

3-2-1992

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### Recommended Citation

Richard G. Wilkins, James L. Kimball III, and Troy R. Braegger, *Supreme Court Voting Behavior: 1991 Term*, 7 BYU J. Pub. L. 1 (1992).  
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# Supreme Court Voting Behavior: 1991 Term

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## I. INTRODUCTION

Six years ago, Professor Robert Riggs began an annual survey of Supreme Court voting behavior designed to give some indication of the ideological leanings of individual Justices and the Court as a whole.<sup>1</sup> The survey has generally demonstrated the relatively consistent conservatism of the Rehnquist Court. This year's survey, however, suggests that—contrary to repeated assertions in the popular press<sup>2</sup> (and even this series

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1. The series began with Robert E. Riggs, *Supreme Court Voting Behavior: 1986 Term*, 2 B.Y.U. J. PUB. L. 15 (1988). Professor Riggs retired from the faculty of the J. Reuben Clark Law School in 1992. Much of the introductory material in this article, as well as the descriptive parameters for the statistical classifications used herein, is drawn from Professor Riggs' earlier work.

2. Linda Greenhouse, *Court Serves Notice of Its Transformation*, N.Y. TIMES, Feb. 2, 1992, §4, at 3 ("David H. Souter and Clarence Thomas, have brought not just incremental change but a quantum shift in the Court's center of gravity . . . . The Rehnquist Court majority now has votes to spare and is ready to put its new power on display"); *The Runaway Supreme Court*, N.Y. TIMES, Feb. 2, 1992, §4, at 16 ("the Supreme Court is off and running on a course more radical than the Presidents who appointed most of the justices"); Joan Biskupic, *Thomas' Victory Puts Icing on Reagan-Bush Court*, 49 CONG. Q. WKLY. REP. 3026 (1991); Bob Cohn & David A. Kaplan, *Supreme Conservatism: Will Justices Hunt Down "Endangered Precedents"?*, NEWSWEEK, Oct. 14, 1991, at 56 (Thomas' arrival "is likely only to accelerate the urge to purge past decisions"); David A. Kaplan & Bob Cohn, *Good for the Left, Now Good for the Right*, NEWSWEEK, July 8, 1991, at 20, 21, 22 ("the court did turn right face and proceeded at double time . . . . The conservatives . . . own the farm, and the ideological horses are already out of the barn"); Joan Biskupic, *1990-91 Term Marked by Surge in Conservative Activism*, 49 CONG. Q. WKLY. REP. 1829 (July 6, 1991) ("The appointees of Presidents Ronald Reagan and George Bush have helped to form a seemingly invincible conservative majority that has moved with increasing boldness to execute a conservative

itself)—the Rehnquist Court is *not* a conservative juggernaut. If anything, this year's statistical analysis indicates increasing moderation on the Court.

Indeed, the statistics were unexpected enough that we considered subtitling this year's installment "The Conservative Revolution That Wasn't," or, perhaps more poetically (considering the explicit efforts of Presidents Reagan and Bush to obtain a "conservative" Supreme Court), "The Emperor's New Court." Like the young boy who pointed out that the Emperor's tailor had left him naked, this article suggests that the current Court has not provided Presidents Reagan and Bush with as much conservative cloth as they might have hoped.

## II. MODE OF ANALYSIS

The following statistical analysis is drawn from a tabulation of each Justice's votes in ten categories of cases.<sup>3</sup> These categories are designed to demonstrate the attitudes of the Justices toward two broad issues underlying most Supreme Court decision-making—individual rights and judicial restraint.

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political agenda"); Marshall Ingwerson, *High Court's Slide to the Right*, CHRISTIAN SCI. MONITOR, Apr. 4, 1991, at 8 ("the overall drift of the court, to most court-watchers, is at the least to consolidate the sharp rightward shift that began at the end of the Reagan presidency"); see also Robert E. Riggs, *Supreme Court Voting Behavior: 1990 Term*, 6 B.Y.U. J. PUB. L. 1, 25 (1992) (noting a slight liberal shift in swing-vote cases, but suggesting that "[t]hese 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"); but see Linda Greenhouse, *Moderates on Court Defy Predictions*, N.Y. TIMES, July 5, 1992, §4, at 1.

3. Nine of the categories are based on the nature of the issues or the character of the parties. These 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 freedom of speech, press, association, and free exercise of religion.

6) Equal protection issues.

7) Statutory civil rights claims.

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

9) Federalism issues.

The tenth category tabulates the number of times each Justice voted with the majority in cases decided by a single vote.

The tabulation of votes in each category, presented as Tables 1-10, demonstrates (in admittedly broad strokes) the frequency with which individual Justices and the Court voted to protect individual rights<sup>4</sup> and/or exercise judicial restraint.<sup>5</sup>

From the voting patterns, we attempt to determine whether individual Justices and the Court are taking "conservative" or "liberal" positions. As analyzed in our tables, a conservative position is 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. A liberal position is inferred from a contrary vote.<sup>6</sup>

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4. Votes implicating individual rights are tabulated in tables reporting the outcome of state and federal criminal prosecutions (Tables 3 and 4), as well as those detailing the resolution of claims based on the First Amendment (Table 5), the Equal Protection Clause (Table 6), and civil rights statutes (Table 7). The civil cases examined in Tables 1 and 2 also involve individual rights, since these suits pit the government against persons asserting private rights. The federalism decisions outlined in Table 9 are less obviously relevant to individual rights because such decisions focus on the balance of federal and state authority. Nevertheless, in such cases the practical effect of voting for the state is to deny federal relief to a party alleging state encroachment upon his rights.

5. Judicial restraint is normally identified with deference the legislature 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. Decisions on jurisdictional questions (Table 8) 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.

6. These general rules, however, do not always give accurate indications of judicial ideology. A number of decisions in the 1991 Term 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 (for example) liberals voting against and conservatives in favor of a criminal defendant. A good illustration is *Evans v. United States*, 112 S. Ct. 1881 (1992). There, the majority affirmed a criminal conviction, rejecting the defendant's plea that the Court strictly construe the elements of extortion under the Hobbs Act. One would ordinarily expect Justice Stevens, who wrote the majority opinion, to apply the rule of lenity and construe the statute in favor of the criminal defendant. Likewise, one might expect the Chief Justice and Justices Scalia and Thomas (possibly the three most conservative members of the Court) to have somewhat less sympathy for the criminal defendant.

To the extent the above inferences are valid, ideological trends can be noted by tracking the votes of the Justices and the Court in each category. The individual votes cast can be readily compared with those of other Justices for any given year to reckon ideological positions within the Court. Determination of the current ideological position of the Court as a whole, however, requires comparisons over time. For our analysis, the best available baseline is the comparable data generated for the five 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 interpret the data with caution, since the percentages are affected not only by the behavior of the individual Justices but also by the factual and legal nature of the cases decided in a given year. One cannot be confident that percentage changes from one year to another reflect a change in the ideological orientation of an individual Justice, or that of the Court majority.<sup>7</sup> Directional changes across a number of tables, however, would strengthen the hypothesis that a genuine shift in attitude has occurred. Although factual and legal variations may skew analysis of a given category of cases (producing unexpectedly "liberal" or "conservative" results), it is unlikely that such factors would account for a pronounced directional change in several tables.

This analytical scheme, of course, is far from perfect. Concern for individual rights and commitment to judicial restraint are not necessarily opposite poles of a single attitudinal dimension. Indeed, in certain instances, judicial restraint may be consistent with and even reinforce individual rights.<sup>8</sup> Nevertheless, generally there is tension between

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Nevertheless, Stevens voted to affirm and the other three to reverse the conviction—the three dissenters apparently more concerned with adherence to precedent, federalism and separation of powers concerns than with any general predisposition against criminal defendants, 112 S. Ct. at 1894-1904 (Thomas, J., dissenting, joined by Rehnquist, C.J. & Scalia, J.), and the majority more concerned with "good government" and eradication of extortion than with generous application of the rule of lenity, 112 S. Ct. at 1885-90.

7. Voting 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 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.

8. 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. A striking example of this

individual rights and judicial restraint.<sup>9</sup> Accordingly, in the tabulations that follow, data supporting an inference of judicial restraint or the lack thereof will generally be consistent, respectively, with either a narrow or broad view of individual rights.

### III. THE VOTING RECORD: MOVING TO THE CENTER

With the replacement of Justice Marshall by Justice Thomas in 1991, we might have expected pronounced movement by the Court in a conservative direction. Indeed, as noted above, the supposed "conservatism" of the present Court has been widely discussed.<sup>10</sup> The data for this year, however, indicates that—rather than moving further to the right—the Court has moderated to a more centrist position and (perhaps) has experienced a modest liberal resurgence.

During the 1991 Term, a directional change was apparent for the Court as a whole, as indicated by the percentage figures in the bottom three rows of each table.<sup>11</sup> Comparison of the majority outcome in 1991 cases with the outcomes from the 1990 Term demonstrates a more liberal orientation in Tables 1, 3, 5, 6, 7, 8, and 9 (state civil cases, state criminal cases, First Amendment issues, equal protection claims, statutory civil rights, jurisdiction, and federalism issues). Only Tables 2 and 4

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phenomenon in the 1991 Term is the Joint Opinion of Justices O'Connor, Souter and Kennedy in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). There, while Justices O'Connor, Souter and Kennedy did not unequivocally endorse the abortion right first enunciated in *Roe*, 112 S. Ct. at 2817 (refusing to "say whether each of us, had we been Members of the Court" when *Roe* was decided would have resolved the abortion question "as the *Roe* Court did"), they nevertheless refused to depart (on grounds of *stare decisis*) from the "central core" of *Roe*. 112 S. Ct. at 2808-14 (Joint Opinion of O'Connor, Kennedy, Souter, JJ.). Therefore, as *Casey* demonstrates, 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.

9. 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 governments, and is a clear rebuff to the claimant seeking federal vindication of her rights.

