

STATISTICAL ABSTRACT

Supreme Court Voting Behavior: 1994 Term

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I. Introduction

This Article, the tenth in a series,¹ tabulates and analyzes the voting behavior of the United States Supreme Court during the 1994 Term.² Our tabulations and statistical analysis are designed to identify movement in the ideological leanings of individual Justices and of the Court as an institution. This analysis, which has been limited to ascertaining trends in voting patterns within ten defined categories of

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1. Professor Robert E. Riggs began this Study with *Supreme Court Voting Behavior: 1986 Term*, 2 B.Y.U. J. PUB. L. 15 (1988).

2. The 1994 Term covers decisions made from October 1994 to October 1995.

cases,³ has been somewhat expanded this year. In addition to a number of qualitative analyses of the numerical results in each of the ten categories, we have employed a quantitative regression analysis to determine whether any ideological movement within the categories is statistically significant, whether the statistics generated by this Study have any predictive value, and whether particular Justices tend to vote together within the identified categories of cases. This year's results reveal not only that the Rehnquist Court is moving slightly toward the ideological center, but also that there are identifiable correlations between the voting patterns of the longest-termed Justices.

First, although the Rehnquist Court is accurately perceived as a "conservative" institution,⁴ seven of the ten categories of cases this Term indicate "liberal" movement by the Court. In 1994, the Court cast more votes against the federal government in civil and criminal litigation (Tables 2 and 4), upheld more First Amendment claims (Table 5), voted in favor of more statutory civil rights claims (Table 7), rejected more limits on its jurisdiction (Table 8), and decided more disputes involving clashes between state and federal power in favor of the federal sovereign (Table 9) than it had in the preceding year. In addition, while nearly two-thirds of the cases decided by a five-to-four vote in 1993 were decided by voting coalitions reaching a conservative result, in an abrupt reversal, nearly two-thirds of the cases decided by one vote last year reached a liberal result (Table 10).

What does this indicate? Is the Rehnquist Court, which is popularly described as decidedly (if not extremely) conservative,⁵ now charting a liberal course? Well, yes and no.

To begin with, the data is not conclusive. It is possible that this Study demonstrates liberal movement only because of its definitional stance. As explained in Section II below, we classify as "liberal" any vote against an assertion of governmental power and in favor of individual rights, and label as "conservative" any contrary vote. Accordingly, some of the liberal movement shown on Tables 2 and 4 (federal

3. See *infra* Tables 1-10.

4. Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1993 Term*, 22 HASTINGS CONST. L.Q. 269, 312 (1995).

5. See, e.g., Joan Biskupic, *Court's Conservatives Make Presence Felt: Reagan Appointees Lead Move Rightward*, WASH. POST, July 2, 1995, at A1; Richard Carelli, *Verdict is in: This Supreme Court Has Taken Sharp Turn to the Right Five Jurists Usually Stick Together to Form Conservative Bloc*, BUFFALO NEWS, June 30, 1995, at A6; James A. Finefrock, *Waiting for Breyer Lacking Leadership From the Center, The U.S. Supreme Court Turns in a Mediocre Year, Dominated by an Outnumbered Right Wing*, S.F. EXAMINER, July 6, 1995, at A16; David G. Savage, *Supreme Court Rulings Herald Rehnquist Era*, L.A. TIMES, July 2, 1995, at A1.

civil and criminal litigation) may result from a politically conservative Court voting against the litigating posture of the politically liberal Clinton Administration. Similarly, the liberal results on Table 5 (First Amendment) flow at least in part from the Court's votes in favor of free speech claims made by politically conservative groups.⁶ Moreover, the liberal movement noted on at least one of the tables this Term may not be reliable: Table 7 (statutory civil rights claims) tabulates the outcome of a mere four cases, a sample too small to have much statistical validity. Accordingly, the assertion that the Court has moved in a liberal direction in 1994 is not beyond question.

Nevertheless, the trend demonstrated by this Term's data cannot be entirely discounted. In 1994, the Court—virtually across the board—cast significantly more liberal votes than in 1993. This suggestion of some liberal movement is reinforced by analysis of Table 1 (state civil litigation), Table 3 (state criminal litigation) and Table 6 (equal protection claims).

Tables 1, 3 and 6 contain the only data indicating a possible conservative voting trend during the 1994 Term. That indication, however, is exceedingly weak. Table 1 shows a mere four-point increase in the percentage of civil cases decided in favor of state government. While this figure demonstrates conservative movement since 1993, the 1994 percentage of cases decided in favor of state governments is still well below the percentage of cases won by state governments in prior years.⁷ Similarly, any conservative trend on Table 3 (state criminal cases) is indeed feeble, with the Court voting a mere two percentage points more often in favor of the states in 1994 than in 1993.

The conservative movement on Table 6 (equal protection), moreover, is not highly reliable, since it is based on the decisions of only three cases. These weak indicators of conservative movement, when contrasted with the more broadly based liberal movement on the other seven tables, imply that the Court in 1994 was in fact moving in a more liberal direction than during the prior Term.

6. *See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510 (1995) (conservative five-member majority upholds First Amendment claim of religious student publication); *Capitol Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. 2440 (1995) (Court, with Justices Stevens and Ginsburg dissenting, upholds First Amendment claim of Ku Klux Klan).

7. While the Court voted somewhat more frequently in favor of state government in 1994 than in 1992 and 1993, those years set the low-water mark for state civil success before the High Court. Therefore, the 45% of all civil cases decided favorably to the states in 1994, while more "conservative" than the outcomes in 1992 and 1993, is still more "liberal" than the outcome recorded during any other year since the inception of this Study.

As a result, when the data on Tables 1 through 10 is viewed as a whole, it suggests that the Rehnquist Court may have reached its conservative high-water mark. The present Court, which now includes two members named by President Clinton,⁸ is rejecting numerous assertions of federal (and state) regulatory power. The Court, furthermore, is increasingly sensitive to First Amendment and statutory civil rights claims. Moreover, and in contrast to the prior two terms, the Court is more willing to exercise its jurisdiction. Any conservative movement by the Court is exceptionally weak. In short, and in comparison to the 1993 Term, the balance of power on the Court is becoming more liberal.⁹

The other matters of note generated by this year's Study are set out in Section IV, which includes various regression analyses of the data collected for this Study. The data demonstrates that while there has been only minor statistically significant ideological movements this term, the data generated over the lifetime of this Study has been rather accurate and (at least as to the voting patterns of individual Justices) may have some predictive value. Section IV also demonstrates that, over time, certain Justices do tend to vote together in various categories of cases. Justice Kennedy, for example, tends to vote in state civil cases with both the Chief Justice and Justice O'Connor. Although subject to important caveats, this statistical result suggests that a state attorney general arguing a civil case could benefit by paying special consideration to the views of those three Justices.

II. Mode of Analysis

Our analysis is drawn from a tabulation of each Justice's votes in ten categories of cases. Nine of the categories are based on the nature of the issues (i.e., First Amendment, equal protection, etc.) or on the character of the parties (i.e., state or federal government litigants).¹⁰

8. Justices Ginsburg and Breyer.

9. The outcome on Table 10 perhaps demonstrates this best. While cases decided by a conservative five-member bloc may have generated significant media attention, the fact remains that the great majority of five-to-four decisions were rendered by a liberal, not a conservative, coalition.

10. The 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, and association.

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

These categories are designed to demonstrate each Justice’s attitude toward two broad issues underlying most Supreme Court decision-making—individual rights and judicial restraint. The tabulation of votes in each category demonstrates, in admittedly broad strokes, the frequency with which individual Justices and the Court as a whole vote to protect individual rights¹¹ or exercise judicial restraint.¹²

From the voting patterns that emerge, we attempt to determine whether individual Justices and the Court are taking “conservative” or “liberal” positions.¹³ For the purposes of this Study, we classify as conservative a vote favoring the government against an individual, a vote against a claim of constitutional or statutory rights, a vote against

6) Equal protection issues.

7) Statutory civil rights claims.

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

9) Federalism issues.

11. 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 or her rights.

12. Jurisdictional questions (Table 8), which exhibit the relative propensity of the Justices to avoid judicial decisions, are perhaps the most direct statistical evidence of judicial restraint as opposed to judicial activism. Other Tables included in this Study, however, also provide some indication of the individual Justices’ (and the Court’s) positions on the “judicial restraint/judicial activism” axis. Judicial restraint is normally identified with deference to the policy-making branches of government, adherence to precedent, avoidance of constitutional bases of decision when narrower grounds exist, respect for the Framers’ intent when construing constitutional text, and avoidance of issues rendered unnecessary by the doctrines of ripeness, mootness, political questions, etc. As a result, a vote in favor of individual rights claims (Tables 3, 4, 5, 6, 7) may provide some indication of “judicial activism” because judicial recognition of individual rights often requires the Court to overturn precedent or invalidate an existing statute. Federalism issues (Table 9) are also relevant because judicial restraint is traditionally identified with respect for the role of the states within the federal system.

13. We are mindful of the limited validity of the “conservative” and “liberal” labels. As one noted federal jurist has commented:

All that I think can be justly said about the utility of applying overworked labels to judges is that they are appropriate to some judges on some issues some of the time. But to use them as generic descriptions characterizing judges on supposedly major points of difference exaggerates the extent to which they may fairly apply.

FRANK M. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* 201 (1980).

the exercise of jurisdiction, or a vote favoring state, as opposed to federal, authority on federalism questions. We classify as liberal all contrary votes.

This analytical scheme, of course, is not perfect. Unanimous decisions (a significant portion of all cases decided by the Court) are included in this Study even though “liberal” or “conservative” ideology may not have influenced the outcome of such cases.¹⁴ Furthermore, concern for individual rights is not always (or even necessarily) the attitudinal opposite of judicial restraint.¹⁵ In other cases, particular circumstances may create a reversal in the expected relationship. For example, liberals may vote against and conservatives in favor of a claim of individual rights. Such events may have occurred several times this term.¹⁶

Nevertheless, the basic assumption that supports this Study—that the general orientation of individual Justices and the Court to individual rights and judicial restraint is suggestive of liberal or conservative ideology—appears generally sound.¹⁷ To the extent that this assumption accurately reflects the proposed ideological tendencies, one can identify trends by tracking the votes reflected in Tables 1 through 10.

To reconcile ideological positions within the Court, the individual votes cast can be readily compared with those of other Justices for any given year. Determination of the current ideological position of the

14. When an opinion is issued by a unanimous Court, it is often true that either the law or the facts, or both, pointed so clearly in one direction that ideology was not a decisional factor.

15. For example, if existing precedent grants extensive protection to individual rights, a Justice who resists efforts to undermine that precedent (a “conservative” trait) is exercising restraint and also acting to preserve individual rights (a “liberal” result).

16. *See, e.g., Adarand Constructors Inc. v. Peña*, 115 S. Ct. 2097 (1995) (politically conservative coalition comprised of Justices O’Connor, Scalia, Kennedy, Thomas, and the Chief Justice voted in favor of an equal protection claim in a “reverse” discrimination case, while the traditional “liberals”—Justices Stevens, Souter, Ginsburg and Breyer—vote in favor of the government, a “conservative” outcome); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510 (1995) (a politically conservative coalition votes in favor of the First Amendment claim brought by a campus religious group, while the “liberal” Justices Stevens, Souter, Ginsburg and Breyer vote against the claimed violation of individual rights); *Miller v. Johnson*, 115 S. Ct. 2475 (1995) (Justices Kennedy, O’Connor, Scalia, Thomas, and the Chief Justice voted in favor of an equal protection claim in a challenge to the racial composition of a voting district, while the Court’s “liberals” cast “conservative” votes supporting the challenged governmental action.).

17. 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 a reluctance 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 rights.

Court as a whole, however, requires comparisons over time. For our analysis, the best available baseline is the comparable data generated for the six prior Terms.¹⁸ In the tables, this information appears in the form of percentages for the Court majority and for each Justice in all but the Swing-Vote Table (Table 10). Figures 1 through 10 graphically demonstrate the voting trends revealed by the tables.

We have also included several regression analyses for the five Justices who have been on the Court since 1987—Justices Scalia, O'Connor, Kennedy, Stevens, and Chief Justice Rehnquist. The remaining four Justices have not been on the Court long enough for us to perform a reliable regression analysis. The goal of Section IV is to test whether any ideological movement this Term by the five longest tenured Justices is statistically significant. In addition, Section IV sets out predicted voting patterns for the upcoming 1995 Term, and identifies several possible voting blocs within the ten categories analyzed in this Study. Among other things, this analysis demonstrates that, over time, certain Justices have indeed tended to vote together in various categories of cases.

However, our data must be interpreted with caution since the percentages on each table 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 term. Although our various regression tests are designed to increase the reliability of this Study, statistics remain a blunt analytical tool for probing the mysteries of a process as delicate as judicial decisionmaking. One cannot be confident that percentage changes from term to term reflect changes in the ideological orientation of an individual Justice or the Court majority.¹⁹

Moreover, while Section IV demonstrates that there are correlations in the voting behavior of individual Justices, such correlations *do not* demonstrate causation. The fact that the Chief Justice and Justices Kennedy and O'Connor tend to vote together in state civil cases simply does not demonstrate that the Chief Justice's vote somehow influences the vote of Justice Kennedy or O'Connor. In short, in

18. We use six years of data primarily to facilitate compilation of the Tables. Because of changes in Court personnel over time, including more than six prior Terms on Tables 1-10 becomes somewhat cumbersome. Comparative analysis of a given Term with six prior Terms, furthermore, is adequate to gauge any ideological fluctuations on the Court.

19. 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 in this Term, 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.

evaluating these findings, one must continually keep in mind the limitations inherent in any attempt to empirically analyze a subjective process.²⁰

III. The Voting Record

We turn now to a detailed examination of the voting behavior of the individual Justices and the Court. As an initial matter, it should be noted that the Court majority vote was very middle-of-the-road in 1994. With the exception of Table 5 (First Amendment Rights) and Table 6 (Equal Protection), which reflects only three total cases, the Court's majority score never ranged below 40% nor above 60%. This outcome, while within predicted statistical values based on prior years' data,²¹ does come as a bit of a surprise considering the supposedly conservative makeup of the Court. This year's data suggests that the Rehnquist Court is moderating its course and moving toward a more centrist position.

20. At this point, one could ask whether this Study—because of its inherent limitations—is worth either conducting or reading. We believe it is. For years, experienced Supreme Court practitioners have attempted to “psyche out” the ideological predilections of individual Justices in framing their arguments to the Court. Moreover, the media (as well as academicians of all stripes) are rather fond of attaching ideological labels to the Court and its personnel. Supreme Court practitioners, legal scholars and the public, therefore, have long assumed that an assessment of Court ideology is valuable—even though such assessments have often been based upon little more than the “gut reactions” of the attorneys, scholars and news reporters involved. This Study, based as it is upon a systematic attempt to objectively gather, quantify and compare data over time, should be somewhat more reliable than such ad hoc assessments.

21. See *infra* Section IV, Regression Tables 1-10.

A. The Data

TABLE 1
CIVIL CASES: STATE GOVERNMENT VERSUS A PRIVATE PARTY

JUSTICE	1994 TERM VOTES			% VOTES FOR GOVERNMENT									
	FOR GOV'T	AGAINST GOV'T	1994 TERM	1993 TERM	1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM				
Rehnquist	12	8	60.00	68.18	52.8	71.4	84.0	70.3	66.7				
Scalia	12	8	60.00	50.00	41.7	64.3	64.0	64.9	59.2				
Thomas	11	9	55.00	45.45	41.7	71.4	—	—	—				
Ginsburg	10	10	50.00	40.91	—	—	—	—	—				
Breyer	8	11	42.11	—	—	—	—	—	—				
Stevens	8	11	42.11	27.27	31.3	29.3	36.0	40.5	35.4				
Kennedy	8	12	40.00	40.91	41.7	42.9	76.0	61.1	57.1				
O'Connor	8	12	40.00	40.91	50.0	50.0	68.0	67.6	57.4				
Souter	7	13	35.00	45.45	36.4	52.5	63.6	—	—				
Majority All Cases	9	11	45.00	40.91	41.7	52.4	64.0	51.4	51.0				
Split Decisions	5	6	45.45	46.15	44.4	51.6	68.8	52.4	64.0				
Unanimous	4	5	44.44	33.33	38.9	54.6	55.6	50.0	50.0				

