	88.9	85.7	90.0
O'Connor	7	2	77.8	71.4	90.0
Scalia	6	3	66.7	64.3	70.0
Stevens	6	3	66.7	64.3	40.0
Blackmun	5	4	55.6	78.6	30.0
Marshall	3	6	33.3	28.6	0.0
Brennan	2	6	25.0	38.5	0.0
Majority	8	1	88.9	78.6	60.0
Split Decisions	6	0	100.0	75.0	—
Unanimous	2	1	66.7	100.0	—

TABLE 5

FIRST AMENDMENT RIGHTS OF EXPRESSION, ASSOCIATION, AND FREE EXERCISE

Justice	Number of Votes, 1988 Term		% Votes for Rights Claim		
	For Claim	Against Claim	1988 Term	1987 Term	1986 Term
Brennan	13	3	81.3	84.6	91.7
Marshall	13	4	76.5	84.6	91.7
Stevens	11	6	64.7	50.0	50.0
Blackmun	7	10	41.2	69.2	72.7
Kennedy	6	10	37.5	66.7	—
Scalia	6	11	35.3	38.5	36.4
O'Connor	4	12	25.0	23.1	45.5
White	4	13	23.5	30.8	41.7
Rehnquist	3	13	18.8	16.7	16.7
Majority	6	11	35.3	50.0	58.3
Split Decisions	2	7	22.2	50.0	—
Unanimous	4	4	50.0	50.0	—

TABLE 6

EQUAL PROTECTION CLAIMS

Justice	Number of Votes, 1988 Term		% Votes for Rights Claim		
	For Claim	Against Claim	1988 Term	1987 Term	1986 Term
O'Connor	4	2	66.7	12.5	42.9
Stevens	4	2	66.7	28.6	33.3
White	4	2	66.7	12.5	28.6
Blackmun	3	2	60.0	50.0	57.1
Kennedy	4	3	57.1	33.3	—
Rehnquist	4	3	57.1	12.5	14.3
Scalia	4	3	57.1	12.5	14.3
Brennan	3	3	50.0	37.5	71.4
Marshall	3	3	50.0	37.5	71.4
Majority	4	3	57.1	12.5	14.3
Split Decisions	1	0	100.0	0.0	—
Unanimous	3	3	50.0	20.0	—

TABLE 7

STATUTORY CIVIL RIGHTS CLAIMS

Justice	Number of Votes, 1988 Term		% Votes for Rights Claim		
	For Claim	Against Claim	1988 Term	1987 Term	1986 Term
Brennan	19	1	95.0	87.5	84.6
Marshall	17	1	94.4	87.5	84.6
Blackmun	16	4	80.0	87.5	84.6
Stevens	14	5	73.7	87.5	61.5
White	11	9	55.0	62.5	61.5
O'Connor	10	9	52.6	42.9	30.8
Kennedy	9	11	45.0	66.7	—
Scalia	8	12	40.0	57.1	38.5
Rehnquist	7	13	35.0	37.5	38.5
Majority	10	10	50.0	75.0	53.9
Split Decisions	3	9	25.0	60.0	—
Unanimous	71	87.5	100.0	—	

TABLE 8

CASES RAISING A CHALLENGE TO THE EXERCISE OF JURISDICTION

Justice	Number of Votes, 1988 Term		% Votes for Jurisdiction		
	For Jurisdiction	Against Jurisdiction	1988 Term	1987 Term	1986 Term
Marshall	27	9	75.0	57.1	57.1
Stevens	27	10	73.0	57.1	71.4
Brennan	24	12	66.7	62.8	60.7
Blackmun	24	13	64.9	58.1	64.3
White	23	14	62.2	51.2	71.4
O'Connor	18	17	51.4	42.9	64.3
Kennedy	19	18	51.4	56.3	—
Rehnquist	19	18	51.4	47.6	67.9
Scalia	18	18	50.0	36.6	61.5
Majority	23	14	62.2	55.8	60.7
Split Decisions	10	6	62.5	71.4	—
Unanimous	13	8	61.9	48.3	—

TABLE 9

FEDERALISM CASES

Justice	Number of Votes, 1988 Term		% Votes for State Claim		
	For State Claim	Against Federal Claim	1988 Term	1987 Term	1986 Term
Rehnquist	17	4	81.0	46.2	—
Scalia	16	5	76.2	30.8	—
O'Connor	14	5	73.7	33.3	—
Kennedy	16	6	72.7	33.3	—
White	14	8	63.6	30.8	—
Stevens	12	9	57.1	46.2	—
Blackmun	9	13	40.9	46.2	—
Marshall	7	14	33.3	53.8	—
Brennan	7	15	31.8	53.8	—
Majority	13	9	59.1	38.5	—
Split Decisions	6	6	50.0	33.3	—
Unanimous	7	3	70.0	42.9	—

TABLE 10

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

Justice	Number of Votes, 1988 Term		% Votes with Majority		
	With Majority	Against Majority	1988 Term	1987 Term	1986 Term
Kennedy	28	6	82.4	71.4	—
O'Connor	26	8	76.5	64.5	—
Rehnquist	26	8	76.5	70.0	—
White	26	8	76.5	77.4	—
Scalia	25	9	73.5	66.7	—
Blackmun	13	21	38.2	45.2	—
Brennan	9	25	26.5	40.0	—
Stevens	9	25	26.5	61.3	—
Marshall	8	26	23.5	38.7	—

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 difficult problems of judgment remain. For example, in *Price Waterhouse v. Hopkins,*[3] four justices voted to remand a Title VII sex discrimination case because the petitioner employer had been held to a standard of "clear and convincing" evidence, rather than merely a "preponderance," in meeting its burden of persuasion. Two justices concurred, though disagreeing with the plurality in some respects, and three justices dissented because they would have reversed outright in favor of the employer. Since the employer was the petitioner, all nine in some sense voted in favor of the employer and against the employee's claim. The case nevertheless was coded six votes for the respondent-employee's statutory civil rights claim and three votes against because the six were

3. 109 S. Ct. 1775 (1989).

considerably more sympathetic to the claim than the three dissenters. This seemed the best way to reflect the impact of the dissent and the very real differences among the members of the Court. At the same time, grouping the two concurrences with the four in the plurality ignored differences among those justices. Most of the decisions fit with little distortion into a dichotomous classification of "for" or "against," but a few, like *Hopkins,* leave room for legitimate difference of opinion how a particular justice's "vote" should be coded.

With that caveat, a brief discussion of the statistical tables may be helpful. The first four tables represent categories which are, for the most part, mutually exclusive: a case coded in one of the categories is unlikely to be included in any of the other three. By definition, a case would not be categorized as both civil and criminal,[4] nor would a case on appeal involve a simultaneous federal and state prosecution. However, a civil suit having a private party on one side and both a state and a federal agency or official on the other is not inconceivable. One case of that nature was decided during the 1988 term,[5] and was included in both Tables 1 and 2. In contrast, the last five tables 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. For example, an action by a private party against a state 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.[6] In a number of instances a case was coded more than once in the same category. This occurred when the facts raised two or more distinct issues affecting the disposition of the case and the issues were decided by differing voting alignments.[7]

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4. In two cases we had difficulty deciding whether the action was civil or criminal. Both were ultimately placed in the criminal tables. *See* United States v. Zolin, 109 S. Ct. 2619 (1989); Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989).

5. Hoffman v. Connecticut Dep't of Income Maintenance, 109 S. Ct. 2818 (1989). Both a state and a federal agency were named respondents.