10. See *supra* note 2.

11. The first of the three rows gives the outcome on all cases included in the tables, whatever the voting alignment, while the second row is limited to decisions with one or more dissenting votes. The third row gives the outcome of the unanimous decisions in each category.

(federal civil and criminal cases) evidence a more conservative orientation than was exhibited in the 1990 Term. Moreover, most of these shifts (in both the liberal and conservative direction) are large.<sup>12</sup> Indeed, only Table 7 (statutory civil rights) resulted in a rather insignificant percentage shift (2.26 points).

A similar shift is evident if one looks only at non-unanimous decisions (*i.e.*, opinions with at least one dissenting vote). Comparison of 1991 Term split decisions with those of 1990 demonstrates a more liberal outcome in Tables 1, 3, 5, 7, 8, and 9.<sup>13</sup> The split decision figures, furthermore, show a *greater* point movement toward liberal outcomes in Tables 1, 3, 7, 8 and 9 than the figures for all (including unanimous) cases.<sup>14</sup> For example, the relatively small (2.26 point) liberal shift in Table 7 becomes a potentially more significant 6.7 point figure. This fact may be quite meaningful if one assumes that the outcome of split decisions is more likely to have been influenced by ideology than the outcome of unanimous cases. To the extent that split decisions *are* motivated by ideological differences on the Court, the pronounced liberal movement in the split decision figures is important indeed.<sup>15</sup>

The movement noted above is also evident in Table 10, which analyzes cases decided by a 5-4 majority. Of the 17 swing-vote decisions in the 1991 Term, 10 (or 58.82 percent) were decided by a liberal coalition. This represents a 13.32 point shift toward greater liberalism than the 1990 Term. Such movement is hard to dismiss. A similar (but less dramatic) shift in the 1990 Term<sup>16</sup> was partially explained with the

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12. The movement toward a more liberal position was 11.62 points in Table 1, 11.16 points in Table 3, 41.67 points in Table 5, 7.1 points in Table 6, 9.43 points in Table 8, and 45.31 points in Table 9. The change toward a more conservative position in Tables 2 and 4 was 20.95 and 9.23 points, respectively.

13. As with the figures for all cases, the comparison of 1991 split decisions with 1990 evidences a conservative movement for Tables 2 and 4 (federal civil and criminal actions).

14. Consideration of only split decisions creates a 17.19 point movement in Table 1, a 34.87 point movement in Table 3, a 6.7 point movement in Table 7, a 30.33 point movement in Table 8, and a 51.43 point movement in Table 9.

15. Only Table 6 (equal protection claims) shows no ideological movement between the 1991 and 1990 split decisions. Table 6 may well give the least reliable data regarding voting patterns on the Court. The table tabulated the results of only six decisions, four of which were unanimous. Any extrapolations drawn from such a small statistical sample are highly questionable.

16. The 1990 Term itself demonstrated almost a 10 point increase in "liberal" decisions from 1989. Robert E. Riggs, *Supreme Court Voting Behavior: 1990 Term*,

observation that Justices O'Connor, Kennedy and Souter were part of a relatively solid six-member conservative bloc. Accordingly, the "liberal" 5-4 decisions did not accurately demonstrate the orientation of the Court because the basic "ideological cleavage on the Court" resulted in a conservative 6-3 division.<sup>17</sup> This explanation, however, while still not without force,<sup>18</sup> loses some of its impact because of the emergence of Justices O'Connor, Kennedy and Souter as anything but a reliably "conservative" bloc. Indeed, these Justices voted together with Justices Blackmun and Stevens (and therefore controlled) the outcome of five of the 10 split decisions decided by a liberal coalition in 1991.<sup>19</sup>

The foregoing data suggests quite strongly that the monolithically "conservative" Rehnquist Court—so often discussed in the popular and academic press<sup>20</sup>—may be more storied than real. Indeed, consideration of the Court's most recent record in split decisions (where ideology ostensibly plays a greater role in Court decisionmaking) and swing decisions (where ideology often accounts for the decisive fifth vote) shows that the Rehnquist Court, as an institution, is moving more toward a centrist rather than a conservative position. We turn now to a detailed examination of individual voting behavior.

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6 B.Y.U. J. PUB. L. 1, 13-14 (1992).

17. *Id.*

18. See discussion *infra* Section III.F.

19. *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992); *Forsyth County, Georgia v. Nationalist Movement*, 112 S. Ct. 2395 (1992); *Lee v. International Soc'y for Krishna Consciousness*, 112 S. Ct. 2709 (1992); *Lee v. Weisman*, 112 S. Ct. 2649 (1992); *Sochor v. Florida*, 112 S. Ct. 286 (1991).

20. See *supra* note 2.



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

TABLE 1  
CIVIL CASES: STATE GOVERNMENT  
VERSUS A PRIVATE PARTY

Justice	1991 Term Votes			% Votes for Government				
	For Gov't	Against Gov't	1991 Term	1990 Term	1989 Term	1988 Term	1987 Term	1986 Term
Rehnquist	30	12	71.43	84.0	70.3	66.7	67.9	71.8
Thomas	25	10	71.43	-----	-----	-----	-----	-----
Scalia	27	15	64.29	64.0	64.9	59.2	51.7	64.1
White	25	17	59.52	64.0	59.5	55.1	53.6	43.6
Souter	21	19	52.50	63.6	-----	-----	-----	-----
O'Connor	21	21	50.00	68.0	67.6	57.4	50.0	64.1
Kennedy	18	24	42.86	76.0	61.1	57.1	50.0	-----
Blackmun	15	27	35.71	24.0	43.2	30.6	44.8	36.8
Stevens	12	29	29.27	36.0	40.5	35.4	37.9	46.2
Majority								
All Cases	22	20	52.38	64.0	51.4	51.0	51.7	53.9
Split Decisions	16	15	51.61	68.8	52.4	64.0	58.8	-----
Unanimous	6	5	54.55	55.6	50.0	50.0	37.5	41.7

Table 1 reveals a change in voting patterns from 1990 that helps explain the general centrist reorientation of the Court just noted. That change is a rather remarkable shift in the voting patterns of Justices O'Connor and Kennedy. Their meteoric fall from the conservative "top of the chart" in 1990 to the liberal bottom in 1991 may suggest a judicial reorientation reminiscent of Justice Blackmun's well-known voyage from the right to the left wing of the Court.

Chief Justice Rehnquist and newly appointed Justice Thomas occupy the top position on Table 1, voting for state governments 71.43% of the time.<sup>21</sup> In the recent past, Justices O'Connor and Kennedy probably would have sat quite comfortably in second or third place. In 1991, however, Justice Kennedy has dropped 33.14 points—moving from second place

21. Although Justices Rehnquist and Thomas share the same final voting percentage, Justice Thomas voted in seven fewer cases than Chief Justice Rehnquist.

to seventh (just above Justice Blackmun). Justice O'Connor, in turn, has moved from third to sixth place, voting for the state only 50% of the time as opposed to 68% of the time in 1990.

This movement by Justices O'Connor and Kennedy may well explain the general, centrist drift of the Court during the 1991 Term. Although these Justices maintained quite conservative voting records in federal civil and criminal matters (Tables 2 and 4), they took a more liberal stance in 1991 on state criminal cases (Table 3), First Amendment issues (Table 5), equal protection claims (Table 6), civil rights claims (Table 7), jurisdictional issues (Table 8), and federalism issues (Table 9). Although the change toward a liberal position in each of these areas was not uniformly large,<sup>22</sup> such a consistent movement across all categories except cases involving the federal government cannot be discounted—particularly in light of Justice O'Connor's and Kennedy's crucial roles in such "hot button" cases as *Planned Parenthood v. Casey*<sup>23</sup> (abortion) and *Lee v. Weisman*<sup>24</sup> (school prayer).

After Justices O'Connor and Kennedy are repositioned, the remaining Justices have generally maintained their same relative placement. Justices Scalia, White and Souter each appear on the chart in the same order as in 1990, although they have each moved up a notch because of the repositioning of Justices O'Connor and Kennedy. Justices Blackmun and Stevens, who occupied the bottom two places on Table 1 in 1990, remain in that niche—although reversing order (with Justice Blackmun in eighth and Justice Stevens in ninth place).<sup>25</sup>

There is one other aspect of Table 1 that is worth noting. Justice Thomas' first place finish (tied with the Chief Justice) suggests that the new Justice will not disappoint those who hoped for a strong conservative voice on the bench. Indeed, except for federal civil and criminal actions and equal protection claims (Tables 2, 4, and 6) (where Justice Thomas has either the first or second most liberal voting record in the 1991

22. Justice O'Connor's voting record on civil rights claims, for instance, changed only 2.26 points. In other categories, however, the alteration was much more significant. Her voting pattern in state criminal cases changed 33.37 points in a liberal direction, and she voted for the states on federalism issues only 39.13% of the time in 1991 as compared with 71.4% of the time in 1990.

23. 112 S. Ct. 2791 (1992).

24. 112 S. Ct. 2649 (1992).

25. Justice Blackmun, along with Justice Scalia, were the only two Justices to vote somewhat more often for the state in 1991 than in 1990.