FIGURE 1

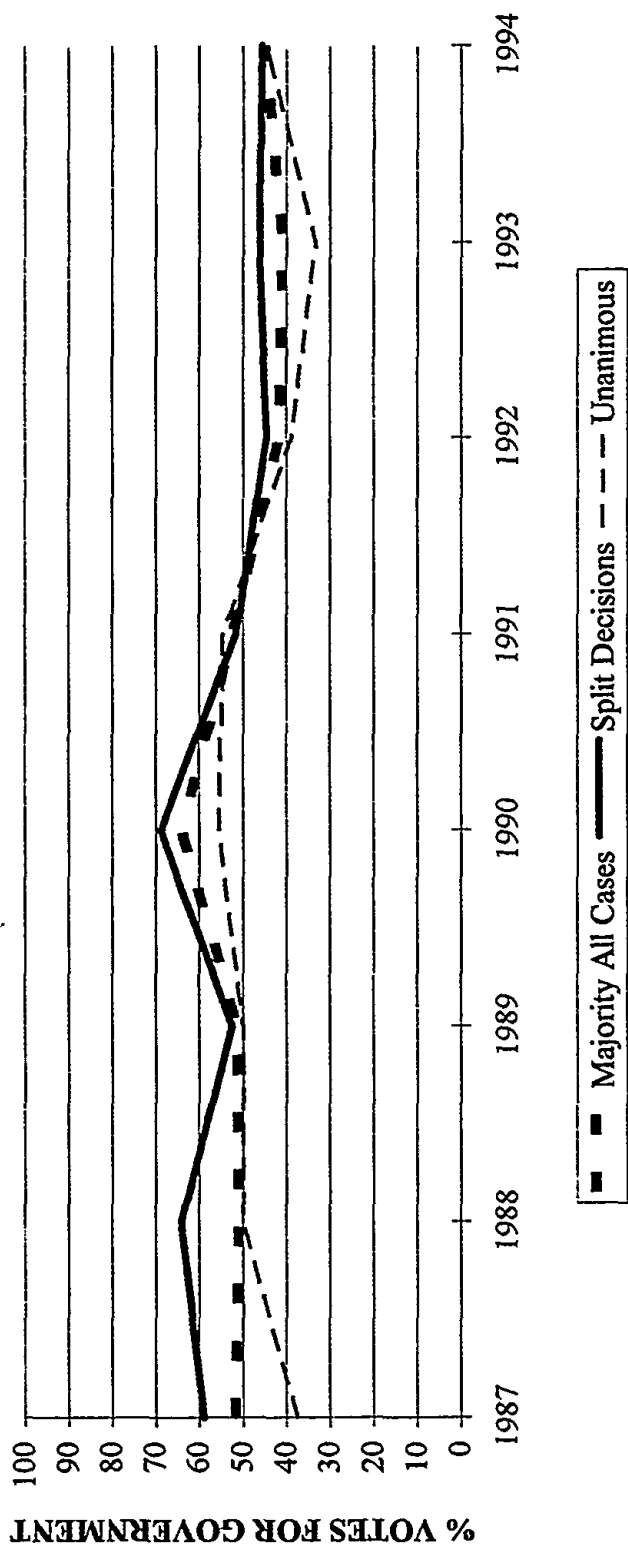


TABLE 2
CIVIL CASES: FEDERAL GOVERNMENT VERSUS A PRIVATE PARTY

JUSTICE	1994 TERM VOTES			% VOTES FOR GOVERNMENT						
	FOR GOV'T	AGAINST GOV'T	1994 TERM	1993 TERM	1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM	
Stevens	13	6	68.42	70.59	34.4	57.1	40.0	57.1	42.9	
Ginsburg	11	7	61.11	58.82	—	—	—	—	—	
Rehnquist	10	9	52.63	58.82	74.2	71.4	70.0	78.6	71.4	
Breyer	9	10	47.37	—	—	—	—	—	—	
Kennedy	9	10	47.37	52.94	70.0	76.2	55.6	60.7	66.7	
Scalia	8	11	42.11	52.94	67.7	71.4	57.9	60.7	59.3	
Souter	8	11	42.11	76.47	70.0	71.4	55.6	—	—	
Thomas	8	11	42.11	47.06	64.5	53.3	—	—	—	
O'Connor	5	13	27.78	56.25	62.5	52.4	60.0	60.7	60.7	
Majority All Cases	8	11	42.11	52.94	66.7	81.0	60.0	71.4	64.3	
Split Decisions	4	8	33.33	42.86	76.5	83.3	60.0	66.7	66.7	
Unanimous	4	3	57.14	60.00	56.3	77.8	60.0	76.9	61.5	

FIGURE 2

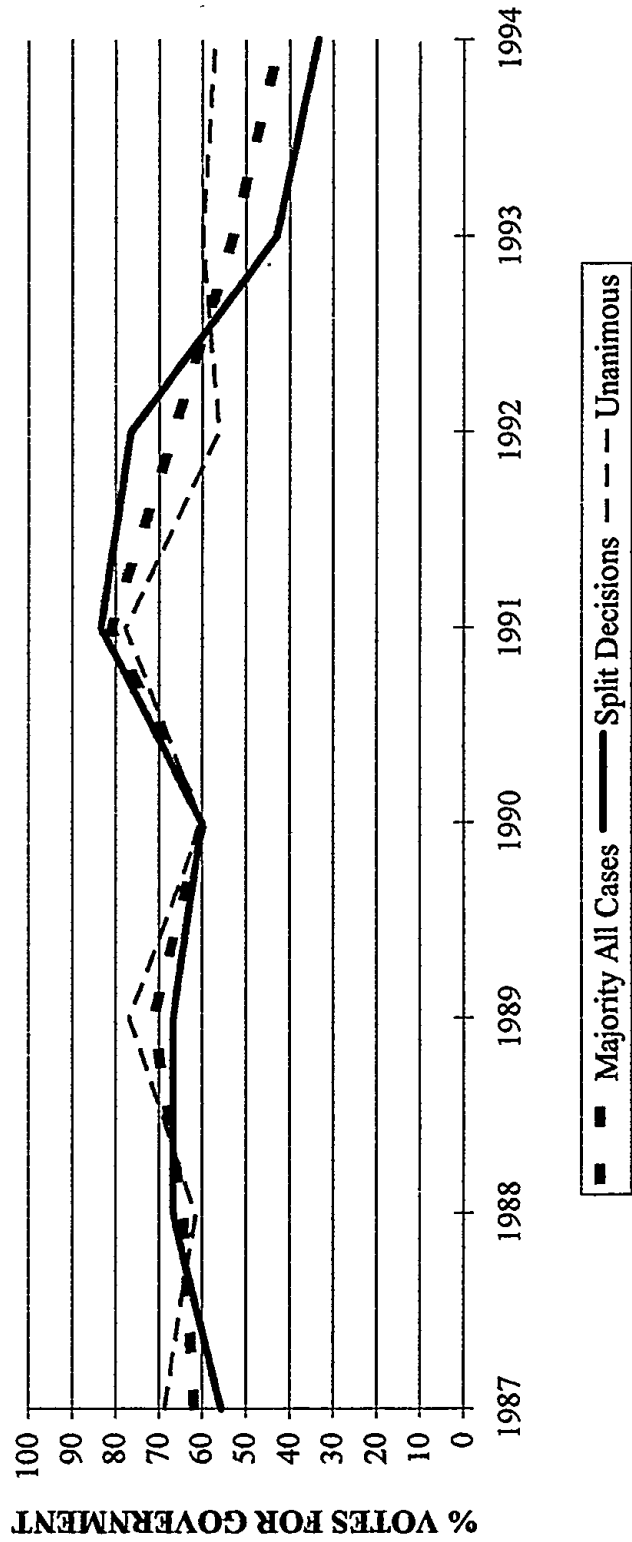


TABLE 3
STATE CRIMINAL CASES

JUSTICE	1994 TERM VOTES			% VOTES FOR GOVERNMENT							
	FOR GOV'T	AGAINST GOV'T	1994 TERM	1993 TERM	1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM		
Thomas	11	1	91.67	87.50	85.7	75.0	—	—	—		
Rehnquist	11	1	91.67	81.25	90.0	66.7	81.5	85.3	85.2		
Scalia	10	2	83.33	81.25	86.4	77.8	74.1	73.5	77.8		
Kennedy	9	3	75.00	50.00	77.3	50.0	57.7	73.5	81.5		
O'Connor	7	5	58.33	68.75	66.7	33.3	66.7	76.5	77.8		
Breyer	5	7	41.67	—	—	—	—	—	—		
Ginsburg	5	7	41.67	43.75	—	—	—	—	—		
Souter	5	7	41.67	25.00	55.0	55.6	68.0	—	—		
Stevens	1	11	8.33	25.00	31.8	27.8	0.0	20.6	37.0		
Majority All Cases	7	5	58.33	56.25	77.3	44.4	55.6	64.7	70.4		
Split Decisions	6	4	60.00	61.54	84.6	33.3	68.2	70.0	72.7		
Unanimous	1	1	50.00	33.33	66.7	66.7	0.0	25.0	60.0		

FIGURE 3

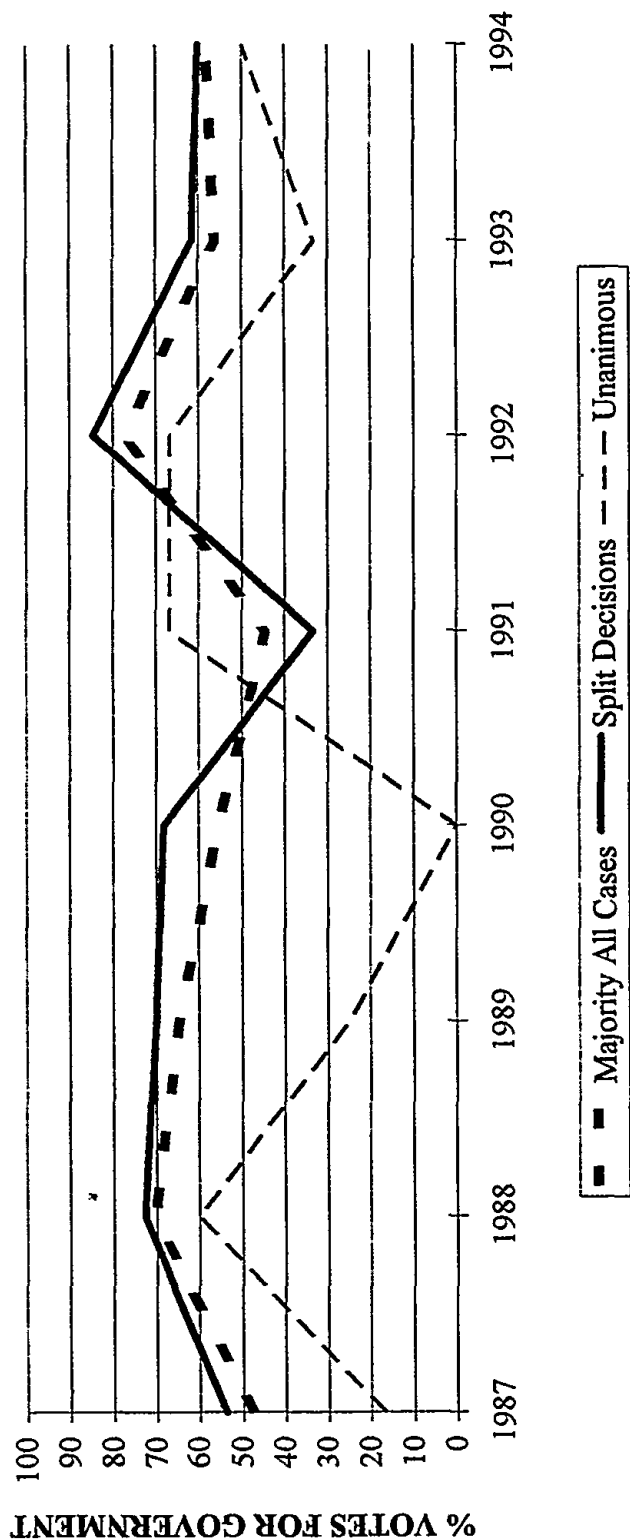


TABLE 4
FEDERAL CRIMINAL CASES

JUSTICE	1994 TERM VOTES			% VOTES FOR GOVERNMENT							
	FOR GOV'T	AGAINST GOV'T	1994 TERM	1993 TERM	1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM		
Breyer	9	4	69.23	—	—	—	—	—	—		
O'Connor	9	4	69.23	75.00	75.0	76.9	70.0	77.8	77.8		
Rehnquist	9	4	69.23	83.33	81.3	76.9	70.0	77.8	88.9		
Ginsburg	8	5	61.54	58.33	—	—	—	—	—		
Kennedy	8	5	61.54	66.67	60.0	84.6	50.0	66.7	88.9		
Souter	8	5	61.54	58.33	43.8	69.2	75.0	—	—		
Thomas	8	5	61.54	83.33	81.3	54.6	—	—	—		
Scalia	7	6	53.85	66.67	62.5	76.9	40.0	66.7	66.7		
Stevens	4	9	30.77	50.00	26.7	38.5	60.0	33.3	66.7		
Majority All Cases	7	6	53.85	66.67	68.8	69.2	60.0	66.7	88.9		
Split Decisions	5	4	55.56	50.00	77.8	55.6	50.0	83.3	100.0		
Unanimous	2	2	50.00	83.33	57.1	100.0	75.0	33.3	66.7		

FIGURE 4

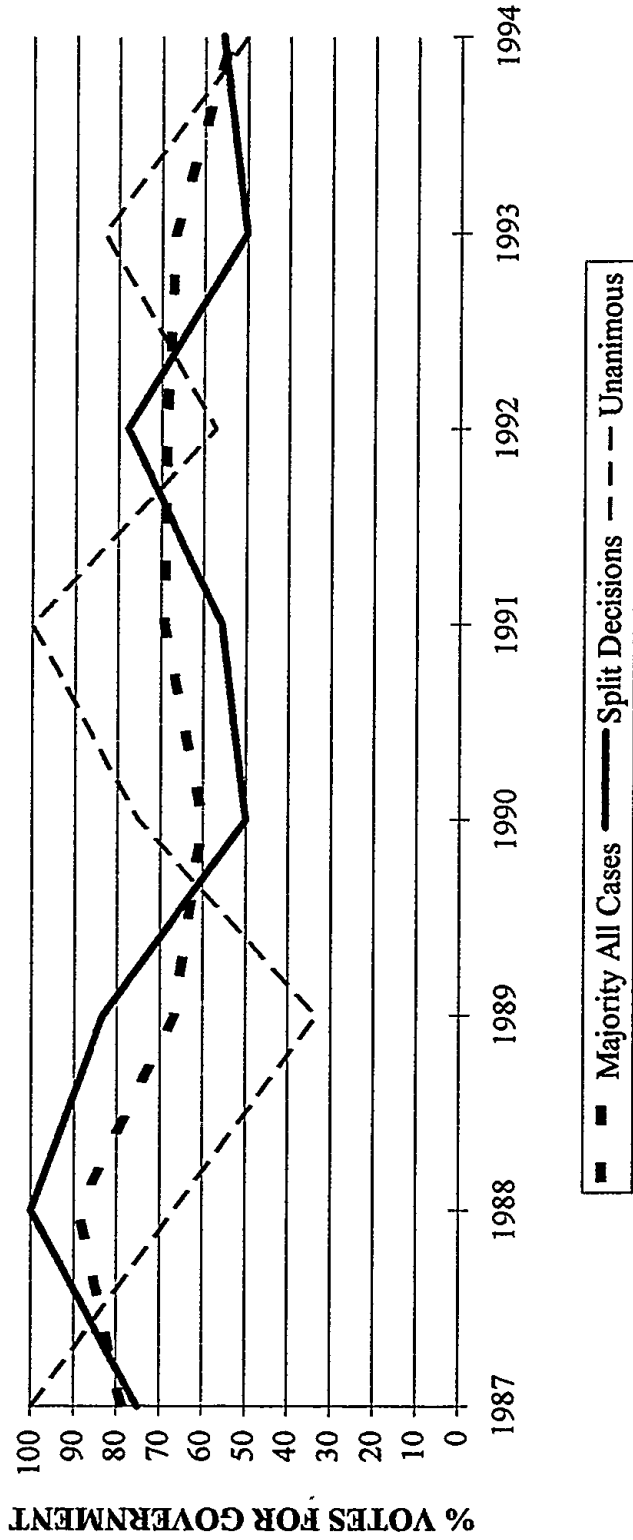


TABLE 5
FIRST AMENDMENT RIGHTS OF EXPRESSION, ASSOCIATION, AND FREE EXERCISE OF RELIGION

JUSTICE	1994 TERM VOTES			% VOTES FOR RIGHTS CLAIM						
	FOR CLAIM	AGAINST CLAIM	1994 TERM	1993 TERM	1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM	
Kennedy	8	1	88.89	71.43	77.8	77.8	41.7	40.0	37.5	
Souter	7	2	77.78	57.14	60.0	88.9	41.7	—	—	
Breyer	6	3	66.67	—	—	—	—	—	—	
Ginsburg	6	3	66.67	71.43	—	—	—	—	—	
O'Connor	6	3	66.67	57.14	36.4	77.8	54.5	26.7	25.0	
Stevens	6	3	66.67	57.14	90.0	100.0	50.0	46.7	64.7	
Thomas	6	3	66.67	85.71	40.0	20.0	—	—	—	
Rehnquist	5	4	55.56	42.86	36.4	50.0	16.7	13.3	18.8	
Scalia	5	4	55.56	85.71	45.5	37.5	25.0	26.7	35.3	
Majority All Cases	7	2	77.78	57.14	45.5	66.7	25.0	40.0	35.3	
Split Decisions	5	1	83.33	40.00	33.3	57.1	30.0	40.0	22.2	
Unanimous	2	1	66.67	100.00	60.0	100.0	0.0	40.0	50.0	

FIGURE 5

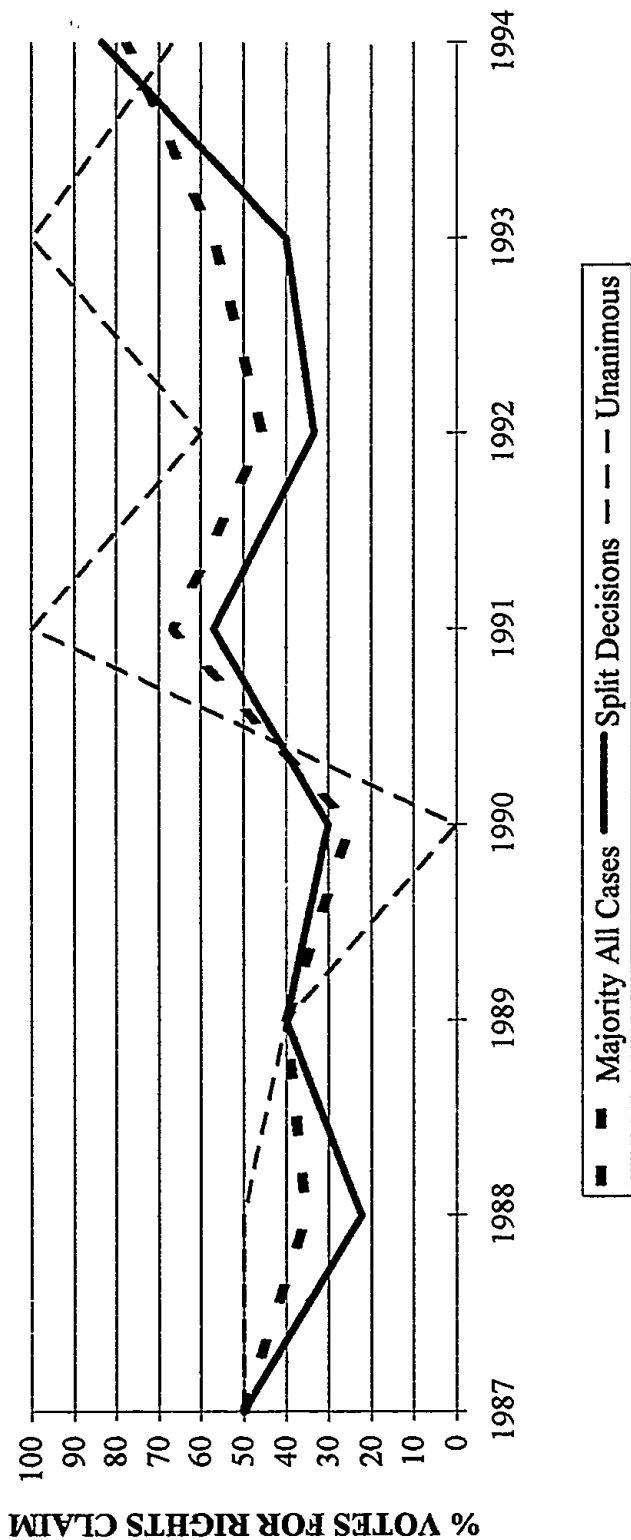


TABLE 6
EQUAL PROTECTION CLAIMS

JUSTICE	1994 TERM VOTES			% VOTES FOR RIGHTS CLAIM						
	FOR CLAIM	AGAINST CLAIM	1994 TERM	1993 TERM	1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM	
Kennedy	2	1	66.67	100.00	20.0	50.0	42.9	25.0	57.1	
O'Connor	2	1	66.67	100.00	40.0	33.3	28.6	25.0	66.7	
Rehnquist	2	1	66.67	0.00	20.0	50.0	14.3	20.0	57.1	
Scalia	2	1	66.67	0.00	20.0	33.3	14.3	25.0	57.1	
Thomas	2	1	66.67	0.00	20.0	60.0	—	—	—	
Breyer	1	2	33.33	—	—	—	—	—	—	
Ginsburg	1	2	33.33	100.00	—	—	—	—	—	
Souter	1	2	33.33	100.00	40.0	50.0	50.0	—	—	
Stevens	1	2	33.33	100.00	40.0	66.7	83.3	0.0	66.7	
Majority All Cases	2	1	66.67	100.00	20.0	50.0	42.9	0.00	57.1	
Split Decisions	2	1	66.67	100.00	33.3	50.0	50.0	0.00	100.0	
Unanimous	0	0	—	0.00	0.0	50.0	33.3	0.0	50.0	