6. For example, in Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890 (1989), the Court was unanimous on the jurisdictional issue but divided 6-3 in holding that the Texas sales tax exemption for religious periodicals violated the establishment clause. In the 1988 term no case was included in more than four categories.

7. For example, Sable Communications v. Federal Communications Comm'n, 109 S. Ct. 2829 (1989), the dial-a-porn case, raised two separate first amendment questions: 1) whether "indecent" material could be totally banned from the telephone lines, and 2) whether "obscene" material could be banned. The Court gave a unanimous "no" to the first question, and a 6-3 "yes" to the second. The case is therefore tabulated twice in Table 2 and twice in Table 5, because the Court voted against the government on one first amendment issue and for the government on the other.

The results of the analysis lend themselves primarily to discussion within categories, but given the widespread public commentary on the Court's shift toward greater conservatism this term, an appraisal of that trend in light of our data may be appropriate. As the decisions are 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, and a vote in favor of state (rather than federal) authority on federalism questions. There are, however, exceptions to this general rule. Some 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 play of liberal or conservative ideologies. In other cases, much fewer in number, the peculiar nature of the facts created a reverse of the expected relationship, with liberals opposing a civil rights claim, for example, and conservatives supporting the claim. A good illustration is the *City of Richmond v. J.A. Croson Co.*,[8] in which a white-owned construction company brought action to void the city's 30% minority set-aside requirement for city construction contracts, claiming it violated the company's equal protection rights. The issue was reverse discrimination, and the decision in favor of the contractor was widely regarded as a set-back for affirmative action. On these facts the three most liberal members of the Court—Justices Brennan, Marshall, and Blackmun—voted for the government and against the equal protection claim, while the remaining six, including the most conservative members of the Court, voted against the government and for the contractor's equal protection claim. Despite such exceptional cases, the expected general correlation between ideology and voting is apparent in most of the tables.

The voting of individual justices can be compared with each other for any given year, but a shift in the orientation of the Court or its members requires a comparison over time. For our analysis the best available baseline is the comparable data generated for the two prior years. In the tables this information appears in the form of percentages for each justice and, in all but the swing-vote table, for the Court majority. One must use caution in interpreting the data because the percentages are affected not only by the behavior of the individual justices but also by the nature of the cases decided in a given year. A vote to uphold a greater percentage of criminal convictions than in a previous term may mean that the justice or the Court has become tougher on criminal defendants. Alternatively, it may mean only that this year the

8. 109 S. Ct. 706 (1989).

facts or the law (or both) of a number of individual cases were less favorable to the defendant than in previous years. The same is true of other categories of cases. Hence, one cannot be confident that percentage changes from one year to another 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. This is true because variation in the nature of the cases should be random and thus is unlikely to account for a pronounced directional change in several tables.

This year a directional change is apparent for the Court as a whole, as indicated by the percentage figures in the bottom three rows of each table, which show how the majority of the Court voted. The first of the three rows gives figures on all cases included in the tables; the second row is limited to decisions with one or more dissenting votes; and figures in the bottom row are calculated only from cases with no dissent. For all cases a statistical shift toward a more conservative result appears, as compared with the two preceding years, in the following tables: state criminal and federal criminal (Tables 3 and 4), first amendment (Table 5), statutory civil rights (Table 7), and federalism (Table 9).[9] No significant change appears with respect to the two categories of civil cases (Tables 1 and 2) or the jurisdictional questions (Table 8). In Table 8 the modest shift from the previous year runs in the liberal direction, toward more expansive jurisdiction. Table 6, dealing with equal protection, shows a large percentage difference from the two preceding terms, also in a liberal rather than a conservative direction.

Most of the apparent inconsistency in the trends indicated by the tables is eliminated when percentages are calculated separately for cases in which a dissenting vote was cast. Excluding unanimous decisions (including decisions in which fewer than the nine justices participated or reached the issue) separately has the disadvantages inherent in a smaller universe of cases, but the advantage of including only those in which ideological differences might have affected the outcome. When only split decisions are counted, every category except equal protection displays a more conservative result for the 1988 term than for 1987.

The equal protection table (Table 6) can also be explained in a way that removes any real inconsistency, by examining only non-unanimous cases. During the 1987 term the equal protection issue was addressed eight times, but in only three cases was it resolved by a divided

9. Data collection for the federalism category was not begun until the 1987 term. Riggs and Moss, *supra* note 1.

court.[10] Two of the split decisions, involving school busing fees[11] and food stamps for strikers,[12] were resolved in favor of the conservative position (rejecting equal protection challenges to the busing fees and the denial of food stamps); and the third, upholding Mississippi's statutory 15% penalty assessed upon unsuccessful appeal of a lower court judgment,[13] was opposed only by Justice Blackmun (Justices Stevens and Kennedy not participating). The ideological content of that issue must have been ambiguous because Justices Brennan and Marshall joined the conservatives. The party claiming equal protection was a large business corporation, obviously not well placed to appeal to the liberal justices' sympathy for the underdog. With rejection of the equal protection claim in every non-unanimous 1987 case, there was no room for improvement of the conservative position in 1988. The percentages, in fact, show a complete reversal of position. But here the appearance belies reality. Only one equal protection case was decided during the 1988 term by a divided vote. Table 6 shows the vote going in favor of that claim, which is correct, but the case was *City of Richmond,* the minority set-off reverse discrimination case. Hence a vote for equal protection was a conservative vote, and the score, based only on non-unanimous decisions, again was conservatives 100%, liberals 0%.

These data indicate that the conservative shift of the Court during the 1988 term is not limited to a few select cases but is statistically apparent across a wide range of cases. The swing-vote table also confirms this directional movement. Looking at the percentage figures for individual justices, the conservative members voted more frequently with the majority than did the liberals in both the 1987 and 1988 terms, along with Justice White (a conservative on some issues but a swing voter on others, over the years). However, for the 1987 term a gradual decline in the percentage of majority voting is evident from one justice to the next in order. Only three percentage points separate Justice O'Connor (generally regarded as a conservative) from Justice Stevens (in the past a swing-voter, but with a liberal orientation); and the largest break—sixteen percentage points—is between Justices Stevens and Blackmun.[14] By contrast, for the 1988 term, there is a 35 percentage point break between the lowest conservative (Scalia) and the high-

10. Kadrmas v. Dickinson Pub. Schools, 108 S. Ct. 2481 (1988); Bankers Life and Casualty Co. v. Crenshaw, 108 S. Ct. 1645 (1988); Lyng v. International Union, UAW, 108 S. Ct. 1184 (1988).

11. *Kadrmas, supra* note 10.

12. *Lyng, supra* note 10.

13. *Bankers Life and Casualty, supra* note 10.

14. The ordering of justices for the 1987 term can be gleaned from Table 10 only with some effort because the members of the Court are listed in order of their 1988 percentages.

est liberal (Blackmun). The percentage score is higher this term for every conservative justice (excepting Justice White, less consistently conservative than the others) and lower for each of the four more liberal justices. Clearly the conservatives voted more as a coalition on the close cases during the 1988 term than during the preceding two terms. The same contrast also appears in the composition of the voting coalitions in the thirty-four cases decided by a 5-4 vote. In nineteen of the thirty-four cases, the majority consisted of Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and White. In six additional cases the winning coalition included at least three of the four most consistently conservative justices (Rehnquist, Kennedy, O'Connor, Scalia). Thus, conservatives dominated the winning coalition in 25 of 34, or 73.5% of close cases. During the previous term the corresponding figures were 17 of 31, or 54.8%. Looking at the liberal end of the scale, Justices Brennan and Marshall together voted with the majority in 12 of 31 close cases (38.7%) during the 1987 term but in just 7 of 34 (20.6%) such decisions in this term. All of these figures attest to the shift in the Court's ideological orientation that appears from the issue tables. If the change is attributable to Justice Kennedy's first full year on the Court, the newest justice has indeed made a difference.