Term), the Justice evidences a relatively consistent (and conservative) voting pattern. He voted in favor of First Amendment claims only 20% of the time (Table 5), was the member of the Court least likely to sustain a statutory civil rights claim (Table 7), is clearly on the conservative half of the Court when it comes to jurisdictional issues (Table 8), and sits in the fourth most conservative position on federalism issues (Table 9).<sup>26</sup>

TABLE 2  
CIVIL CASES: FEDERAL GOVERNMENT  
VERSUS A PRIVATE PARTY

Justice	1991 Term Votes			% Votes for Government				
	For Gov't	Against Gov't	1991 Term	1990 Term	1989 Term	1988 Term	1987 Term	1986 Term
White	17	4	80.95	70.0	75.0	71.4	72.7	87.1
Kennedy	16	5	76.19	55.6	60.7	66.7	58.3	-----
Rehnquist	15	6	71.43	70.0	78.6	71.4	61.8	90.6
Scalia	15	6	71.43	57.9	60.7	59.3	62.5	82.8
Souter	15	6	71.43	55.6	-----	-----	-----	-----
Blackmun	12	9	57.14	60.0	64.3	60.7	50.0	53.1
Stevens	12	9	57.14	40.0	57.1	42.9	55.9	50.0
Thomas	8	7	53.33	-----	-----	-----	-----	-----
O'Connor	11	10	52.38	60.0	60.7	60.7	76.5	75.0
Majority								
All Cases	17	4	80.95	60.0	71.4	64.3	61.8	68.8
Split Decisions	10	2	83.33	60.0	66.7	66.7	55.6	-----
Unanimous	7	2	77.78	60.0	76.9	61.5	68.8	-----

Table 2, and Table 4, are the only two tables in 1991 showing a general conservative trend in the Court's voting pattern. The federal government was able to garner a majority 80.95% of the time, a 20.95 point increase over 1990, when the federal government prevailed only 60% of the time. This significant victory level is the highest the federal government has achieved in the six years of this survey.

But, while the overall trend in favor of the federal government is clear (with only Justices Blackmun and O'Connor voting for the federal government fewer times than 1990), the

26. Chief Justice Rehnquist and Justice Blackmun tied for first place on Table 9.

ranking of individual Justices within Table 2 appears almost random. As occurred in 1990, Justice White tops the list, voting for the government 80.95% of the time. Justice Kennedy comes in second, moving up from the sixth position in 1990. On the other end of the scale we find Justices O'Connor and Thomas, voting for the government 52.38% and 53.33% of the time, respectively. Considering Justice Thomas' showing in Table 1, where he tied with Chief Justice Rehnquist for the most conservative voting record, his position in Table 2 is fairly surprising. Almost as surprising is Justice O'Connor's shift from 1990, when she tied for the second most conservative position on the chart. Chief Justice Rehnquist and Justices Scalia, and Souter all tied for the third most conservative spot, coming in at 71.43% for the government. Justices Blackmun and Stevens also tied, voting 57.14% of the time for the government.

It is difficult to explain precisely why the federal government experienced such success in 1991, or why the ranking of individual Justices on Table 2 appears so erratic. The government's success rate may be due primarily to the efforts of Solicitor General Kenneth Starr, who is apparently doing a remarkable job of screening cases for the federal government and presenting the Court primarily with "winners." The United States is in the enviable position of being able to pick and choose the cases it wishes to take to the High Court, and the Solicitor General has traditionally been exceptionally careful in selecting federal vehicles for Supreme Court litigation.<sup>27</sup> The high success rate in 1991 may mean little more than that Solicitor General Starr is "on a roll."

Some of the eccentricities of Table 2, however, may be explained by the peculiar nature of the decisions analyzed under the table. A vote in favor of the federal government in many civil cases simply cannot be classified, without more, as a "conservative" vote, nor is a vote against the government automat-

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27. As is usually the case, the federal government won more of its cases (80.95%) than the states (52.38%). This high comparative success rate on the part of the federal government may well be due, in part, to the Solicitor General's experienced and centralized control of the federal litigation docket. While the Solicitor General has traditionally managed federal cases to present the Supreme Court with cases most likely to result in decisions favorable to the government, state attorneys general have often not been as selective—and, accordingly, have often not been as successful. See generally Richard G. Wilkins, *An Officer and an Advocate: The Role of the Solicitor General*, 21 *LOYOLA L. REV.* 1167 (1988). (Professor Wilkins served as an Assistant to Solicitor General Rex E. Lee from 1981 to 1984.)

ically "liberal." For example, in *Federal Trade Commission v. Titor Title Insurance Co.*<sup>28</sup> the question before the Court was whether a state rate setting agency (controlled by the state's title insurance industry) was immune from prosecution under federal antitrust laws. In such a case, a vote in favor of the FTC (which argued against immunity) can hardly be called "conservative." To the contrary, the true "conservative" vote would seem to be *against* the federal government and *in favor* of the price fixers.

Nevertheless, the six votes in favor of the federal government in *Titor*—including those of Justices Blackmun and Stevens—are (according to the classification scheme of this analysis) counted as "conservative" while the dissenting votes of Chief Justice Rehnquist and Justices O'Connor and Thomas are classified as "liberal." Such permutations, evident in other cases under Table 2,<sup>29</sup> may partially explain both the high "conservative" success rate and the apparent unpredictability of the ranking of individual Justices.

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28. 112 S. Ct. 2169 (1992).

29. See also *Lechmere v. National Labor Relations Bd.*, 112 S. Ct. 841 (1992). In *Lechmere*, the question was whether non-employee union organizers must be given access to an employer's property. Votes in favor of the NLRB (cast by Justices White, Blackmun and Stevens) are hardly "conservative" (because these Justices would subjugate the property rights of employers to the organizational rights of unions), yet these votes—under the analysis of this article—count as "conservative" while the six votes of the Court majority (in favor of property rights) count as "liberal."

*B. Criminal Cases*

TABLE 3  
STATE CRIMINAL CASES

Justice	1991 Term Votes			% Votes for Government				
	For Gov't	Against Gov't	1991 Term	1990 Term	1989 Term	1988 Term	1987 Term	1986 Term
Scalia	14	4	77.78	74.1	73.5	77.8	47.4	81.8
Thomas	12	4	75.00	-----	-----	-----	-----	-----
Rehnquist	12	6	66.67	81.5	85.3	85.2	73.7	87.9
Souter	10	8	55.56	68.0	-----	-----	-----	-----
White	10	8	55.56	48.1	73.5	77.8	47.4	81.8
Kennedy	9	9	50.00	57.7	73.5	81.5	70.0	-----
Blackmun	6	12	33.33	14.8	35.3	37.0	26.3	30.3
O'Connor	6	12	33.33	66.7	76.5	77.8	61.1	75.8
Stevens	5	13	27.78	0.0	20.6	37.0	21.1	21.2
Majority								
All Cases	8	10	44.44	55.6	64.7	70.4	47.4	60.6
Split Decisions	4	8	33.33	68.2	70.0	72.7	53.8	-----
Unanimous	4	2	66.67	0.0	25.0	60.0	16.7	-----

Table 3 shows a voting pattern similar to that of Table 1, with Justices O'Connor and Kennedy again demonstrating a more liberal voting pattern than in the 1990 Term. As with Table 1, the most conservative group consists of Justices Scalia and Thomas and Chief Justice Rehnquist, who voted for the government 77.78%, 75%, and 66.67% of the time, respectively. Justices Souter and White tied, voting for state government in 55.56% of the cases examined. Justice Kennedy drops 7.7 points from the 1990 Term, slipping from fifth to sixth place in Table 3.

The final and most liberal group of Justices on Table 2 is comprised of Justices Blackmun, O'Connor, and Stevens, who respectively voted in favor of the government 33.33%, 33.33%, and 27.78% of the time. These figures, however, represent "conservative" movement by Justices Blackmun and Stevens, with Justice Blackmun moving 18.53 points in favor of state government in 1991, and Justice Stevens—who did not vote for the state in a single criminal case in 1990—voting for the pros-

ecution in 27.78% of the cases. The most surprising individual shift was by Justice O'Connor, who voted only half as often in favor of the state in 1991 as she did in 1990.

The overall trend in state criminal cases was toward a more liberal position, since the state governments won only 44.44% of the time, as compared to 55.6% in 1990. This statistic is even more remarkable when one considers only split decisions, where state governments won just 33.33% of the time, as opposed to 68.2% in 1990. As noted above, this change in the orientation of the Court appears to be due largely to the repositioning of Justices O'Connor and Kennedy.

TABLE 4  
FEDERAL CRIMINAL CASES

Justice	1991 Term Votes			% Votes for Government				
	For Gov't	Against Gov't	1991 Term	1990 Term	1989 Term	1988 Term	1987 Term	1986 Term
Kennedy	11	2	84.62	50.0	66.7	88.9	71.4	-----
O'Connor	10	3	76.92	70.0	77.8	77.8	71.4	90.0
Rehnquist	10	3	76.92	70.0	77.8	88.9	85.7	80.0
Scalia	10	3	76.92	40.0	66.7	66.7	64.3	70.0
Souter	9	4	69.23	75.0	-----	-----	-----	-----
White	9	4	69.23	60.0	77.8	88.9	85.7	90.0
Blackmun	8	5	61.54	70.0	44.4	55.6	78.6	30.0
Thomas	6	5	54.55	-----	-----	-----	-----	-----
Stevens	5	8	38.46	60.0	33.3	66.7	64.3	40.0
Majority								
All Cases	9	4	69.23	60.0	66.7	88.9	78.6	60.0
Split Decisions	5	4	55.56	50.0	83.3	100.0	75.0	-----
Unanimous	4	0	100.00	75.0	33.3	66.7	100.0	-----

Table 4, like Table 2, evidences overall conservative voting patterns by most members of the Court. Justice Kennedy voted most often for the federal government, voting in favor of the federal government in 84.62% of all federal criminal cases. The Chief Justice and Justices O'Connor and Scalia tied for second place, with a 76.92% ranking. Justices White and Souter tied for third place at 69.23%. The bottom three slots are filled by Justices Blackmun, Stevens and Thomas<sup>30</sup>—with Justice

30. Justice Thomas only participated in eleven of the thirteen cases. The two

Stevens possessing by far the most liberal record, siding with the federal government only 38.46% of the time. Compared with 1990, the overall trend is slightly conservative, with the government increasing its win percentage by 9.23 points.

When compared with 1990, the above rankings reveal some fairly surprising movement. Justice Scalia—who was in last place in 1990, voting for the government only 40% of the time—moved up to second place in 1991. Similarly, Justice Kennedy—who in 1990 was tied with Justice Marshall for the second most liberal position on the chart—moved up to the first, most “conservative” position. Movement by the “liberal” wing of the Court, however, was not as surprising. Although the overall trend on the Table is conservative, the most liberal Justices on the Court (Justices Blackmun and Stevens) voted for the federal government fewer times in 1991, thereby taking a more liberal position than in 1990. Indeed, Justice Stevens dropped 21.54 points.