FIGURE 6

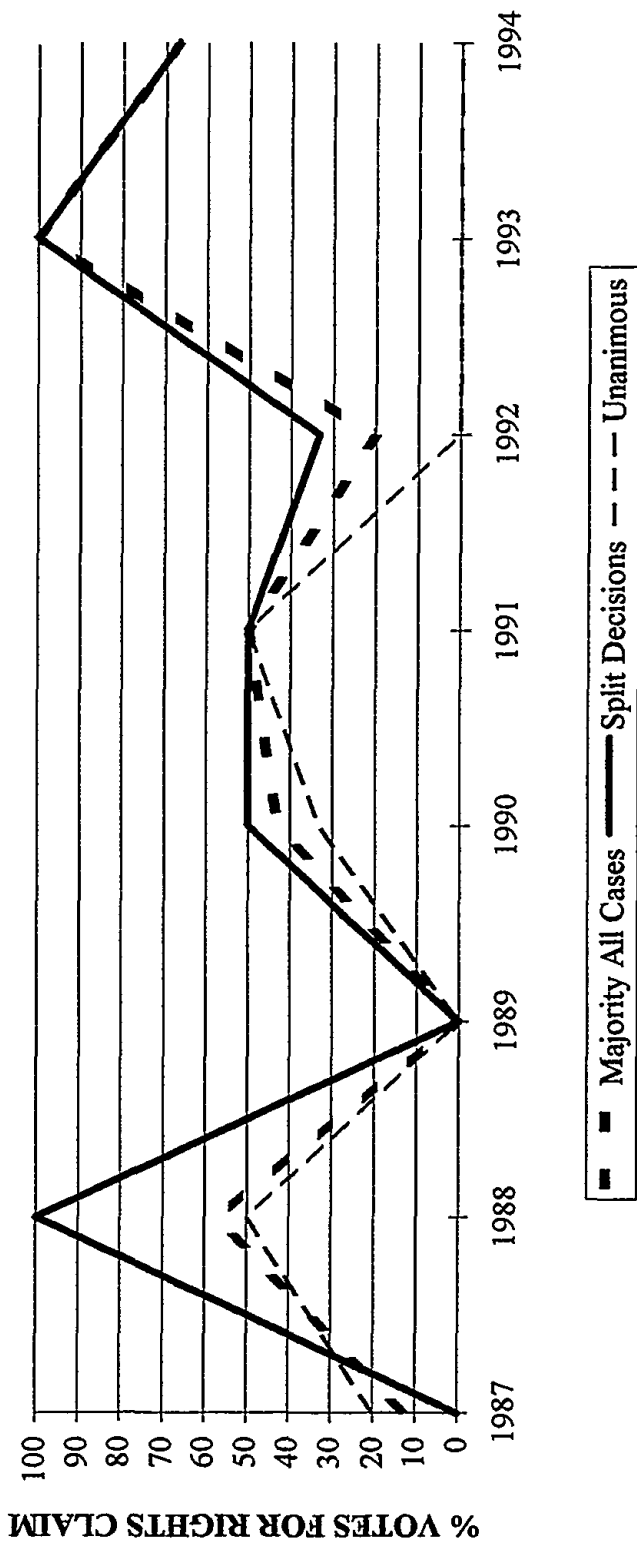


TABLE 7
STATUTORY CIVIL RIGHTS CLAIMS

JUSTICE	1994 TERM VOTES			% VOTES FOR RIGHTS CLAIM						
	FOR CLAIM	AGAINST CLAIM	1994 TERM	1993 TERM	1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM	
Breyer	3	1	75.00	—	—	—	—	—	—	
Ginsburg	3	1	75.00	44.44	—	—	—	—	—	
Souter	3	1	75.00	44.44	45.5	44.4	57.1	—	—	
Stevens	3	1	75.00	55.56	70.0	88.9	80.0	77.8	73.7	
O'Connor	2	2	50.00	33.33	54.6	55.6	53.3	55.6	52.6	
Rehnquist	2	2	50.00	33.33	36.4	44.4	33.3	44.4	35.0	
Kennedy	1	3	25.00	33.33	36.4	55.6	33.3	62.5	45.0	
Scalia	1	3	25.00	33.33	45.5	44.4	46.7	55.6	40.0	
Thomas	1	3	25.00	33.33	45.5	28.6	—	—	—	
Majority All Cases	2	2	50.00	33.33	50.0	55.6	53.3	88.9	50.0	
Split Decisions	1	1	50.00	0.00	50.0	40.0	33.3	83.3	25.0	
Unanimous	1	1	50.00	60.00	50.0	75.0	83.3	100.0	87.5	

FIGURE 7

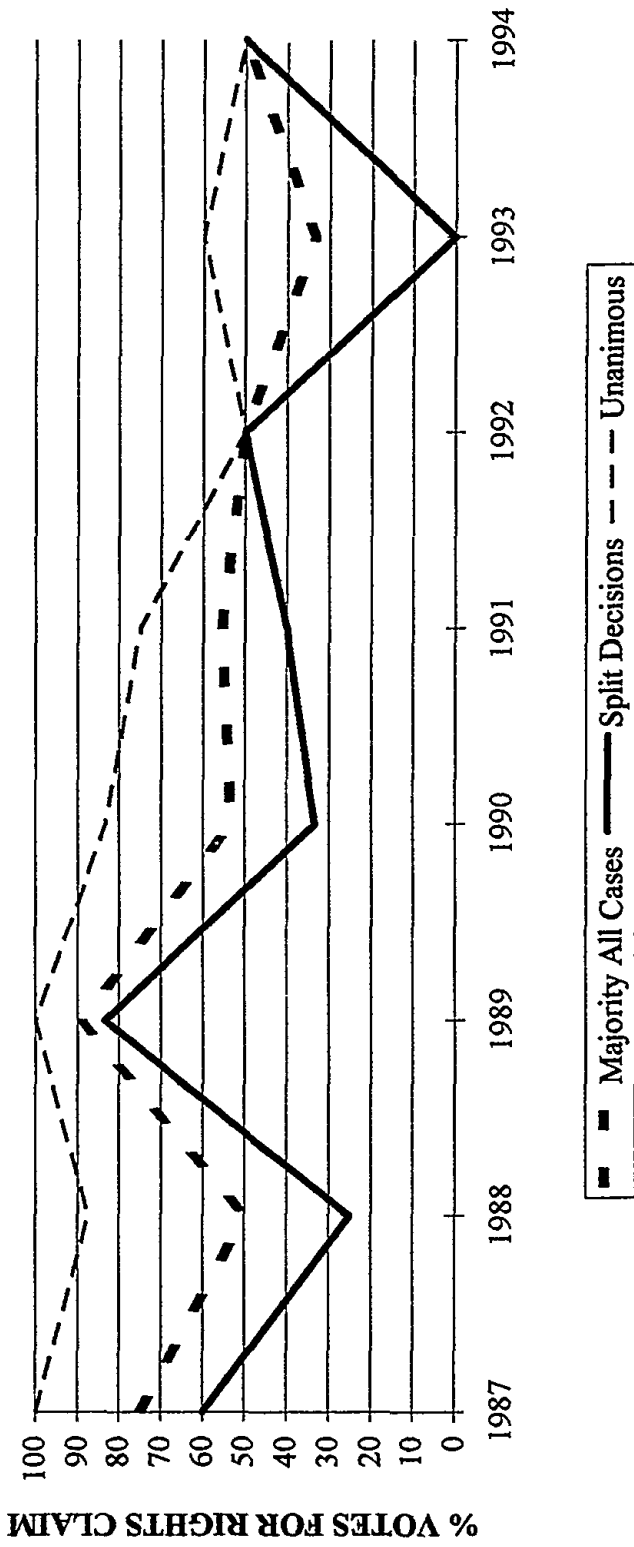


TABLE 8
 CASES RAISING A CHALLENGE TO THE EXERCISE OF JURISDICTION

JUSTICE	1994 TERM VOTES			% VOTES FOR JURISDICTION					
	FOR JURIS.	AGAINST JURIS.	1994 TERM	1993 TERM	1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM
Stevens	8	11	42.11	44.44	69.7	75.0	91.4	68.0	73.0
Kennedy	8	12	40.00	33.33	51.5	73.3	58.3	64.0	51.4
O'Connor	8	12	40.00	22.22	53.1	63.3	54.3	68.0	51.4
Ginsburg	7	12	36.84	33.33	—	—	—	—	—
Scalia	7	13	35.00	22.22	51.5	55.2	48.5	60.0	50.0
Breyer	6	12	33.33	—	—	—	—	—	—
Rehnquist	6	14	30.00	22.22	54.6	62.1	54.3	60.0	51.4
Souter	6	14	30.00	33.33	56.3	75.0	57.6	—	—
Thomas	6	14	30.00	33.33	54.6	66.7	—	—	—
Majority All Cases	8	12	40.00	33.33	52.9	73.3	63.9	64.0	62.2
Split Decisions	6	5	54.55	33.33	37.5	69.2	38.9	33.0	62.5
Unanimous	2	7	22.22	40.00	66.7	76.5	88.9	81.3	61.9

FIGURE 8

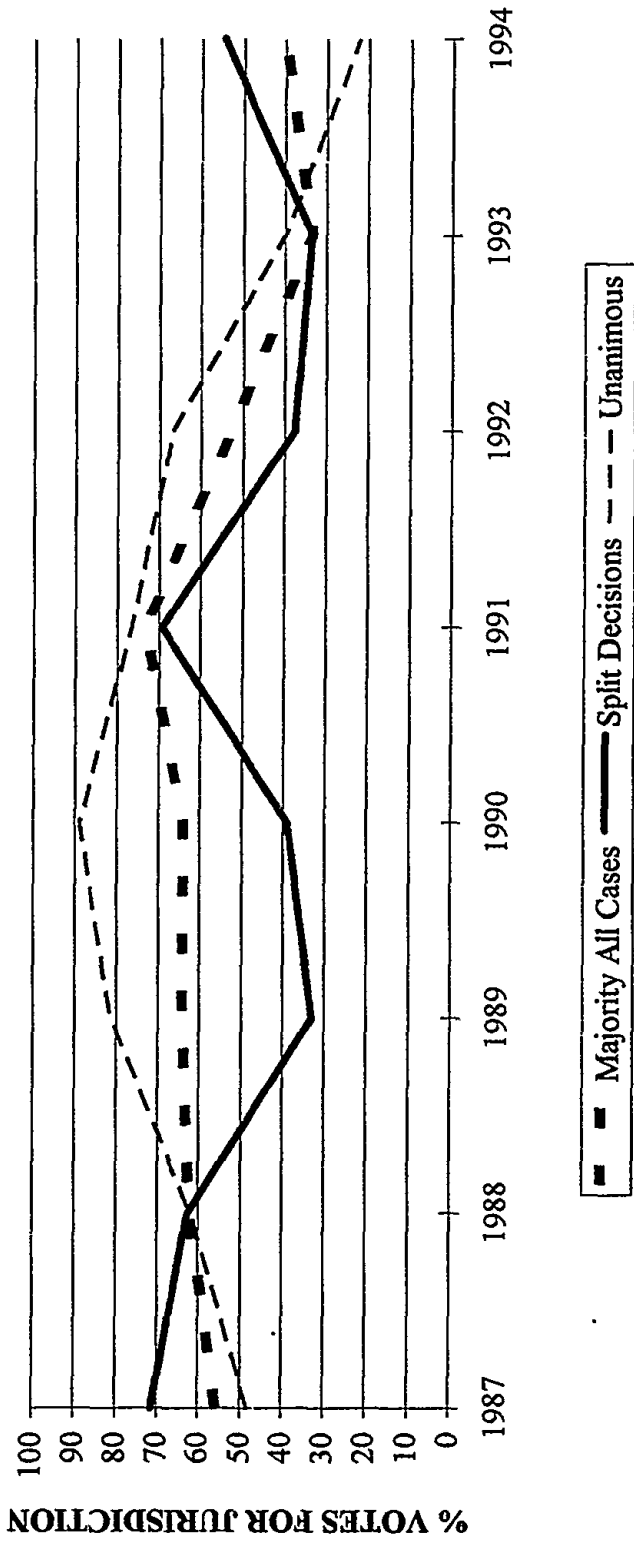


TABLE 9
FEDERALISM CASES

JUSTICE	1994 TERM VOTES			% VOTES FOR STATE CLAIM							
	FOR STATE	FOR U.S.	1994 TERM	1993 TERM	1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM		
Scalia	13	3	81.25	57.14	60.0	26.1	71.4	56.3	76.2		
Rehnquist	13	5	72.22	71.43	73.3	43.5	71.4	56.3	81.0		
Thomas	13	5	72.22	42.86	66.7	35.0	—	—	—		
Kennedy	10	8	55.56	42.86	60.0	26.1	71.4	56.3	72.7		
O'Connor	10	8	55.56	57.14	73.3	39.1	71.4	56.3	73.7		
Stevens	10	8	55.56	57.14	60.0	31.8	28.6	43.8	57.1		
Ginsburg	9	9	50.00	57.14	—	—	—	—	—		
Souter	8	10	44.44	57.14	60.0	36.4	83.3	—	—		
Breyer	7	11	38.89	—	—	—	—	—	—		
Majority All Cases	10	8	55.56	57.14	66.7	26.1	71.4	43.8	59.1		
Split Decisions	4	7	36.36	50.00	57.1	28.6	80.0	25.0	50.0		
Unanimous	6	1	85.71	60.00	75.0	22.2	50.0	50.0	70.0		

FIGURE 9

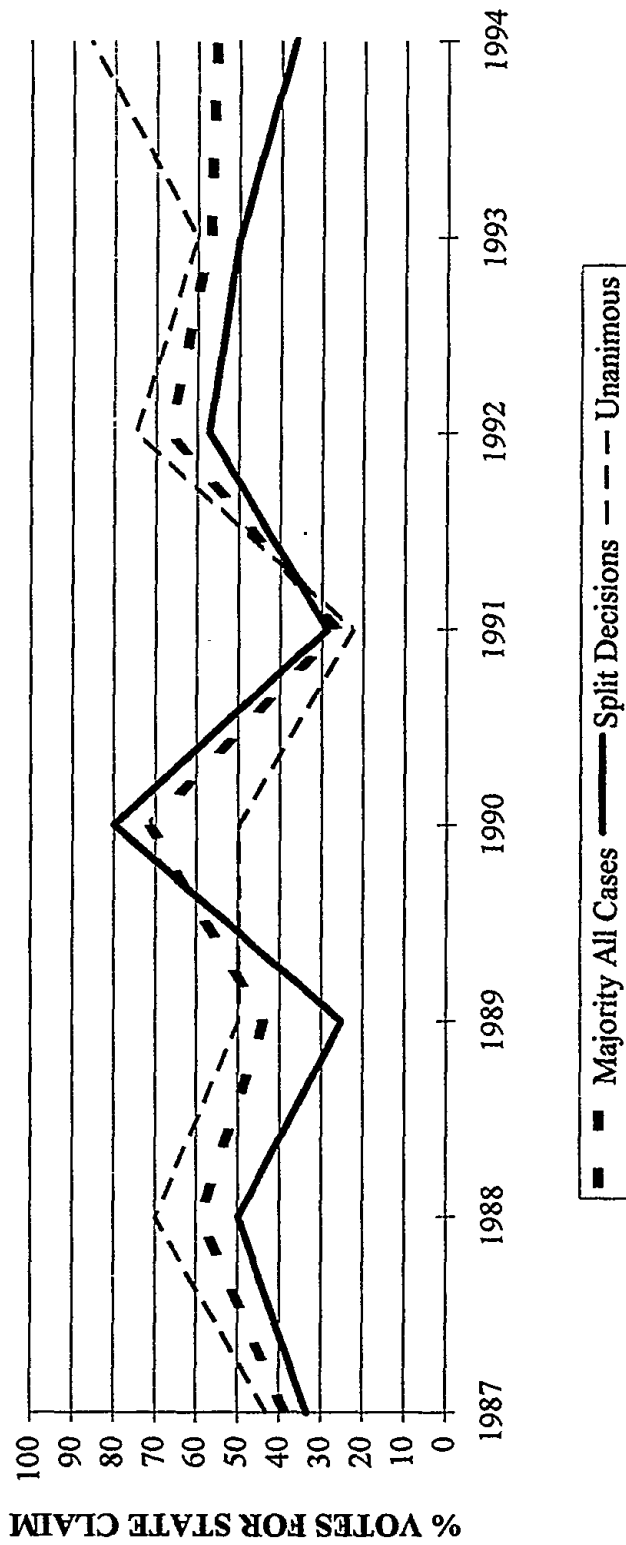
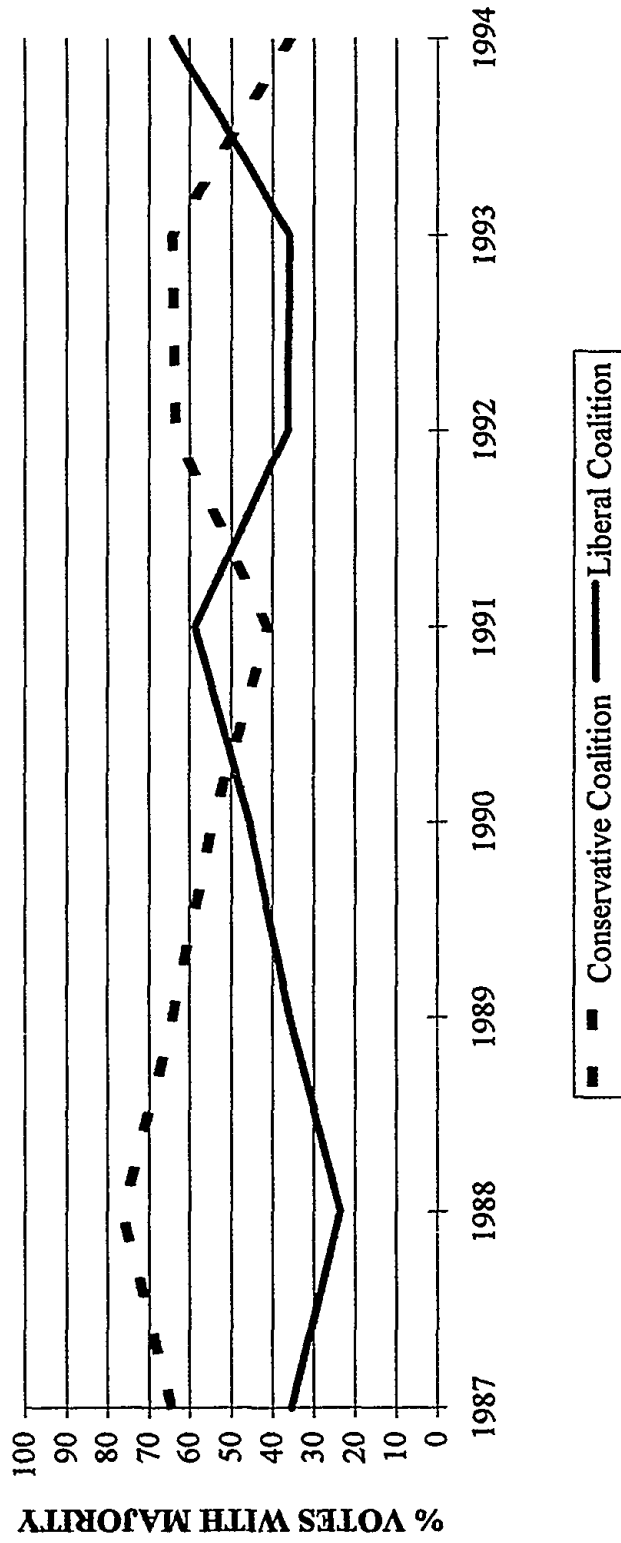