An examination of the individual tables is now in order.

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

Table 1 lists summary percentages and the number of times each justice voted for and against the state government in a civil dispute with a private litigant. Table 2 gives the same kind of data for civil disputes between the federal government and private parties. Inspection of the rankings shows no special surprises; the conservative justices are at the top (pro-government) of the scale and the liberal justices are at the bottom. Chief Justice Rehnquist, who fell almost to the middle of the rankings on the federal table last year (when many observers believed he was treading cautiously with his eight-member Court most of the term), regained his customary spot at the top of the list. In the same table Justice Blackmun edged out Justice Scalia for the number five ranking, but only by 1.4 percentage points. Last year Justice Kennedy, participating in fewer than half of the Court's decisions, was squarely at the midpoint of both tables. This year he has moved a little closer to the top. Justice O'Connor showed the biggest individual change on either table, dropping nearly 16 percentage points and from first to fourth place in the federal rankings. The greatest variations in the state table all occurred at the bottom of the list—Brennan, Marshall and Blackmun each declined 13-14 percentage points in their support of the

state. As in past years, the federal government prevailed in a somewhat larger percentage of its cases than did the states.

Examination of the state cases (Table 1) in which justices at the extremes voted contrary to their anticipated pro- or anti-government leanings shows that the discrepancy is largely accounted for by the unanimous decisions which, we assume, suggests a government case strong enough to transcend ideological differences. Chief Justice Rehnquist, at the top of the scale, voted only twice against the state when the Court was divided. One was the *City of Richmond* reverse discrimination case, discussed above, in which a vote against the city was the conservative position. The other case was an 8-1 decision in which only Justice Stevens was willing to uphold Michigan's tax exemption for retirement benefits of state (but not federal) employees against a challenge based on preemption and alleged violation of intergovernmental tax immunity.[15] At the bottom of the scale Justices Brennan and Marshall voted only once for the government in a divided vote, and that was in *City of Richmond.* Their liberal voting record in this category was therefore perfect.

In Table 2, civil cases involving a federal government party, most of the unexpected votes occurred in unanimous decisions. Five of Chief Justice Rehnquist's and five of Justice White's votes against the government were in this category. The other three, for each justice, were an odd assortment of cases with little obvious ideological content. Two of Justice Rehnquist's were 8-1 decisions, one a tax case holding the taxpayer was entitled to capital gains treatment on a stock transaction[16] and the other a decision under the Freedom of Information Act (FOIA) requiring the Department of Justice to make available, on request, copies of district court decisions the Department receives in the course of litigating tax cases.[17] His third anti-government vote was cast with the majority in *Mallard v. United States District Court for the Southern District of Iowa,*[18] a 5-4 decision holding that a federal district court

15. Davis v. Michigan Dep't of Treasury, 109 S. Ct. 1500 (1989). Justice Scalia, in addition, voted against the government in Healy v. Beer Inst., Inc., 109 S. Ct. 2491 (1989) (Connecticut's attempt to regulate price of beer in other states violates commerce clause); Missouri v. Jenkins, 109 S. Ct. 2463 (1989) (eleventh amendment does preclude attorney fee award against state); and Barnard v. Thorstenn, 109 S.Ct. 1294 (1989) (Virgin Islands' residency requirement for bar admission violates privileges and immunities clause). Justice O'Connor, in addition to *City of Richmond, Davis,* and *Jenkins,* voted against the government in County of Allegheny v. ACLU, 109 S. Ct. 3086 (1989) (display of creche violates establishment clause); and Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890 (1989) (sales tax exemption for religious periodicals violates establishment clause).

16. Commissioner v. Clark, 109 S. Ct. 1455 (1989).

17. United States Dep't of Justice v. Tax Analysts, 109 S. Ct. 2841 (1989).

18. 109 S. Ct. 1814 (1989).

may not require an unwilling attorney to represent an indigent defendant in a civil case. Justice White stood with the Chief Justice in *Mallard* and in the FOIA case and cast his third vote against the government in *Frank v. Minnesota Newspaper Association, Inc.*[19] His dissent in *Frank* (along with Marshall and Stevens) related only to its formal disposition, not to its substance, since he would have affirmed the decision below. The majority found the appeal moot.

At the bottom of the scale, Justice Brennan voted for the government only twice and Justice Marshall three times in a divided Court. Both upheld the IRS in a dispute with a large life insurance company.[20] Their sympathies for the underdog were perhaps not evoked by a well-heeled business corporation. Justice Brennan's other pro-government vote was in *Frank,* where, as noted above, the distinction between the six in the majority and the three dissenters was merely technical.[21] Justice Marshall's other two votes for the government came in *Mallard*[22] (to require an unwilling attorney to perform pro bono services for indigents) and *Hernandez v. Commissioner,*[23] a decision disallowing certain payments to the Church of Scientology as charitable deductions. His *Mallard* vote was clearly a vote for the underdog; his support for the IRS in *Hernandez* is not readily explicable on ideological grounds.

B. Criminal Cases

The two criminal case tables (Tables 3 and 4), as in previous terms, reflect the same ideological divisions as the civil case tables, but the voting is somewhat more polarized. In the state cases, Justices Brennan and Marshall voted for the prosecution more often than last year, but three of these decisions were unanimous. Marshall's one other uncharacteristic vote was a lone dissent in *Olden v. Kentucky,*[24] addressed not to the merits but to the Court's summary disposition of the case.[25] Justice Brennan's two votes for the government in non-unani-

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19. 109 S. Ct. 1734 (1989).

20. Colonial Am. Life Ins. Co. v. Commissioner, 109 S. Ct. 2408 (1989).

21. *See supra* note 19 and accompanying text. In fact, only by contrast to the dissent could the majority position be called a vote for government. Frank, the Postmaster General, had already agreed to everything the Minnesota Newspaper Association wanted, which made the case moot, according to the majority. Declaring the case moot, however, was technically more favorable to Frank than affirming the decision below as the dissent would have done.

22. *See supra* note 18 and accompanying text.

23. 109 S. Ct. 2136 (1989).

24. 109 S. Ct. 480 (1988).

25. Justice Marshall has repeatedly objected to summary reversals, insisting that the Court should not reverse a lower court decision without the benefit of full briefing and oral argument. *See, e.g.,* Pennsylvania v. Bruder, 109 S. Ct. 205 (1988); Rhodes v. Stewart, 109 S. Ct. 202

mous decisions[26] are less easily explained, but neither case involved a closely divided Court. In one of them[27] Justice Marshall provided the lone dissent. In the other[28] Justice Stevens joined Justice Marshall, but neither dissented on the merits. Justice Marshall objected once again to summary reversal without the benefit of full briefings, and both thought the case too insignificant to justify granting certiorari in the first instance.