As with Table 2, the Solicitor General’s ability to present the Court with “winning” cases may influence the generally favorable outcome for the federal government on Table 4. This supposition, in fact, is strengthened by an analysis of the outcome in non-unanimous cases. When unanimous cases on Table 4 are disregarded, the government wins only 55.56% (not 69.23%) of the time. This demonstrates that the government does very well in unanimous cases—and these “winning” cases are the ones most likely to be pressed by the Solicitor General.<sup>31</sup>

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cases in which he did not participate were decided unanimously for the government. If he had participated in those cases and voted with the rest of the Court, his overall percentage would be equal to that of Justice Blackmun, 61.54%. This outcome is somewhat unexpected—due to Justice Thomas’ generally conservative orientation on other Tables (e.g., Tables 1, 5, 7, 8 and 9).

31. The four unanimous cases, each of which was decided for the government, were all drug-related. *United States v. Ibarra*, 112 S. Ct. 4 (1991); *Griffin v. United States*, 112 S. Ct. 466 (1991); *United States v. Felix*, 112 S. Ct. 1377 (1992); *Wade v. United States*, 112 S. Ct. 1840 (1992). It appears that the Court supports, at least to some extent, the current “war on drugs.”



C. *Individual Rights*

**TABLE 5**  
**FIRST AMENDMENT RIGHTS OF EXPRESSION,**  
**ASSOCIATION, AND FREE EXERCISE OF RELIGION**

Justice	1991 Term Votes			% Votes for Rights Claim				
	For Claim	Against Claim	1991 Term	1990 Term	1989 Term	1988 Term	1987 Term	1986 Term
Stevens	9	0	100.00	50.0	46.7	64.7	50.0	50.0
Blackmun	8	1	88.89	69.2	60.0	41.2	69.2	72.7
Souter	8	1	88.89	41.7	-----	-----	-----	-----
Kennedy	7	2	77.78	41.7	40.0	37.5	66.7	-----
O'Connor	7	2	77.78	54.5	26.7	25.0	23.1	45.5
Rehnquist	4	4	50.00	16.7	13.3	18.8	16.7	16.7
White	4	4	50.00	15.4	20.0	23.5	30.8	41.7
Scalia	3	5	37.50	25.0	26.7	35.3	38.5	36.4
Thomas	1	4	20.00	-----	-----	-----	-----	-----
Majority								
All Cases	6	3	66.67	25.0	40.0	35.3	50.0	58.3
Split Decisions	4	3	57.14	30.0	40.0	22.2	50.0	-----
Unanimous	2	0	100.00	0.0	40.0	50.0	50.0	-----

Table 5 reveals a striking shift from a conservative to a liberal position, with the Court finding in favor of First Amendment claims 66.67% of the time, compared to only 25% of the time during the 1990 Term. But, while this movement by the entire Court may be somewhat unexpected, the ranking of individual Justices in Table 5 is not: the most liberal Justices occupy the top and the most conservative Justices the bottom of the chart. Perhaps the most telling aspect of Table 5, however, is the fact that it—like Tables 1 and 10—reveals what may be a new 5-4 centrist realignment of the Court.

Justice Stevens occupies the top, most liberal position on Table 5—finding in favor of 100% of First Amendment claims. Justices Blackmun and Souter come next, finding in favor of all but one claim, for an overall result of 88.89%. The next positions are filled by Justices Kennedy and O'Connor, who found for the claim 77.78% of the time. Together, these five Justices can control the outcome of First Amendment cases, as demon

strated in 1991 by *Lee v. International Society for Krishna Consciousness, Inc.*<sup>32</sup> and *Lee v. Weisman*.<sup>33</sup>

Between the top five Justices and the next four is a significant percentage break. The Chief Justice and Justice White found in favor of First Amendment claimants only half the time—27.78 points below the record of Justices O'Connor and Kennedy. Justices Scalia and Thomas round out the conservative end of the scale, voting for 37.5% and 20% of the claims, respectively. These Justices, of course, populated the dissents of the First Amendment decisions noted above.

One should not, perhaps, make too much of the obvious liberal shift in First Amendment cases in 1991. The shift may be explained, at least in part, by the nature of the cases reaching the Court, since every Justice voted for First Amendment claims more in 1991 than 1990. Also, there were no unanimous cases in 1990, while in 1991 there were two—both decided for the claim.<sup>34</sup> But, notwithstanding these observations, the presence of Justices Souter, Kennedy and O'Connor on the liberal side of Table 5 *has* tipped the balance of the chart to a liberal position—as on Tables 1 and 10. The Court as a whole, moreover, has a more liberal record in 1991 than 1990 on all but two Tables included in this study. This movement, taken as a whole, does not appear to be insignificant.

As a result, Table 5—viewed in context with other Tables in this study—suggests that ideological control on the Court may well have shifted since the 1990 Term. The liberal wing of the Court (Justices Blackmun and Stevens) is often joined by a moderate center (Justices O'Connor, Kennedy and Souter) to produce liberal outcomes. While this may be insufficient evidence upon which to confidently predict a change in the Court's sea level, it does suggest that—at least in the 1991 Term—the tide has turned.

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32. 112 S. Ct. 2709 (1992).

33. 112 S. Ct. 2649 (1992). *Weisman* is not included in the calculation of Table 5. As explained in the appendix to this study, Establishment Clause challenges are omitted from Table 5 because one party's claim of religious establishment is often aligned against another party's claim of free exercise or other individual right, thus blurring the issue of individual rights.

34. The unanimity of the Court in one of these cases, however, masks *serious* doctrinal disagreement. See, e.g., *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (Court unanimously invalidates cross burning statute, but on two widely divergent rationales).

TABLE 6  
EQUAL PROTECTION CLAIMS

Justice	1991 Term Votes			% Votes for Rights Claim				
	For Claim	Against Claim	1991 Term	1990 Term	1989 Term	1988 Term	1987 Term	1986 Term
Stevens	4	2	66.67	83.3	0.0	66.7	28.6	33.3
Thomas	3	2	60.00	-----	-----	-----	-----	-----
Blackmun	3	3	50.00	83.3	0.0	60.0	50.0	57.1
Kennedy	3	3	50.00	42.9	25.0	57.1	33.3	-----
Rehnquist	3	3	50.00	14.3	20.0	57.1	12.5	14.3
Souter	3	3	50.00	50.0	-----	-----	-----	-----
White	3	3	50.00	42.9	0.0	66.7	12.5	28.6
O'Connor	2	4	33.33	28.6	25.0	66.7	12.5	42.9
Scalia	2	4	33.33	14.3	25.0	57.1	12.5	14.3
Majority								
All Cases	3	3	50.00	42.9	0.0	57.1	12.5	14.3
Split Decisions	1	1	50.00	50.0	0.0	100.0	0.0	-----
Unanimous	2	2	50.00	33.3	0.0	50.0	20.0	-----

Table 6 shows a slight liberal shift, but the significance of this shift may well be negligible. Four cases were decided by a unanimous Court, two for the claim and two against. This leaves only two cases in which ideology may have played a significant role. Such a small number of cases makes any significant statistical analysis difficult, if not impossible.

With the above caveat in mind, the rankings on Table 6 are not unexpected. Indeed, in the non-unanimous cases, the voting pattern does not diverge significantly from 1990. Justice Stevens voted for the claim in both non-unanimous cases. Chief Justice Rehnquist and Justices Blackmun, Thomas, Kennedy, Souter, and White split, voting for the claim 50% of the time. Justices O'Connor and Scalia, finally, voted against both claims. Compared to 1990, the only noticeable shift was that of Chief Justice Rehnquist, who voted for the equal protection claim 50% of the time in 1991 as opposed to 1990's 14.3%. It bears repeating, however, that the limited number of split decisions renders suspect any conclusions concerning ideological trends.

1] SUPREME COURT VOTING BEHAVIOR: 1991 TERM 19

TABLE 7  
STATUTORY CIVIL RIGHTS CLAIMS

Justice	1991 Term Votes			% Votes for Rights Claim				
	For Claim	Against Claim	1991 Term	1990 Term	1989 Term	1988 Term	1987 Term	1986 Term
Blackmun	8	1	88.89	80.0	88.9	80.0	87.5	84.6
Stevens	8	1	88.89	80.0	77.8	73.7	87.5	61.5
White	6	3	66.67	53.3	88.9	55.0	62.5	61.5
Kennedy	5	4	55.56	33.3	62.5	45.0	66.7	----
O'Connor	5	4	55.56	53.3	55.6	52.6	42.9	30.8
Rehnquist	4	5	44.44	33.3	44.4	35.0	37.5	38.5
Scalia	4	5	44.44	46.7	55.6	40.0	57.1	38.5
Souter	4	5	44.44	57.1	----	----	----	----
Thomas	2	5	28.57	----	----	----	----	----
Majority								
All Cases	5	4	55.56	53.3	88.9	50.0	75.0	53.9
Split Decisions	2	3	40.00	33.3	83.3	25.0	60.0	----
Unanimous	3	1	75.00	83.3	100.0	87.5	100.0	----

Table 7 reveals a modest liberal shift. The liberal movement for the Court as a whole, however, is quite small—2.26%. Indeed, were it not for the fact that so many Tables reflect a liberal shift in 1991, this movement would probably be disregarded altogether. Viewed in light of other changes in voting patterns in 1991, however, even a movement this small may be significant. Moreover, when one considers the outcome of only non-unanimous cases, the shift becomes a more substantial 6.7 points.