TABLE 10
SWING-VOTE ANALYSIS: WHO VOTES MOST OFTEN WITH THE MAJORITY IN CLOSE CASES

JUSTICE	1994 TERM VOTES			% VOTES WITH MAJORITY					
	FOR MAJ.	AGAINST MAJ.	1994 TERM	1993 TERM	1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM
Kennedy	13	3	81.25	92.86	72.7	64.7	52.2	71.4	82.4
O'Connor	11	5	68.75	57.14	40.9	58.8	69.6	69.0	76.5
Rehnquist	10	6	62.50	71.43	72.7	41.2	69.6	66.7	76.5
Scalia	9	7	56.25	71.43	81.8	35.3	52.2	66.7	73.5
Ginsburg	8	8	50.00	35.71	—	—	—	—	—
Stevens	8	8	50.00	35.71	40.9	58.8	47.8	42.9	26.5
Thomas	8	8	50.00	57.14	72.7	23.5	—	—	—
Breyer	7	9	43.75	—	—	—	—	—	—
Souter	6	10	37.50	42.86	31.8	82.4	59.1	—	—
Conservative Outcome	5	9	35.71	64.29	63.6	41.2	54.5	64.3	76.5
Liberal Outcome	9	5	64.29	35.71	36.4	58.8	45.5	35.7	23.5

FIGURE 10



B. Analysis

Table 1: Civil—State Party

Table 1²² and Figure 1 both show a slight increase in support for state civil cases. Both the Majority All Cases and Unanimous categories rose slightly in 1994 from 40.91% to 45% and from 33.33% to 44.44% respectively. There was a small decrease in the number of decisions decided in favor of state governments in the Split Decision category (46.15% to 45.45%), but the decrease is so small that it seems insignificant. Consequently, in the aggregate, support for state governments in civil cases has increased marginally, ending what was a constant, but gradual decline since 1990.

On an individual basis, Chief Justice Rehnquist remains the most conservative Justice in civil cases involving state governments. In 1994, he voted in favor of state governments 60% of the time. This score is an 8.18 point decrease from 1993, however, and is lower than any of his previous terms except 1992. In addition, Justice Scalia joined Chief Justice Rehnquist for the top position, increasing his support for state governments from 50% in 1993 to 60% in 1994. This increase, however, is also lower than in the past years of 1989, 1990, and 1991, in which Justice Scalia's scores were all 64% or more.

Justice Souter made the greatest change in position among the Justices, moving from a third-place tie with Justice Thomas in 1993

22. Cases decided in favor of state government:

Nebraska Dept. of Revenue v. Loewenstein, 115 S. Ct. 557 (1994)
 Anderson v. Edwards, 115 S. Ct. 1291 (1995)
 Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 115 S. Ct. 1331 (1995)
 New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 1671 (1995)
 Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S. Ct. 2214 (1995)
 Missouri v. Jenkins, 115 S. Ct. 2038 (1995)
 National Private Truck Council, Inc. v. Oklahoma Tax Comm'n, 115 S. Ct. 2351 (1995)
 Florida Bar v. Went for It, Inc., 115 S. Ct. 2371 (1995)
 Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386 (1995).

Cases decided against state government:

Hess v. Port Auth. Trans-Hudson Corp., 115 S. Ct. 394 (1994)
 Reich v. Collins, 115 S. Ct. 547 (1994)
 Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 115 S. Ct. 1043 (1995)
 Swint v. Chambers County Comm'n, 115 S. Ct. 1203 (1995)
 McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995)
 U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995)
 City of Milwaukee v. Cement Div. Nat. Gypsum Co., 115 S. Ct. 2091 (1995)
 Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S. Ct. 2214 (1995)
 Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995)
 Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995)
 Miller v. Johnson, 115 S. Ct. 2475 (1995).

(45.45%), to last place in 1994 (35%). This change of position, however, occurred with only a 10.45 point decrease in supporting votes. As a result, Justice Souter's five-position drop took place not only because he voted fewer times in favor of state governments, but also because the number of votes dividing all the Justices decreased dramatically in 1994. The maximum number of votes in favor of state governments in 1994 was 12 (scored by Chief Justice Rehnquist and Justice Scalia), while the minimum number was 7 (scored by Justice Souter). This five-vote spread is almost half of what it was in 1993²³ and 1992²⁴ when the spread was nine votes. Thus, any changes in positions by the Justices may not be as dramatic as a simple reading of Table 1 might suggest. Nevertheless, Justice Souter's 1994 voting percentage (35%) is his lowest since joining the Court in 1990.

Also noteworthy is the apparent shift in state support that Justice O'Connor has demonstrated since 1990. In 1990, she voted in favor of the states 68% of the time, a score 8% higher than the Chief Justice's current—and "top of the chart"—1994 score. By contrast, in 1994 Justice O'Connor voted in favor of state governments a mere 40% of the time. This is her lowest voting percentage in this category since the inception of this Study. Is it possible that Justice O'Connor, a former state legislator and judge,²⁵ is growing less receptive to arguments propounded by state governments the longer she sits on the High Court?²⁶

Counter to Justice O'Connor's steady decline in support of the states, Justice Stevens made a 14.84 point increase in support in 1994.²⁷ In 1993, he voted in favor of the states only 27.27% of the time, the lowest percentage of support given to the states by any of the listed Justices since 1988. In 1994, however, he increased his support to 42.11%, his highest level of support ever recorded by this Study.

23. See Wilkins et al., *Supreme Court Voting Behavior: 1993 Term*, *supra* note 4.

24. See Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1992 Term*, 8 B.Y.U. J. PUB. L. 229 (1994).

25. STEVEN G. O'BRIEN, *AMERICAN POLITICAL LEADERS* 307 (Paula McGuire ed., 1991).

26. Compare *supra* Table 2 (Justice O'Connor, of all members of the current Court, casts the least number of votes in favor of the federal government in civil cases in 1994). Justice O'Connor's state and federal civil votes this Term may not demonstrate any growing antipathy for state government *per se*, but rather growing wariness of government (state or federal) in general.

27. Justice Stevens abstained from voting in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043 (1995). Thus, he confronted one less case than did the majority in Table 1.

Finally, Justice Breyer, who replaced Justice Blackmun in 1994, voted only three-quarters of a percentage point below Justice Blackmun's 1993 percentage of 42.86%.²⁸ Justice Breyer's 42.11 voting percentage in favor of state governments in 1994 shows that Justice Breyer seems to have picked up right where Justice Blackmun left off.

Table 2: Civil—Federal Party

Table 2²⁹ and Figure 2 suggest that the Court is increasingly less supportive of federal government claims. From 81% support in 1990, the Court's votes in favor of the federal government in the Majority All Cases category have consistently decreased—down to a mere 42.11% in 1994. In the Split Decision category, Court support has dropped from a high of 83.30% in 1991 to 33.33%. These figures are below the results recorded in any previous term analyzed in this Study.

This decrease may be attributed partially to the Court's reaction to ordinary politics. Where in 1991, a Republican Administration brought claims to what was considered a fairly conservative Court, in 1994 a Democratic Administration brought different claims before a substantially identical Court. It could be that the Court was more sympathetic to the federal government's claims in 1991 because these claims were more agreeable to a conservative Court's principles of

28. Justice Breyer abstained from voting in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock*, 115 S. Ct. 1043 (1995).

29. Cases decided in favor of the federal government:
ICC v. Transcon Lines, 115 S. Ct. 689 (1995)
NationsBank of N.C. v. Variable Annuity Life Ins. Co., 115 S. Ct. 810 (1995)
Shalala v. Guernsey Memorial Hosp., 115 S. Ct. 1232 (1995)
Shalala v. Whitecotton, 115 S. Ct. 1477 (1995)
Stone v. INS, 115 S. Ct. 1537 (1995)
Metropolitan Stevedore Co. v. Rambo, 115 S. Ct. 2144 (1995)
Commissioner of Internal Revenue v. Schleier, 115 S. Ct. 2159 (1995)
Babbitt v. Sweet Home Chapter of Communities for a Great Or., 115 S. Ct. 2407 (1995)
United States v. Hays, 115 S. Ct. 2431 (1995).

Cases decided against the federal government:
Federal Elections Comm'n v. NRA Political Victory Fund, 115 S. Ct. 537 (1994)
Brown v. Gardner, 115 S. Ct. 552 (1994)
Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961 (1995)
United States v. National Treasury Employees Union, 115 S. Ct. 1003 (1995)
Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995)
Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995)
United States v. Williams, 115 S. Ct. 1611 (1995)
Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995)
Gutierrez de Martinez v. Lamagno, 115 S. Ct. 2227 (1995)
Miller v. Johnson, 115 S. Ct. 2475 (1995).

adjudication. By contrast, the Court is less sympathetic to claims brought by an ideologically polarized Executive Branch.

The above hypothesis also seems to explain the voting patterns evidenced by certain individual Justices. At the top of Table 2 is Justice Stevens. In 1994, he voted in favor of the federal government 68.42%. In 1993, his support of the federal government was almost equally strong as he took the second position on Table 2, voting 70.59% of the time in favor of the United States. These two scores, rendered during terms when a purportedly liberal President occupied the White House, are nearly thirty-five percentage points above his 1992 score and more than ten percentage points above any previous year in this Study (years, of course, when conservatives held the Executive reins). Based on these figures, it is at least plausible that when the Executive Branch changed course in 1992, so did the issues raised by the federal government and, subsequently, the support of Justice Stevens.

Chief Justice Rehnquist showed similar behavior, albeit in the opposite direction. Before 1993, his support for the federal government never dipped below 70%. In 1993, however, it decreased to 58.82% and even further in 1994 to 52.63%. Such shifts are correlated to Justice Stevens' increases and suggest that the Chief Justice's approach to adjudication is less supportive of the issues raised by the current Administration.

Justice Scalia's voting pattern also parallels the gradual decline in support of the federal government that the Court majority has shown since 1991. In 1994, Justice Scalia voted in favor of the federal government only 42.11%. This is his lowest mark in the Study and matches those of Justices Souter and Thomas.

While Chief Justice Rehnquist's and Justices Stevens' and Scalia's voting habits seem rather inclined to rise and fall in accordance with the ideologies of the reigning Executive Branch, Justices Souter's and O'Connor's voting patterns are less predictable. This Term, Justice Souter decreased his support for the federal government from 76.47% in 1993 to 42.11%. This 34.36 percentage point drop is his lowest level of federal support since joining the Court in 1990. In addition, this drop is not gradual, but follows his high mark of 76.47%, a score that gave him the highest 1993 voting percentage in favor of the federal government.

Justice O'Connor gave her lowest support ever to federal claims in 1994.³⁰ Voting only 27.78% in favor of federal claims, her score is 28.47 percentage points below her 1993 score of 56.25%. This decline is also nearly twenty-five percentage points below her 1991 score of 52.4%, the lowest recorded support for federal claims previously recorded in this Study. It should be noted, however, that while her 1994 voting behavior shows a substantial decrease in support for federal claims from previous years, it is not the first time she has been the least supportive Justice. In 1991, Justice O'Connor also ranked last place in support for federal claims. In fact, her 52.38% support for federal claims in that year was 28.57 percentage points below the Court's majority score of 80.95%.³¹ The remaining Justices made no significant movement in 1994.³²

Table 3: State Criminal Cases

Support for the states in criminal cases increased somewhat from the 1993 to the 1994 Term.³³ In 1994, the Court majority voted in favor of the states 58.33%. That percentage, however, is not a significant shift from last year's figure of 56.25%. Equally uneventful are the scores in the Split Decision and Unanimous categories.³⁴

30. Justice O'Connor abstained from voting on the Civil, Federal Party issue in *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961 (1995). Thus, she addressed one less issue than did the majority in Table 2.

31. Furthermore, Justice O'Connor's decline in support for the federal government between 1991 and 1994 is less dramatic than the overall decrease in support by the Court majority. The majority's 42.11% support in 1994 is a drastic 39-point decline from the 81% support it gave in 1991. By comparison, Justice O'Connor's support of the federal government has declined only twenty-five percentage points since 1991.

32. Justice Ginsburg abstained from voting in *Federal Election Comm'n v. NRA Political Victory Fund*, 115 S. Ct. 537 (1994).

33. Cases decided in favor of the state:

Duncan v. Henry, 115 S. Ct. 887 (1995)

Harris v. Alabama, 115 S. Ct. 1031 (1995)

Arizona v. Evans, 115 S. Ct. 1185 (1995)

Goeke v. Branch, 115 S. Ct. 1275 (1995)

California Dep't of Corrections v. Morales, 115 S. Ct. 1597 (1995)

Purkett v. Elem, 115 S. Ct. 1769 (1995)

Sandin v. Conner, 115 S. Ct. 2293 (1995)

Cases decided against the state:

Schlup v. Delo, 115 S. Ct. 851 (1995)

O'Neal v. McAninch, 115 S. Ct. 992 (1995)

Kyles v. Whitley, 115 S. Ct. 1555 (1995)

Wilson v. Arkansas, 115 S. Ct. 1914 (1995)

Garlotte v. Fordice, 115 S. Ct. 1948 (1995).

34. Votes in favor of the state in split decisions dropped a mere 1.54 percentage points, a score easily within the range of the past. In the Unanimous category, the Court increased its voting percentage 16.67 points from 33.33% in 1993 to 50% in 1994. Considering, how-

But, while the Court majority figures are rather mundane, the voting pattern displayed by the individual Justices ranged all across the spectrum, from Chief Justice Rehnquist and Justice Thomas, who voted 91.67% of the time in favor of the states, to Justice Stevens, who cast only 8.33% of his votes in favor of the states. Four Justices—Rehnquist, Thomas, Scalia, and Kennedy—voted in favor of the states at least 75% of the time, while another four Justices—Breyer, Ginsburg, Souter, and Stevens—cast fewer than 42% of their votes on behalf of the state. In the middle, and mirroring the statistical outcome of the Majority All Cases category, lies Justice O'Connor who voted for the states 58.33% of the time.

In the area of state criminal cases, this breakdown suggests that the Court is fairly evenly divided. Four Justices voted consistently in favor of the states, while four voted consistently against. One or the other of these wings was decisive, depending upon how Justice O'Connor cast her fifth vote. Indeed, Table 3 suggests that the outcome of state criminal cases was heavily influenced by Justice O'Connor's swing vote.³⁵

Table 4: Federal Criminal Cases

Paralleling the decline in its support of federal civil claims, Table 4³⁶ and Figure 4 demonstrate a continuing decline in the Court's overall support for the federal government in criminal cases. As with the civil cases, this trend began after the 1991 Term. Since that term, the Court majority has decreased its support of the federal government in criminal cases from 69.20% to 53.85% in 1994. At no other time since

ever, the two unanimous cases in this category in 1994, and the variance in previous terms, the 1994 result suggests no notable changes.

35. In the State Criminal Cases category, there were three swing-vote decisions. Justice O'Connor was the deciding vote in all three. See *Schlup v. Delo*, 115 S. Ct. 851 (1995); *Kyles v. Whitley*, 115 S. Ct. 1555 (1995); *Sandin v. Conner*, 115 S. Ct. 2293 (1995).

36. Cases decided in favor of the federal government:

United States v. Shabani, 115 S. Ct. 382 (1994)
United States v. X-Citement Video, Inc., 115 S. Ct. 464 (1994)
United States v. Mezzanatto, 115 S. Ct. 797 (1995)
United States v. Robertson, 115 S. Ct. 1732 (1995)
Witte v. United States, 115 S. Ct. 2199 (1995)
Reno v. Koray, 115 S. Ct. 2021 (1995).