Among the conservative members of the Court, Chief Justice Rehnquist favored the criminal defendant in only two non-unanimous state cases,[29] and each of them had only a single dissenter. One of the cases was *Olden,* where Justice Marshall objected to the summary reversal rather than to the merits of the decision. The other case,[30] over the sole objection of Justice Kennedy, held that the "plain statement" rule of *Michigan v. Long*[31] (as a basis for declining review of a state court decision reached on "adequate and independent state grounds") was applicable to federal habeas corpus proceedings as well as to direct review. Justice Kennedy's three non-unanimous votes against the government came in *Olden, Texas v. Johnson* (the flag burning case),[32] and *Penson v. Ohio,*[33] where all members of the Court except Chief Justice Rehnquist agreed that the Ohio court failed to follow proper procedures in allowing appointed counsel to withdraw from the case.[34] Table 3 shows a division of the Court into two distinct groups—five who voted overwhelmingly in favor of the government and four who voted consistently in favor of the defendant. The gap between Justice Scalia and Justice Blackmun is a remarkable 37.1 percentage points.

Table 4 (federal criminal cases), involves fewer decisions and ex-

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(1988); Buchanan v. Stanships, Inc., 485 U.S. 265 (1988).

26. Alabama v. Smith, 109 S. Ct. 2201 (1989), and *Bruder,* 109 S. Ct. at 205.

27. *Smith, supra* note 26

28. *Bruder, supra.* note 25

29. *Olden,* 109 S. Ct. at 480; Harris v. Reed, 109 S. Ct. 1038 (1989).

30. *See Harris, supra* note 29.

31. 463 U.S. 1032, 1041-42 (1983).

32. 109 S. Ct. 2533 (1989).

33. 109 S. Ct. 346 (1988).

34. Justice O'Connor voted four times against the government in non-unanimous decisions: *Olden, Penson, Harris,* and Penry v. Lynaugh, 109 S. Ct. 2934 (1989). In *Penry* she voted to affirm the lower court's holding that the eighth amendment does not categorically prohibit capital punishment for a mentally retarded person, the most significant holding in the case; but she voted to reverse Penry's conviction because of an error in mitigation instructions. Justice White also had four non-unanimous pro-defendant votes: *Olden, Penson, Harris,* and South Carolina v. Gathers, 109 S. Ct. 2207 (1989), in which he joined the four more liberal members of the Court in overturning a death penalty sentence. Justice Scalia had five non-unanimous votes in support of the defendant: *Olden, Penson, Harris, Johnson,* and Jones v. Thomas, 109 S. Ct. 2522 (1989), a decision rejecting a double jeopardy claim from which he dissented, along with Justices Brennan, Marshall, and Stevens.

hibits a more gradual progression in the rankings from very frequent to very infrequent support of the prosecution. As in previous years, the government's success rate in federal cases is higher than in state cases. Justices Rehnquist, Kennedy and White voted against the prosecution only once, and that decision was unanimous. Justices Brennan and Marshall voted for the prosecution only once in a case when the Court was divided.[35] That decision, *Mistretta v. United States,*[36] upheld the constitutionality of the Sentencing Reform Act of 1984, with only Justice Scalia dissenting. This year's figures seem to confirm what last year's figures suggested about Justice Kennedy—he is noticeably more prosecution-oriented than his predecessor Justice Powell.[37]

C. *Individual Rights*

Tables 5, 6, and 7 deal with claims of constitutional and statutory rights. Table 5 (first amendment claims) and Table 7 (statutory civil rights claims) show the same broad voting patterns as Tables 1 through 4 (government versus private party claims). There are slight variations in the rankings, but Justices Brennan and Marshall, followed by Justices Blackmun or Stevens, are at one extreme in both scales. Chief Justice Rehnquist is at the other extreme, followed in varying order by Justices Kennedy, O'Connor, Scalia, and White. Justices Kennedy and Scalia are noticeably more centrist on first amendment issues, while Justices O'Connor and White are more centrist on statutory civil rights issues. Table 6 (equal protection claims), does not show as clear a voting pattern but generally points in an unexpected direction, with conservatives supporting civil rights claims more frequently and liberals opposing them. This table, as explained above,[38] is entirely misleading. All of the decisions but one were unanimous, six justices did not participate in one or more of the decisions, and the facts of the one split decision, *City of Richmond v. J.A. Croson Co.,*[39] were so postured that a vote for the city was a vote in favor of minority rights.

Table 5 (first amendment claims) follows the anticipated distribution, and the fit is even closer when cases without dissent are eliminated. In the split decisions, Justices Brennan and Marshall voted to uphold the first amendment claim in every instance, while the Chief

35. Justice Marshall is shown in Table 4 with three pro-government votes to Justice Brennan's two because Justice Brennan did not participate in United States v. Zolin, 109 S. Ct. 2619 (1989), an otherwise unanimous decision.

36. 109 S. Ct. 647 (1989).

37. Riggs and Moss, *supra* note 1, at 61-65.

38. *See supra* text accompanying notes 10-13.

39. 109 S. Ct. 706 (1989).

Justice and Justices White and O'Connor voted against it in every case. Justices Kennedy and Scalia, however, parted company with their conservative brethren in two important cases, giving the liberals the margin of victory in *Texas v. Johnson*[40] and *Florida Star v. B.J.F.*[41] Justice Blackmun, who supported most first amendment claims in the two previous terms, voted this term to reject most of them.

Table 7 (statutory civil rights) also has few surprises. Justices Marshall and Brennan voted to uphold every statutory civil rights claim presented to the Court except in one unanimous decision.[42] At the conservative end, Chief Justice Rehnquist did not support a single civil rights claim in any decision marked by one or more dissents. Justice Scalia voted in favor of one such claim,[43] Justice Kennedy two,[44] and Justice O'Connor three.[45] Table 7 thus presents a nice ranking of members of the Court in descending order of predilection to construe broadly the protections granted by civil rights statutes.

D. Jurisdiction and Justiciability Questions

Table 8 (jurisdiction claims) conforms in general outline to our initial assumptions about judicial restraint—the liberal justices appearing more inclined to exercise jurisdiction and the conservative justices less so. Justice White is at the mid-point of the scale, which comports with his past reputation as a swing-voter, although the biggest break in the table is the ll percentage point gap between him and Justices O'Connor, Kennedy, and Rehnquist. The number of jurisdiction and justiciability questions is large every term, but often the issue is not

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40. 109 S. Ct. 2533 (1989) (invalidating the Texas flag desecration statute).

41. 109 S. Ct. 2603 (1989) (reversing a judgment imposing damages on a newspaper for publishing the name of a victim of sexual assault, contrary to state law).

42. City of Canton v. Harris, 109 S. Ct. 1197 (1989). This was a § 1983 action against the city for failure to provide medical treatment for the emotional illness of a person who was in police custody for about one hour. Justice O'Connor, joined by Justices Kennedy and Scalia, wrote an opinion concurring in part and dissenting in part, which would have entered judgment outright for the city rather than remanding. This was another case difficult to classify. The city was petitioner; hence all ruled in the city's favor. On that basis we classified this as a unanimous decision. In at least one other case of this nature, discussed *supra* note 20 and accompanying text, we classified the case as a split decision. Here the nine were so much in agreement that we decided to disregard the partial dissent.

43. Missouri v. Jenkins, 109 S. Ct. 2463 (1989). Two separate issues were raised—one pertaining to the enhancement of an attorney fee award under § 1988 and the other to the enhancement of law clerk and paralegal fees. Only the Chief Justice was opposed to the claim relating to law clerk and paralegal fees.

44. *Id.* Kennedy supported the right to enhancement on both issues.