Table 7 also evidences movement by Justice Kennedy similar to that found on Tables 1, 5 and 10. Justice Kennedy moves from the bottom, most conservative position on Table 7 in 1990 to a ranking in the top five most liberal Justices—voting for 55.56% of statutory civil rights claims in 1991, as opposed to 33.3% of such claims in the 1990 Term. Justice White also moved up the chart in 1991, adding 13.37 points to his record in 1990. Justice Souter, by contrast, moved in a conservative direction, dropping 12.66 points from his record in 1990. The remaining Justices voted largely as expected, with Justices Blackmun and Stevens voting for the claim most often, 88.89% of the time, and with Justice Thomas at the opposite end of the

scale, voting for the claim only 28.57% of the time.

The conservative position of Justice Thomas on Table 7 is worth noting. Justice Thomas' record on Table 7 appears to fulfill at least some of the conservative hopes that surrounded his confirmation. But this is not all. His conservative presence on the Court also lends added importance to the slight overall liberal shift reflected on Table 7. Justice Thurgood Marshall, whom Justice Thomas replaced, led the field on Table 7 in 1990, voting for the claim 86.7% of the time. In spite of the replacement of 1990's most liberal Justice in this category by 1991's most conservative, the overall results on Table 7 still gravitated to the left. This phenomenon indicates that—despite the relatively small liberal shift in Table 7—a significant reorientation of the Court may well have taken place.

#### *D. Jurisdiction and Justiciability Questions*

TABLE 8  
CASES RAISING A CHALLENGE TO  
THE EXERCISE OF JURISDICTION

Justice	1991 Term Votes			% Votes for Jurisdiction				
	For Juris.	Against Juris.	1991 Term	1990 Term	1989 Term	1988 Term	1987 Term	1986 Term
Souter	21	7	75.00	57.6	-----	-----	-----	-----
Stevens	21	7	75.00	91.4	68.0	73.0	57.1	71.4
Kennedy	22	8	73.33	58.3	64.0	51.4	56.3	-----
Blackmun	20	8	71.43	80.0	79.2	64.9	58.1	64.3
White	20	9	68.97	63.9	68.0	62.2	51.2	71.4
Thomas	16	8	66.67	-----	-----	-----	-----	-----
O'Connor	19	11	63.33	54.3	68.0	51.4	42.9	64.3
Rehnquist	18	11	62.07	54.3	60.0	51.4	47.9	67.9
Scalia	16	13	55.17	48.5	60.0	50.0	36.6	61.5
Majority								
All Cases	22	8	73.33	63.9	64.0	62.2	55.8	60.7
Split Decisions	9	4	69.23	38.9	33.0	62.5	71.4	-----
Unanimous	13	4	76.47	88.9	81.3	61.9	48.3	-----

Table 8 demonstrates a significant shift in favor of liberal outcomes on jurisdictional issues, with the Court ruling in favor of jurisdiction 73.33% of the time, compared to only 63.9% in 1990. The liberal outcome in split decisions is even more

notable, with the Court asserting jurisdiction in 69.23% of these cases, a 30.33 point increase from the 1990 Term.

The individual rankings for the bottom half of Table 8 are not particularly surprising. Chief Justice Rehnquist and Justices O'Connor and Scalia maintain the same relative positions they occupied in the 1990 Term—with Justice Scalia being the member of the Court least likely to uphold a jurisdictional claim. Justice White maintains a position in the middle of the chart, and Justice Thomas exhibits a voting record roughly comparable to those of the Chief Justice and Justice O'Connor. But, while the bottom half of Table 8 may be predictable, the top half reveals some fairly surprising movement by Justices who, according to popular theory, should vote in a “conservative” or “liberal” fashion.

For example, Justice Souter (a supposed “conservative”) ties with Justice Stevens (a traditionally “liberal” Justice) as the member of the Court most likely to assert federal jurisdiction, finding in favor of jurisdictional claims 75% of the time. Justice Kennedy similarly exhibits a more liberal voting record in 1991, adding 15.03 points to his record from 1990 and moving into a position 1.67 points behind Justices Souter and Stevens and 1.9 points ahead of Justice Blackmun. In counterpoise to the movement of Justices Souter and Kennedy, however, is the record of Justices Stevens and Blackmun. Although they maintain positions high on the “liberal” end of Table 8, Justices Stevens and Blackmun actually voted more conservatively in 1991, dropping 16.4 and 8.57 points respectively from their 1990 records.

The pronounced liberal movement in Table 8 must be due, at least in part, to the nature of the cases addressed by the Court in 1991. Six Justices (the Chief Justice, White, O'Connor, Kennedy, Scalia and Souter) voted more frequently in favor of jurisdiction in 1991 than 1990, with only two members of the Court (Justices Blackmun and Stevens) asserting jurisdiction less frequently. This suggests that the nature of the cases—and not just judicial ideology—was playing a significant role in 1991. This supposition is strengthened by the fact that, of the 28 cases raising a jurisdictional question, 13 were decided unanimously in favor of the jurisdictional claim.

Nevertheless, it is unlikely that the evident shift on Table 8 is simply the result of an aberrant universe of cases. The statistics on split decisions (which exclude the unanimous deci-

sions) show even greater liberal movement than the statistics for all (including unanimous) decisions. Moreover, the percentage of votes favoring jurisdiction in 1991 is the highest it has been since the inception of this survey. Finally, Table 8, like Tables 1, 5, and 7, demonstrates significant movement by supposedly "conservative" Justices (here, Justices Souter and Kennedy) into the "liberal" ranks.<sup>35</sup>

The above factors suggest that the movement on Table 8 is significant. Whether it portends a long-term change in direction for the Court only time will tell. But, at least for 1991, Table 8 demonstrates that the Court was much more willing to rule in favor of jurisdictional claims than one would expect from a staunchly "conservative" body.

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35. The movement by Justices Souter and Kennedy noted above is not the result of their participation in the large number of unanimous cases raising a jurisdictional challenge. The same movement is evident even if one considers only their ranking in the outcome of split decisions.

TABLE 8A  
JURISDICTION--SPLIT DECISIONS

Justice	For Claim	Against Claim	1991 Term
Stevens	9	3	75.00
Kennedy	9	4	69.23
Souter	8	4	66.67
Blackmun	8	4	66.67
White	8	5	61.54
Thomas	6	6	50.00
O'Connor	6	7	46.15
Rehnquist	5	7	41.67
Scalia	4	9	30.77
Total	9	4	69.23

*E. Federalism Issues*

TABLE 9  
FEDERALISM CASES

Justice	1991 Term Votes			% Votes for State Claim				
	For State	For U.S.	1991 Term	1990 Term	1989 Term	1988 Term	1987 Term	1986 Term
Blackmun	10	13	43.48	14.3	43.8	40.9	46.2	-----
Rehnquist	10	13	43.48	71.4	56.3	81.0	46.2	-----
O'Connor	9	14	39.13	71.4	56.3	73.7	33.3	-----
Souter	8	14	36.36	83.3	-----	-----	-----	-----
Thomas	7	13	35.00	-----	-----	-----	-----	-----
Stevens	7	15	31.82	28.6	43.8	57.1	46.2	-----
White	7	16	30.43	57.1	43.8	63.6	30.8	-----
Kennedy	6	17	26.09	71.4	56.3	72.7	33.3	-----
Scalia	6	17	26.09	71.4	56.3	76.2	30.8	-----
Majority								
All Cases	6	17	26.09	71.4	43.8	59.1	38.5	-----
Split Decisions	4	10	28.57	80.0	25.0	50.0	33.3	-----
Unanimous	2	7	22.22	50.0	50.0	70.0	42.9	-----

Table 9 deals with questions raised by conflict between federal and state governmental authority.<sup>36</sup> In examining these issues, we assume that the more conservative Justices will tend to favor state authority, while the liberal Justices will tend to support federal authority. On its face, Table 9 suggests a sharp shift to the left, with the Court deciding for the federal government 73.91% of the time, as compared to only 28.6% in 1990. The same shift is evident in the statistics for split decisions, where the Court ruled for the federal government 71.43% of the time. This pronounced movement results in the most liberal voting record for the Court as a whole since the inception of this study.

Almost as surprising as the above statistics is the reorientation of individual Justices on Table 9. Justice Blackmun, who in 1990 voted for the state government only once (and then in

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



a unanimous case), exhibited a considerably more conservative record in 1991, tying with Chief Justice Rehnquist for first place on Table 9 by voting in favor of the state in 10 out of 23 cases. By contrast, Justices Kennedy and Scalia—who in 1990 joined the Chief Justice and Justice O'Connor in voting for the state 71.4% of the time—dropped precipitously to a two-way tie for last place, voting for the state only 26.09% of the time. As a result, the rankings on Table 9 are quite unexpected, with staunchly liberal Justice Blackmun in the most “conservative” position and staunchly conservative Justice Scalia in the most “liberal” slot.

The unusual rankings described above are difficult to explain. They do not appear to be the result of the relatively large number of unanimous cases (seven) decided in favor of the United States in 1991. Indeed, if one removes the unanimous cases from Table 9 (seven for the federal government and two for the state), the rankings of the individual Justices (as well as the relative percentages of cases decided in favor of the state) remain essentially unchanged.<sup>37</sup>

The significance of the unusual ranking in Table 9, however, may be limited. In spite of the large number of cases included on Table 9, there are only a few votes separating the ideologi-

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37. Table 9A reflects the same data as is demonstrated in Table 9 with the unanimous cases removed.

TABLE 9A  
FEDERALISM CASES--SPLIT DECISIONS

Justice	For State	For U.S.	1991 Term
Blackmun	8	6	57.14
Rehnquist	8	6	57.14
O'Connor	7	7	50.00
Souter	6	7	46.15
Thomas	6	7	46.15
Stevens	6	8	42.86
White	5	9	35.71
Kennedy	4	10	28.57
Scalia	4	10	28.57
Total	4	10	28.57

The modified table does reveal a larger spread between the most conservative and the most liberal positions. And although the gap increases from 17.39 to 28.57 points, no clear ideological schism develops.

cal poles—with the consequence that the unpredictable rankings on the Table are the result of voting differences in a fairly narrow range. As a result, the precise rankings of individual Justices on Table 9 may not be terribly meaningful.<sup>38</sup> What is more significant is the fact that the Court, as a whole, took a decidedly more liberal position on federalism issues in 1991 than 1990.