Cases decided against the federal government:

Tome v. United States, 115 S. Ct. 696 (1995)
United States v. Lopez, 115 S. Ct. 1624 (1995)
Hubbard v. United States, 115 S. Ct. 1754 (1995)
Ryder v. United States, 115 S. Ct. 2031 (1995)
United States v. Gaudin, 115 S. Ct. 2310 (1995)
United States v. Aguilar, 115 S. Ct. 2357 (1995).

this Study began has the Court's support for the federal government in criminal cases dipped below 60%.³⁷

On an individual basis, after his first year, Justice Breyer tied with Justice O'Connor and Chief Justice Rehnquist for the spot most supportive of the federal government. These three Justices voted in favor of the government in 69.23% of criminal issues in 1994. Behind those Justices, by only one vote, are Justices Ginsburg, Kennedy, Souter, and Thomas, who all favored the federal government 61.54% of the time in 1994. With a score of 53.85%, Justice Scalia ranks second to last on Table 4 in 1994. Justice Stevens anchors the table with a score 23.08 percentage points below Justice Scalia. Justice Stevens was the only Justice who voted in favor of the federal government less than 50% of the time.

Chief Justice Rehnquist and Justice O'Connor seem to be the only members of the Court who made significant shifts from 1993 to 1994. Both voted less for the federal government than during any previous year of this Study. However, these declines were less than two percentage points below their scores in 1990 and, therefore, may not be noteworthy.

*Table 5: First Amendment**

Table 5³⁸ and Figure 5 appear to signal a significant liberal shift in favor of First Amendment claims. Overall, the Court embraced these claims 77.78% of the time, more often than in any previous term analyzed in this Study. In fact, the Court's receptivity increased 20 percentage points from 1993, and more than doubled in the Split Decisions category.

Moreover, from 1993 to 1994, a significant liberal movement is evidenced by the individual voting patterns of six Justices. Justice Kennedy jumped 17.46 percentage points, from the middle of the

37. For example, the Court majority's 1994 score is 12.82 percentage points below its 1993 score of 66.67% and nearly fifteen percentage points below its 1992 score of 68.75%.

38. Cases decided in favor of First Amendment claim:
Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961 (1995)
United States v. National Treasury Employees Union, 115 S. Ct. 1003 (1995)
McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995)
Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995)
Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 115 S. Ct. 2338 (1995)
Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995)
Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995).

Cases decided against the First Amendment claim:
United States v. Aguilar, 115 S. Ct. 2357 (1995)
Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995).

chart, to take first place as the Justice most receptive of First Amendment claims, voting for the claim in 88.89% of cases. Similarly, Justice Souter catapulted from near last place to second. His shift from 57.14% to 77.78% mirrored exactly the Court's 20.64% upward leap. Even the Chief Justice, who, for the last three terms, has stood as the Court's most conservative Justice with regard to First Amendment claims, embraced such claims in over half of the cases presented, up 12.70 percentage points.³⁹ Furthermore, there is not much difference in the statistics of the individual Justices. Indeed, five members of the Court—both politically conservative and liberal—voted for the claim in 66.67% of cases.

But, despite the above statistics, it may be too soon to announce a new dawning of liberal First Amendment ideology. Notwithstanding the apparent First Amendment uniformity this term,⁴⁰ great differences exist in the Justices' individual motivations. Indeed, the liberal movement noted in 1994 may have resulted from political interplay between the ideological camps on the Court. The Court's disposition of *Rosenberger v. Rector & Visitors of the University of Virginia*⁴¹ and *Capitol Square Review and Advisory Board v. Pinette*⁴² demonstrate this possibility. In both, the Justices evinced interesting ideological role reversals. In *Rosenberger*, a five-to-four majority composed of the Court's most politically conservative members⁴³ sustained a freedom of speech claim raised by students who wished to publish with University funds an avowedly Christian journal. Similarly, in *Capitol Square*, a seven-to-two majority, anchored by these same Justices, accepted a First Amendment claim by the Ku Klux Klan, overturning an injunction barring the Klan from displaying a cross in a public square adjacent to Ohio's state capitol building. Two of the Court's most po-

39. Only Justices Scalia, Thomas and Ginsburg voted less frequently in favor of First Amendment claims.

40. The Court unanimously accepted the First Amendment claims in *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995), and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 115 S. Ct. 2338 (1995), and nearly unanimously in *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961 (1995). Only Justice O'Connor dissented in *Lebron*. For jurisdictional reasons, she confined her analysis of the case to a much narrower question than did the majority. Because *Lebron* had conceded in a lower court that Amtrak was not a governmental entity and because that question was not presented in *Lebron's* petition for certiorari, Justice O'Connor restricted her analysis to "[w]hether the alleged suppression of *Lebron's* speech by Amtrak, as a conceded private entity, should be imputed to the Government." *Lebron*, 115 S. Ct. at 975. *United States v. Aguilar*, 115 S. Ct. 2357 (1995), was decided unanimously against the claim.

41. 115 S. Ct. 2510 (1995).

42. 115 S. Ct. 2440 (1995).

43. The Chief Justice and Justices Kennedy, O'Connor, Scalia and Thomas.

litically liberal Justices—Stevens and Ginsburg—were the only dissenters.

Last Term, there were similar role reversals in which politically conservative majorities effected liberal results by espousing First Amendment claims.⁴⁴ We explained this phenomenon by noting a realignment in conservative and liberal poles on the Court in reaction to the liberal agenda asserted by the federal government under President Clinton.⁴⁵ This Term, although the Court's reaction does not appear to flow from the litigating posture of the federal government, the same ideological role reversal is apparent. In 1994, the politically liberal Justices tended to vote in favor of the government, while the politically conservative Justices adopted liberal, antigovernment stances—e.g., in favor of the Virginia students and the Ku Klux Klan. Indeed, *Rosenberger* and *Capitol Square*, along with one case decided unanimously against the First Amendment claim, *United States v. Aguilar*,⁴⁶ explain all three conservative votes of Justices Stevens and Ginsburg.

But despite this, the liberal movement in the First Amendment arena this term cannot be discounted entirely or attributed simply to the political reorientation of the Court. Unlike last Term, when the traditionally liberal Justices generally voted against First Amendment claims, there were a number of cases this Term in which political liberals voted in favor of First Amendment claims, as they traditionally have done. Indeed, once beyond the role reversal and unanimous (or near unanimous) decisions, it was the historically liberal Justices, not the politically conservative members of the Court, who embraced the First Amendment claims in the three remaining cases.⁴⁷ This factor

44. See, e.g., *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994) (Chief Justice Rehnquist and Justices Kennedy and Souter, joined by Justices Stevens and Blackmun rejected the claim that the First Amendment required strict scrutiny of provisions for cable television); *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516 (1994) (Chief Justice Rehnquist joined by Blackmun, O'Connor, Souter, and Ginsburg struck down several provisions of an injunction limiting antiabortion protests).

45. Wilkins et al., *Supreme Court Voting Behavior: 1993 Term*, *supra* note 4, at 294-97.

46. 115 S. Ct. 2357 (1995).

47. E.g., *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995) (Justices Stevens, Kennedy, Souter, Ginsburg, Breyer and O'Connor sustained First Amendment challenge to the Ethics in Government Act; the Chief Justice and Justices Scalia and Thomas dissented); *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511 (1995) (Justices Stevens, O'Connor, Kennedy, Souter, Ginsburg and Breyer sustained First Amendment challenge to Ohio elections law; the Chief Justice and Justice Scalia dissented). Cf. *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995) (five-to-four decision rejecting First Amendment claim, with Justices Kennedy, Stevens, Souter and Ginsburg voting in favor of the First Amendment argument).

validates, at least to some degree, the apparent liberal shift of the Court this term.⁴⁸

Table 6: Equal Protection

Table 6⁴⁹ and Figure 6 afford little data that is useful for statistical analysis. Last Term, the Court considered only one case involving an equal protection claim. This Term, the Court considered three. This is an exceptionally small sample from which to draw any statistical conclusion. The equal protection cases, however, will undoubtedly provide ample fodder for the more traditional legal analysis.

In each of the equal protection cases this Term, the same five-member majority held sway. In *Missouri v. Jenkins*,⁵⁰ Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia and Thomas voted against the claim and in favor of the State in a school desegregation action. However, this same politically conservative coalition reached liberal results by voting in favor of equal protection claims in *Adarand Constructors, Inc. v. Peña*⁵¹ and *Miller v. Johnson*.⁵² Responding to Adarand's challenge against the federal government's subcontractor compensation program, which offered financial incentives to governmental contractors hiring minority owned subcontractors, the Court held that all governmental classifications based on race are subject to strict judicial scrutiny. Similarly, the Court in *Miller* held that Georgia's congressional redistricting plan violated equal protection principles because the state focused solely on the race of the prospective constituents in redrawing the lines of three majority-minority districts.

These results, like the First Amendment cases discussed above, may be the result of a political reorientation on the Court. A politically conservative coalition voted against the equal protection claim when it required continuing supervision of a school desegregation program, but sustained the claim when the equal protection clause was

48. It also explains the drastic drop in receptivity by Justices Scalia and Thomas, both of whom fell from first place in 1993, where they voted in favor of the claim 85.71% of the time. This Term, Justice Scalia voted for the claim 55.56% of the time, dropping over thirty percentage points to join the Chief Justice in last place. Justice Thomas accepted the claim in only 66.67% of the cases.

49. Cases decided in favor of the equal protection claim:
Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995)
Miller v. Johnson, 115 S. Ct. 2475 (1995).

Case decided against the equal protection claim:
Missouri v. Jenkins, 115 S. Ct. 2038 (1995).

50. 115 S. Ct. 2038 (1995).

51. 115 S. Ct. 2097 (1995).

52. 115 S. Ct. 2475 (1995).

invoked to curtail the explicit use of racial classifications as a remedial tool. The politically liberal Justices took the opposite tack. This explanation may account for the unusually conservative showing of Justice Stevens, who traditionally has favored equal protection claims, as well as the liberal voting records of the Chief Justice and Justices O'Connor and Scalia who historically have been reluctant to embrace such claims.

In light of the foregoing explanation, one could ask whether the terms "liberal" and "conservative," as used in this Study, reflect reality—inasmuch as Table 6 suggests that the Chief Justice and Justice Scalia are significantly more "liberal" than Justice Stevens. We can only answer that the ideological labels used here do not hold the same connotations attributed to those terms by ordinary politics. In this Study, "liberal" votes are those cast to invalidate a challenged assertion of government power, while "conservative" votes are cast to sustain the disputed regulation. While this classification scheme may produce the apparent anomaly of a "conservative" Justice Stevens, it is nevertheless true that in 1994 Justice Stevens was twice as supportive of assertions of government regulatory power in the equal protection arena as Justice Scalia. We will leave it to legal philosophers and other pundits to debate which is the truly conservative or liberal position.

Table 7: Statutory Civil Rights

Table 7⁵³ and Figure 7 at first glance appear to evince significant liberal movement in the Court's acceptance of civil rights claims. The Court accepted half of all claims presented to it this Term, whereas last Term it accepted only a third. Additionally, five of the nine Justices significantly increased their individual receptivity to these claims: Justices Stevens increased his vote 19.44 percentage points while Justices Ginsburg and Souter each increased their votes 30.56 percentage points to vote for the claim 75% of the time, joining Justice Breyer, the Court's newest member, at the top of the chart. Also, the Chief Justice and Justice O'Connor each voted for the claim in 50% of the cases, an increase of 16.67 percentage points from last term.

53. Cases decided in favor of statutory civil rights claims:
McKennon v. Nashville Banner Pub. Co., 115 S. Ct. 879 (1995)
City of Edmonds v. Oxford House, Inc., 115 S. Ct. 1776 (1995).

Cases decided against statutory civil rights:
National Private Truck Council, Inc. v. Oklahoma Tax Comm'n, 115 S. Ct. 2351 (1995)
Miller v. Johnson, 115 S. Ct. 2475 (1995).

However, the magnitude of this shift may be deceiving because only four cases proffered statutory civil rights claims, two of which were decided unanimously.⁵⁴ Of the two remaining cases, only one was resolved in favor of the claim. In *City of Edmonds v. Oxford House, Inc.*,⁵⁵ the Court sustained a challenge under the Fair Housing Act against municipal limitations on the number of unrelated persons permitted to live in one dwelling unit. Conversely, *Miller v. Johnson*,⁵⁶ discussed in Table 6 above, involved Georgia's hotly contested congressional redistricting plan and a claim of voter's rights. In *Miller*, a majority comprised of Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas voted against the claim. With such a small statistical universe, it is difficult to draw any fixed conclusions from Table 7.

Table 8: Jurisdiction

Table 8⁵⁷ and Figure 8 reveal a slight liberal shift in the overall acceptance of claims asserting the Court's jurisdiction. From the 1993 Term, receptivity has increased 6.67 percentage points in the Majority All Cases category to 44.44% in 1994. In the Split Decisions category,

54. The Court decided *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879 (1995), unanimously for the claim, and *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 115 S. Ct. 2351 (1995), unanimously against the claim.

55. 115 S. Ct. 1776 (1995).

56. 115 S. Ct. 2475 (1995).

57. Cases decided in favor of the exercise of jurisdiction:

U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386 (1994)

Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961 (1995)

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 115 S. Ct. 1043 (1995)

Arizona v. Evans, 115 S. Ct. 1185 (1995)

Garlotte v. Fordice, 115 S. Ct. 1948 (1995)

Missouri v. Jenkins, 115 S. Ct. 2038 (1995)

Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995)

Gutierrez de Martinez v. Lamagno, 115 S. Ct. 2227 (1995).

Cases decided against the exercise of jurisdiction:

Federal Election Comm'n v. NRA Political Victory Fund, 115 S. Ct. 537 (1994)

NationsBank v. Variable Annuity Life Ins., 115 S. Ct. 810 (1995)

Duncan v. Henry, 115 S. Ct. 887 (1995)

Swint v. Chambers Cy. Comm'n, 115 S. Ct. 1203 (1995)

Director, Office of Workers' Comp. v. Newport News Shipbuilding and Dry Dock Co., 115 S. Ct. 1278 (1995)

Celotex Corp. v. Edwards, 115 S. Ct. 1493 (1995)

Stone v. INS, 115 S. Ct. 1537 (1995)

Wilton v. Seven Falls Co., 115 S. Ct. 2137 (1995)

Johnson v. Jones, 115 S. Ct. 2151 (1995)

Vimar Seguros y Reaseguros v. M/V Sky Reefer, 115 S. Ct. 2322 (1995)

United States v. Hays, 115 S. Ct. 2431 (1995)

Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995).

the Court embraced 21.22% more claims than in 1993. Four Justices appreciably increased their votes in favor of exercising jurisdiction—Justice O'Connor by 17.78 percentage points, Justice Scalia by 12.78 percentage points, the Chief Justice by 7.78 percentage points, and Justice Kennedy by 6.67 percentage points. Justice O'Connor in particular soared from last place on the chart to first, joining Justice Kennedy, who climbed from third place, and Justice Stevens.

This movement, however, may be insignificant when viewed in light of the Court's pre-1993 statistics. With the lone exception of 1993, this term's record appears significantly more conservative than those of all previous terms. All nine Justices remained several percentage points below their next most conservative showings, and Justice Stevens, whose historic receptivity toward jurisdictional claims remains unmatched by any other Justice currently on the Court, even expanded his notably conservative showing from last term.⁵⁸ Furthermore, of eight unanimous opinions, the Court issued only 25.00% in favor of jurisdictional claims, down 15 percentage points from 1993. Thus, the showing on Table 8 this Term appears to indicate merely some moderation in the Court's generally conservative stance on jurisdictional issues, rather than any general change of attitude.

*Table 9: Federalism*⁵⁹

After deciding only seven federalism issues in 1993,⁶⁰ eight less than it decided in the 1992 Term,⁶¹ and 13 less than in the 1991 Term,⁶² the Court resumed a more active role in the area by deciding 18 cases involving issues of federalism in 1994.⁶³ As a majority, the Court

58. Justice Stevens abstained from voting in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043 (1995), Justice Ginsburg in *Federal Election Comm'n v. NRA Political Victory Fund*, 115 S. Ct. 537 (1994), and Justice Breyer in *Jerome B. Grubart*, 115 S. Ct. 1043 (1995), and *Wilton v. Seven Falls Co.*, 115 S. Ct. 2137 (1995). Thus, these Justices addressed fewer issues than did the Court as a whole.

59. Because *American Airlines v. Wolens*, 115 S. Ct. 817 (1995), had two federalism issues, the federalism category contains eighteen votes total with only seventeen actual cases.

60. See Wilkins et al., *Supreme Court Voting Behavior: 1993 Term*, *supra* note 4.

61. See Wilkins et al., *Supreme Court Voting Behavior: 1992 Term*, *supra* note 24.

62. See Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1991 Term*, 7 B.Y.U. J. PUB. L. 1 (1992).

63. Cases decided in favor of the states:

Nebraska Dep't. of Revenue v. Loewenstein, 115 S. Ct. 557 (1994)

American Airlines v. Wolens, 115 S. Ct. 817 (1995)

Anderson v. Edwards, 115 S. Ct. 1291 (1995)

Oklahoma Tax Comm'n v. Jefferson Lines, 115 S. Ct. 1331 (1995)

Freightliner Corp. v. Myrick, 115 S. Ct. 1483 (1995)

United States v. Lopez, 115 S. Ct. 1624 (1995)

voted in favor of the states 55.56%. This score is slightly less than the Court majority's 57.14% score in 1993, but substantially higher than its 26.09% score in 1991. Consequently, although the Court decided several high profile cases in 1994 that could suggest that the Court is highly sensitive to the balance of state power in the federalism area,⁶⁴ its overall support for state governments, as opposed to the federal government, was just slightly more than 50%.

In split decisions, the Court tended strongly toward the federal government, voting only 36.36% of the time for the states. In unanimous decisions, however, the Court voted against the states only once out of seven issues (or 85.71% in favor of the states). This suggests that support for the states waned when the federalism issue was controversial.