45. *Id.* (the law clerk and paralegal claim); Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) (employer's burden of proof in a Title VII discrimination case); NCAA v. Tarkanian, 109 S. Ct. 454 (1988) (dissented from holding that NCAA was not a state actor).

substantial enough to draw a single dissent. As shown by the figures on the second row from the bottom, the issue was disputed in only sixteen of the thirty-seven instances. The rankings in Table 8 are largely as expected, although the percentage differences are small. These differences are amplified when only the non-unanimous decisions are tabulated, as follows:

Justice	For Jurisdiction	Against	% For
Marshall	14	1	93.3
Stevens	14	2	87.5
Brennan	12	2	75.0
Blackmun	11	5	68.8
White	10	6	62.5
O'Connor	6	9	40.0
Kennedy	6	10	37.5
Rehnquist	6	10	37.5
Scalia	6	10	37.5

Using these numbers, the total spread is 56 percentage points (compared with 25 percentage points in Table 8), and a gap of 25 percentage points emerges between Justices White and O'Connor. If judicial restraint is identified with reluctance to exercise jurisdiction, it is also strongly identified—this year at least—with the judicial conservatives on the Court. Conversely, activism, as measured by willingness to exercise jurisdiction in a disputed case, characterizes the liberal members of the Court.[46]

E. Federalism Issues

Table 9 (federalism issues), used for the first time in last year's analysis of the 1987 term,[47] deals with issues raised by conflict between federal and state governmental authority. Federalism, for purposes of this category, includes such matters as preemption, intergovernmental taxation, application of the tenth and eleventh amendments, and federal court interference with state court activities (other than review of state court decisions). Table 9 does not include cases in which the only conflict is alleged incompatibility of the state action with the United States

46. Justice Marshall, who came closest to a perfect record in the revised table, cast his sole vote against the exercise of jurisdiction in Martin v. Wilks, 109 S. Ct. 2180 (1989), the Birmingham firefighters case. Such a vote, had it been a majority, would have barred a challenge by white firefighters to a previously decreed affirmative action program.

47. *See* Riggs and Moss, *supra* note 1, at 65.

Constitution. Nor does it include issues of "horizontal" (interstate) federalism, arising under the dormant commerce clause or the privileges and immunities clause in response to state-erected barriers to interstate commerce.

In examining issues of federalism, we assume that the more conservative justices—Rehnquist, O'Connor, Scalia, and Kennedy—would tend to favor state authority, while Justices Brennan, Marshall, and Blackmun would tend to support federal authority. For the 1987 term reported last year,[48] the results were more or less the reverse of what we expected: Justices Brennan and Marshall appeared most supportive of the state; Justices Blackmun, Rehnquist, and Stevens were in the middle; and Justices O'Connor, Kennedy, White, and Scalia were the least supportive. We explained this anomaly by reference to the relatively few split decisions (six of thirteen in the table) and the specific subject matter of the disputes which led the liberals to support the state position more frequently than the conservatives.[49] This explanation, in retrospect, is still plausible. For the 1988 term, however, no such explanation is necessary because the ranking of the justices in Table 9 falls cleanly into the anticipated pattern.[50]

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 1988 term, we identified thirty-four such decisions made by a 5 to 4 vote.[51] In such cases, a shift of any one justice from the majority to the minority coalition would have created a new majority and a different result. We call this "swing-vote" analysis because each member of the majority is in a position to swing the decision one way or the other, assuming the other votes remain constant. Because each vote is crucial to the outcome, frequency of voting with the majority in such cases may

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48. *Id.* at 65, 75-76.

49. *Id.* at 75-77.

50. If the 10 decisions without dissent are excised, the ordering changes only slightly—O'Connor and Kennedy change places. Nor are the percentages changed substantially for the top six justices. The pro-United States position of the bottom three justices, however, becomes much more pronounced. Justice Blackmun moves from 40.9% for the state to 16.7%, while Justices Marshall and Brennan at 33.3% and 31.8%, respectively, fall to 0% support of the state.

51. This is the usual "close case." During the preceding term, however, when the Court consisted of only eight members before Justice Kennedy's confirmation, we included in the swing-vote category 14 cases decided 5-4, 14 decided 5-3, and 3 decided 4-3. Seven additional 5-3 decisions were not included because they were affirmances rather than reversals of a lower court decision. With 5-3 affirmances, the shift of one vote would not change the outcome because the case would be affirmed without opinion by a 4-4 vote.

be regarded as one index of influence on Court decision-making.

The archetypical swing voter on the Court is a person not ideologically committed to a liberal or a conservative position who votes sometimes with one group and sometimes with the other, making the crucial difference on close cases. Justice White has occupied this position in recent years, as did Justice Powell before his retirement.[52] During the 1987 term, Justice White was the most frequent swing voter in a Court that drew its winning coalitions in close cases more often from conservatives than liberals. This year, however, Justice Kennedy was the most frequent swing voter, joining the majority on twenty-eight of thirty-four issues, followed by Justices White, O'Connor, and the Chief Justice, each with twenty-six votes, and Scalia with twenty-five. In the same thirty-four decisions, the four liberal members of the Court—Blackmun, Brennan, Stevens, and Marshall—voted with the majority 13, 9, 9, and 8 times, respectively. This configuration suggests very little shifting from one group to another by the high scorers, and a conservative bloc quite consistently defeating the liberals. Justice Kennedy voted on the liberal side twice to gain his edge over the Chief Justice[53] but never voted with the liberals in a losing cause. Justice O'Connor joined the liberals to make a winning coalition four times—more than any other conservative,[54] but also voted with them four times on the losing side.[55] Chief Justice Rehnquist, tied at second from the top, never voted in a winning coalition dominated by liberal justices in a 5-4 decision.[56] Voting conservative was good enough to score high in the swing-vote table this term.

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52. *See, e.g.,* Bender, Book Review, 82 MICH. L. REV. 635 (1984) (reviewing V. BLASI, THE BURGER COURT (1983); Fallon, A Tribute to Justice Lewis F. Powell, Jr., 101 HARV. L. REV. 399 (1987).

53. Texas v. Johnson, 109 S. Ct. 2533 (1989) (flag desecration), and Pittston Coal Group v. Sebben, 109 S. Ct. 414 (1988) (favoring black-lung disease claimants).

54. County of Allegheny v. ACLU, 109 S. Ct. 3086 (1989) (creche violates establishment clause); Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 109 S. Ct. 2994 (1989) (tribe has right to zone land on reservation); Penry v. Lynaugh, 109 S. Ct. 2934 (1989) (mitigation instruction in sentencing proceeding erroneous); Sullivan v. Hudson, 109 S. Ct. 2248 (1989) (social security claimant may be awarded attorney fees).

55. Mallard v. United States Dist. Court for S. Dist. of Iowa, 109 S. Ct. 1814 (1989) (with Marshall, Blackmun, and Stevens); Schmuck v. United States, 109 S. Ct. 1443 (1989) (with Brennan, Marshall, and Scalia); United States v. Ron Pair Enters., 109 S. Ct. 1026 (1989) (with Brennan, Marshall, and Stevens); NCAA v. Tarkanian, 109 S. Ct. 454 (1988) (with Brennan, Marshall, and White).

56. The closest he came was *Schmuck,* 109 S. Ct. 1443 (odometer tampering case in which he voted to affirm the conviction, along with Justices Blackmun, Stevens, White, and Kennedy).