### F. Swing-Vote Analysis

TABLE 10  
SWING-VOTE ANALYSIS: WHO VOTES MOST OFTEN  
WITH THE MAJORITY IN CLOSE CASES

Justice	1991 Term Votes			% Votes with Majority				
	For Maj.	Against Maj.	1991 Term	1990 Term	1989 Term	1988 Term	1987 Term	1986 Term
Souter	14	3	82.35	59.1	-----	-----	-----	-----
Blackmun	12	5	70.59	47.8	33.3	38.2	45.2	-----
Kennedy	11	6	64.71	52.2	71.4	82.4	71.4	-----
White	11	6	64.71	60.9	78.6	76.5	77.4	-----
O'Connor	10	7	58.82	69.6	69.0	76.5	64.5	-----
Stevens	10	7	58.82	47.8	42.9	26.5	61.3	-----
Rehnquist	7	10	41.18	69.6	66.7	76.5	70.0	-----
Scalia	6	11	35.29	52.2	66.7	73.5	66.7	-----
Thomas	4	10	23.53	-----	-----	-----	-----	-----
Conservative Coalition	7	10	41.18	54.5	64.3	76.5	64.5	-----
Liberal Coalition	10	7	58.82	45.5	35.7	23.5	35.5	-----

We identified 17 “swing-vote” decisions for the 1991 Term. In these cases, a shift of a single Justice from the majority to

38. The random outcome on Table 9 can also perhaps be explained by a small number of cases that seem to defy ideological classification. In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992), and *Kraft General Foods, Inc. v. Iowa Dep't of Revenue and Fin.*, 112 S. Ct. 2365 (1992), the Court decided for the United States by a 7-2 vote. In both cases the dissenters were Justice Blackmun and Chief Justice Rehnquist, hardly ideological soulmates. In *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 112 S. Ct. 2447 (1992), the Court by a 6-3 margin found for the State of Wisconsin. In that case, Justices Blackmun, Kennedy, and Chief Justice Rehnquist dissented, again joining the “liberal” and “conservative” wings of the Court. Such unexpected coalitions can explain the unusual rankings on Table 9, particularly in light of the small number of decisions that affect that ranking.

the minority coalition would create a new majority and a different result.<sup>39</sup> 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 of a case decided by a single vote, swing-voting is an important index of ideological influence on Court decision-making.<sup>40</sup> In 1991, the swing-vote table suggests a significant resurgence of liberal influence on the Court.

Within the top six positions on Table 10 we find the two most consistently "liberal" Justices, Blackmun and Stevens; Justice White, who has traditionally been a swing-vote leader; and Justices Souter, O'Connor, and Kennedy, who played a significant role in the outcome of many 1991 swing-vote cases. Far down the list we find the plainly conservative wing of the Court, the Chief Justice and Justices Scalia and Thomas. As this ranking suggests, liberal coalitions generally controlled the outcome of 1991's swing-vote cases. Indeed, liberal coalitions won ten out of the seventeen swing-vote cases. This contrasts markedly with 1990's results, when Justices Marshall, Blackmun, and Stevens were at the bottom of the chart, with conservative Justices filling the top positions.

This is not the first year that the liberal forces on the Court have increased their influence in swing-vote outcomes. A less significant liberal shift was noted in 1990's swing-vote analysis.<sup>41</sup> Professor Riggs, however, hypothesized that this did

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39. Fourteen of these decisions were made by a 5-4 vote. These, and three 5-3 decisions, are included in the table. The usual "swing-vote 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 an affirmance by an equally divided Court. A 5-3 *affirmance* is *not* included, however, because the lower court decision would be affirmed without opinion by a 4-4 vote.

40. The archetypal 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, making the crucial difference on close cases. Justice White has to some extent filled this role in recent years. During the 1987 term, the first year that swing-vote analysis was included in this survey, Justice White voted most frequently with the majority. Justice Kennedy was the most frequent swing voter in 1988, and Justice White again took that role in 1989. In 1990, Justices O'Connor and Rehnquist tied as the most influential Justices in close cases. In 1991, Justice Souter fills the position as most frequent swing voter, voting with the majority in 82.35% of swing-vote cases.

41. Robert E. Riggs, *Supreme Court Voting Behavior: 1990 Term*, 6 B.Y.U. J. PUB. L. 1, 25 (1992).

“not mean that the Court, against all odds, turned in a liberal direction,” but rather indicated that cases with strong ideological content were being decided by a conservative 6-3 majority.<sup>42</sup> An examination of the cases decided by a 6-3 margin continues to lend some support to this hypothesis.

TABLE 10A  
6-3 DECISIONS FOR 1991 TERM

Justice	In Majority	In Dissent	% In Majority
Kennedy	20	3	86.96
Souter	17	5	77.27
O'Connor	17	6	73.91
Scalia	17	6	73.91
White	17	6	73.91
Rehnquist	15	8	65.22
Thomas	14	8	63.64
Stevens	11	12	47.83
Blackmun	8	15	34.78

Table 10A suggests that the two most liberal members of the Court *do not* control the outcome of 6-3 decisions. Indeed, there is a clear break between Justices Blackmun and Stevens—the bottom two Justices on the chart—and the top seven. We can assume from this division that Justices Blackmun and Stevens—while often able to attract one other vote<sup>43</sup>—were unable to get another vote to push the cases into the swing-vote category. As a result, the swing-vote table may somewhat exaggerate liberal influence on the Court.

Nevertheless, the data from the 1991 Term swing-vote category cannot be readily dismissed. The fact remains that a lib-

42. *Id.* at 25-26.

43. These two Justices, though frequently able to garner a third vote, were often unable to do so, as can be seen from the following cases in which they were the sole dissenters against a seven- or six-vote majority: *Ardestani v. Immigration and Naturalization Serv.*, 112 S. Ct. 515 (1991); *Barnhill v. Johnson*, 112 S. Ct. 1386 (1992); *Benten v. Kessler*, 112 S. Ct. 2929 (1992); *Denton v. Hernandez*, 112 S. Ct. 1728 (1992); *Gomez v. United States District Court for Northern District of California*, 112 S. Ct. 1652 (1992); *Medina v. California*, 112 S. Ct. 2572 (1992); *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992); *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992) (6-2); *Suter v. Artist M.*, 112 S. Ct. 1360 (1992); *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011 (1992); *Zatko v. California*, 112 S. Ct. 355 (1991).

eral coalition *did* control the outcome of a majority of the swing-vote decisions. Moreover, that coalition included Justices O'Connor, Kennedy and Souter five times.<sup>44</sup> These three Justices, furthermore, are also at the top of Table 10A, which shows that they often control the outcome of 6-3 decisions. When such a powerful bloc of Justices evidences a willingness to reach liberal results—as they undoubtedly have in 1991—it is a development that cannot be pushed aside as a statistical aberration. Justices O'Connor, Kennedy, and Souter may well be attempting to mitigate the much-anticipated conservative shift of the Rehnquist Court. Rather than propelling it to the right, the voting behavior of these three Justices is keeping the Court in the middle of the road.

#### IV. CONCLUSION

Pontification regarding the supposedly conservative judicial juggernaut created by Presidents Reagan and Bush has continued apace for some time.<sup>45</sup> Indeed, members of the Supreme Court have sometimes themselves expressed concern that liberal monuments of the past were about to be relegated to legal history.<sup>46</sup> The 1991 Term, however, suggests that the pundits—if not wrong—have at least overstated their case, and that the Court—despite the misgivings of some of its members—is not about to dash its past handiwork upon the shoals. Indeed, to paraphrase Mark Twain, reports of judicial liberalism's demise have been greatly exaggerated.<sup>47</sup> The 1991 voting patterns explored above demonstrate that the Court is voting more often in favor of individual rights and less often in

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44. *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992); *Forsyth County, Ga. v. National Movement*, 112 S. Ct. 2395 (1992); *Lee v. International Soc'y for Krishna Consciousness*, 112 S. Ct. 2709 (1992); *Lee v. Weisman*, 112 S. Ct. 2649 (1992); *Sochor v. Florida*, 112 S. Ct. 2102 (1992).

45. *See supra* note 2.

46. *See, e.g., Payne v. Tennessee*, 111 S. Ct. 2597, 2623 (1991) (Marshall, J., dissenting). Justice Marshall stated that "taking into account the majority's additional criterion for overruling—that a case either was decided or reaffirmed by a 5-4 margin 'over spirited dissen[t,]' [cite omitted]—the continued vitality of literally scores of decisions must be understood to depend on nothing more than the proclivities of the individuals who *now* comprise a majority of this Court." After making this assertion, Justice Marshall then proceeded to name a number of cases that the "majority's additional criterion" would place on the "endangered precedents list." *Id.* at 2623 n.2.

47. In a cable from Europe to the Associated Press, Mark Twain is supposed to have said, "The report of my death was an exaggeration." *The Oxford Dictionary of Quotations* 550 (2d ed. 1953).

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favor of judicial restraint than most observers have expected. In short, if the assumptions that have guided this statistical study since its inception are broadly accurate, the monolithically Republican Court *is not* behaving in a monolithically conservative fashion.