On an individual basis, Justice Scalia voted most often in favor of the states in 1994.⁶⁵ He reached 81.25%, his highest pro-state voting percentage since the inception of this Study. This 1994 score is 24.11 percentage points higher than his 1993 score of 57.14% and a whopping 55.16 percentage points higher than the 26.09% pro-state votes he cast in 1991. But, while his 1994 score is his highest yet, no clear trend is apparent for Justice Scalia, due to the volatility of his voting pattern over the years.⁶⁶

New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 1671 (1995)

North Star Steel Co. v. Thomas, 115 S. Ct. 1927 (1995)

Missouri v. Jenkins, 115 S. Ct. 2038 (1995)

National Private Truck Council Inc. v. Oklahoma Tax Comm'n, 115 S. Ct. 2351 (1995).

Cases decided in favor of the federal government:

Hess v. Port Auth. Trans-Hudson Corp., 115 S. Ct. 394 (1994)

American Airlines v. Wolens, 115 S. Ct. 817 (1995)

Allied-Bruce Terminix Co. v. Dobson, 115 S. Ct. 834 (1995)

Arizona v. Evans, 115 S. Ct. 1185 (1995)

Mastrobuono v. Shearson Lehman Hutton, 115 S. Ct. 1212 (1995)

McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995)

Reynoldsville Casket Co. v. Hyde, 115 S. Ct. 1745 (1995)

U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995).

64. See *United States v. Lopez*, 115 S. Ct. 1624 (1995) (holding Gun Free Zones Act exceeds congressional power under the commerce clause); *Oklahoma Tax Comm'n v. Jefferson Lines*, 115 S. Ct. 1331 (1995) (holding Oklahoma sales tax does not violate the dormant commerce clause).

65. Justice Scalia did not participate in *American Airlines v. Wolens*, 115 S. Ct. 817 (1995), which resulted in two separate federalism issues. This explains why he voted on 16 federalism issues instead of the total 18.

66. While his 1992 and 1993 scores were rather stable (60% and 57.14%, respectively), the outcome most years has varied by at least 20 percentage points. The 1989 Term dropped to 56.3% from the 1988 figure of 76.2%. Even more pronounced was the drop

The second most ardent supporters of states' rights are Chief Justice Rehnquist and Justice Thomas. In 1994, each voted in favor of the states 72.22%. For Chief Justice Rehnquist, this score is over five percentage points higher than his 1993 score of 71.43%. This score, however, does not suggest any significant ideological movement for the Chief Justice, considering his 1988 score of 81%. Conversely, Justice Thomas' support for states jumped 29.36 percentage points, increasing from 42.86% in 1993. This jump is the most extreme made by any Justice on the Court in 1994.

Tying for third place on Table 9 are Justices Kennedy, O'Connor, and Stevens. In 1994, they supported state government on just over 55% of the federalism issues. This percentage approximates the middle of the voting ranges evidenced by these Justices in the past and, therefore, does not appear to suggest any ideological movement. Justice Ginsburg followed in fourth place with a 50% vote in favor of the states, and Justice Souter was right behind with 44.44%.

Justice Breyer was the least supportive of states' rights in 1994. This showing is unsurprising given his strong leadership in voting for the federal government in criminal cases (Table 4). This seeming correlation between Justice Breyer's voting in these two areas is not reflected, however, in Chief Justice Rehnquist's voting pattern. Although he joined Justices Breyer and O'Connor at the top of Table 4, the Chief Justice largely rejected assertions of power by the federal government over the states in federalism cases. Apparently, Justice Breyer's motivations in federal criminal and federalism cases are somewhat linked, while the Chief Justice's inclinations in these areas are largely unrelated.

Table 10: Swing Votes

Table 10⁶⁷ and Figure 10 reveal an interesting flip in the liberal and conservative voting patterns of the different Justices. Whereas

between 1990 and 1991, when Justice Scalia lowered his support for the states from 71.4% to 26.1%.

67. Swing-vote cases reaching a conservative outcome:

Shalala v. Guernsey Memorial Hosp., 115 S. Ct. 1232 (1995)

Missouri v. Jenkins, 115 S. Ct. 2038 (1995)

Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S. Ct. 2214 (1995)

Sandin v. Conner, 115 S. Ct. 2293 (1995)

Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995).

Swing-vote cases reaching a liberal outcome:

Hess v. Port Auth. Trans-Hudson Corp., 115 S. Ct. 394 (1994)

Tome v. United States, 115 S. Ct. 696 (1995)

Schlup v. Delo, 115 S. Ct. 851 (1995)

last term, five-member coalitions voted for conservative results in 64.29% of cases, coalitions this term favored liberal results by that same proportion.⁶⁸ This table measures the influence of each member of the Court in effecting these conservative or liberal results. The Justice who most often votes with the majority in five-to-four cases wields significant sway in shaping the disposition of the Court in the most contentious issues.

As he did last term, Justice Kennedy tops the chart. Although he dropped 11.61 percentage points from 1993, he voted with the majority in 81.25% of close cases this term. Justice O'Connor was the next most influential Justice, displacing the Chief Justice and Justice Scalia in second place on the chart. She voted with the majority in 68.75% of cases. Chief Justice Rehnquist slipped 8.93 percentage points to third place, while Justice Scalia dropped 15.18 percentage points to fourth place. Justices Ginsburg and Stevens each increased their showings on this Term's table by voting 50% with Court majorities. As in 1993, Justice Souter remains the Court's least influential Justice, siding with the majority only 37.5% of the time.

Several occurrences make this Term's results particularly interesting. First, as has been noted, the Court's traditionally conservative members united in several of the most notable cases to effect, by liberal votes against the exercise of government power, politically conservative ends. The same five Justices—Chief Justice Rehnquist and

Kyles v. Whitley, 115 S. Ct. 1555 (1995)

U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995)

Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995)

Gutierrez de Martinez v. Lamagno, 115 S. Ct. 2227 (1995)

Miller v. Johnson, 115 S. Ct. 2475 (1995)

Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995).

Swing-vote cases not classifiable as either conservative or liberal in outcome:

Gustafson v. Alloyd Co., Inc., 115 S. Ct. 1061 (1995)

United States v. Lopez, 115 S. Ct. 1624 (1995).

68. Two cases were not included in calculating the statistics in the Conservative and Liberal Outcome categories: The results of *Gustafson v. Alloyd Co., Inc.*, 115 S. Ct. 1061 (1995), were not measurable by any of the previous nine tables, and thus not classifiable as "liberal" or "conservative" per our definitions. Further, the Court in *United States v. Lopez*, 115 S. Ct. 1624 (1995), declined to extend the commerce clause of the U.S. Constitution to allow the federal government to proscribe carrying firearms in local school zones (a liberal result) in favor of the states' police power (a conservative result in the federalism table). These results proved mutually exclusive and were not included in the coalition categories. They were, however, included in our calculus for the individual voting patterns of the Justices. Compare *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995), in which the Court voted for jurisdiction (a liberal result), but also voted for the government, for the state in a federalism issue, and against an equal protection claim (all conservative claims). The results in this case were counted as a conservative outcome for purposes of Table 10.

Justices Kennedy, O'Connor, Scalia and Thomas—dominated the Court in *Adarand Constructors, Inc. v. Peña*,⁶⁹ *Miller v. Johnson*,⁷⁰ and *Rosenberger v. Rector & Visitors of the University of Virginia*.⁷¹ In *Adarand*, the Court rejected the federal government's subcontractor compensation program and held that all racial classifications, whether benign or invidious, are subject to strict equal protection scrutiny.⁷² Likewise, in *Miller*, the Court held that Georgia violated equal protection principles by looking solely to the race of prospective constituents in restructuring its congressional districts.⁷³ The *Rosenberger* Court, for its part, concluded that the University of Virginia curtailed certain students' First Amendment right to freedom of speech by denying them funds to publish a journal expressing a Christian viewpoint when those funds were generally available to other student groups.⁷⁴ In each of these cases, the five-member majority voted against the government and in favor of claims for individual rights. This role reversal—wherein politically conservative Justices vote for liberal results—explains in part the relatively high number of “liberal” coalitions this term, more than in any other term examined by this Study.⁷⁵

Yet, in other cases which did not as readily attract media attention or scholarly comment as did the “big” cases just noted, the Court's majorities voted according to the expected model of conservatives voting for, and liberals against, the government.⁷⁶ Furthermore, review of these close but less politically charged cases reveals an interesting chronological adjustment in the composition of the Court's majorities. Six cases confronted by the Court near the beginning of the

69. 115 S. Ct. 2097 (1995).

70. 115 S. Ct. 2475 (1995).

71. 115 S. Ct. 2510 (1995).

72. *Adarand*, 115 U.S. at 2117.

73. *Miller*, 1995 U.S. LEXIS 4462, at *40.

74. *Rosenberger*, 1995 U.S. LEXIS 4461, at *34.

75. *But see* *Shalala v. Guernsey Memorial Hosp.*, 115 S. Ct. 1232 (1995), in which traditionally liberal Justices Stevens, Ginsburg and Breyer, together with Justice Kennedy and Chief Justice Rehnquist, voted conservatively in favor of the Health & Human Services Secretary.

76. *See* *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995) (conservative coalition) (dissenting Justices Stevens, Souter, Ginsburg and Kennedy vote in favor of First Amendment claim); *Sandin v. Conner*, 115 S. Ct. 2293 (1995) (conservative coalition) (dissenting Justices Stevens, Souter, Ginsburg and Breyer conclude that prisoners have protected liberty interests rejected by the majority); *Schlup v. Delo*, 115 S. Ct. 851 (1995) (liberal coalition) (rejecting government's argument that strict standards should be applied to successive habeas corpus petitions); *Tome v. United States*, 115 S. Ct. 696 (1995) (liberal coalition) (concluding that child's prior consistent out-of-court statements could not be admitted on behalf of prosecution); *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S. Ct. 394 (1994) (liberal coalition) (rejecting immunity claim of state government).

1994 Term were overwhelmingly decided by liberal majorities composed primarily of Justices Stevens, Ginsburg, Breyer, and Souter, and either Justice Kennedy or Justice O'Connor.⁷⁷ Conversely, conservative majorities held sway in the four close cases confronted near the end of the term.⁷⁸ If (as is often assumed) the most troublesome cases are decided near the end of the Court's term, it appears that conservative coalitions were having a rather difficult time coalescing this term. This would indicate that, as noted at the outset of this Study, the Rehnquist Court is becoming less rather than more conservative.

As in past terms, the Court remains polarized between its core conservatives, Chief Justice Rehnquist and Justices Scalia and Thomas, and the equally intrepid liberal wing of Justices Stevens, Souter, Ginsburg, and Breyer. Providing balance, however, are Justices Kennedy and O'Connor, the Court's most moderate members. These two Justices, though generally conservative in orientation, have proved willing to lead the Court's decisionmaking in close cases. In fact, Justice Kennedy anchored five-member coalitions in 13 of 16 swing vote cases, again positioning him as the Court's most influential Justice. Justice O'Connor follows closely behind in second place.⁷⁹

IV. Statistical Analyses

Using regression analysis, the voting patterns of the five Justices analyzed in Tables 1-10 were tracked over an eight-year period.⁸⁰

77. *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S. Ct. 394 (1994) (liberal coalition—Breyer, Ginsburg, Kennedy, Souter, Stevens); *Tome v. United States*, 115 S. Ct. 696 (1995) (liberal coalition—Kennedy, Stevens, Scalia, Souter, Ginsburg); *Schlup v. Delo*, 115 S. Ct. 851 (1995) (liberal coalition—Stevens, O'Connor, Souter, Ginsburg, Breyer); *Kyles v. Whitley*, 115 S. Ct. 1555 (1995) (liberal coalition—Souter, Stevens, O'Connor, Ginsburg, Breyer); *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995) (liberal coalition—Stevens, Kennedy, Souter, Ginsburg, Breyer); *Gutierrez de Martinez v. Lamagno*, 115 S. Ct. 2227 (1995) (liberal coalition—Ginsburg, Breyer, Kennedy, Stevens, O'Connor).

78. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S. Ct. 2214 (1995) (conservative coalition—Ginsburg, Kennedy, Rehnquist, Scalia, Thomas); *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995) (conservative coalition—Rehnquist, O'Connor, Scalia, Kennedy, Thomas); *Sandin v. Conner*, 115 S. Ct. 2293 (1995) (conservative coalition—Rehnquist, O'Connor, Scalia, Kennedy, Thomas); *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995) (conservative coalition—O'Connor, Rehnquist, Scalia, Thomas, Breyer).

79. Justice O'Connor, moreover, is particularly deft at leveraging her vote in these close cases. Frequently, she sides only tenuously with five-member majorities, limiting the precedential value of those opinions through concurrences full of caveats and limitations. *See, e.g.*, *Schlup v. Delo*, 115 S. Ct. 851 (1995); *Gutierrez de Martinez v. Lamagno*, 115 S. Ct. 2227 (1995).

80. Specifically, from 1987 through 1994. We use eight years here, rather than the seven Terms set out on Tables 1-10, to increase the reliability of this statistical analysis. *See infra* notes 83-84.

Three sets of statistical tests were performed on the data. First, we obtained the average voting percentage of a given Justice from 1987 (the inception of this Study) to 1993. We then took the Justice's 1994 voting percentage and used a Pooled T-test statistic to determine whether the 1994 score differed in a statistically significant sense from the 1987-1993 average. If it did, we could conclude that the Justice's 1994 voting behavior was significantly different from that of past terms.⁸¹ This was done to determine whether any shifts in a given Justice's voting behavior during the 1994 Term were statistically significant. Second, the data from 1987 to 1993 were used to form a predictive model for the voting behavior on each table. We then compared the predictions for 1994 with the actual voting behavior of each Justice this term, and have predicted how the Justices can be expected to vote during the 1995 Term based on prior behavioral patterns.⁸²

The third set of statistical tests is designed to determine whether particular Justices tend to vote in similar (or specifically dissimilar) ways. For instance, do Justice Scalia and Justice Stevens tend to vote similarly (or dissimilarly) in federal criminal appeals? In reviewing the results of this segment of the Study, however, readers should bear in mind that we can only demonstrate relationships (or "correlations") between and among the Justices' voting patterns. For example, while we can show that Justices Kennedy and O'Connor tend to vote together in state civil cases, we cannot demonstrate that Justice O'Connor's vote *causes* Justice Kennedy's behavior.⁸³

81. For a complete explanation of the statistical methods used, see Appendix B.

82. For a complete explanation of the forecasting model used, see Appendix B.

83. "Correlation" and "causation" are distinct concepts. Correlation involves the similar (or dissimilar) movement of two variables over different values. For instance, the correlation between temperature and ice cream purchases might be highly positive for different values of the "temperature" and "ice cream" variables. As temperature rises over a given range (say, 85 to 105 degrees), the number of gallons of ice cream sold at a local market might also rise proportionately. Perfect correlation occurs when a change in one variable is matched by an equivalent change in the other—a one degree rise in temperature is matched by a one-gallon increase in ice cream sales.

If, on the other hand, a one-degree rise in temperature were matched by a one-gallon *drop* in ice cream sales, the two variables would be perfectly *negatively* correlated. The degree of correlation, then, is annotated by the rate of change between one variable and the other, with +1.00 implying perfect *positive* correlation, and -1.00 implying perfect *negative* correlation. "No correlation" occurs when the rate of change between two variables equals 0.

Causation occurs when one of two correlated variables *causes* the change in the other factor. It is important to remember, however, that two highly correlated variables may very well have absolutely no causal relationship. In other words, the perfect correlation described above (between ice cream and temperature) may be purely incidental—the rise in ice cream sales might be wholly due to the grocery store's going-out-of-business sale.

This analysis yields interesting results. To begin with, only two of the shifts in voting patterns this Term were statistically significant. The data generated during the prior years of the Study, moreover, were generally accurate in predicting this Term's voting behavior. There are, finally, a few positive (and one negative) correlations between the voting patterns of the individual Justices. But, before moving to further explication of these results, readers must be cautioned regarding the limits of a statistical analysis of a process as subjective as Supreme Court decisionmaking.

The general reliability of statistical inference depends upon random sampling.⁸⁴ The data used here, however, were not gathered randomly since the goals of this Study are to analyze a fixed number of specific individual preferences over a limited time period. In addition, the Court's own method of selecting cases is far from random, but is rather the result of a conscious decisional process. Reliable statistics, furthermore, generally require large quantities of information to produce accurate results. As the sample size gets larger, inferences become more accurate.⁸⁵ Again, this Study is limited to a rather small universe: the one hundred or so decisions rendered by the entire Court each term. From a purist's perspective, then, this Study is subject to sampling bias, both because the sample is not random and because it is comparatively small. The statistical inferences generated below, therefore, may not accurately represent a Justice's (or the Court's) views.

Then again, the correlation might be partially due to the sale and partially due to the high temperature. The tension between simple correlation and causation, as well as the struggle to delineate causal factors, is the major empirical barrier to regression inference. Accordingly, regardless of the presence of high correlation between the Justices' voting patterns on a given topic, readers should not attempt to infer causation.

84. See generally ALLEN T. CRAIG AND ROBERT V. HOGG, INTRODUCTION TO MATHEMATICAL STATISTICS 157-58 (1995); RAYMOND H. MYERS, CLASSICAL AND MODERN REGRESSION WITH APPLICATIONS 9-11 (1990).

85. CRAIG AND HOGG, *supra* note 84, at 273-74.

A. The Data

Regression Table 1

Justice	Did 1994 show a statistically significant change in voting behavior? ⁸⁶	99% Confidence Interval for the true average voting percentage. ⁸⁷	Prediction for 1994 Term	Actual voting percentage for 1994 Term	Prediction for 1995 Term
Kennedy	No	(35.42, 67.00)	38.0188	40.0000	33.9658
O'Connor	No	(39.76, 66.22)	38.6204	40.0000	37.3525
Rehnquist	No	(56.51, 78.81)	62.7116	60.0000	64.5003
Scalia	No	(46.62, 67.33)	52.0278	60.0000	51.0359
Stevens	No	(28.42, 41.53)	37.0171	42.1100	33.0618

continued

86. For an explanation of the methods used to answer this question for each category, see Appendix B.

87. The number on the left of each parenthetical entry in these tables represents the lower bound, and the number on the right represents the upper bound of an interval with 99% chance of containing a given Justice's *true* voting average as measured over the last eight years of his or her career. That is, we can say with 99% confidence that the Justices' 1994 voting percentage for this category will fall between the lower and upper bounds of confidence.