IV. Conclusion

As in previous years, our discussion has highlighted some of the relationships appearing in patterns of Supreme Court voting without exhausting all credible interpretations of the data. The availability of information for previous terms gives an important temporal dimension to the analysis which, over the years, should add to the value of this report. In last year's report on the 1987 term, the tables did not show any major changes from the preceding term, either for individual justices or for the Court as a whole, despite the addition of Justice Kennedy for the last few months of the term.[57] The 1988 term was a different story. The whole Court shifted to the right, as detailed above, and, on the basis of full participation in the decided cases, Justice Kennedy moved closer to the conservative pole in several tables. There was also a tendency for the Court to be more polarized, with a greater point spread between the extremes of some of the tables: scores at the top of the tables are higher than last term, and scores at the bottom are lower. It is possible that the shift toward conservatism during the 1988 term may in retrospect appear only aberrational. However, given the present membership of the Court and what is known about their individual propensities, the 1988 term will likely be seen as part of a longer range swing of the pendulum.

V. Appendix

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

1. *The universe of cases*

Only cases decided during the 1988 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 for the Court, but not if the only opinion is a dissent. Cases decided by a 4-4 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 into any of the ten categories are, of course, not included in the data base for any of the tables.

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57. Riggs and Moss, *supra* note 1, at 61-65, 78. "Justice Kennedy," we said, "seems to have had little effect on the orientation of the Court during the 1987 term. To the extent of his participation, his voting behavior is quite comparable to that of his predecessor Justice Powell (except, perhaps, for a somewhat tougher attitude toward criminal defendants)." *Id.* at 78.

2. *Cases classified as civil or criminal*

Classification of cases as civil or criminal follows commonly accepted definitions; generally the nature of the case is clearly identified in the opinion. Last year one case, *Hicks v. Feiock,* 485 U.S. 624 (1988), raised a difficult problem of classification because the outcome of the case hinged on whether the contempt citation was found to be civil or criminal. The case was remanded for a lower court determination of the issue, and we classified it as criminal because the lower courts had previously acted on that assumption. This year *Caplin & Drysdale, Chartered v. United States,* 109 S. Ct. 2646 (1989) presented another difficult choice. The action was brought by attorneys, not themselves charged with a crime, to adjudicate their interest in property of their client that had been forfeited under the provisions of 21 U.S.C. Section 853, a criminal statute. Because it interpreted a criminal statute and was incident to a criminal proceeding, we classified the case as criminal.

3. *Cases classified by nature of the parties*

Cases are included in Tables 1 through 4 only if governmental and private entities appear as opposing parties. This is necessarily true of 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. 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 both 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.

A suit against an official in his personal capacity is included if he is represented by government attorneys or the interests of the state are otherwise clearly implicated. In instances of multiple parties, a civil case is excluded if governmental entities appear on both sides of the controversy. This rule was applied, for example, to exclude *Martin v. Wilks,* 109 S. Ct. 2180 (1989) (the firefighters case) from Tables 1 and 2 because the City of Birmingham and Jefferson County were parties to the case on one side and the United States was a plaintiff-intervenor on the other side.

4. Classification by nature of the issue

A case is included in each category (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 the issues are resolved by differing voting alignments. A case is not included for any issue which, though raised by one of the litigants, is not addressed in any opinion.

Identification of first amendment and equal protection issues 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. Establishment clause cases are excluded, however, because one party's claim of religious establishment is often arrayed 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; the civil rights statutes appearing in 42 U.S.C. §§ 1981-1988 (1982); and other federal statutes expressly barring discrimination on the basis of race, color, national origin, sex, religion, age, or physical handicap. Actions brought under 42 U.S.C. § 1983 are included if the substantive right asserted is based on a federal statute or if the issue is the application of § 1983—that is, whether or how the statutory protections apply in the case at hand. However, § 1983 actions are excluded if the substantive right asserted is based on the United States Constitution and the issue relates to that right. The purpose of the § 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 com-

merce clause or the privileges and immunities clause, are excluded from the table.

*B. Cases Included in Statistical Tables**

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

Allegheny Pittsburgh Coal Co. v. County Comm'n, 109 S. Ct. 633 (1989).
Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey Dep't of Treasury, 109 S. Ct. 1617 (1989).
Barnard v. Thorstenn, 109 S. Ct. 1294 (1989).
Blanchard v. Bergeron, 109 S. Ct. 939 (1989).
Board of Estimate v. Morris, 109 S. Ct. 1433 (1989).
Board of Trustees v. Fox, 109 S. Ct. 3028 (1989).
Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 109 S. Ct. 2994 (1989).
Brower v. County of Inyo, 109 S. Ct. 1378 (1989).
California v. Arc America Corp., 109 S. Ct. 1661 (1989).
California State Bd. of Equalization v. Sierra Summit, Inc., 109 S. Ct. 2228 (1989).
City of Canton v. Harris, 109 S. Ct. 1197 (1989).
City of Dallas v. Stanglin, 109 S. Ct. 1591 (1989).
City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989).
Cotton Petroleum Corp. v. New Mexico, 109 S. Ct. 1698 (1989).
County of Allegheny v. ACLU, 109 S. Ct. 3086 (1989).
County of Allegheny v. ACLU, 109 S. Ct. 3086 (1989).
Davis v. Michigan Dep't of Treasury, 109 S. Ct. 1500 (1989).
Dellmuth v. Muth, 109 S. Ct. 2397 (1989).
DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998 (1989).
Duquesne Light Co. v. Barasch, 109 S. Ct. 609 (1989).
Eu v. San Francisco County Democratic Cent. Comm., 109 S. Ct. 1013 (1989).
Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. 916 (1989).
Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. 916 (1989).
Frazee v. Illinois Dep't of Employment Sec., 109 S. Ct. 1514 (1989).
Goldberg v. Sweet, 109 S. Ct. 582 (1989).
Graham v. Connor, 109 S. Ct. 1865 (1989).
Hardin v. Straub, 109 S. Ct. 1998 (1989).
Healy v. Beer Inst., Inc., 109 S. Ct. 2491 (1989).

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

Hoffman v. Connecticut Dep't of Income Maintenance, 109 S. Ct. 2818 (1989).
Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989).
Kentucky Dep't of Corrections v. Thompson, 109 S. Ct. 1904 (1989).
Missouri v. Jenkins by Agyei, 109 S. Ct. 2463 (1989).
Missouri v. Jenkins by Agyei, 109 S. Ct. 2463 (1989).
Neitzke v. Williams, 109 S. Ct. 1827 (1989).
New Orleans Pub. Serv., Inc. v. Council of New Orleans, 109 S. Ct. 2506 (1989).
North W. Cent. Pipeline Corp. v. State Corp. Comm'n, 109 S. Ct. 1262 (1989).
Oklahoma Tax Comm'n v. Graham, 109 S. Ct. 1519 (1989).
Owens v. Okure, 109 S. Ct. 573 (1989).
Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989).
Public Employees Retirement Sys. v. Betts, 109 S. Ct. 2854 (1989).
Quinn v. Millsap, 109 S. Ct. 2324 (1989).
Rhodes v. Stewart, 109 S. Ct. 202 (1988).
Shell Oil Co. v. Iowa Dep't of Revenue, 109 S. Ct. 278 (1988).
Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890 (1989).
Texas State Teachers Ass'n v. Garland Indep. School Dist., 109 S. Ct. 1486 (1989).
Town of Huntington v. Huntington Branch, NAACP, 109 S. Ct. 276 (1988).
Ward v. Rock Against Racism, 109 S. Ct. 2746 (1989).
Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989).
Will v. Michigan Dep't of State Police, 109 S. Ct. 2304 (1989).