## V. APPENDIX

A. *Explanation of Criteria for Selection and Classification of Cases*1. *The universe of cases*

Only cases decided during the 1991 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 in 1991 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 her personal capacity is included if 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 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 freedom 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 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 also is 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*

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

- Allied-Signal, Inc. v. Director, Division of Taxation, 112 S. Ct. 2251 (1992)
- Barker v. Kansas, 112 S. Ct. 1619 (1992) (Unanimous)
- Burdick v. Takushi, 112 S. Ct. 2059 (1992)
- Burson v. Freeman, 112 S. Ct. 1846 (1992) (Thomas, J., did not participate)
- Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992)
- City of Burlington v. Dague, 112 S. Ct. 2638 (1992)
- Collins v. City of Harker Heights, 112 S. Ct. 1061 (1992) (Unanimous)
- County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 112 S. Ct. 683 (1992) (2 issues; 1 was unanimous)
- Denton v. Hernandez, 112 S. Ct. 1728 (1992)
- Forsyth County, Georgia v. Nationalist Movement, 112 S. Ct. 2395 (1992)
- Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 112 S. Ct. 2019 (1992)
- Franklin v. Gwinnett County Public Schools, 112 S. Ct. 1028 (1992) (Unanimous)
- Freeman v. Pitts, 112 S. Ct. 1430 (1992) (Unanimous; Thomas, J., did not participate)
- Gade v. National Solid Wastes Management, 112 S. Ct. 2375 (1992)
- General Motors Corp. v. Romein, 112 S. Ct. 1105 (1992) (Unanimous)
- Hilton v. South Carolina Public Railways Commission, 112 S. Ct. 560 (1991) (Thomas, J., did not participate)
- Hudson v. McMillian, 112 S. Ct. 995 (1992)

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International Society for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992)  
Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance, 112 S. Ct. 2365 (1992)  
Lee v. International Society for Krishna Consciousness, Inc., 112 S. Ct. 2709 (1992) (Per curiam)  
Lee v. Weisman, 112 S. Ct. 2649 (1992)  
Lucas v. South Carolina Coastal Commission, 112 S. Ct. 2886 (1992) (Souter, J., did not decide this issue)  
Mireles v. Waco, 112 S. Ct. 286 (1991) (Per curiam; Thomas, J., did not participate)  
Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031 (1992) (Souter, J., did not participate)  
Nordlinger v. Hahn, 112 S. Ct. 2326 (1992)  
Norman v. Reed, 112 S. Ct. 698 (1992) (Thomas, J., did not participate)  
Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (4 issues, 1 of which Stevens, J., did not decide)  
Presley v. Etowah County Commission, 112 S. Ct. 820 (1992)  
Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992) (2 issues; 1 of which was unanimous)  
Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748 (1992) (Thomas, J., did not participate)  
Simon & Schuster, Inc. v. New York State Crime Victims Board, 112 S. Ct. 501 (1991) (Unanimous; Thomas, J., did not participate)  
Smith v. Barry, 112 S. Ct. 678 (1992) (Unanimous)  
Suter v. Artist M., 112 S. Ct. 1360 (1992)  
Wisconsin Department of Revenue v. William Wrigley, Jr., Co., 112 S. Ct. 2447 (1992) (2 issues; 1 of which was unanimous)  
Wyatt v. Cole, 112 S. Ct. 1827 (1992)  
Yee v. City of Escondido, 112 S. Ct. 1522 (1992) (Unanimous)

### **Table 2: Civil Cases: Federal Government versus Private Party**

Ardestani v. Immigration and Naturalization Service, 112 S. Ct. 515 (1991) (Thomas, J., did not participate)  
Board of Governors of the Federal Reserve System v. MCorp Financial, Inc., 112 S. Ct. 459 (1991) (Unanimous; Thomas did not participate)  
Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589 (1992)  
Federal Trade Commission v. Ticor Title Insurance Co., 112 S. Ct. 2169 (1992)  
Holywell Corp. v. Smith, 112 S. Ct. 1021 (1992) (Unanimous)  
Hunter v. Bryant, 112 S. Ct. 534 (1991) (Thomas, J., did not participate)  
Immigration and Naturalization Service v. Doherty, 112 S. Ct. 719 (1992) (2 issues; 1 of which was unanimous; Thomas, J., did not participate)  
Immigration and Naturalization Service v. Elias-Zacarias, 112 S. Ct. 812 (1992)  
Immigration and Naturalization Service v. National Center for Immigrants' Rights, Inc., 112 S. Ct. 551 (1991) (Unanimous)  
Indopco, Inc. v. Commissioner of Internal Revenue, 112 S. Ct. 1039 (1992) (Unanimous)  
Lechmere, Inc. v. National Labor Relations Board, 112 S. Ct. 841 (1992)  
Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992)  
McCarthy v. Madigan, 112 S. Ct. 1081 (1992) (Unanimous)  
Molzof v. United States, 112 S. Ct. 711 (1992) (Unanimous)  
National Railroad Passenger Corp. v. Boston and Maine Corp., 112 S. Ct. 1394 (1992)  
Robertson v. Seattle Audubon Society, 112 S. Ct. 1407 (1992) (Unanimous)  
United States Department of State v. Ray, 112 S. Ct. 541 (1991) (Unanimous; Thomas, J., did not participate)  
United States v. Burke, 112 S. Ct. 1867 (1992)  
United States v. Nordic Village, Inc., 112 S. Ct. 1011 (1992)  
United States v. Thompson/Center Arms Co., 112 S. Ct. 2102 (1992)

**Table 3: State Criminal Cases**

Dawson v. Delaware, 112 S. Ct. 1093 (1992)  
 Espinosa v. Florida, 112 S. Ct. 2926 (1992) (Per curiam)  
 Estelle v. McGuire, 112 S. Ct. 475 (1991) (2 issues; 1 was unanimous; Thomas, J., did not participate)  
 Foucha v. Louisiana, 112 S. Ct. 1780 (1992)  
 Georgia v. McCollum, 112 S. Ct. 2348 (1992)  
 Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992)  
 Medina v. California, 112 S. Ct. 2572 (1992)  
 Morgan v. Illinois, 112 S. Ct. 2222 (1992)  
 R.A.V. v. City of St. Paul, Minnesota, 112 S. Ct. 2538 (1992) (Unanimous)  
 Riggins v. Nevada, 112 S. Ct. 1810 (1992)  
 Sawyer v. Whitley, 112 S. Ct. 2514 (1992) (Unanimous)  
 Sochor v. Florida, 112 S. Ct. 2114 (1992) (2 issues)  
 Stringer v. Black, 112 S. Ct. 1130 (1992)  
 Trevino v. Texas, 112 S. Ct. 1547 (1992) (Per curiam; Unanimous)  
 White v. Illinois, 112 S. Ct. 736 (1992) (Unanimous)  
 Wright v. West, 112 S. Ct. 2482 (1992) (Unanimous)

**Table 4: Federal Criminal Cases**

Doggett v. United States, 112 S. Ct. 2686 (1992)  
 Evans v. United States, 112 S. Ct. 1881 (1992)  
 Griffin v. United States, 112 S. Ct. 466 (1991) (Unanimous; Thomas, J., did not participate)  
 Jacobson v. United States, 112 S. Ct. 1535 (1992)  
 United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992)  
 United States v. Felix, 112 S. Ct. 1377 (1992) (Unanimous)  
 United States v. Ibarra, 112 S. Ct. 4 (1991) (Per curiam; Unanimous; Thomas, J., did not participate)  
 United States v. R.L.C., 112 S. Ct. 1329 (1992)  
 United States v. Salerno, 112 S. Ct. 2503 (1992)  
 United States v. Williams, 112 S. Ct. 1735 (1992)  
 United States v. Wilson, 112 S. Ct. 1351 (1992)  
 Wade v. United States, 112 S. Ct. 1840 (1992) (Unanimous)  
 Williams v. United States, 112 S. Ct. 1112 (1992)

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

Burdick v. Takushi, 112 S. Ct. 2059 (1992)  
 Burson v. Freeman, 112 S. Ct. 1846 (1992) (Thomas, J., did not participate)  
 Dawson v. Delaware, 112 S. Ct. 1093 (1992)  
 Forsyth County, Georgia v. Nationalist Movement, 112 S. Ct. 2395 (1992) (Rehnquist, C.J., and Scalia, Thomas, and White, JJ., did not address this issue)  
 International Society for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992)  
 Lee v. International Society for Krishna Consciousness, Inc., 112 S. Ct. 2709 (1992) (Per curiam)  
 Norman v. Reed, 112 S. Ct. 698 (1992) (Thomas, J., did not participate)  
 R.A.V. v. City of St. Paul, Minnesota, 112 S. Ct. 2538 (1992) (Unanimous)  
 Simon & Schuster, Inc. v. New York State Crime Victims Board, 112 S. Ct. 501 (1991) (Unanimous; Thomas, J., did not participate)

**Table 6: Cases Involving Equal Protection Claims**

Burlington Northern Railroad Co. v. Ford, 112 S. Ct. 2184 (1992) (Unanimous)  
 Freeman v. Pitts, 112 S. Ct. 1430 (1992) (Unanimous; Thomas, J., did not participate)  
 Georgia v. McCollum, 112 S. Ct. 2348 (1992)

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Nordlinger v. Hahn, 112 S. Ct. 2326 (1992)  
Trevino v. Texas, 112 S. Ct. 1547 (1992) (Per curiam; Unanimous)  
United States v. Fordice, 112 S. Ct. 2727 (1992) (Unanimous)

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

Ardestani v. Immigration and Naturalization Service, 112 S. Ct. 515 (1991) (Thomas, J., did not participate)  
Collins v. City of Harker Heights, 112 S. Ct. 1061 (1992) (Unanimous)  
Franklin v. Gwinnett County Public Schools, 112 S. Ct. 1028 (1992) (Unanimous)  
Hafer v. Melo, 112 S. Ct. 358 (1991) (Unanimous; Thomas, J., did not participate)  
Hudson v. McMillian, 112 S. Ct. 995 (1992)  
Presley v. Etowah County Commission, 112 S. Ct. 820 (1992)  
Suter v. Artist M., 112 S. Ct. 1360 (1992)  
United States v. Fordice, 112 S. Ct. 2727 (1992) (Unanimous)  
Wyatt v. Cole, 112 S. Ct. 1827 (1992)