The sample [average] . . . is the natural estimator of the unknown population [average] The law of large numbers says that the sample mean must approach the population [average] as the [sample size] grows The confidence [interval] shows how confident [the researcher is] that the procedure [has caught] the true population [average]

Regression Table 1 continued

Justice	Correlations ⁸⁸ with other Justices (-0.7 +0.7)	Regression equation(s) ⁸⁹	(1) Regression r^2 (adjusted); (2) "Student's t" non-rejections ⁹⁰
Kennedy	O'Connor (0.911)	KEN = 6.4+1.09 O.C.	(1) R-sq(adj) = 80.1%; (2) constant falls within a "zero" null hypothesis
	Rehnquist (0.765)	KEN = 22.1+1.08 REHN	(1) R-sq(adj) = 51.6%; (2) constant falls within a "zero" null hypothesis
		KEN = 26.1+0.843 O.C. +0.482 REHN	(1) R-sq(adj) = 86.5%; (2) constant and "REHN" fall within a "zero" null hypothesis

88. See Appendix B.

89. See Appendix B.

90. The regression adjustment r^2 provides a more refined view of the original correlation measured by determining *exactly* what percentages of the variation in one Justice's voting is explained by how another Justice votes. "Student's t' non-rejections" simply refers to a procedure that tests whether a given Justice (the constant term) has, in fact, a "zero" effect on the Justice being analyzed. For instance, this particular Table includes, as its first regression, analyses of Justices Kennedy ("KEN") and O'Connor ("O.C."). The last column of the Table notes that, using Justice O'Connor's voting as a constant to model Justice Kennedy's voting results, explains the variation in Kennedy's voting record 80.1% of the time (adjusted r^2). Testing the constant term (-6.4) and the "O.C." term results in a conclusion that the constant term is probably zero. In other words, it is Justice O'Connor's voting—and nothing else—that explains roughly 80% of Justice Kennedy's voting.

Regression Table 2: Civil Cases—Federal Government Versus a Private Party

Justice	Did 1994 show a statistically significant change in voting behavior?	99% Confidence Interval for the true average voting percentage.	Prediction for 1994 Term.	Actual voting percentage for 1994 Term.	Prediction for 1995 Term.
Kennedy	No	(49.22, 72.73)	48.5787	47.3700	44.5030
O'Connor	Yes	(40.10, 74.11)	36.0578	27.7800	37.2541
Rehnquist	No	(56.55, 78.16)	51.8479	52.6300	52.1175
Scalia	Yes	(4, 70.46)	47.7008	42.1100	44.9309
Stevens	No	(37.06, 69.54)	55.5080	68.4200	79.7710

continued

Regression Table 2: continued

Justice	Correlations with other Justices (-0.7 +0.7)	Regression equation(s)	(1) Regression r^2 (adjusted); (2) "Student's t" non-rejections
Kennedy	Rehnquist (0.711) Scalia (0.908)	KEN = 8.8+0.774 REHN KEN = 4.1+0.959 SCAL KEN = 1.9+0.091 REHN +0.893 SCAL	(1) R-sq(adj) = 42.4%; (2) constant falls within a "zero" null hypothesis (1) R-sq(adj) = 79.6%; (2) constant falls within a "zero" null hypothesis (1) R-sq(adj) = 75.9%; (2) constant and "REHN" fall within a "zero" null hypothesis
Rehnquist	Scalia (0.742)	REHN = 24.7+0.720 SCAL	(1) R-sq(adj) = 47.6%; (2) constant falls within a "zero" null hypothesis

Regression Table 3: State Criminal Cases

Justice	Did 1994 show a statistically significant change in voting behavior?	99% Confidence Interval for the true average voting percentage.	Prediction for 1994 Term.	Actual voting percentage for 1994 Term.	Prediction for 1995 Term.
Kennedy	No	(51.39, 82.36)	Cannot be estimated ⁹¹	75.0000	Cannot be estimated
O'Connor	No	(46.36, 80.93)	60.5263	58.3300	60.0797
Rehnquist	No	(71.64, 92.19)	89.363	91.670	88.018
Scalia	No	(60.27, 90.13)	83.780	83.330	86.371
Stevens	No	(6.41, 36.50)	14.1038	8.3300	14.5907
Justice	Correlations with other Justices (-0.7 +0.7)	Regression equation(s)	(1) Regression r ² (adjusted); (2) "Student's t" non-rejections		
NONE	NONE	NONE	NONE		

91. We were unable to fit a consistent pattern to Justice Kennedy's voting record.

Regression Table 4: Federal Criminal Cases

Justice	Did 1994 show a statistically significant change in voting behavior?	99% Confidence Interval for the true average voting percentage.	Prediction for 1994 Term.	Actual voting percentage for 1994 Term.	Prediction for 1995 Term.
Kennedy	No	(52.85, 84.61)	61.1195	61.5400	62.1040
O'Connor	No	(69.84, 78.44)	71.1916	69.2300	71.3161
Rehnquist	No	(70.41, 87.88)	76.1190	69.2300	74.0678
Scalia	No	(48.62, 75.79)	57.1360	53.8500	60.7004
Stevens	No	(26.46, 66.11)	24.3001	30.7700	32.8340
Justice	Correlations with other Justices (-0.7 +0.7)	Regression equation(s)	(1) Regression r^2 (adjusted); (2) "Student's t" non-rejections		
Scalia	Kennedy (0.796) O'Connor (0.766)	SCAL = 15.4+0.680 KEN SCAL = 1.17+2.42 O.C. SCAL = 67.9+0.439 KEN +1.35 O.C.	(1) R-sq(adj) = 57.2%; (2) constant falls within a "zero" null hypothesis (1) R-sq(adj) = 51.8%; (2) constant falls within a "zero" null hypothesis (1) R-sq(adj) = 63.0%; (2) all variables fall within a "zero" null hypothesis		

Regression Table 5: First Amendment Claims

Justice	Did 1994 show a statistically significant change in voting behavior?	99% Confidence Interval for the true average voting percentage.	Prediction for 1994 Term.	Actual voting percentage for 1994 Term.	Prediction for 1995 Term.
Kennedy	No	(37.87, 87.59)	84.5720	88.8900	86.5660
O'Connor	No	(20.02, 71.81)	68.4430	66.6700	72.7970
Rehnquist	No	(10.35, 52.23)	53.4742	55.5600	57.2505
Scalia	No	(19.49, 67.95)	64.4870	55.5600	70.9180
Stevens	No	(41.37, 89.94)	72.5910	66.6700	76.3200
Justice	Correlations with other Justices (-0.7 +0.7)	Regression equation(s)	(1) Regression r² (adjusted); (2) "Student's t" non-rejections		
Rehnquist	Kennedy (0.869) O'Connor (0.805)	REHN = 14.6 + 0.732 KEN REHN = 1.39 + 0.651 O.C. REHN = 17.9 + 0.511 KEN + 0.372 O.C.	(1) R-sq(adj) = 71.4%; (2) constant falls within a "zero" null hypothesis (1) R-sq(adj) = 59.0%; (2) constant falls within a "zero" null hypothesis (1) R-sq(adj) = 85.8%; (2) constant falls within a "zero" null hypothesis		

Regression Table 6: Equal Protection Claims

Justice	Did 1994 show a statistically significant change in voting behavior?	99% Confidence Interval for the true average voting percentage.	Prediction for 1994 Term.	Actual voting percentage for 1994 Term.	Prediction for 1995 Term.
Kennedy	No	(17.38, 81.37)	50.338	66.6700	81.826
O'Connor	No	(10.90, 82.30)	64.646	66.6700	83.146
Rehnquist	No	(00.01, 60.14)	Cannot be estimated	66.6700	Cannot be estimated
Scalia	No	(00.34, 56.87)	50.6587	66.6700	24.7783
Stevens	No	(11.90, 92.70)	48.194	33.3300	97.3400
Justice	Correlations with other Justices (-0.7 +0.7)	Regression equation(s)	(1) Regression r^2 (adjusted); (2) "Student's t" non-rejections		
Kennedy	O'Connor (0.877)	KEN = 12.8+0.786 O.C.	(1) R-sq(adj) = 73.1 %; (2) constant falls within a "zero" null hypothesis		
Rehnquist	Scalia (0.965)	REHN = 0.71+1.03 SCAL	(1) R-sq(adj) = 92.0%; (2) constant falls within a "zero" null hypothesis		

Regression Table 7: Statutory Civil Rights Claims

Justice	Did 1994 show a statistically significant change in voting behavior?	99% Confidence Interval for the true average voting percentage.	Prediction for 1994 Term.	Actual voting percentage for 1994 Term.	Prediction for 1995 Term.
Kennedy	No	(25.81, 63.65)	Cannot be estimated	25.0000	Cannot be estimated
O'Connor	No	(40.05, 59.43)	49.5393	50.0000	44.5606
Rehnquist	No	(31.63, 56.73)	45.8835	50.0000	39.5741
Scalia	No	(30.19, 56.72)	26.8307	25.0000	21.4752
Stevens	No	(63.01, 89.10)	68.3959	75.0000	62.5371
Justice	Correlations with other Justices (-0.7 +0.7)	Regression equation(s)	(1) Regression r^2 (adjusted); (2) "Student's t" non-rejections		
Kennedy	Scalia (0.828)	KEN = 6.6+1.18 SCAL	(1) R-sq(adj) = 63.4%; (2) constant falls within a "zero" null hypothesis		

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

Justice	Did 1994 show a statistically significant change in voting behavior?	99% Confidence Interval for the true average voting percentage.	Prediction for 1994 Term.	Actual voting percentage for 1994 Term.	Prediction for 1995 Term.
Kennedy	No	(37.79, 69.24)	39.7022	40.0000	39.0790
O'Connor	No	(31.59, 67.21)	37.5565	40.0000	36.8128
Rehnquist	No	(30.15, 65.48)	29.5259	30.0000	29.6294
Scalia	No	(29.38, 60.38)	35.3150	35.0000	34.6807
Stevens	No	(42.52, 67.82)	36.9307	48.1100	43.5004

continued

Regression Table 8: continued

Justice	Correlations with other Justices (-0.7 +0.7)	Regression equation(s)	(1) Regression r ² (adjusted); (2) "Student's t" non-rejections
Kennedy	O'Connor (0.890); Rehnquist (0.928); Scalia (0.829); Stevens (0.966)	KEN = 14.7+0.786 O.C.; KEN = 14.0+0.826 REHN; KEN = 15.8+0.841 SCAL; KEN = 12.7+1.20 STEV	(1) R-sq(adj) = 75.7%; (2) constant falls within a "zero" null hypothesis (1) R-sq(adj) = 83.7%; (2) constant falls within a "zero" null hypothesis (1) R-sq(adj) = 63.5%; (2) constant falls within a "zero" null hypothesis (1) R-sq(adj) = 92.1%; (2) constant falls within a "zero" null hypothesis
O'Connor	Rehnquist (0.940); Scalia (0.982); Stevens (0.794)	O.C. = 4.07+0.948 REHN; O.C. = 1.27+1.13 SCAL; O.C. = 12.3+1.12 STEV	(1) R-sq(adj) = 86.4%; (2) constant falls within a "zero" null hypothesis (1) R-sq(adj) = 96.0%; (2) constant falls within a "zero" null hypothesis (1) R-sq(adj) = 56.9%; (2) constant falls within a "zero" null hypothesis
Rehnquist	Scalia (0.938); Stevens (0.838)	REHN = 0.16+1.07 SCAL; REHN = 16.8+1.17 STEV	(1) R-sq(adj) = 83.7%; (2) constant falls within a "zero" null hypothesis (1) R-sq(adj) = 63.5%; (2) constant falls within a "zero" null hypothesis
Scalia	Stevens (0.727)	SCAL = 4.3+0.891 STEV	(1) R-sq(adj) = 83.7%; (2) constant falls within a "zero" null hypothesis

Regression Table 9: Federalism Cases

Justice	Did 1994 show a statistically significant change in voting behavior?	99% Confidence Interval for the true average voting percentage.	Prediction for 1994 Term.	Actual voting percentage for 1994 Term.	Prediction for 1995 Term.
Kennedy	No	(31.34, 73.21)	51.5828	55.5600	42.8233
O'Connor	No	(38.56, 76.39)	56.1786	55.5600	56.1301
Rehnquist	No	(47.26, 82.64)	72.8930	76.4300	77.4180
Scalia	No	(32.59, 82.21)	73.3720	81.2500	74.3650
Stevens	No	(32.55, 62.50)	56.8601	55.5600	57.9345

continued

Regression Table 9: continued

Justice	Correlations with other Justices (-0.7 +0.7)	Regression equation(s)	(1) Regression r ² (adjusted); (2) "Student's t" non-rejections
Kennedy	O'Connor (0.913); Rehnquist (0.812); Scalia (0.873)	KEN = 5.8+1.01 O.C.; KEN = 10.2+0.961 REHN; KEN = 10.0+0.737 SCAL; KEN = 12.2+0.919 O.C. 0.848 REHN +0.741 SCAL	(1) R-sq(adj) = 80.5%; (2) constant falls within a "zero" null hypothesis (1) R-sq(adj) = 60.3%; (2) constant falls within a "zero" null hypothesis (1) R-sq(adj) = 72.2%; (2) constant falls within a "zero" null hypothesis (1) R-sq(adj) = 89.4%; (2) constant, REHN and SCAL variables fall within a "zero" null hypothesis
O'Connor	Rehnquist (0.860); Scalia (0.800)	O.C. = 2.3+0.920 REHN; O.C. = 22.5+0.610 SCAL; O.C. = 2.4+0.927 REHN 0.006 SCAL	(1) R-sq(adj) = 69.7%; (2) constant falls within a "zero" null hypothesis (1) R-sq(adj) = 57.9%; (2) constant falls within a "zero" null hypothesis (1) R-sq(adj) = 63.7%; (2) all variables fall within a "zero" null hypothesis
Rehnquist	Scalia (0.930)	REHN = 26.9+0.663 SCAL	(1) R-sq(adj) = 69.7%; (2) constant falls within a "zero" null hypothesis

Regression Table 10: Cases Decided on a Swing-Vote

Justice	Did 1994 show a statistically significant change in voting behavior?	99% Confidence Interval for the true average voting percentage.	Prediction for 1994 Term.	Actual voting percentage for 1994 Term.	Prediction for 1995 Term.
Kennedy	No	(58.42, 88.80)	85.215	81.2500	84.3330
O'Connor	No	(49.61, 76.68)	61.7710	68.7500	61.8312
Rehnquist	No	(46.48, 79.93)	Cannot be estimated	62.5000	Cannot be estimated
Scalia	No	(44.92, 81.05)	64.174	56.2500	64.7220
Stevens	No	(31.17, 59.80)	Cannot be estimated	50.0000	Cannot be estimated
Justice	Correlations with other Justices (-0.7 +0.7)	Regression equation(s)	(1) Regression r^2 (adjusted); (2) "Student's t" non-rejections		
Rehnquist	Stevens (-0.879)	REHN = 110 1.03 STEV	(1) R-sq(adj) = 71.4%; (2) <i>no</i> variables fall within a "zero" null hypothesis		

B. Analysis

Regression Table 1: Civil—State Party

Regression analysis of Table 1 shows that none of the five examined Justices exhibited a statistically significant shift in voting behavior. Indeed, there were only two statistically significant shifts on *any* of the tables this Term.⁹² This, of course, suggests that the overall liberal trend noted this Term at most represents a moderation rather than an alteration of the Court's attitudinal stance. The Court remains basically conservative, although the addition of Justices Ginsburg and Breyer may have moved the Court as a whole somewhat toward the "middle of the road."

The table also shows that data generated by this Study from 1987 through 1993 was relatively accurate in predicting the 1994 voting patterns of the five analyzed Justices. The greatest variation from the predicted score is seen in the outcome for Justice Stevens, who voted approximately five points more often for state government than prior years' data would suggest. This renegade result for Justice Stevens holds true on most of the regression tables set out below: his actual voting pattern rather consistently demonstrates one of the greatest variations from predicted outcomes.⁹³ This outcome may lend some credence to the opinion occasionally expressed at Washington, D.C. cocktail parties that Justice Stevens' votes are exceptionally difficult to forecast.⁹⁴

Regression Table 1 also shows a high positive correlation in Justice Kennedy's tendency to vote with Justices O'Connor and Chief Justice Rehnquist in state civil cases. The correlation with Justice O'Connor is particularly strong. Indeed, regression analysis suggests that Justice O'Connor's vote is linked with that of Justice Kennedy in roughly 80% of the cases analyzed in Table 1.⁹⁵

Regression Table 2: Civil—Federal Party

The data on Regression Table 2 were not as accurate as those on Regression Table 1 in predicting voting behavior in 1994. Justice

92. See Regression Table 2.

93. The exception is Regression Table 9, Federalism, where the predicted score more accurately predicts Justice Stevens' behavior than that of the other Justices.

94. One of the authors of this Study, Richard G. Wilkins, heard that opinion expressed several times at informal legal gatherings during his tenure as Assistant to the Solicitor General from 1981 through 1984.

95. See *infra* text accompanying note 93. We have excluded correlations where the statistical reliability is questionable. As shown on the Regression Tables, we accepted only those scores that ranged either below a -0.7 or above +0.7.

O'Connor voted nearly nine points *less* often, Justice Scalia nearly six points *less* often, and Justice Stevens about thirteen points *more* often for the federal government than prior years' data suggested. While this outcome lends some support to the notion that the Court is re-orienting itself to the political stance of the Clinton Administration (with Justice Stevens voting in favor of and Justices O'Connor and Scalia against the Administration), none of these variations are statistically significant. The forecast of the voting patterns of the other two Justices, moreover, were fairly accurate.⁹⁶

The data demonstrates that Justice Kennedy's voting behavior is rather highly correlated with that of Chief Justice Rehnquist and Justice Scalia. The correlation with Justice Scalia is particularly strong. Regression analysis shows that Justice Kennedy joins Justice Scalia in federal civil cases approximately 80% of the time. There is also a positive correlation between the voting pattern of the Chief Justice in federal civil cases and Justice Scalia. But, while the initial correlation is rather positive (0.742), regression analysis shows that Justice Scalia's vote explains the variability in the Chief Justice's vote only 47.6% of the time.

Table 2, finally, has one other statistic of some interest. The movement in voting behaviors exhibited by Justices O'Connor and Scalia on Table 2 is the only statistically significant movement uncovered this Term. Both Justices, in 1994, voted significantly less often for the federal government than would have been expected based on their voting patterns in prior years. This movement suggests that the litigating posture of the current Administration is, indeed, inconsistent with the ideological bent of these two Members of the Court.⁹⁷

Regression Table 3: State Criminal Cases

Regression Table 3 demonstrates that, with the exceptions of Justice Stevens (who departed approximately six points from his predicted voting pattern) and Justice Kennedy (whose erratic voting behavior on this table precludes any 1994 or 1995 Term predictions),⁹⁸ data from prior years has been rather accurate in predicting the voting behavior of the longest-tenured members of the Court. This suggests

96. Furthermore, all of the predictions on Regression Table 2 are relatively accurate by objective statistical standards.