Table 2: Civil Cases: Federal Government versus Private Party

American Foreign Serv. Ass'n v. Garfinkel, 109 S. Ct. 1693 (1989).
Bowen v. Georgetown Univ. Hosp., 109 S. Ct. 468 (1988).
Carlucci v. Doe, 109 S. Ct. 407 (1988).
Coit Indep. Joint Venture v. Federal Sav. & Loan Ins. Corp., 109 S. Ct. 1361 (1989).
Colonial Am. Life Ins. Co. v. Commissioner, 109 S. Ct. 2408 (1989).
Commissioner v. Clark, 109 S. Ct. 1455 (1989).
Federal Sav. & Loan Ins. Corp. v. Ticktin, 109 S. Ct. 1626 (1989).
Finley v. United States, 109 S. Ct. 2003 (1989).
Frank v. Minnesota Newspaper Ass'n, 109 S. Ct. 1734 (1989).
Hernandez v. Commissioner, 109 S. Ct. 2136 (1989).
Hoffman v. Connecticut Dep't of Income Maintenance, 109 S. Ct. 2818 (1989).
Mallard v. United States Dist. Court for S. Dist. of Iowa, 109 S. Ct. 1814 (1989).

Marsh v. Oregon Natural Resources Council, 109 S. Ct. 1851 (1989).
National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989).
Pittston Coal Group v. Sebben, 109 S. Ct. 414 (1988).
Public Citizen v. United States Dep't of Justice, 109 S. Ct. 2558 (1989).
Robertson v. Methow Valley Citizens Council, 109 S. Ct. 1835 (1989).
Sable Communications v. Federal Communications Comm'n, 109 S. Ct. 2829 (1989).
Sable Communications v. Federal Communications Comm'n, 109 S. Ct. 2829 (1989).
Skinner v. Mid-America Pipeline Co., 109 S. Ct. 1726 (1989).
Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402 (1989).
Sullivan v. Hudson, 109 S. Ct. 2248 (1989).
Thornburgh v. Abbott, 109 S. Ct. 1874 (1989).
United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 109 S. Ct. 1468 (1989).
United States Dep't of Justice v. Tax Analysts, 109 S. Ct. 2841 (1989).
United States v. Halper, 109 S. Ct. 1892 (1989).
United States v. Ron Pair Enters., 109 S. Ct. 1026 (1989).
United States v. Stuart, 109 S. Ct. 1183 (1989).

Table 3: State Criminal Cases

Alabama v. Smith, 109 S. Ct. 2201 (1989).
Arizona v. Youngblood, 109 S. Ct. 333 (1988).
Blanton v. City of N. Las Vegas, 109 S. Ct. 1289 (1989).
Carella v. California, 109 S. Ct. 2419 (1989).
Castille v. Peoples, 109 S. Ct. 1056 (1989).
Duckworth v. Eagan, 109 S. Ct. 2875 (1989).
Dugger v. Adams, 109 S. Ct. 1211 (1989).
Florida v. Riley, 109 S. Ct. 693 (1989).
Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. 916 (1989).
Harris v. Reed, 109 S. Ct. 1038 (1989).
Hildwin v. Florida, 109 S. Ct. 2055 (1989).
Jones v. Thomas, 109 S. Ct. 2522 (1989).
Lockhart v. Nelson, 109 S. Ct. 285 (1988).
Maleng v. Cook, 109 S. Ct. 1923 (1989).
Massachusetts v. Morash, 109 S. Ct. 1668 (1989).
Massachusetts v. Oakes, 109 S. Ct. 2633 (1989).
Murray v. Giarratano, 109 S. Ct. 2765 (1989).
Olden v. Kentucky, 109 S. Ct. 480 (1988).
Pennsylvania v. Bruder, 109 S. Ct. 205 (1988).
Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

Penry v. Lynaugh, 109 S. Ct. 2934 (1989).
Penson v. Ohio, 109 S. Ct. 346 (1988).
Perry v. Leeke, 109 S. Ct. 594 (1989).
South Carolina v. Gathers, 109 S. Ct. 2207 (1989).
Stanford v. Kentucky, 109 S. Ct. 2969 (1989).
Teague v. Lane, 109 S. Ct. 1060 (1989).
Texas v. Johnson, 109 S. Ct. 2533 (1989).

Table 4: Federal Criminal Cases

Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989).
Gomez v. United States, 109 S. Ct. 2237 (1989).
Midland Asphalt Corp. v. United States, 109 S. Ct. 1494 (1989).
Mistretta v. United States, 109 S. Ct. 647 (1989).
Schmuck v. United States, 109 S. Ct. 1443 (1989).
United States v. Broce, 109 S. Ct. 757 (1989).
United States v. Monsanto, 109 S. Ct. 2657 (1989).
United States v. Sokolow, 109 S. Ct. 1581 (1989).
United States v. Zolin, 109 S. Ct. 2619 (1989).

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

Board of Trustees v. Fox, 109 S. Ct. 3028 (1989).
City of Dallas v. Stanglin, 109 S. Ct. 1591 (1989).
Eu v. San Francisco County Democratic Cent. Comm., 109 S. Ct. 1013 (1989).
Florida Star v. B.J.F., 109 S. Ct. 2603 (1989).
Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. 916 (1989).
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Frazee v. Illinois Dep't of Employment Sec., 109 S. Ct. 1514 (1989).
Harte-Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678 (1989).
Hernandez v. Commissioner, 109 S. Ct. 2136 (1989).
Massachusetts v. Oakes, 109 S. Ct. 2633 (1989).
Sable Communications v. Federal Communications Comm'n, 109 S. Ct. 2829 (1989).
Sable Communications v. Federal Communications Comm'n, 109 S. Ct. 2829 (1989).
Texas v. Johnson, 109 S. Ct. 2533 (1989).
Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890 (1989).
Thornburgh v. Abbott, 109 S. Ct. 1874 (1989).
Ward v. Rock Against Racism, 109 S. Ct. 2746 (1989).

Table 6: Cases Involving Equal Protection Claims

Allegheny Pittsburgh Coal Co. v. County Comm'n, 109 S. Ct. 633 (1989).
Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey Dep't of Treasury, 109 S. Ct. 1617 (1989).
Board of Estimate v. Morris, 109 S. Ct. 1433 (1989).
City of Dallas v. Stanglin, 109 S. Ct. 1591 (1989).
City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989).
Michael H. v. Gerald D., 109 S. Ct. 2333 (1989).
Quinn v. Millsap, 109 S. Ct. 2324 (1989).

Table 7: Cases Involving Statutory Civil Rights Claims

Blanchard v. Bergeron, 109 S. Ct. 939 (1989).
City of Canton v. Harris, 109 S. Ct. 1197 (1989).
Graham v. Connor, 109 S. Ct. 1865 (1989).
Hardin v. Straub, 109 S. Ct. 1998 (1989).
Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 2732 (1989).
Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989).
Lorance v. A.T. & T. Technologies, Inc., 109 S. Ct. 2261 (1989).
Missouri v. Jenkins by Agyei, 109 S. Ct. 2463 (1989).
Missouri v. Jenkins by Agyei, 109 S. Ct. 2463 (1989).
NCAA v. Tarkanian, 109 S. Ct. 454 (1988).
Owens v. Okure, 109 S. Ct. 573 (1989).
Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).
Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).
Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989).
Public Employees Retirement Sys. v. Betts, 109 S. Ct. 2854 (1989).
Rhodes v. Stewart, 109 S. Ct. 202 (1988).
Texas State Teachers Ass'n v. Garland Indep. School Dist., 109 S. Ct. 1486 (1989).
Town of Huntington v. Huntington Branch, NAACP, 109 S. Ct. 276 (1988).
Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).
Will v. Michigan Dep't of State Police, 109 S. Ct. 2304 (1989).