### **Table 8: Cases Involving Jurisdictional Issues**

American National Red Cross v. S.G., 112 S. Ct. 2465 (1992)  
Ankenbrandt v. Richards, 112 S. Ct. 2206 (1992) (Unanimous)  
Argentina v. Weltover, Inc., 112 S. Ct. 2160 (1992) (Unanimous)  
Board of Governors of the Federal Reserve System v. MCorp Financial, Inc., 112 S. Ct. 459 (1991) (Unanimous; Thomas, J., did not participate)  
Connecticut National Bank v. Germain, 112 S. Ct. 1146 (1992) (Unanimous)  
Estelle v. McGuire, 112 S. Ct. 475 (1991) (Unanimous; Thomas, J., did not participate)  
Forsyth County, Georgia v. Nationalist Movement, 112 S. Ct. 2395 (1992)  
Franklin v. Massachusetts, 112 S. Ct. 2767 (1992) (2 issues)  
Georgia v. McCollum, 112 S. Ct. 2348 (1992)  
Lucas v. South Carolina Coastal Commission, 112 S. Ct. 2886 (1992)  
Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992)  
McCarthy v. Madigan, 112 S. Ct. 1081 (1992) (Unanimous)  
Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031 (1992) (Rehnquist, C.J., and Blackmun and Stevens, JJ., did not decide jurisdiction issue; Souter, J., did not participate)  
New York v. United States, 112 S. Ct. 2408 (1992) (Unanimous; Blackmun, Stevens and White, JJ., did not specifically decide)  
Norman v. Reed, 112 S. Ct. 698 (1992) (Unanimous; Scalia, J., did not specifically decide; Thomas, J., did not participate)  
Smith v. Barry, 112 S. Ct. 678 (1992) (Unanimous)  
Sochor v. Florida, 112 S. Ct. 2114 (1992)  
Taylor v. Freeland & Kronz, 112 S. Ct. 1644 (1992)  
Trevino v. Texas, 112 S. Ct. 1547 (1992) (Per curiam; Unanimous)  
United States Department of Commerce v. Montana, 112 S. Ct. 1415 (1992) (Unanimous)  
United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992)  
United States v. Ibarra, 112 S. Ct. 4 (1991) (Per curiam; Unanimous; Thomas, J., did not participate)  
United States v. Williams, 112 S. Ct. 1735 (1992) (Thomas, J., did not decide the issue)  
Wade v. United States, 112 S. Ct. 1840 (1992) (Unanimous)  
Willy v. Coastal Corp., 112 S. Ct. 1076 (1992) (Unanimous)  
Wooddell v. International Brotherhood of Electrical Workers, Local 71, 112 S. Ct. 494 (1991) (Unanimous; Thomas, J., did not participate)  
Wyoming v. Oklahoma, 112 S. Ct. 789 (1992)  
Yee v. City of Escondido, 112 S. Ct. 1522 (1992) (2 issues, 1 of which Souter, J., did not decide; both were unanimous)

**Table 8A: Jurisdiction—Split Decisions**

American National Red Cross v. S.G., 112 S. Ct. 2465 (1992)  
 Forsyth County, Georgia v. Nationalist Movement, 112 S. Ct. 2395 (1992)  
 Franklin v. Massachusetts, 112 S. Ct. 2767 (1992) (2 issues)  
 Georgia v. McCollum, 112 S. Ct. 2348 (1992)  
 Lucas v. South Carolina Coastal Commission, 112 S. Ct. 2886 (1992)  
 Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992)  
 Sochor v. Florida, 112 S. Ct. 2114 (1992)  
 Taylor v. Freeland & Kronz, 112 S. Ct. 1644 (1992)  
 United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992)  
 United States v. Williams, 112 S. Ct. 1735 (1992) (Thomas, J., did not decide the issue)  
 Wyoming v. Oklahoma, 112 S. Ct. 789 (1992)

**Table 9: Cases Raising a Federalism Issue**

Allied-Signal, Inc. v. Director, Division of Taxation, 112 S. Ct. 2251 (1992)  
 Ankenbrandt v. Richards, 112 S. Ct. 2206 (1992) (2 issues; 1 unanimous 9-0 for U.S.; 1 unanimous 7-0 for State; Stevens and Thomas, JJ., did not decide second issue)  
 Barker v. Kansas, 112 S. Ct. 1619 (1992) (Unanimous)  
 Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992) (2 issues)  
 County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 112 S. Ct. 683 (1992) (2 issues; 1 of which was unanimous)  
 Federal Trade Commission v. Tior Title Insurance Co., 112 S. Ct. 2169 (1992)  
 Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 112 S. Ct. 2019 (1992)  
 Gade v. National Solid Wastes Management Association, 112 S. Ct. 2374 (1992)  
 Hilton v. South Carolina Public Railways Commission, 112 S. Ct. 560 (1991) (Thomas, J., did not participate)  
 Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance, 112 S. Ct. 2365 (1992)  
 Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031 (1992) (Souter, J., did not participate)  
 New York v. United States, 112 S. Ct. 2408 (1992) (2 issues; 1 of which was unanimous)  
 Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992) (2 issues; 1 of which was unanimous)  
 United States Department of Commerce v. Montana, 112 S. Ct. 1415 (1992) (Unanimous)  
 United States Department of Energy v. Ohio, 112 S. Ct. 1627 (1992)  
 United States v. Alaska, 112 S. Ct. 1606 (1992) (Unanimous)  
 Wisconsin Department of Revenue v. William Wrigley, Jr., Co., 112 S. Ct. 2447 (1992)  
 Wooddell v. International Brotherhood of Electrical Workers, Local 71, 112 S. Ct. 494 (1991) (Unanimous; Thomas, J., did not participate)

**Table 10: Swing-Vote Cases**

Allied-Signal, Inc. v. Director, Division of Taxation, 112 S. Ct. 2251 (1992) (Majority: Kennedy, Scalia, Souter, Stevens, White)  
 American National Red Cross v. S.G., 112 S. Ct. 2465 (1992) (Majority: Souter, White, Blackmun, Stevens, Thomas)  
 Burson v. Freeman, 112 S. Ct. 1846 (1992) (Thomas did not participate) (Majority: Blackmun, Kennedy, Rehnquist, Scalia, White) (5-3 to reverse)  
 Doggett v. United States, 112 S. Ct. 2686 (1992) (Majority: Blackmun, Kennedy, Souter, Stevens, White)  
 Forsyth County, Georgia v. Nationalist Movement, 112 S. Ct. 2395 (1992) (Majority: Blackmun, Stevens, Kennedy, O'Connor, Souter)  
 Foucha v. Louisiana, 112 S. Ct. 1780 (1992) (Majority: Blackmun, O'Connor, Souter, Stevens, White)

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- Gade v. National Solid Wastes Management Association, 112 S. Ct. 2374 (1992) (Majority: Kennedy, O'Connor, Rehnquist, Scalia, White)
- Immigration and Naturalization Service v. Doherty, 112 S. Ct. 719 (1992) (Majority: Blackmun, Kennedy, O'Connor, Rehnquist, White) (5-3 to reverse; Thomas did not participate)
- Jacobson v. United States, 112 S. Ct. 1535 (1992) (Majority: Blackmun, Souter, Stevens, Thomas, White)
- Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992) (Majority: White, Rehnquist, Scalia, Souter, Thomas)
- Lee v. International Society for Krishna Consciousness, Inc., 112 S. Ct. 2709 (1992) (Per curiam) (Majority: Blackmun, Kennedy, O'Connor, Souter, Stevens)
- Lee v. Weisman, 112 S. Ct. 2649 (1992) (Majority: Blackmun, Kennedy, O'Connor, Souter, Stevens)
- Mireles v. Waco, 112 S. Ct. 286 (1991) (Per curiam) (Majority: Blackmun, O'Connor, Rehnquist, Souter, White; Minority: Kennedy, Scalia, Stevens) (5-3 to reverse; Thomas did not participate)
- Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (Majority: Blackmun, Kennedy, O'Connor, Souter, Stevens)
- Sochor v. Florida, 112 S. Ct. 2114 (1992) (Majority: Blackmun, Kennedy, O'Connor, Souter, Stevens)
- United States v. Thompson/Center Arms Co., 112 S. Ct. 2102 (1992) (Majority: O'Connor, Rehnquist, Scalia, Souter, Thomas)
- United States v. Williams, 112 S. Ct. 1735 (1992) (Majority: Kennedy, Rehnquist, Scalia, Souter, White)

### Table 11: 1991 6-3 Decisions

- Burdick v. Takushi, 112 S. Ct. 2059 (1992)
- Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992)
- City of Burlington v. Dague, 112 S. Ct. 2638 (1992)
- Eastman Kodak Co. v. Image Technical Services, Inc., 112 S. Ct. 2072 (1992)
- Espinosa v. Florida, 112 S. Ct. 2926 (1992)
- Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589 (1992)
- Evans v. United States, 112 S. Ct. 1881 (1992)
- Federal Trade Commission v. Ticor Title Insurance Co., 112 S. Ct. 2169 (1992)
- Immigration and Naturalization Service v. Elias-Zacarias, 112 S. Ct. 812 (1992)
- International Society for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992)
- Lechmere, Inc. v. National Labor Relations Board, 112 S. Ct. 841 (1992)
- Lucas v. South Carolina Coastal Commission, 112 S. Ct. 2886 (1992)
- Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031 (1992)
- Morgan v. Illinois, 112 S. Ct. 2222 (1992)
- National Railroad Passenger Corp. v. Boston and Maine Corp., 112 S. Ct. 1394 (1992)
- New York v. United States, 112 S. Ct. 2408 (1992)
- Presley v. Etowah County Commission, 112 S. Ct. 820 (1992)
- Stringer v. Black, 112 S. Ct. 1130 (1992)
- United States Department of Energy v. Ohio, 112 S. Ct. 1627 (1992)
- United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992)
- Wisconsin Department of Revenue v. William Wrigley, Jr., Co., 112 S. Ct. 2447 (1992)
- Wyatt v. Cole, 112 S. Ct. 1827 (1992)
- Wyoming v. Oklahoma, 112 S. Ct. 789 (1992)