97. See discussion of Table 2, *supra* note 96, and accompanying text.

98. Justice Kennedy's voting pattern on Table 3 has not been consistent. Our forecasting model was unable to predict a score for the Justice, even though the forecasting algorithm was programmed to attempt a prediction pattern 25 different ways. See Appendix B.

that, at least as far as the Chief Justice and Justices O'Connor and Scalia are concerned, the 1995 Term will follow the approximate voting patterns demonstrated this year. There are, however, no positive or negative correlations between the voting patterns of the individual Justices in state criminal cases.

Regression Table 4: Federal Criminal Cases

Regression Table 4 suggests that none of the five Justices made any statistically significant shifts. However, with the exception of the Chief Justice and Justice Stevens, the table indicates that this Study is rather accurate at predicting voting behavior in federal criminal cases.⁹⁹ Indeed, Justice Kennedy's predicted score of 61.1195% varied only 0.4205% from his actual 1994 voting pattern, where he cast 61.54% of his votes in favor of the federal government.

Furthermore, it appears that Justice Scalia's voting is positively correlated with that of Justices Kennedy and O'Connor. This correlation, however, is not extreme. Regression analysis shows that Justice Kennedy's vote is linked to the variability in Justice Scalia's vote only 57% of the time, while Justice O'Connor's vote is linked to variations in Justice Scalia's vote approximately 52% of the time. Accordingly, the positive correlation between the voting pattern of Justice Scalia and the other two Justices individually is not particularly strong. However, when Justices Kennedy and O'Connor vote together in federal criminal cases, Justice Scalia joins them 63% of the time.

Regression Table 5: First Amendment

Regression Table 5 indicates that of the five Justices examined, Justice Scalia departed most from his predicted performance in the First Amendment arena, voting approximately nine percentage points less often in favor of First Amendment claims than could have been predicted based on data from prior years. Justice Stevens was the next least predictable Justice, reducing his predicted receptivity to First Amendment claims by some six percentage points. Justice Scalia's results tend to weaken the hypothesis that he is likely to embrace First Amendment claims when championed by politically conservative advocates as in this term, although the hypothesis is supported by Justice

99. While Justice Stevens varied some six percentage points, and the Chief Justice some seven percentage points, from their predicted scores, neither variance is statistically significant.

Steven's downward departure from his expected score.¹⁰⁰ However, neither Justice Scalia's nor Justice Stevens' sudden First Amendment reticence is statistically significant. Any statistical argument, therefore, should not be overstated.

Regression Table 5 also shows rather strong correlations between the voting behavior of the Chief Justice and Justices Kennedy and O'Connor. Indeed, regression analysis demonstrates that the Chief Justice joins Justice Kennedy on approximately 71% and Justice O'Connor on 59% of the First Amendment issues addressed by the Court. Moreover, when Justices Kennedy and O'Connor vote together on the First Amendment, the Chief Justice joins them nearly 86% of the time. This voting bloc, therefore, could be a rather significant target for First Amendment litigators.

Regression Table 6: Equal Protection

The results of Regression Table 6 show somewhat more variability between predicted and actual outcomes than the other regression tables.¹⁰¹ This may well result from the exceptionally small universe of equal protection cases - only three cases this term and one case last term. However, while any inferences from this table must be drawn with caution, both Justices Kennedy and Scalia voted nearly 16 percentage points more often in favor of equal protection claims this term than was predicted on the basis of data from prior years. This may indicate that these Justices are more willing to accept equal protection claims when raised by politically conservative advocates.¹⁰² This assertion, however, should not be pressed too strongly since neither Justice's equal protection voting pattern in 1994 demonstrated statistically significant movement.

Regression Table 6 also indicates that Justice Kennedy's voting pattern is rather highly correlated to that of Justice O'Connor. Regression analysis indicates that Justice O'Connor's vote is linked to Justice Kennedy's equal protection vote approximately 73% of the

100. See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510 (1995) (upholding First Amendment claim raised by religiously oriented student publication); *Capitol Square Review and Advisory Board v. Pinette*, 115 S. Ct. 2440 (1995) (upholding free speech claim against defense that allowing the restricted speech would violate the Establishment Clause).

101. Chief Justice Rehnquist's voting pattern on Regression Table 6, moreover, is insufficiently stable to permit computation of predicted outcomes for 1994 and 1995.

102. See, e.g., *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) (holding all governmental racial classifications must be subjected to strict scrutiny); *Miller v. Johnson*, 115 S. Ct. 2475 (1995) (congressional redistricting plan may not focus solely on the constituents' race).

time. The Chief Justice's equal protection vote is even more highly correlated with that of Justice Scalia. Regression testing shows that the Chief Justice joins Justice Scalia approximately 92% of the time in resolving equal protection issues.

Regression Table 7: Statutory Civil Rights

As with state criminal cases, Justice Kennedy's past stance on statutory civil rights issues has been so unstable that no statistical prediction of his voting pattern can be made for the 1994 or 1995 Terms. The predicted 1994 outcomes for the other Justices, however, were rather accurate with the possible exception of Justice Stevens.¹⁰³

Moreover, despite the instability of Justice Kennedy's voting pattern in this area, there is a rather strong positive correlation between his statutory civil rights vote and that of Justice Scalia. Regression analysis, in fact, demonstrates that Justice Kennedy's vote in statutory civil rights cases is linked to that of Justice Scalia about 63% of the time.

Regression Table 8: Jurisdiction

Regression Table 8 demonstrates a high level of stability between and among the voting patterns of the five Justices analyzed. With the exception of Justice Stevens (who varied from his predicted score by nearly 11 percentage points), each Justice's actual voting percentage on jurisdictional issues was very close to the predictions for 1994. There is, moreover, a high degree of correlation between virtually all five Justices. Justice Kennedy's jurisdictional votes, for example, are highly correlated to those of the Chief Justice and Justices O'Connor, Scalia, and Stevens. These five members of the Court, therefore, often vote as a bloc on jurisdictional questions.

Regression Table 9: Federalism

Regression Table 9 demonstrates that the data of prior years were not as accurate in predicting federalism votes this year. While the Chief Justice's and Justice O'Connor's and Stevens' predicted scores were rather close to their actual voting patterns, the other two Justices departed somewhat from the predicted behavior. This indicates some present instability on the Court regarding federalism issues. None of this movement, however, is statistically significant.

103. The difference between Justice Stevens' actual and predicted score was 6.6041%. This gap, however, while clearly greater than that of any other Justice for which a prediction could be computed, is still not statistically significant.

As for correlation, Regression Table 9 demonstrates that the votes of four of the five Justices—the Chief Justice and Justices Kennedy, O'Connor, and Scalia—are highly correlated.¹⁰⁴ Indeed, only Justice Stevens stands alone in the federalism area, with his votes showing neither positive nor negative correlation with the other four Justices.¹⁰⁵ This result may well indicate that there is a four-member bloc, comprised of the Chief Justice and Justices Kennedy, O'Connor, and Scalia, which tends to vote similarly on federalism issues.

Regression Table 10: Swing Votes

Regression Table 10 is difficult to interpret. To begin with, in comparison with the other regression tables, this table exhibits rather high differences between the predicted 1994 voting behaviors and the actual voting patterns of the five examined Justices. Furthermore, two members of the Court, the Chief Justice and Justice Stevens, have exhibited such erratic behavior in “swing vote” cases that no predicted values could be computed for 1994 and 1995. These outcomes, however, are hardly surprising.

If the outcome in “swing vote” cases is, as we assume, more highly influenced by ideology than the rest of the Court's docket, statistical predictions on Regression Table 10 are likely to be particularly unstable. As noted above, the validity of any statistical analysis depends upon random sampling of a large universe. The Court's selection of the difficult cases it will review is hardly random. The troublesome cases that ultimately result in five-to-four outcomes are not drawn out of a hat, but rather, are consciously selected by the individual members of the Court. Nor is the universe of such cases particularly large. This term, we included only fourteen cases on Table 10. As a result, statistical analysis of the outcome of five-to-four decisions on the Court is particularly prone to error.

Nevertheless, one notable statistic on Regression Table 10 is the very high *negative* correlation (the only negative correlation uncovered by this Study) between the voting behaviors of the Chief Justice and Justice Stevens. Indeed, regression analysis demonstrates that in swing vote cases the Chief Justice can be expected to vote in opposition to Justice Stevens approximately 71.4% of the time. This suggests

104. The last regression for Justice O'Connor produced a model whose individual elements did not, by themselves, have any noticeable effect on the variance in O'Connor's voting.

105. Justice Stevens was not included in Regression Table 9 because his correlation scores did not meet the requirements for reliability. *See supra* note 93.

that in close cases, the Chief Justice and Justice Stevens are ideological opposites.

V. Conclusion

This Term's data indicates that the Rehnquist Court is moderating its course. While the present Court is still a conservative institution, there was a discernable liberal trend in 1994 in seven of the ten categories of cases examined by this Study. While some of this "liberal" movement might be attributable to politically conservative Justices siding with the anti-government positions of politically conservative litigants, that explanation is probably too facile to explain the broad-based reversal of the trend demonstrated by the 1994 data. The Rehnquist Court, while hardly a liberal juggernaut, may well have reached its conservative apex by becoming less, not more, conservative.

This year's data also show that (as with the 1993 Term) Justice Kennedy remains the single most influential Justice on the Court, with his vote determining the outcome of 81.25% of the Court's most closely divided opinions. Regression analysis demonstrates that there are several positive correlations (and one negative correlation) between the voting patterns of the five longest-tenured Justices. This analysis shows that litigants with a First Amendment issue before the Court would do well to pay special attention to the possible concerns of the Chief Justice and Justices Kennedy and O'Connor. If the case is closely divided, however, and if the hypothetical litigant succeeds in garnering the vote of the Chief Justice, Regression Table 10 indicates that the advocate will almost certainly lose the vote of Justice Stevens.

Appendix A

1. *The Universe of Cases*

The only cases included in the database are those 1994 Term cases decided by full opinion. Decisions on motions have been excluded even if accompanied by an opinion. Cases handled by summary disposition are included only if they are accompanied by a full opinion of the Court and not if the only opinion is a dissent. Cases decided by a four-four vote, hence resulting in affirmance without written opinion have been 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 within any of these categories are not included in the database for any of the tables.

2. *Cases Classified as Civil or Criminal*

The classification of cases as civil or criminal follows commonly understood 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 1994 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 United States government, one of its agencies or officials, or, with respect to a state government, one of its political subdivisions. A suit against a government official in a personal capacity is included if that official 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 different 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 by written opinion. 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 the category affecting the disposition of the case and the issues are resolved by different voting alignments. A case is not included for any issue raised by one of the litigants which is not addressed in any opinion.

Identification of First Amendment and equal protection issues poses no special problem since the nature of each claim is expressly identified in the opinion. Issues of freedom of speech, press, association, and free exercise of religion are included. However, Establishment Clause cases are excluded since 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.

Statutory civil rights cases included in Table 7 are limited to those invoking the Civil Rights Act of 1964, the Voting Rights Act of 1965, and other 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 involves how to apply section 1983 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 that 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.

Federalism cases in Table 9 are limited to those cases in which there were issues raised by conflicting actions of federal and state or local governments. Common examples of these issues are preemption, inter-governmental immunities, application of the Tenth and Eleventh Amendments as a limit on federal government action, 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-three decisions, if any, as well as five-three and four-two decisions resulting in reversal of a lower court decision. Affirmances by a vote of five-three or four-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 different voting alignments.

Appendix B: Quantitative Foundations

A. Student's *t* Testing¹⁰⁶

Data from 1987 to 1993 were used to compute an initial mean value ($xbar_1$). 1994 results were then added, and the resulting data set was used to produce a new mean value ($xbar_2$). The following hypotheses were tested using a student's *t* statistic:

$$H_0: \mu = xbar_1$$

$$H_a: \mu \neq xbar_1$$

The applicable test statistic was articulated by the formula

$$t = \frac{\bar{X}_2 - \mu}{s/\sqrt{n}}$$

where $t \sim$ Student's $t_{(n-k)}$ ¹⁰⁷ and μ is, by null hypothesis, $xbar_1$. A rejection of the null hypothesis by any *t*-statistic had to imply that the voting proportion for 1994 shifted μ from its previous value on the real number line. This test statistic requires two assumptions:

- 1) the sample from which the data is drawn is simple and random; and,
- 2) the parent population being sampled follows a normal distribution; in other words, $X \sim N(\mu, \sigma^2)$.

For small sample sizes, the Student's *t* procedure is not robust with regard to assumptional departures.

B. Predictive Modeling

Data in this project were fitted to an Auto Regressive Integrated Moving Average (ARIMA) forecasting model, in which a given Justice's voting is first expressed as Y , and then is differenced, producing Y^* :

The general forecasting model for Y^* is written as

$$Y^*_t = \phi_1 Y^*_{t-1} + \phi_2 Y^*_{t-2} + \dots + \phi_p Y^*_{t-p} + \varepsilon_t + \theta_1 \varepsilon_{t-1} + \theta_2 \varepsilon_{t-2} + \dots + \theta_q \varepsilon_{t-q}$$

where the ϕ and θ are unknown parameters and the ε_i are independent and identically distributed normal errors with zero mean [$\varepsilon_i \sim N(\mu=0; \sigma_2)$]. Note that this model expresses Y^* in terms only of its past values along with current and past errors; there are no explanatory variables as there would be in a traditional

106. For a practical perspective on this procedure, see MOORE and McCABE, *supra* note 87, 500-18 (1993). See also CRAIG AND HOGG, *supra* note 84.

107. k = the number of parameters being tested; here, μ is the only hypothesized parameter, so $k = 1$.

[regression] model. This general model is called an ARIMA (p,d,q) model for Y.¹⁰⁸

Here, $p = 1$, $d = 1$, and $q = 1$.

C. Correlation and Regression Analysis

The positive changes in the ice cream example, *supra*, may be mapped over a two-dimensional Cartesian plane, with the slope, or rate of change, between the two variables being positive. If, for every one unit “rise” in temperature, there is a one unit “run” in ice cream, perfect correlation exists between the two variables. Algebraically, then, the slope between the two factors is the “rise” divided by the “run” (or $1/1 [=1]$). The term “unitary” or “perfect” correlation results from this slope of +1.00.

If a rise in one factor is matched by a quantitative equivalent fall in the other, perfect negative correlation occurs; the two variables share a slope of -1.00. In the ice cream example, then, a one-degree rise is matched by a one-degree drop.

Linear regression is, in its most simple form, an attempt to accurately estimate the true values of the slope between two or more variables.¹⁰⁹ However, one crucial difference between simple correlation and regression is the presumption of causation. A linear regression model is one that attempts to use one (or more) explanatory, or “independent,” variables to explain the variance in one “dependent” variable. Most linear regression computer results test the hypothesis that the estimated parameters, or β s, are equivalent to 0. Of course, the analyst typically desires such a result not to occur—in other words, she wants the data to summarily reject the statistical test of this hypothesis.¹¹⁰ It is important to remember, though, that neither a rejec-

108. PETER KENNEDY, A GUIDE TO ECONOMETRICS 248-49 (1992).

109. The moment an analyst starts speaking about multivariate regression, most people (especially lawyers) start to run screaming out of the lecture room. However, the principles remain the same, with the only difference being a corresponding increase (no pun intended) between the number of variables and the number of dimensions on the Cartesian coordinate plane.

110. In its most simple form, a basic regression model posits the following relationship:

$$y = \beta_0 + \beta_1 x + \varepsilon$$

where y is the dependent variable, x is the independent variable, β_0 (the intercept term) and β_1 (the slope term for x) are the true slope parameters for the equation, and ε is the error term (the difference between the predicted value of the equation and y term's actual value). One of the tenets of regression theory is that ε is distributed according to a Gaussian probability between a predicted “ y ” and an actual “ y ” is 0 (on the average). While there are different methods of estimating β in a regression setting, the easiest involves using the Ordinary Least Squares estimation procedure. As interesting as the proof for least-squares regression might be, such an intellectual exercise would (regrettably) be a

tion of the null hypothesis that β equals 0¹¹¹ or a high r^2 (adjusted) statistic¹¹² imply causation. Justice Scalia's voting record might correlate quite highly with that of Justice Stevens on Equal Protection topics. That does not, however, imply that Justice Scalia causes Justice Stevens to vote the way that he does.

In closing, there are five assumptions necessary for a valid classical regression model:

1) The dependent variable may be calculated as a linear function of one or more independent variables.

2) The mean value of the disturbance term e (the difference between observed and expected dependent variable values) is 0.

3) The variance of the disturbance term is constant (homoskedasticity).

4) Observations of independent variables are fixed with regard to repeated sampling.

5) The number of observations is greater than the number of independent variables, and there are no linear relationships between independent variables (multicollinearity).¹¹³

The modeling completed in this project failed to meet the second, third, fourth, and fifth assumptions of classical linear regression. However, results were usually accurate enough to assume some degree of robustness with regard to assumptional departures, at least from an empirical perspective.

substantial digression from the topic of this paper. Interested readers are encouraged to consult Kennedy's excellent book on econometrics regression techniques. See KENNEDY, *supra* note 108 (App. B), at 44-51; see also WILLIAM H. GREENE, *ECONOMETRIC ANALYSIS* 148, 154 (1993). The regressions carried out in this project used the least-squares method to estimate β s; computer modeling was accomplished using the *MINITAB* and *SHAZAM!* Statistical software packages.

111. More formally, $H_0: \beta_i=0$ and, by inference, the alternative test hypothesis that $\beta_i \neq 0$ ($H_a: \beta_i \neq 0$) are tested as t statistics, where t_i is distributed as a Student's t with degrees of freedom equivalent to n (the sample size) minus k (the number of slope parameters, or β s).

112. The r^2 statistic is an estimate of ρ^2 , the true measure of correlation between the dependent variable and its independent counterpart(s). The "adjusted" r^2 value in the following tables is a result of the computer's attempts to filter out any statistical bias in the original r^2 result.

113. See KENNEDY, *supra* note 108 (App.B), at 43-44.