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

American Foreign Serv. Ass'n v. Garfinkel, 109 S. Ct. 1693 (1989).
Argentine Republic v. Amerada Hess Shipping Corp., 109 S. Ct. 683 (1989).
Argentine Republic v. Amerada Hess Shipping Corp., 109 S. Ct. 683 (1989).

Asarco Inc. v. Kadish, 109 S. Ct. 2037 (1989).
Castille v. Peoples, 109 S. Ct. 1056 (1989).
City of Canton v. Harris, 109 S. Ct. 1197 (1989).
Coit Indep. Joint Venture v. Federal Sav. & Loan Ins. Corp., 109 S. Ct. 1361 (1989).
Dellmuth v. Muth, 109 S. Ct. 2397 (1989).
Duquesne Light Co. v. Barasch, 109 S. Ct. 609 (1989).
Federal Sav. & Loan Ins. Corp. v. Ticktin, 109 S. Ct. 1626 (1989).
Finley v. United States, 109 S. Ct. 2003 (1989).
Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. 916 (1989).
Frank v. Minnesota Newspaper Ass'n, Inc., 109 S. Ct. 1734 (1989).
Harris v. Reed, 109 S. Ct. 1038 (1989).
Hildwin v. Florida, 109 S. Ct. 2055 (1989).
Hoffman v. Connecticut Dep't of Income Maintenance, 109 S. Ct. 2818 (1989).
Lauro Lines S.R.L. v. Chasser, 109 S. Ct. 1976 (1989).
Maleng v. Cook, 109 S. Ct. 1923 (1989).
Mallard v. United States Dist. Court for S. Dist. of Iowa, 109 S. Ct. 1814 (1989).
Martin v. Wilks, 109 S. Ct. 2180 (1989).
Massachusetts v. Oakes, 109 S. Ct. 2633 (1989).
Mesa v. California, 109 S. Ct. 959 (1989).
Midland Asphalt Corp. v. United States, 109 S. Ct. 1494 (1989).
Mississippi Band of Choctaw Indians v. Holyfield, 109 S. Ct. 1597 (1989).
Missouri v. Jenkins by Agyei, 109 S. Ct. 2463 (1989).
Newman-Green, Inc. v. Alfonzo-Larrain, 109 S. Ct. 2218 (1989).
New Orleans Pub. Serv., Inc. v. Council of New Orleans, 109 S. Ct. 2506 (1989).
Oklahoma Tax Comm'n v. Graham, 109 S. Ct. 1519 (1989).
Osterneck v. Ernst & Whinney, 109 S. Ct. 987 (1989).
Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989).
Public Citizen v. United States Dep't of Justice, 109 S. Ct. 2558 (1989).
Quinn v. Millsap, 109 S. Ct. 2324 (1989).
Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890 (1989).
United States Dep't of Justice v. Tax Analysts, 109 S. Ct. 2841 (1989).
United States v. Zolin, 109 S. Ct. 2619 (1989).
Volt Information Sciences, Inc. v. Board of Trustees, 109 S. Ct. 1248 (1989).
Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989).

Table 9: Cases Raising a Federalism Issue

Asarco Inc. v. Kadish, 109 S. Ct. 2037 (1989).
Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 109 S. Ct. 2994 (1989).
Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 109 S. Ct. 2994 (1989).
Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 109 S. Ct. 971 (1989).
California v. Arc Am. Corp., 109 S. Ct. 1661 (1989).
California State Bd. of Equalization v. Sierra Summit, Inc., 109 S. Ct. 2228 (1989).
Castille v. Peoples, 109 S. Ct. 1056 (1989).
Cotton Petroleum Corp. v. New Mexico, 109 S. Ct. 1698 (1989).
Davis v. Michigan Dep't of Treasury, 109 S. Ct. 1500 (1989).
Dellmuth v. Muth, 109 S. Ct. 2397 (1989).
Hoffman v. Connecticut Dep't of Income Maintenance, 109 S. Ct. 2818 (1989).
Mansell v. Mansell, 109 S. Ct. 2023 (1989).
Massachusetts v. Morash, 109 S. Ct. 1668 (1989).
Mesa v. California, 109 S. Ct. 959 (1989).
Mississippi Band of Choctaw Indians v. Holyfield, 109 S. Ct. 1597 (1989).
Missouri v. Jenkins by Agyei, 109 S. Ct. 2463 (1989).
New Orleans Pub. Serv., Inc. v. Council of New Orleans, 109 S. Ct. 2506 (1989).
North W. Cent. Pipeline Corp. v. State Corp. Comm'n, 109 S. Ct. 1262 (1989).
Oklahoma Tax Comm'n v. Graham, 109 S. Ct. 1519 (1989).
Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989).
Shell Oil Co. v. Iowa Dep't of Revenue, 109 S. Ct. 278 (1988).
Volt Information Sciences, Inc. v. Board of Trustees, 109 S. Ct. 1248 (1989).

Table 10: Swing-vote Cases

Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 109 S. Ct. 2994 (1989).
Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989).
County of Allegheny v. ACLU, 109 S. Ct. 3086 (1989).
Dellmuth v. Muth, 109 S. Ct. 2397 (1989).
Duckworth v. Eagan, 109 S. Ct. 2875 (1989).
Dugger v. Adams, 109 S. Ct. 1211 (1989).
Finley v. United States, 109 S. Ct. 2003 (1989).

Florida v. Riley, 109 S. Ct. 693 (1989).
Hoffman v. Connecticut Dep't of Income Maintenance, 109 S. Ct. 2818 (1989).
Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989).
Jones v. Thomas, 109 S. Ct. 2522 (1989).
Mallard v. United States Dist. Court for S. Dist. of Iowa, 109 S. Ct. 1814 (1989).
Martin v. Wilks, 109 S. Ct. 2180 (1989).
Michael H. v. Gerald D., 109 S. Ct. 2333 (1989).
Murray v. Giarratano, 109 S. Ct. 2765 (1989).
NCAA v. Tarkanian, 109 S. Ct. 454 (1988).
National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989).
Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).
Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989).
Penry v. Lynaugh, 109 S. Ct. 2934 (1989).
Penry v. Lynaugh, 109 S. Ct. 2934 (1989).
Pittsburgh & Lake Erie Railroad v. Railway Labor Executives' Ass'n, 109 S. Ct. 2584 (1989).
Pittston Coal Group v. Sebben, 109 S. Ct. 414 (1988).
Rodriguez de Quijas v. Shearson/ Am. Express, Inc., 109 S. Ct. 1917 (1989).
Schmuck v. United States, 109 S. Ct. 1443 (1989).
South Carolina v. Gathers, 109 S. Ct. 2207 (1989).
Stanford v. Kentucky, 109 S. Ct. 2969 (1989).
Sullivan v. Hudson, 109 S. Ct. 2248 (1989).
Texas v. Johnson, 109 S. Ct. 2533 (1989).
United States v. Monsanto, 109 S. Ct. 2657 (1989).
United States v. Ron Pair Enters., 109 S. Ct. 1026 (1989).
Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).
Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989).
Will v. Michigan Dep't of State Police, 109 S. Ct. 2304 (1989).